STATE OF CONNECTICUT *v.* RICHARD FOURTIN
(SC 18523)

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

*Argued October 17, 2011—officially released September 28, 2012***

Susann E. Gill, supervisory assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Cornelius P. Kelly*, senior assistant state's attorney, for the appellant (state).

Robert E. Byron, special public defender, for the appellee (defendant).

Nancy B. Alisberg filed a brief for the office of protection and advocacy for persons with disabilities et al. as amici curiae.

Opinion

PALMER, J. After a jury trial, the defendant, Richard Fourtin, was convicted of attempt to commit sexual assault in the second degree in violation of General Statutes §§ 53a-71 (a) (3)[1] and 53a-49 (a) (2),[2] and sexual assault in the fourth degree in violation of General Statutes (Rev. to 2005) § 53a-73a (a) (1) (C),[3] both of which require proof beyond a reasonable doubt that the victim,[4] at the time of the offense, was physically helpless.[5] Under General Statutes § 53a-65 (6), a person is physically helpless if he or she is "unconscious or for any other reason is physically unable to communicate unwillingness to an act." After the state had presented its case at trial, and again following the close of evidence, the defendant filed a motion for a judgment of acquittal, claiming that the state had failed to offer sufficient evidence that the victim was physically helpless. The trial court denied the motions and rendered judgment of guilty in accordance with the jury verdict, and the defendant appealed to the Appellate Court. That court considered the sole issue of whether the jury reasonably could have found that the state introduced sufficient evidence to prove that the victim was unable to communicate her lack of consent to the defendant's sexual advances and concluded that the state had failed to sustain its evidentiary burden. See *State* v. *Fourtin*, 118 Conn. App. 43, 48, 53, 982 A.2d 261 (2009). The state, in its appeal to this court upon our granting of certification; *State* v. *Fourtin*, 294 Conn. 925, 926, 985 A.2d 1062 (2010); claims that the Appellate Court improperly reversed the judgment of the trial court. We disagree and affirm the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth certain of the facts that the jury reasonably could have found, as well as some of the relevant procedural history. "In February, 2006, the twenty-five year old [victim] lived in an apartment complex with her mother [S]. The defendant, who was [S's] boyfriend . . . lived nearby.[6] He frequently assisted [S] in caring for the [victim]. The [victim] got along with him.

"The [victim] is a woman with significant disabilities that affect the manner in which she interacts with others. She [suffered a brain hemorrhage after being born three months premature, and her disabilities include] cerebral palsy, mental retardation and hydrocephalus. She cannot walk and needs assistance in performing the activities of daily living. She is nonverbal but communicates with others by gesturing and vocalizing and through the use of a communication board.[7] To manifest her displeasure, she can kick, bite and scratch. The [victim] can also vocalize her feelings by groaning or screeching.

"In 2006, the [victim] was attending an adult day care program for . . . physically, emotionally or mentally

disabled [persons]. Deacon Raymond Chervenak was a staff member at the day care program with whom the [victim] regularly communicated about her interest in sports.[8] On February 23, 2006, Chervenak observed that the [victim] looked 'aggravated' and 'scared.' In response to Chervenak's inquiry, the [victim], by means of appropriate gestures[9] and the use of a communication board, made him aware that the defendant had sexually assaulted her at her home. In similar fashion, the [victim] repeated this accusation to Frances Hernandez, the supervisor of the adult program, by pointing to her own body parts and [to] Chervenak's body parts.[10] A subsequent medical examination disclosed physical symptoms consistent with the [victim's] report that she had been sexually assaulted." *State* v. *Fourtin*, supra, 118 Conn. App. 46–47.

In addition to the testimony of Chervenak and Hernandez, the assistant state's attorney (prosecutor) elicited testimony from Dee Vetrano, the director of residential support at the victim's group home, regarding the victim's ability to communicate her preferences. Specifically, the state asked Vetrano whether the victim "is susceptible to being suggested to or manipulated in any way?" Vetrano replied: "No. She is not. . . . She's . . . very direct in what her beliefs are or what her feelings are toward others. [The victim is] actually . . . one of [the] people we use when we hire staff. We do initial interviews with staff, and if there's someone that we're interested in hiring, we always bring them to the house . . . to see them interact with clients. . . . We have had a situation where one individual was hired . . . and it's someone that the group home manager felt strongly about, and [the victim] to this day does not care for this person. It's not that she hates her . . . but she really . . . prefer[s] [not] to have that individual work with her, and she still expresses that, even after knowing that it's someone [who] I value as an employee. . . . So, she's not swayed in any way by her feelings . . . and she will always consistently indicate those to us."

S testified similarly that the victim was able to express her feelings and emotions. When the prosecutor asked S whether the victim had gotten along with S's former husband, the victim's stepfather, S responded: "[H]e got along with her. She did not like him." S explained that the victim "would always be frowning [when he was around] and she never wanted him near her. . . . And she . . . would try to hurt him." When the prosecutor asked S whether the victim would try to hurt him physically, S responded: "Physically. Biting, scratching, leaving marks . . . [k]icking." Subsequently, during cross-examination, defense counsel asked S whether the victim had "any problem whatsoever communicating that she did or didn't want to do something . . . ." S responded that the victim "never had a problem." Defense counsel then asked: "If you

took her to the shower when she didn't want to go to the shower, I think you testified [that] she would bite you?" S responded, "Yes, and kick [and] scratch."

Finally, the prosecutor also presented the testimony of two physicians, both of whom previously had examined the victim, regarding their ability to communicate with her. Jose Reyes, an obstetrician and gynecologist, testified that when he treated the victim for dermatitis in her genital area in 2005, he communicated with the victim through S because he was unable to communicate with the victim directly. The prosecutor also asked James Bovienzo, an emergency department physician who had examined the victim after the alleged sexual assault, whether he was "able to discuss matters with [the victim] while [he was] involved in collecting any evidence in this case . . . ." Bovienzo replied that "[t]he patient was noncommunicative."[11]

After the state presented its case, the defendant moved for a judgment of acquittal, outside the presence of the jury, on the ground that the evidence was insufficient to establish that the victim had been physically helpless at the time of the alleged sexual assault. Specifically, the defendant argued that there was uncontroverted evidence that the victim could communicate her lack of consent by biting, kicking, screaming and gesturing. The state opposed the motion, arguing that the issue of physical helplessness and the question of whether the victim was unable "to communicate her wishes" was a question of fact for the jury. The trial court denied the defendant's motion on the ground that the state had presented sufficient evidence to allow the matter to be decided by the jury.

Thereafter, the defense called several witnesses who testified that the victim often used gestures, kicking, biting, screaming or screeching to express herself. Sandra Newkirk, a home health aide who had cared for the victim for several months prior to the assault, testified that, when the victim did not receive the food she was expecting, "[s]he would have a fit." During such a fit, "[s]he would kick and, you know, kick and sort of make a groaning noise." Newkirk further testified that she had witnessed the victim scratch and bite S on a few occasions. The victim's grandmother, R, testified that the victim had a temper and that, "[i]f she didn't like what she was supposed to do, she would screech, and, to anyone who . . . wasn't used to the noise . . . it would be kind of unnerving." R recalled that, sometimes, if the victim did not want to take a shower, she would bite S to the point of drawing blood, or, if the victim did not want to wear a particular pair of shoes, she would kick S when S bent down to put the shoes on her feet.

During closing argument, the prosecutor emphasized that the jurors had had an opportunity to observe the victim in the courtroom and contended that "[s]he's a

young woman who . . . is very, very limited in terms of what she can—what type of information she can pass on to you, the manner in which she can pass it on." The prosecutor then asked the jurors to be mindful of the fact that the victim was "disabled to a point where she has some difficulty expressing herself in how she can get her message across in terms of what happened." With respect to whether the victim was physically helpless at the time of the alleged assault, the prosecutor argued that the jurors could find that she was because, like an infant, "[s]he is totally dependent on others." The prosecutor's contention that the victim was like an infant in terms of her physical dependency was the only argument that he made at trial with respect to the physically helpless prong of the charged offenses.

During deliberations, the jury sent a note to the trial court in which it requested a transcript of the victim's testimony and clarification of the legal definition of "physically helpless." In response to the latter request, the trial court simply reiterated the statutory definition that it had provided during its original charge.[12] The jury subsequently found the defendant guilty of attempt to commit sexual assault in the second degree and sexual assault in the fourth degree, and the trial court rendered judgment in accordance with the jury's verdict.

The defendant appealed to the Appellate Court, claiming that the state had failed to adduce sufficient evidence to prove that the victim's disabilities rendered her physically helpless within the meaning of § 53a-65 (6). *State* v. *Fourtin*, supra, 118 Conn. App. 47. The defendant argued that the state "[had] not alleged that, at the time . . . [he] assaulted the [victim], she was unconscious, intoxicated, asleep or for some other reason unable to communicate nonverbally, such as by kicking, scratching and screeching. The defendant maintain[ed], therefore, that, even viewing the evidence at trial in favor of the state, the record [did] not establish beyond a reasonable doubt that the [victim] was physically unable to communicate [her] unwillingness to an act, as § 53a-65 (6) requires." (Internal quotation marks omitted.) Id., 48.

In response, the state argued that, even though there was testimony "that [the victim] would screech, bite, or kick to indicate displeasure, fear, resistance, or some other negative emotion, it was undisputed that [the victim] was nonverbal." *State* v. *Fourtin*, Conn. Appellate Court Records & Briefs, September Term, 2009, State's Brief p. 9. The state contended that "[m]erely making noises, biting, groaning or screeching is not communication" within the meaning of § 53a-65 (6) because "[n]one [of these modes of interaction] transmit[s] a message to the hearer with sufficient clarity to be called 'communication.' This is especially so if the

hearer is unfamiliar with [the victim].'' Id., p. 10.

The Appellate Court rejected the state's argument, concluding in relevant part: ''All the . . . witnesses testified that, sometimes with the aid of a communication board and at other times, with appropriate gestures, the [victim] was able to make herself understood. Witnesses testified about the 'temper' of the [victim] and her concomitant ability to make her displeasure known through nonverbal means, using gestures, physical aggression and screeching and groaning sounds. Notably, the alleged sexual assault in this case came to light only because the [victim] was able to communicate her distress to Chervenak. His testimony squarely contradicts the state's assertion that the [victim] was unable to transmit a message to the intended recipient with sufficient clarity to be called 'communication.' '' *State* v. *Fourtin*, supra, 118 Conn. App. 50–51 ''Given the uncontradicted evidence in the record that the [victim] could communicate using various nonverbal methods, including screeching, biting, kicking and scratching, and the failure of the state to present any evidence probative of whether the [victim] was unable to use these forms of communication at the time of the alleged assault, no reasonable jury could have concluded that [the victim] was physically helpless as [that term is] defined by § 53a-65 (6).'' Id., 51. We subsequently granted the state's petition for certification to appeal, limited to the following issue: ''Did the Appellate Court improperly substitute its judgment for that of the jury when it determined that the state did not sustain its burden of proof that the victim was 'physically helpless' under . . . § 53a-65 (6)?'' *State* v. *Fourtin*, supra, 294 Conn. 926.

On appeal to this court, the state argues that, contrary to the determination of the Appellate Court, the evidence was sufficient to support the jury's verdict because the jury was not required to accept the testimony of the witnesses who stated that the victim could express her displeasure and unwillingness to an act through biting, kicking, scratching, screeching, groaning and gesturing. In essence, it is the state's contention that, if the jury rejected all of the evidence concerning the victim's ability to communicate displeasure and unwillingness to act through nonverbal methods, then the evidence that remained—namely, that the victim could not speak and communicated with words solely by means of a communication board—was sufficient to support a finding that, at the time of the alleged sexual assault, the victim was unable to communicate unwillingness to an act.

The defendant counters that the Appellate Court's conclusion that the state failed to sustain its burden of proof with respect to the element of physical helplessness ''did not constitute an improper substitution of judgment but a recognition that the state did not

produce evidence to support its theory." The defendant also contends that the state's argument on appeal that the jury could have rejected all evidence of the victim's ability to communicate nonverbally—which differs not only from its argument in the trial court but also from that which it presented to the Appellate Court—constitutes an "untenable reconstruction" of how the case was presented to the jury and how we must presume that the jury considered and applied the evidence.[13] We agree with the defendant.

We review a claim of evidentiary insufficiency by applying a two-part test. "First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . [I]n viewing evidence which could yield contrary inferences, the jury is not barred from drawing those inferences consistent with guilt and is not required to draw only those inferences consistent with innocence. The rule is that the jury's function is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Ovechka*, 292 Conn. 533, 540–41, 975 A.2d 1 (2009).

Before we can determine whether the state presented sufficient evidence to prove that the victim was "physically helpless," however, we first must consider the meaning of that statutory term. Because the state's claim raises an issue of statutory interpretation, we exercise a plenary standard of review. E.g., *State* v. *Courchesne*, 296 Conn. 622, 668, 998 A.2d 1 (2010). Pursuant to General Statutes § 1-2z, we begin our analysis with "the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

As a preliminary matter, it bears emphasis that no one would dispute that the victim is physically helpless in the ordinary sense of that term. Physical helplessness under § 53a-65 (6), however, has a highly particularized meaning that is unrelated to whether a person is physically able to resist unwanted sexual advances or mentally able to understand when to resist such advances. Rather, under § 53a-65 (6), a person is physically helpless if they are "unconscious *or for any other reason . . . physically unable to communicate* unwillingness to an act." (Emphasis added.) Our case law, and the case law of other jurisdictions, makes clear that, under this definition, even total physical incapacity does not, by itself, render an individual physically helpless.[14]

In *State* v. *Hufford*, 205 Conn. 386, 397–99, 533 A.2d 866 (1987), for example, we rejected the state's claim that the victim, who was totally physically restrained, was physically helpless as that phrase is statutorily defined. In *Hufford*, the victim allegedly was sexually assaulted by the defendant, Steven H. Hufford, an emergency medical technician, while she was being transported to the hospital by ambulance. Id., 390. Although the victim was unable to resist the alleged sexual assault because she was restrained on a stretcher; id., 390, 393; this court rejected the state's claim that she was physically helpless because she repeatedly told Hufford to stop touching her. Id., 398–99. We explained that, because the victim "was not unconscious, we [were] concerned with whether she was physically able to communicate her unwillingness to the act." Id., 398. We concluded that the word "communicate" was plain and unambiguous, and meant "to make known: inform a person of . . . speak, gesticulate . . . to convey information." (Internal quotation marks omitted.) Id., quoting Webster's Third New International Dictionary. Because the victim in *Hufford* was able to communicate her lack of consent to Hufford, the state failed to satisfy its burden of proving the essential element of physical helplessness. *State* v. *Hufford*, supra, 398–99; see also *People* v. *Orda*, 180 Misc. 2d 450, 454, 690 N.Y.S.2d 822 (1999) (physical helplessness requirement in New York Penal Law "is not satisfied by an inability to move one's body [when] the victim is able to protest verbally"); *People* v. *Morales*, 139 Misc. 2d 200, 202, 528 N.Y.S.2d 286 (1988) ("although [the victim, who was paralyzed from the neck down] was indeed physically helpless in the ordinary sense of the term, she was not physically helpless for purposes of the [New York Penal Law]").

Our decision in *Hufford*, which is consistent with case law from other jurisdictions, establishes that physical helplessness under § 53a-65 (6) applies only to a person who, at the time of the alleged act, was unconscious or for some other reason physically unable to communicate lack of consent to the act. This court never has had occasion, however, to explore the applicability of the term "physically helpless" to a severely disabled person who may be able to communicate nonverbally, as distinguished from a person who is unconscious or, for a similar reason, temporarily unable to communicate unwillingness to an act. Indeed, criminal law treatises suggest that physical helplessness, as that term is used in statutes such as § 53a-65 (6) and similar statutes from other jurisdictions, was intended primarily to address the latter situation. For example, in discussing the crime of sexual assault based on the victim's incapacity to consent, Professor Wayne R. LaFave notes that "[t]his type of case arises in three separate circumstances: where the [victim] is unconscious; where the [victim] is mentally incompetent; and where neither of those circumstances [exists] but the [victim] is under

the influence of self-administered drugs or intoxicants." 2 W. LaFave, Substantive Criminal Law (2d Ed. 2003) § 17.4 (b), p. 643; see also 3 F. Wharton, Criminal Law (15th Ed. Torcia 1995) § 282, p. 57 ("A victim is obviously incapable of consenting to sexual intercourse when [the victim] is unconscious or asleep. The term commonly adopted by statute to express the idea is 'physically helpless,' which means a victim who is 'unconscious, asleep, or otherwise unable to indicate willingness to act.' "); cf. 2 American Law Institute, Model Penal Code and Commentaries (1980) § 213.1, comment, p. 317 ("Common-law authorities treated intercourse with an unconscious [person] as rape and occasionally expanded this rule to cases [in which] the [person] was not technically unconscious but was so incapacitated by alcohol or drugs as to be in a condition of utter insensibility or stupefaction. Most current statutes, however, differentiate unconsciousness from lesser impairment and require in the latter case that the drug or intoxicant be administered by or with the privity of the defendant in order to constitute the highest degree of forcible rape.").

Case law from other jurisdictions, particularly New York, also supports the view that the physically helpless requirement was designed to protect victims who are unconscious or in a similar condition that has rendered them temporarily unable to communicate.[15] As one New York court stated: "Physically helpless . . . means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act." (Internal quotation marks omitted.) *People* v. *Morales*, supra, 139 Misc. 2d 201. "The . . . [p]ractice [c]ommentaries [to the New York Penal Law] note that . . . this definition would apply to a person who is in a deep sleep as a result of barbituates or who is a total paralytic. To some extent, the definitions of mentally incapacitated and physically helpless overlap." (Citation omitted; internal quotation marks omitted.) Id. "Mentally incapacitated means that a person is rendered temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or intoxicating substance administered to him without his consent, or to any other act committed upon him without his consent." (Internal quotation marks omitted.) Id., 201–202. "As noted in the [p]ractice [c]ommentaries, these two forms of incapacity, physically helpless and mentally incapacitated, are applicable to victims *who have no mental disease or defect but who are temporarily, for a variety of reasons, not able to make a rational, free-will determination to consent*, or not able to communicate an unwillingness to consent, to sexual activity." (Emphasis added; internal quotation marks omitted.) Id., 202. "It is apparent that the physical helplessness contemplated by the statute *requires more than a disease causing physical paralysis*." (Emphasis added; internal quotation marks omitted.) Id. "A fair

reading of the [applicable] statute indicates the requirement of a mental state that limits or prohibits the victim from communicating a lack of consent to the conduct of the perpetrator." Id.; see also *People* v. *Copp*, 169 Misc. 2d 757, 758–59, 648 N.Y.S.2d 492 (1996) ("A survey of the cases shows that [when] . . . prosecutions are premised on the victim's lack of consent due to physical helplessness, the condition is generally drug or alcohol induced . . . . However, the statutory definition appears to . . . be broad enough to include a sleeping victim." [Citations omitted; internal quotation marks omitted.]); *State* v. *Puapuaga*, 54 Wn. App. 857, 861, 776 P.2d 170 (1989) ("[t]he state of sleep appears to be universally understood as unconsciousness or physical inability to communicate unwillingness").

In fact, it is the rare case that does *not* involve a victim who was physically helpless due to unconsciousness, sleep or intoxication. Of the numerous reported cases involving the sexual assault of a physically helpless person, only a few involve a victim alleged to have been physically helpless by virtue of having a physical or intellectual disability. Of the few cases involving victims with such disabilities and a statutory definition of "physically helpless" that is identical or similar to the definition of that term in § 53a-65 (6), the pertinent sexual assault charge was dismissed or the defendant's conviction was set aside in all but one case.[16] In the *only* case that is directly on point, *People* v. *Huurre*, 84 N.Y.2d 930, 645 N.E.2d 1210, 621 N.Y.S.2d 511 (1994), the New York Court of Appeals upheld the determination of the Appellate Division of the New York Supreme Court; see *People* v. *Huurre*, 193 App. Div. 2d 305, 306–307, 603 N.Y.S.2d 179 (1993); that a nonverbal, profoundly retarded woman who also suffered from cerebral palsy, was not physically helpless within the meaning of N.Y. Penal Law § 130.00 (7), New York's equivalent to § 53a-65 (6). The defendant in that case, Leo Huurre, "was convicted . . . of sexual abuse in the first degree in that he subjected the victim, a profoundly mentally retarded woman, to sexual contact when she was incapable of consenting to such contact by reason of being physically helpless . . . ." (Citation omitted.) Id., 306. "The victim . . . was a [thirty-five year old] woman with an [intelligence quotient] of 16 to 20, which is the functional equivalent of [that of] a three year old and renders her profoundly mentally retarded. In addition, the victim suffers from cerebral palsy and epilepsy, and is nonverbal in the sense that she has no understandable speech, but she does make gutteral noises and is capable of making and understanding a few signs. Essentially, she is capable of doing and understanding that which a three year old can do and understand, except that she does not have the ability to speak. Those who care for the victim testified, however, that her lack of speech does not inhibit her from communicating when she wants or does not want something. Thus, for exam-

ple, when she was in the hospital after [the alleged sexual] assault [and] waiting to be examined, she kept crying and pointing away as though she wanted to leave. When the doctor attempted to examine her, she kept trying to get off the examining table and jumped back when he approached her with a tube." Id., 307.

On appeal, Huurre claimed "that in drafting [New York] Penal Law article 130, the article that deals with sex offenses, the [l]egislature defined the phrase 'incapable of consent' in such a way as to preclude a finding that [a person] who is mentally retarded could be incapable of consenting by reason of being physically helpless . . . ." (Citation omitted.) Id., 306. The Appellate Division rejected this contention, concluding in relevant part: "[T]he fact that an individual is mentally retarded does not, perforce, preclude a finding that she, either as a consequence of or in addition to that retardation, is physically helpless, that is, physically unable to communicate an unwillingness to an act . . . . [T]he evidence adduced at trial, [however] when viewed in the light most favorable to the prosecution, is legally insufficient to establish that the victim was physically unable to communicate unwillingness to an act. In fact, the testimony is to the contrary. Although the victim, by virtue of her retardation, is not able to determine what she should or should not be unwilling to do, the testimony adduced at trial established that when she is unwilling to do something she communicates that unwillingness. Thus, [Huurre's] conviction for sexual abuse in the first degree [was] reversed . . . and that count of the indictment [was] dismissed." (Citation omitted.) Id., 306–307.

In reaching its determination, the Appellate Division acknowledged that "there may be situations under which the different factors that cause a victim to become incapable of consent overlap . . . . Indeed, one of the psychologists who testified on behalf of the [prosecution] indicated that while the victim, who is at the high end of the scale which is used to measure profound retardation, has rudimentary communication abilities, there are those on the low end of the scale used to measure profound mental retardation that have none. Such persons may, as a consequence of their mental retardation, or mental defect . . . be physically unable to communicate unwillingness to an act . . . . [In this case], however, the [prosecution] failed to establish that such an overlap exists."[17] (Citations omitted.) Id., 309–10.

In sum, even if the term "physically helpless" in § 53a-65 (6) was not intended primarily to apply to a severely handicapped person who is able to communicate nonverbally, we agree with the conclusion in *Huurre* that a person's physical or intellectual disabilities do not preclude a finding that such a person, by virtue of his or her disabilities or other reasons, is physically helpless in

the sense of being "physically unable to communicate unwillingness to an act." General Statutes § 53a-65 (6). Thus, regardless of the reason for the alleged inability to communicate, the key question in cases that require proof of physical helplessness is whether, at the time of the alleged sexual assault, the victim was physically able to convey a lack of consent or unwillingness to an act.

In the present appeal, the state contends that whether the victim was unable to physically communicate her lack of consent at the time of the alleged assault was a factual matter properly left to the jury and that the Appellate Court improperly substituted its judgment for that of the jury. It is axiomatic that physical helplessness is a question of fact for the jury but *only if the court determines that the evidence is legally sufficient to support a finding as to that issue*. The question, therefore, is whether the state met that threshold burden.

The state argues that the evidence adduced at trial was sufficient to satisfy its burden of proof with respect to the element of physical helplessness because the jury was not required to accept the testimony of the witnesses who stated that the victim could express her displeasure and unwillingness to an act through biting, kicking, scratching, screeching, groaning or gesturing. The state further contends that, even if the jury credited this testimony, "[it] was not required to accept the interpretation of [the victim's] actions assigned by these witnesses." The state maintains that, "[r]ather than conclude, as these witnesses did, that [the victim] was able to signal 'no' by biting, screeching, kicking or groaning, the jury could find this behavior merely emblematic of her multiple disabilities. Or, the jury could conclude [that] such behavior, rather than serving as a conduit for communication, was a reflection of her attitude toward [S], or merely part of [the victim's] startle reflex, or a sign of generalized anger, frustration or even mischievousness."

If the state had pursued any of these theories at trial, so that the jury could have considered them, it is entirely possible that we would find them persuasive for purposes of our sufficiency analysis on appeal. We have consistently held, however, that, "in order for any appellate theory to withstand scrutiny . . . it must be shown to be not merely before the jury due to an incidental reference, but as part of a coherent theory of guilt that, upon [review of] the principal stages of trial, can be characterized as having been presented in a focused or otherwise cognizable sense. We adopted this rule as the standard by which to gauge whether evidence introduced at trial, but not relied on by the state in its legal argument, is properly cognizable by an appellate court when evaluating the sufficiency of the evidence. . . . In addition, it is well established that [o]ur rules of procedure do not allow a [party] to pursue one course

of action at trial and later, on appeal, argue that a path [the party] rejected should now be open to him. . . . To rule otherwise would permit trial by ambuscade." (Citation omitted; internal quotation marks omitted.) *State* v. *Scruggs*, 279 Conn. 698, 718–19, 905 A.2d 24 (2006).

At no time during the trial, including cross-examination, closing argument or rebuttal, did the state challenge or dispute testimony establishing that the victim communicated displeasure through biting, kicking, scratching, screeching or groaning. Indeed, the *state itself* elicited much of this testimony, albeit in an attempt to establish for the jury that the victim was credible and perfectly capable of communicating her likes and dislikes. Nor did the state contend or otherwise suggest that these behaviors were simply manifestations of the victim's disabilities rather than volitional, communicative acts intended to express displeasure. Likewise, the state did not proceed on the theory that the victim's behaviors merely reflected generalized anger or frustration.[18]

To the contrary, the prosecutor expressly told the jury during closing argument that the victim, "according to all accounts, was very vocal, very active, and, if in fact she felt that . . . [people were not understanding] what she was saying, I believe [that] everybody [who has] testified here [has indicated that] she would throw up her arms and say 'stop.' " During closing argument, the prosecutor also noted that the victim was "very limited in terms of . . . what type of information she can pass on to you," and that she had "some difficulty expressing herself . . . ." At no time, however, did the state even raise the notion that the victim was *unable* to communicate an unwillingness to an act. Indeed, it appears that the state believed there was no reason to contest the victim's ability to express herself by biting, kicking, scratching, screeching, groaning or gesturing because it was the state's theory that the victim was physically helpless, *notwithstanding her ability to communicate nonverbally*, in view of her limited cognitive abilities, the fact that she cannot speak and that fact that she is totally dependent on others for all of her needs.[19] The state, having chosen to pursue this path at trial, cannot now proceed on the basis of theories that it opted not to pursue.[20] See, e.g., *State* v. *Scruggs*, supra, 279 Conn. 719.

As we have explained, the term "physically helpless" has a particular statutory meaning that requires more than a showing that a victim is totally physically incapacitated. We therefore turn to the evidence adduced at trial to determine whether, when considered in light of the state's theory of guilt at trial, the state presented sufficient evidence to satisfy § 53a-65 (6). We conclude that it did not.

As our recitation of the facts indicates, the state pre-

sented a significant amount of testimony explaining the victim's physical and cognitive limitations. The state also presented ample evidence to demonstrate that the victim communicated with many individuals by various means, including the use of a communication board, as well as by gestures, biting, kicking and screaming. As we previously indicated, the state presented no evidence or argument to call into question the testimony concerning the victim's nonverbal methods of communication. The state did, however, elicit testimony from several physicians that they were unable to communicate with the victim during the course of gynecological examinations. That evidence simply is not probative of whether the victim was unable to physically communicate *to the defendant* that his alleged sexual advances were unwelcome. The fact that the physicians sought information from S, rather than the victim, for purposes of conducting medical examinations is not relevant with respect to establishing that the victim was unable to convey the concept of "no" at the time of the alleged sexual assault.[21]

When we consider this evidence in the light most favorable to sustaining the verdict, and in a manner that is consistent with the state's theory of guilt at trial, we, like the Appellate Court, "are not persuaded that the state produced any credible evidence that the [victim] was either unconscious or so uncommunicative that she was physically incapable of manifesting to the defendant her lack of consent to sexual intercourse at the time of the alleged sexual assault." *State* v. *Fourtin*, supra, 118 Conn. App. 53.

The judgment of the Appellate Court is affirmed.

In this opinion ROGERS, C. J., and ZARELLA and McLACHLAN, Js., concurred.

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

** September 28, 2012, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] General Statutes § 53a-71 (a) provides in relevant part: "A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and . . . (3) such other person is physically helpless . . . ."

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

[3] General Statutes (Rev. to 2005) § 53a-73a (a) provides in relevant part: "A person is guilty of sexual assault in the fourth degree when: (1) Such person intentionally subjects another person to sexual contact who is . . . (C) physically helpless . . . ."

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

[5] The defendant was found not guilty of sexual assault in the second degree in violation of § 53a-71 (a) (3).

[6] "Although the defendant was arrested in 2006, his trial was postponed because he was found incompetent to stand trial at that time. The trial commenced two years later, when he was found to have been restored to competency after a period of commitment to Connecticut Valley Hospital."

State v. *Fourtin*, supra, 118 Conn. App. 46 n.5.

[7] Ralph Welsh, a clinical psychologist, described the victim's total functioning as akin to that of a person between the ages of two and five years old, which he based on a "total composite" indicating "severe to profound deficit[s]" in the areas of living communication, daily living, socialization and adaptive behavior. The victim's mathematical and language comprehension skills were between a kindergarten and second grade level. Welsh, who testified for the defense regarding what he considered to be the victim's suggestibility during interviews and interrogations, compared the victim to a five year old child who has been "isolated" and has "not had contact with anything other than a certain limited world. . . . She's not like the average five year old child who has . . . [many] more life experiences."

[8] Despite the victim's cognitive limitations, Chervenak described her as "very bright" and stated that she often would call him over to talk, particularly about baseball. When Chervenak was asked how he communicated with her, he replied, "I would verbally speak to her, and she would respond either [with] the shrill of her voice . . . or she had a communication board which she keeps on the tray to her wheelchair. She would point to letters to spell out a word. . . . Or she would actually use the computer to write me little messages or little notes, and [we would] talk back and forth [that way]."

[9] "[The victim] pointed to her mouth and then to Chernevak's crotch, and to her chest area and then to her pubic area." *State* v. *Fourtin*, supra, 118 Conn. App. 46 n.6.

[10] Hernandez testified that, although the victim was nonverbal, her cognitive abilities were "very high" and that she was able to communicate her emotions and feelings. Hernandez stated that S frequently complained to day care staff that the victim was not receiving adequate care during the day. According to Hernandez, the victim would get "very upset" and "embarrassed" when S complained, and later would apologize profusely for S's behavior.

[11] Elenita Espina, an obstetrician and gynecologist who testified for the defense, offered similar testimony. When she was questioned about several routine examinations that she had performed on the victim in 2003, 2005 and 2006, Espina indicated that she could not communicate with the victim and that she "would talk to [S] about issues concerning [the victim] before [she] began [the] examination . . . ."

[12] The trial court instructed the jury as follows: "The second element of [sexual assault in the second degree] is that the sexual intercourse was with a person who was physically helpless at the time of the sexual intercourse. 'Physically helpless' is defined in . . . [§] 53a-65 (6) as follows: 'Physically helpless' means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to act. There's no requirement that the state prove that the intercourse was done by force or even without the consent of the other person. Force [and] lack of consent are not elements of the crime. Consent is not a defense. Whether or not the other person consented is irrelevant to your consideration of this element of the crime. The only requirements are that the accused engaged in sexual intercourse with another person who, at the time of the sexual intercourse, was physically helpless, as I have just defined that for you." In charging the jury on sexual assault in the fourth degree, the trial court indicated that the foregoing instruction would apply.

[13] Specifically, the defendant contends, inter alia, that "[t]he state posits the theory, not offered at trial, that [the victim's kicking, biting, screeching and groaning] could be deemed 'merely emblematic of her multiple disabilities' or 'a reflection of her attitude toward [S]' or 'a sign of generalized anger, frustration, or even mischievousness.' " The defendant argues, however, that the state never presented any evidence in support of this theory at trial and, therefore, that the jury would have been required to go outside the record to find facts to support it. The defendant argues that "[t]he jury isn't surmising then, it is speculating, and it is acting contrary to the trial court's . . . instruction that it is 'not allowed to find facts outside of the evidence.' " The defendant also argues that the state's many theories regarding what the jury *could have done* "[offer] a radical and untenable reconstruction of how juries may consider and apply evidence."

[14] It is for this reason that some courts and commentators have characterized statutes proscribing sexual intercourse with a physically helpless person as mislabeled. See, e.g., *Coley* v. *State*, 616 So. 2d 1017, 1019–20 (Fla. App. 1993) ("The phrase, 'physically helpless to resist,' is a misnomer. The phrase suggests that it applies [when] . . . the victim is tied up, but in fact the phrase has nothing at all to do with being physically restrained. . . . The

statute gives 'physically helpless to resist' an unusual and very limited definition.").

[15] This court repeatedly has stated that, "[w]hen the language and legislative history of a criminal statute do not resolve the question of statutory interpretation presented by a particular case, this court may turn to the parallel statutory provisions set forth in the Model Penal Code and the [revised] New York . . . Penal Law, effective September 1, 1967, for guidance . . . *State* v. *Havican*, 213 Conn. 593, 601, 569 A.2d 1089 (1990); because [t]he drafters of [our Penal Code] relied heavily [on] the Model Penal Code and various state criminal codes, especially the [P]enal [Law] of New York. Conn. Joint Standing Committee Hearings, Judiciary, Pt. 1, 1969 Sess., p. 11. *State* v. *Hill*, 201 Conn. 505, 516–17, 523 A.2d 1252 (1986); see also *State* v. *Henry*, 253 Conn. 354, 363, 752 A.2d 40 (2000) ([w]e note that our Penal Code is modeled after the New York Penal [Law]); *State* v. *Desimone*, 241 Conn. 439, 456, 696 A.2d 1235 (1997) (legislature relied on the interpretations of the American Law Institute's Model Penal Code and the New York [P]enal [Law] . . . when it revised the state [P]enal [C]ode in 1969 . . .) . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Courchesne*, supra, 296 Conn. 671.

[16] See, e.g., *People* v. *Clyburn*, 212 App. Div. 2d 1030, 1031, 623 N.Y.S.2d 448 (evidence was insufficient to sustain conviction for sexual assault of physically helpless person because victim, who suffered from Huntington's disease, was able to communicate verbally), appeal denied, 85 N.Y.2d 971, 653 N.E.2d 627, 629 N.Y.S.2d 731 (1995); *People* v. *Huurre*, 193 App. Div. 2d 305, 307, 603 N.Y.S.2d 179 (1993) (defendant's conviction was reversed because profoundly retarded victim, although nonverbal, could communicate her unwillingness when she was unwilling to do something and, therefore, was not physically helpless within meaning of sexual assault statutes), aff'd, 84 N.Y.2d 930, 645 N.E.2d 1210, 621 N.Y.S.2d 511 (1994); *People* v. *Morales*, supra, 139 Misc. 2d 202 (although victim was physically incapable of moving her arms or legs, she verbally communicated her lack of consent to defendant during alleged sexual assault, and, therefore, court dismissed count of indictment charging defendant with sexual assault of physically helpless person); *State* v. *Bucknell*, 144 Wn. App. 524, 528–30, 183 P.3d 1078 (2008) (although victim was paralyzed from her chest down, she was able to speak and make decisions, and, thus, evidence was insufficient to sustain defendant's conviction for sexual assault of physically helpless person).

Although the defendant's conviction was affirmed in *Dabney* v. *State*, 326 Ark. 382, 385, 930 S.W.2d 360 (1996), as the court explained, the facts in that case were significantly different. See id., 383–85. Specifically, there was evidence that the victim in that case, a fifty-three year old woman who was blind, mentally retarded and confined to a bed, generally was unable to understand what went on around her and therefore could not respond to stimuli in any meaningful way. Id. In addition, although *State* v. *Atkins*, 193 N.C. App. 200, 204–205, 666 S.E.2d 809 (2008), review denied, 363 N.C. 130, 673 S.E.2d 364 (2009), involved a physically or mentally handicapped victim, that case also involved a different statutory definition of "physically helpless" and, therefore, is not instructive.

[17] The dissent argues that "*Huurre* is only superficially similar to the present case on the basis of the disabilities [that the victim in that case suffered] as described in [that decision], and is distinguishable because, although it, like the present case, contained some evidence that the victim's 'lack of speech [did] not inhibit her from communicating when she want[ed] or [did] not want something'; *People* v. *Huurre*, supra, 193 App. Div. 2d 307; the evidence of the victim's responsiveness to medical examinations in *Huurre* was the polar opposite of that considered by the jury in [the present] case . . . . Specifically, the victim in *Huurre* actively communicated her desire to avoid the examination and physically tried to 'get off the examining table and jumped back when [the physician] approached her with a tube. The [physician] finally became discouraged and left the room without [completing] the examination. The victim did receive a complete gynecological examination later that day at the clinic, but in order to do so she had to be strapped down and her legs held apart by two or three people.' Id., 307–308 . . . ." (Citation omitted.) The dissent thus concludes that "[t]he victim in *Huurre* is . . . distinguishable from the victim in the present case, who exhibited to her physicians no . . . ability to communicate or resist gynecological examinations." Text accompanying footnote 18 of the dissenting opinion.

This conclusion is predicated on the testimony of three physicians, who observed "that the victim was unable to communicate with them during the

course of gynecological examinations, and that they had to speak with S in order to obtain necessary information." In reliance on this testimony, the dissent reasons that, insofar as the victim did not communicate with her physicians during the course of gynecological examinations, or try to resist those examinations, this case is distinguishable from *Huurre* because it is reasonable to assume that the victim in the present case, in contrast to the victim in *Huurre*, could do neither of these things.

The dissent's attempt to distinguish *Huurre* is unavailing. The far more logical explanation for the inability of the victim's physicians to communicate with the victim during the course of her gynecological examinations is that the victim does not speak. In fact, it would have been remarkable if the physicians had testified that they were able to obtain information from the victim during her examinations in view of the fact that she would have been prone on her back at the time, with her feet in stirrups and without the use of her communication board. Nor is the fact that the victim does not resist gynecological examinations probative of whether she *could resist* if she wanted to do so. Indeed, the fact that the victim was a cooperative patient is wholly consistent with the testimony of several witnesses, including Vetrano, who described the victim as "a trooper" in public, someone who "likes to please everybody" and "look[s] good in the eyes of others . . . ." Vetrano also testified that "[the victim] was able to tolerate the dentist like any other normal human being that doesn't have a disability. She was pretty amazing. Most of our [clients] require sedation to go through a dental evaluation. The fear that's involved usually just triggers them . . . . It's very difficult. [There are] a lot of behavioral issues that come into play. [The victim, however] has a full understanding of what going to the dentist means. When I took her, I was able to transfer her with . . . assistance into the normal chair . . . and she had a full oral exam without any anesthesia, any medication at all, and was able to have a full scaling done by the dentist. She was pretty amazing." In light of the evidence, the dissent's contention that *Huurre* is distinguishable because the victim in the present case did not communicate with her examining physicians or attempt to resist them lacks merit.

[18] Another theory that the state did not pursue at trial but does on appeal is that, "even if the jury concluded that [the victim] could signal 'no' by screeching, kicking, or [by] other nonverbal means, it could nevertheless conclude [that the victim] was incapable of communicating an 'unwillingness to an act.' The jury could reasonably determine that [although the victim] may have had a method of protesting unwanted sexual contact, or an attempted sexual assault, after it occurred, she would have no way of signaling her unwillingness to engage in that conduct prior to its occurrence." As with the other theories that the state now raises, the state did not introduce evidence or argue in support of this theory at trial.

[19] The dissent disagrees with our application of *State* v. *Scruggs*, supra, 279 Conn. 698, to the present case, contending that the state did not violate *Scruggs* in this case because its factual arguments on appeal are consistent with how the case was litigated "with respect to legal matters determined by the trial court . . . ." Specifically, the dissent asserts that "the state's factually based arguments . . . are consistent with its argument before the trial court in response to the defendant's motions [for a judgment of acquittal], namely, that the victim's ability to communicate consent at the time of the [alleged sexual] assault was a credibility based question of fact." Any such argument to the trial court outside the presence of the jury is wholly irrelevant to a *Scruggs* inquiry, which is concerned *solely* with the theory of guilt that was presented to the jury. As the First Circuit Court of Appeals stated in *Cola* v. *Reardon*, 787 F.2d 681 (1st Cir.), cert. denied, 479 U.S. 930, 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986), the very case on which our analysis in *Scruggs* is predicated; see *State* v. *Scruggs*, supra, 718; "the reason [fundamental fairness] requires the appellate theory to be present in the indictment *and* the proof at trial, is a fundamental sixth amendment concern that guilt be initially adjudicated before a jury based on the government's case as presented at trial." (Emphasis in original.) *Cola* v. *Reardon*, supra, 697; see also id., 687 ("the state appeals court, in upholding [the defendant's] conviction on a theory of guilt not presented at trial, violated his due process right to have such guilt determined on a basis set forth in the indictment *and presented to the jury*" [emphasis added]).

Finally, the dissent appears to assert that *Scruggs* applies only to the defendant's right to fair notice of "*the specific charged acts* that form the basis [of] the criminal charges for which he is being tried." (Emphasis in original.) Footnote 21 of the dissenting opinion. On the contrary, the *Scruggs*

fair notice requirement necessarily applies equally to any and all elements of the offense, not merely to the actus reus element. The dissent has identified no reason for limiting the doctrine in such a manner, and we can think of none.

[20] Indeed, as the Appellate Court suggested; see *State* v. *Fourtin*, supra, 118 Conn. App. 49; this appears to be a case in which the state ultimately proceeded against the defendant under the wrong statute. Originally, the state also had charged the defendant with sexual assault in the second degree in violation of § 53a-71 (a) (2), attempt to commit sexual assault in the second degree in violation of §§ 53a-71 (a) (2) and 53a-49 (a) (2), and sexual assault in the second degree in violation of General Statutes (Rev. to 2005) § 53a-73a (a) (1) (B), all of which require that the victim be unable to consent to sexual intercourse because the victim is "mentally defective . . . ." Because the evidence established that the victim's cognitive abilities are significantly limited, the state could well have prosecuted the defendant under those provisions. The record does not indicate why the state decided not to do so and opted instead to pursue charges requiring proof that the victim was physically helpless. By electing to prove that the victim was physically helpless rather than mentally defective, the state removed from the case all issues pertaining to the victim's mental capacity to consent to sex.

[21] In concluding that the evidence supported a finding that the victim was physically helpless, the dissent relies heavily on the fact that "the victim's communicative abilities . . . were significantly and severely restricted, as shown by her need to use a cumbersome and slow communication board," and on "the testimony of three physicians . . . that the victim was unable to communicate with them during the course of gynecological examinations, and that they had to speak with S in order to obtain necessary information." The fact that the victim needs a slow and cumbersome communication board to express herself in words does not establish that the victim was unable to express herself in some other manner, specifically, by biting, kicking, scratching, screeching, groaning or gesturing, when the defendant approached her. Of course, if the state had challenged that evidence at trial and advanced the position that the victim could communicate via her communication board only, the result of this appeal might be different.

The dissent also contends that the jury reasonably could have found that the victim could not communicate unwillingness to an act on the basis of the testimony of the physicians who stated that they could not communicate with the victim during the course of her gynecological examinations. As we previously explained, however; see footnote 17 of this opinion; the fact that the physicians could not communicate with the victim does not establish that the victim was unable to communicate with them by biting, kicking, scratching, screeching, groaning or gesturing if she felt the need to do so. Because the victim requires a communication board to express herself in words, it proves nothing that, without the aid of her communication board, the victim did not attempt to communicate with her physicians.