STATE OF CONNECTICUT *v.* DONALD CURTIS WILSON
(SC 18631)

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

Argued November 29, 2012—officially released April 30, 2013

G. Douglas Nash, assigned counsel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom were *Richard J. Colangelo, Jr.*, senior assistant state's attorney, and, on the brief, *David I. Cohen*, state's attorney, for the appellee (state).

Opinion

ZARELLA, J. The defendant, Donald Curtis Wilson, appeals from the judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes § 53a-54a.[1] On appeal, the defendant claims that the trial court improperly (1) curtailed defense counsel's cross-examination of a jailhouse informant regarding the maximum sentence the informant faced on pending felony charges at the time he incriminated the defendant in violation of the defendant's constitutional right of confrontation and the state rules of evidence, (2) allowed inadmissible hearsay from the informant that his parole officer supported his application for a sentence modification in violation of the defendant's constitutional right of confrontation, and (3) admitted into evidence testimony regarding the defendant's gang membership. In addition, the defendant claims that the assistant state's attorney (prosecutor) engaged in prosecutorial impropriety during his cross-examination of the defendant's expert witness and during closing argument, thereby depriving the defendant of his due process right to a fair trial. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On the night of December 25, 2007, the defendant shot and killed Larry Paulk (victim). That evening, several members of the Paulk family had gathered to celebrate the holiday at the home of the victim's mother at a housing complex in Norwalk. In attendance were two of the victim's brothers, Fred Paulk (Fred) and Ozell Paulk, and their wives and children. When Fred arrived at the complex, he noticed the defendant standing alone in front of the building. Fred had known the defendant since the defendant was a young child, and the two exchanged Christmas greetings.

Fred's son, Derrick Paulk (Derrick), arrived shortly after his father. As Derrick climbed the stairs to his grandmother's second floor apartment, he passed the defendant, who appeared to be selling drugs to a person named Kenny Jackson. Upon arriving at the party, Derrick said something to his father and the victim, which caused the victim to stand up and walk out the door. When the victim emerged from the apartment, Jackson and the defendant, who were now outside the apartment door, left the area, but the victim followed them down the stairs and into the vestibule. There, Jackson and the defendant met Jason Gonzalez. Gonzalez and the victim exchanged words, and a fight broke out, during which Gonzalez drew a gun. Upstairs in his mother's apartment, Fred heard gunshots and ran to a second floor balcony that overlooked the vestibule. Below, he saw the victim fighting with Gonzalez over something in Gonzalez' hands. Fred also observed a young woman, later identified as Kim Martinez, holding Gonzalez around the waist, trying to restrain him and shouting

for him to stop.

Two witnesses gave conflicting testimony as to the defendant's location during the fight. Fred testified that the defendant stood in the doorway with his back to the open door. At some point, Gonzalez and the victim broke apart from each other, causing Gonzalez and Martinez to fall to the floor and the victim to fall back against a wall of mailboxes. When Fred looked toward the doorway, he saw the defendant aiming the gun at the victim. Fred shouted for the defendant not to shoot. In response, the defendant looked directly at Fred but then turned and shot the victim, who collapsed onto Gonzalez. The defendant then grabbed Gonzalez, and the two fled from the scene.

A first floor resident, Barbara Thivierge, was also in the vestibule during the shooting. Thivierge testified that the defendant was standing near Gonzalez when the fight began but ended up next to her by a set of windows bordering the front door. Thivierge tried to escape but her shirt got caught on the front door latch and ripped, preventing her from leaving just as she heard the last shot. When Thivierge turned to look behind her, she saw Gonzalez slide out from underneath the victim. Unable to move, Thivierge held the door for Gonzalez and the defendant, who ran through it.

A police investigation of the crime scene resulted in the discovery of three spent .40 caliber Smith & Wesson cartridge casings. One bullet, which had struck a first floor resident's front door, was recovered at the crime scene. Two others were recovered from the victim's body. All three bullets were fired from the same handgun, which the state's firearms expert testified was almost certainly a Glock, but no gun was ever recovered.

The defendant was charged with the victim's murder on January 2, 2008, and subsequently was tried for that offense.[2] The defendant did not testify at his trial. The jury in the defendant's first trial was unable to reach a verdict, and a mistrial was declared on May 8, 2009. The present appeal arises from the second trial of the defendant in which the jury returned a verdict of guilty of the crime of murder on October 9, 2009. Additional facts will be set forth as necessary in the context of the defendant's specific claims on appeal.

I

The defendant first claims that defense counsel's cross-examination of James F. McGourn, the state's jailhouse informant, was improperly curtailed when the court precluded counsel from asking McGourn about the maximum possible penalty he faced on his pending criminal charges. The defendant argues that (1) the trial court violated his right of confrontation by unduly restricting defense counsel's ability to attack McGourn's credibility through impeachment, (2) the

trial court abused its discretion by precluding the impeachment evidence as irrelevant, and (3) such error, irrespective of whether it is determined to be evidentiary or constitutional, is harmful and warrants a new trial. The state responds that the defendant's right to confront McGourn was not infringed because defense counsel was permitted to adduce ample evidence from which the jury could infer any bias, motive or incentive of McGourn to testify falsely. With respect to the evidentiary claim, the state contends that the trial court did not abuse its discretion by precluding cross-examination into McGourn's maximum potential sentence because the court reasonably could have concluded that the evidence, although relevant, was unduly prejudicial. In the alternative, the state asserts that, even if the trial court's ruling were an abuse of discretion, such error was harmless. Because we assume, arguendo, that there was constitutional error but nevertheless conclude that the impropriety was not harmful, we reject the defendant's claim that such impropriety would compel a new trial.

We set forth the following additional facts that are relevant to our resolution of this claim. On January 3, 2008, the defendant was arraigned on the murder charge before the trial court and transferred to the Bridgeport correctional center, where he shared a prison cell with McGourn for approximately one week. McGourn, who previously had been convicted of twelve felonies, was awaiting trial on pending felony charges. On January 16, 2008, McGourn contacted the Norwalk police department to report that, while he and the defendant were cellmates, the defendant confessed to shooting the victim. At trial, McGourn admitted that he shared this information with the police in an attempt to obtain favorable treatment from prosecutors on his pending charges.

During cross-examination, defense counsel sought to elicit McGourn's "maximum possible exposure" for the felony conviction to which he ultimately pleaded guilty on May 8, 2008, but the trial court sustained the prosecutor's objection to this question on relevancy grounds.[3] Nevertheless, McGourn testified on cross-examination that, before he had encountered the defendant, the state had offered him a sentence of two and one-half years but that he ultimately "pled out to two." Defense counsel further elicited from McGourn that his May 8, 2008 conviction was his thirteenth and that it resulted in a "flat" two year sentence, with no probation.

After serving the first year of his sentence, McGourn was released on parole and obtained employment in Massachusetts. McGourn, however, could not leave the state of Connecticut without violating the terms of his parole, so he filed a motion for sentence modification, seeking early termination of parole. Although McGourn testified that he was offered "[n]o promises; no deals,"

from the state, and that he ultimately received no deal, he admitted that his motion for sentence modification was granted on April 6, 2009, prior to his testimony in the defendant's first trial on April 30, 2009. As a result, McGourn's parole was terminated after only one year, and he was permitted to, and did, move out of state. McGourn agreed with defense counsel's characterization that he was a "jailhouse snitch" with "a long list of felony convictions . . . ." Because of McGourn's status as an informant, the trial court gave a special credibility instruction in its final charge to the jury, admonishing the jury to "review the testimony of an informant with particular scrutiny and weigh it with greater care than you would the testimony of an ordinary witness . . . in light of any motive he may have for testifying falsely and inculpating the accused."[4]

Assuming, without deciding, that the trial court's curtailment of defense counsel's cross-examination of McGourn amounted to constitutional error, we begin by considering whether such error was harmful. We have long recognized that "a violation of the defendant's right to confront witnesses is subject to harmless error analysis . . . ." *State* v. *Smith*, 289 Conn. 598, 628, 960 A.2d 993 (2008). In undertaking this analysis, "the test for determining whether a constitutional [error] is harmless . . . is whether it appears beyond a reasonable doubt that the [error] complained of did not contribute to the verdict obtained." (Internal quotation marks omitted.) *State* v. *Hampton*, 293 Conn. 435, 463, 978 A.2d 1089 (2009), quoting *Neder* v. *United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). In addition, "[w]hen an [evidentiary] impropriety is of constitutional proportions, the state bears the burden of proving that the error was harmless beyond a reasonable doubt. . . . [W]e must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . That determination must be made in light of the entire record [including the strength of the state's case without the evidence admitted in error]." (Citations omitted; internal quotation marks omitted.) *State* v. *Mitchell*, 296 Conn. 449, 460, 996 A.2d 251 (2010).

Applying these principles, we are persuaded that the alleged error was harmless in light of the facts set forth previously. Specifically, the defendant claims that defense counsel was precluded from eliciting testimony from McGourn that would have informed the jury of the maximum penalty McGourn faced for his pending charges. In the defendant's view, this testimony would have enabled the jury to assess McGourn's incentive to testify falsely against the defendant by comparing the sentence actually imposed with that which McGourn might otherwise have received but for his cooperation. Nevertheless, the jury heard McGourn's unopposed testimony that he had been offered a two and one-half

year sentence *before* he met the defendant and became involved in the defendant's case.[5] In addition, defense counsel established that McGourn received a two year sentence, without probation, after pleading guilty to his thirteenth felony, and that McGourn served only one half of this sentence before he was released from the terms of his parole and granted permission to move out of state. The jury was therefore made aware of the two and one-half year sentence offered to McGourn prior to his involvement in the defendant's case, as well as the sentence ultimately imposed on and served by McGourn, and, accordingly, the jury was capable of assessing McGourn's credibility by comparing these sentences. Under such circumstances, given that the jury was presented with uncontroverted evidence of a compromise offer that predated McGourn's potential motive to fabricate, as well as the sentence that McGourn actually received due to his cooperation in the defendant's prosecution, we are persuaded that the defendant's inability to present evidence regarding the maximum potential sentence McGourn otherwise might have faced was harmless.

Finally, because constitutional error claims are subjected to a stricter harmless error standard than nonconstitutional evidentiary claims, our conclusion that the trial court's preclusion of the cross-examination, if improper, was nevertheless harmless necessarily compels us to conclude that it was likewise harmless under a nonconstitutional evidentiary analysis. See, e.g., *State* v. *George J.*, 280 Conn. 551, 592, 910 A.2d 931 (2006) ("[I]f an [evidentiary] impropriety is of constitutional proportions, the state bears the burden of proving that the error was harmless beyond a reasonable doubt. . . . When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful." [Internal quotation marks omitted.]), cert. denied, 549 U.S. 1326, 127 S. Ct. 1919, 167 L. Ed. 2d 573 (2007). Accordingly, we reject the defendant's claim that the curtailment of defense counsel's cross-examination of McGourn entitles him to a new trial.

II

The defendant next claims that the trial court abused its discretion in admitting certain testimony from McGourn on the ground that it constituted inadmissible hearsay evidence. The defendant also alleges that the trial court improperly admitted the challenged testimony in violation of the defendant's constitutional right of confrontation. Specifically, the defendant challenges the trial court's admission of McGourn's statement that his parole officer was in agreement with the sentence reduction sought in his motion for sentence modification because he "met all her restrictions and qualifications and groups." The defendant argues that the admission of McGourn's self-serving statement unfairly

bolstered McGourn's testimony and prejudiced the defendant. The state responds that, even if the trial court improperly admitted this statement in violation of the defendant's right of confrontation, such admission was harmless because the same evidence already had been admitted properly during defense counsel's cross-examination of McGourn. We agree with the state.

The following additional facts are relevant to our resolution of this claim. During cross-examination, defense counsel asked McGourn a number of questions regarding the two year sentence he received for his thirteenth felony conviction, seeking to expose facts from which the jury could infer that McGourn had received a substantial benefit from the state in exchange for his testimony. Defense counsel began by asking McGourn, "You got a sentence modification from the state's attorney in Meriden, right?" McGourn replied in the affirmative. Shortly thereafter, defense counsel began, "The state's attorney in Meriden—you got a lifetime of crime. You got cases pending. You get two years on a drug case-" but McGourn cut him off, stating, "If you're gonna ask me something, let me answer it." At this point, the prosecutor objected, but the court overruled the objection, instructing defense counsel to "[a]sk [his] question" and "[l]et [McGourn] answer it." Before defense counsel could ask another question, McGourn began testifying as follows: "I was offered a job out of state. I had talked to the prosecutor in the Meriden court because I was maintaining the job when I was out. *My parole officer stuck up for me, went to bat with him so I could move to Mass*[*achusetts*]. On parole, I could not leave the state of Connecticut. It was all agreed upon because I was attending [Narcotics Anonymous] meetings, maintaining steady employment, reporting regularly, clean urines and stuff, they—you—would modify my sentence to allow me to move to Massachusetts on the condition that I did move to Mass[achusetts]. That's why it was done." (Emphasis added.)

Subsequently, defense counsel asked McGourn if he received a "break" from the prosecutor in exchange for his testimony. McGourn replied that he did not know, but he believed that his motion for sentence modification was granted because his parole officer told the prosecutor that he had "met his terms" with her, and the prosecutor "agreed with the recommendation from [his] parole officer."

Defense counsel never objected to any of this testimony, and did not ask that any of it be stricken. On redirect examination, however, defense counsel did object to the prosecutor's sole question regarding the same topic, namely, whether McGourn's parole officer indicated that she was in agreement with a reduced sentence. McGourn answered: "Yes, because I met all her restrictions and qualifications and groups." At this

point, defense counsel objected. The prosecutor responded that the defense had opened the door to the question during cross-examination, and the trial court overruled defense counsel's objection.

A

We begin by considering the defendant's evidentiary claim, namely, that the testimony was improperly admitted because it constituted hearsay. "[A] party who delves into a particular subject during the examination of a witness cannot object if the opposing party later questions the witness on the same subject. . . . The party who initiates discussion on the issue is said to have opened the door to rebuttal by the opposing party. . . . [T]his rule operates to prevent a defendant from successfully excluding inadmissible prosecution evidence and then selectively introducing pieces of this evidence for his own advantage, without allowing the prosecution to place the evidence in its proper context." (Internal quotation marks omitted.) *State* v. *Victor O.*, 301 Conn. 163, 189, 20 A.3d 669, cert. denied, U.S. , 132 S. Ct. 583, 181 L. Ed. 2d 429 (2011). Because defense counsel was the first to elicit the challenged statement during cross-examination, and because the prosecutor merely asked that McGourn *repeat* this statement on redirect examination, we conclude that the defense opened the door to the challenged statement. Accordingly, we conclude that the trial court did not abuse its discretion in admitting the statement.

B

We next consider whether the admission of the statement, although consistent with our principles of evidence, nevertheless violated the defendant's right of confrontation. As we have explained previously, "[a]lthough . . . hearsay rules and the [c]onfrontation [c]lause are generally designed to protect similar values, [the court has] also been careful not to equate the [c]onfrontation [c]lause's prohibitions with the general rule prohibiting the admission of hearsay statements. . . . The [c]onfrontation [c]lause, in other words, bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule." (Internal quotation marks omitted.) *State* v. *Pierre*, 277 Conn. 42, 75, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006). We see no reason to conclude, however, that this is such a case.

Even assuming, arguendo, that the admission of the statement was a constitutional violation, we conclude that any such error was harmless. See *State* v. *Smith*, supra, 289 Conn. 628. "As with other constitutional violations that are subject to harmless error analysis, the state has the burden of demonstrating that a confrontation clause violation was harmless beyond a reasonable doubt." *State* v. *Merriam*, 264 Conn. 617, 649, 835 A.2d 895 (2003). "Whether such error is harmless in a particu-

lar case depends [on] a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless." (Internal quotation marks omitted.) *State* v. *Smith*, supra, 628.

In the present case, the contents of the contested statement were first put before the jury by defense counsel, who elicited these statements through a series of questions regarding the length of McGourn's sentence vis-á-vis the length of his criminal record. Apparently seeking to address the thrust of defense counsel's questions as to why he served such a short sentence for his thirteenth felony, McGourn testified that his "parole officer stuck up for [him]" and that she "went to bat [for him] with [the prosecutor] so [he] could move to Mass[achusetts]." Rather than moving to strike this testimony as beyond the scope of the question, defense counsel proceeded to elicit the same statement two more times. It was only when the prosecutor, on redirect examination, asked McGourn if his "parole officer [was] in agreement with [his] getting a reduced sentence" that defense counsel objected. By this point, however, McGourn's answer, that he met "all [of his parole officer's] restrictions and qualifications and groups," was cumulative of evidence that already was properly put before the jury by defense counsel. Because the prosecutor's question required only that McGourn repeat his prior testimony, the challenged statement could not have had any "impact . . . on the trier of fact" or on "the result of the trial"; nor could it have had any "tendency to influence the judgment of the jury . . . ." (Internal quotation marks omitted.) *State* v. *Smith*, supra, 289 Conn. 628. Accordingly, to the extent that the admission of this evidence was, in fact, a violation of the defendant's right of confrontation, a determination we do not make in this case, we conclude that any such impropriety was harmless. See id., 629 (finding harmless error notwithstanding violation of defendant's right of confrontation when statements admitted were "cumulative" of other evidence properly before jury and statements "appeared from the record to be little more than [the witness'] own opinion or a repetition of what he previously had heard from another source"). But cf. *State* v. *Colton*, 227 Conn. 231, 254, 630 A.2d 577 (1993) (confrontation clause violation not harmless when improperly admitted testimony formed basis of jury's verdict and, had it not been credited, jury would not have been able to find

defendant guilty).

III

Next, the defendant claims that the trial court improperly admitted evidence regarding his affiliation with a gang, asserting that this evidence was far more prejudicial than probative. The state counters that the trial court was well within its broad discretion in admitting the evidence and that the evidence was probative of the defendant's motive to commit the murder. We agree with the state.

The following additional facts are relevant to our resolution of this claim. Over defense counsel's objection, the trial court permitted the prosecutor to elicit testimony from McGourn regarding his sworn statement to the police. McGourn testified that he first learned of the murder from the defendant himself, who told him he had been "accused of [the] murder [of] a well-known boxer's brother." The defendant explained to McGourn that he, his father, and his "codefendant" planned to assault the victim, who had objected to and interfered with their drug trade. On the day of the murder, the trio sought out the victim, and when they encountered him, a fight broke out between the victim and the "codefendant." The fight ended when the defendant gained control of the gun and shot the victim.

After the murder, the defendant's father disposed of all incriminating evidence, including the murder weapon. The defendant expressed surprise that the police had charged him with the murder because they initially had suspected his "codefendant." He nonetheless claimed to be unconcerned with punishment, as his "codefendant" would accept blame for the murder because of their respective positions in their street gang.

Prior to trial, the defendant filed a motion in limine seeking to exclude all evidence of the defendant's gang affiliation. The defendant argued that "[t]he testimony of street gangs and gang activity is so prejudicial and inflammatory that there is a high likelihood that this type of evidence will unduly arouse the [jurors'] emotions of prejudice, hostility or sympathy" and that such testimony has "little or no relevance to the main issues in this trial." At a pretrial motion conference conducted by the trial court, *White*, *J.*, defense counsel repeated the substance of these arguments. The prosecutor countered that such testimony, if credited, "lays out a motive" and describes the mechanics of the murder in great detail. The court agreed with the state and denied the defendant's motion in limine, but stated that it would instruct the jury on the credibility of "jailhouse snitches."

"Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . Evidence is relevant if it tends to make the exis-

tence or nonexistence of any other fact more probable or less probable than it would be without such evidence. . . . To be relevant, the evidence need not exclude all other possibilities; it is sufficient if it tends to support the conclusion [for which it is offered], even to a slight degree." (Internal quotation marks omitted.) *State* v. *Peeler*, 267 Conn. 611, 634–35, 841 A.2d 181 (2004). "Evidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact even to a slight degree, so long as it is not prejudicial or merely cumulative." (Internal quotation marks omitted.) *State* v. *Allen*, 289 Conn. 550, 562, 958 A.2d 1214 (2008).

"Although relevant, evidence may be excluded by the trial court if the court determines that the prejudicial effect of the evidence outweighs its probative value. . . . Of course, [a]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jury. . . . Reversal is required only whe[n] an abuse of discretion is manifest or whe[n] injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Peeler*, supra, 267 Conn. 637.

In the present case, evidence of the defendant's gang affiliation, if credited by the jury, was highly probative of a motive to kill the victim. Although motive is not an element of murder, "[w]e previously have recognized the significance that proof of motive may have in a criminal case. . . . [S]uch evidence is both desirable and important. . . . It strengthens the state's case when an adequate motive can be shown. . . . Evidence tending to show the existence or nonexistence of motive often forms an important factor in the inquiry as to the guilt or innocence of the defendant. . . . This factor is to be weighed by the jury along with other evidence in the case." (Internal quotation marks omitted.) Id., 636. As the state persuasively argues, the jury might reasonably have inferred that the defendant would have been prone to be less cautious, and more inclined to shoot the victim, if Gonzalez, who was actively fighting with the victim, was a confederate who would accept blame for the murder. Moreover, proof of that motive was particularly important in light of the identity of the victim, a longtime acquaintance of the defendant. See id., 637 ("proof of . . . motive was especially important in view of the nature of the crimes with which the defendant was charged and the identity of the victims").

Nevertheless, the defendant argues that the evidence of his gang affiliation was "dramatically presented" in McGourn's testimony, improperly arousing the emo-

tions of the jurors. We disagree. Although the jurors undoubtedly lacked a favorable opinion of the defendant's gang, McGourn referred to the gang only once during his testimony, and the prosecutor never referred to the gang during closing argument. These factors minimized the risk of unfair prejudice to the defendant. Moreover, as the defendant was accused of murdering the victim pursuant to a plan developed by and executed with the other members of his drug trafficking organization—itself a gang of at least three—it is hard to see what, if any, *unfair* negative associations the jurors might impute to the defendant upon learning that his drug trafficking organization was, or was associated with, his gang. See, e.g., *State* v. *Mozell*, 40 Conn. App. 47, 51–52, 668 A.2d 1340 (evidence of defendant's gang membership probative of motive to kill to protect gang's drug sales territory, not unduly prejudicial), cert. denied, 236 Conn. 910, 671 A.2d 842 (1996). On the basis of the strong probative value of the evidence and the limited risk of unfair prejudice, we conclude that the trial court did not abuse its discretion in admitting the challenged evidence.

IV

Finally, the defendant claims that the prosecutor engaged in prosecutorial impropriety by denigrating the defendant's expert witness during cross-examination and closing argument, thereby depriving the defendant of his due process right to a fair trial. The defendant further argues that, even if the alleged improprieties did not deprive him of a fair trial, this court should exercise its supervisory authority over the administration of justice to grant him a new trial because of pervasive prosecutorial impropriety. The state concedes the "excessive and unnecessary use of sarcasm" by the prosecutor but contends that the conceded improprieties did not deprive the defendant of a fair trial. The state further maintains that the exercise of this court's supervisory authority is unwarranted in the present case. We agree with the state.

The following additional facts are relevant to our disposition of this claim. Through the use of forensic evidence of gunshot residue deposited in and around the victim's fatal wound, the defense sought to establish that he could not have been the shooter because he was standing too far from the victim at the time the fatal bullet was fired.

Both sides called expert witnesses to testify regarding the approximate distance of the muzzle of the murder weapon from the victim's chest at the time of the fatal shot (muzzle distance) on the basis of the gunshot residue evidence.[6] Robert K. O'Brien, a supervisor of the identification section of the state forensic laboratory, testified for the state. Peter Diaczuk, the director of forensic science training at John Jay College of Criminal Justice (John Jay) in New York City, testified for the

defendant. The muzzle distance analyses of both experts reflected substantial agreement. O'Brien estimated the minimum muzzle distance range as between one and four feet. On direct examination, Diazcuk estimated the muzzle distance at not less than one foot and no more than three feet. On cross-examination, however, Diaczuk agreed with O'Brien's conclusion that the maximum distance was "[n]o further away than three to four feet . . . ." Nevertheless, Diaczuk favored an approximate distance of two feet, as this was the statistical mean between the one and three foot distances that he had estimated as the lower and upper boundaries of the muzzle distance range. O'Brien, however, disagreed that, "[i]n all likelihood . . . the shot [was] really in the two to two and [one]-half feet range," stating that he "[did not] think a scientist [could] say that."

Both experts explained that, because the murder weapon was never recovered, their approximations were necessarily imprecise. For instance, O'Brien testified that factors such as the length of the barrel of the murder weapon, the type of ammunition used, and the dirtiness of the gun's barrel affect the amount of gunpowder deposited in and around the wound. Furthermore, both experts testified that agitation of the victim's garment, such as that which occurred when emergency medical services personnel administered treatment to the victim, could have dislodged additional gunpowder particles. In reaching their conclusions, both experts conducted tests by firing a Glock handgun from controlled distances at a garment similar to that worn by the victim at the time of the murder.

Despite the substantial agreement between the parties' expert witnesses, the prosecutor made a number of comments regarding Diaczuk during both cross-examination and closing argument that are the subject of the fourth and final issue on appeal. Diaczuk, whose credentials are relevant to this claim, received his bachelor's degree from John Jay in 1978 and returned twenty-five years later to pursue a master's degree. During the interim, Diaczuk started his own consulting firm, which worked on mechanical and structural engineering projects, but spent approximately one half of his time and derived most of his income from doing carpentry work. After returning to John Jay, Diaczuk and a colleague presented research involving gunshot residue deposition at a meeting of the American Academy of Forensic Sciences, one of several professional organizations of which Diaczuk was a member. Diaczuk worked as a lecturer at John Jay and as a "forensic consultant" to his mentors, Professors Peter R. De Forest and Thomas A. Kubic, assisting them in conducting distance determination research. Diaczuk admitted on cross-examination, however, that his work on the defendant's criminal case was the first time he had conducted unsupervised muzzle distance testing using a Glock firearm.

Defense counsel did not object at trial to a number of the improprieties that the defendant now challenges on appeal. "[A] claim of prosecutorial impropriety, [however] even in the absence of an objection, has constitutional implications and requires a due process analysis under *State* v. *Williams*, 204 Conn. 523, 535–40, 529 A.2d 653 (1987). . . . In analyzing claims of prosecutorial impropriety, we engage in a two step process."[7] (Internal quotation marks omitted.) *State* v. *Gilberto L.*, 292 Conn. 226, 245, 972 A.2d 205 (2009). "The two steps are separate and distinct: (1) whether [an impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial. Put differently, [impropriety] is [impropriety], regardless of its ultimate effect on the fairness of the trial; whether that [impropriety] [was harmful and thus] caused or contributed to a due process violation is a separate and distinct question . . . ." (Internal quotation marks omitted.) *State* v. *Outing*, 298 Conn. 34, 81, 3 A.3d 1 (2010), cert. denied, U.S. , 131 S. Ct. 1479, 179 L. Ed. 2d 316 (2011).

"[I]t is not the prosecutor's conduct alone that guides our inquiry, but, rather, the fairness of the trial as a whole. . . . We are mindful throughout this inquiry, however, of the unique responsibilities of the prosecutor in our judicial system. A prosecutor is not only an officer of the court, like every other attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . By reason of his [or her] office, [the prosecutor] usually exercises great influence [on] jurors. [The prosecutor's] conduct and language in the trial of cases in which human life or liberty [is] at stake should be forceful, but fair, because he [or she] represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice or resentment." (Internal quotation marks omitted.) *State* v. *Stevenson*, 269 Conn. 563, 571–72, 849 A.2d 626 (2004). That is not to say, however, "that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument." (Internal quotation marks omitted.) *State* v. *Santiago*, 269 Conn. 726, 734, 850 A.2d 199 (2004). Indeed, this court "give[s] the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade them to draw inferences in the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand. The state's attorney should not be put in the rhetorical straitjacket of always using the passive voice, or continually emphasizing that he is simply saying I submit to you that this is what the evidence shows, or the like." (Internal quotation marks omitted.) *State* v. *Thompson*, 266 Conn. 440, 465–66, 832 A.2d 626 (2003).

"The prosecutor may not express his own opinion, directly or indirectly, as to the credibility of the witnesses. . . . Such expressions of personal opinion are a form of unsworn and unchecked testimony, and are particularly difficult for the jury to ignore because of the prosecutor's special position." (Internal quotation marks omitted.) *State* v. *Outing*, supra, 298 Conn. 83. Neither may a prosecutor "appeal to the emotions, passions and prejudices of the jurors." (Internal quotation marks omitted.) *State* v. *Rizzo*, 266 Conn. 171, 255, 833 A.2d 363 (2003). Because a prosecutor may commit either or both of these improprieties by denigrating a witness through the frequent and gratuitous use of sarcasm, it follows that such denigration is improper. See, e.g., *State* v. *Outing*, supra, 84 (excessive use of sarcasm during cross-examination of defense witness "[may call on] the jurors' feelings of disdain, and [may send] them the message that the use of sarcasm, rather than reasoned and moral judgment, as a method of argument [is] permissible and appropriate for them to use" [internal quotation marks omitted]); *State* v. *Salamon*, 287 Conn. 509, 564, 949 A.2d 1092 (2008) (prosecutor's "gratuitous use of sarcasm and repeated questioning of [a witness] as to matters that he already had explored thoroughly with her" improperly conveyed prosecutor's own belief that witness was not credible). We address, in turn, each of the improprieties alleged by the defendant.

A

Denigration of Diaczuk

The defendant claims that the prosecutor improperly denigrated Diaczuk by (1) asking Diaczuk sarcastic questions during cross-examination, (2) engaging in name-calling during closing argument, (3) improperly commenting on Diaczuk's testimony during cross-examination, and (4) improperly commenting on Diaczuk's testimony during closing argument.

1

Sarcastic Questioning

The defendant contends that the prosecutor committed impropriety during cross-examination by asking Diaczuk sarcastically if (1) his job entailed "carry[ing] his [mentor's] bags," (2) his job consisted of "hanging out" with his mentor and "helping him do his experiments," (3) he was "basically a carpenter" prior to returning to John Jay, and (4) his test fires in preparation for the present case represented a "maiden voyage with a Glock." The defendant also challenges the prosecutor's sarcastic statement to the judge, offered in response to defense counsel's relevancy objection, that defense counsel was "making [Diaczuk] out to be a renowned expert."

During cross-examination, the prosecutor asked

Diaczuk about his work history prior to his enrollment in the forensic program at John Jay. Diaczuk testified that he spent about one half of his time doing carpentry and supported himself from the proceeds of his consulting firm and from carpentry. The prosecutor then asked if Diaczuk was "basically a carpenter" before returning to John Jay. At this point, defense counsel objected on the ground of relevancy, and the prosecutor countered that defense counsel was "making [Diaczuk] out to be a renowned expert." The trial court overruled the objection.

The prosecutor later asked Diaczuk if the study he conducted in the present case was "a maiden voyage with a Glock." The witness replied, "Ah," and the prosecutor clarified: "The first time doing distance determination with a Glock is this case, correct?" Diaczuk agreed. Apparently reading from Diaczuk's resume, the prosecutor subsequently asked, "[y]ou say, 2002 to present, forensic consultant, casework assistant to . . . De Forest. What's that mean? You carry his bags?" Referring to Diaczuk's work with De Forest, the prosecutor also asked, "[s]o you're hanging out with him and helping him do his experiments, basically?"

Though it is manifestly the purpose of cross-examination to expose to the jury facts from which *it* may gauge the credibility of an expert witness; see, e.g., *State* v. *Copas*, 252 Conn. 318, 327, 746 A.2d 761 (2000) ("[a] basic and proper purpose of cross-examination of an expert is to test that expert's credibility" [internal quotation marks omitted]); a prosecutor may not express *his own opinion* of the witness' credibility, such as by engaging in a line of questioning designed to mock and belittle that witness. See *State* v. *Salamon*, supra, 287 Conn. 563–64 (prosecutor's questioning of witness improper "because his intent was not to elicit testimony from [her] but, rather, to mock and belittle her"); *State* v. *Whipper*, 258 Conn. 229, 266, 780 A.2d 53 (2001) (prosecutor's insistence on referring to expert witness, a doctor, as " 'Ms. Rudin' " or " 'Mrs. Rudin' " rather than "Dr." led court to conclude that prosecutor improperly expressed personal opinion concerning witness' credibility as expert), overruled in part on other grounds by *State* v. *Cruz*, 269 Conn. 97, 848 A.2d 445 (2004), and *State* v. *Grant*, 286 Conn. 499, 944 A.2d 947, cert. denied, 555 U.S. 916, 129 S. Ct. 271, 172 L. Ed. 2d 200 (2008).

The state concedes the impropriety of the prosecutor's question about whether Diaczuk's work as a doctoral candidate consisted of carrying his mentor's bags.[8] We find no impropriety, however, in the prosecutor's question whether Diaczuk was "basically a carpenter" prior to beginning his graduate studies at John Jay. Diaczuk's relative inexperience was a proper subject for the jury to consider in weighing the credibility of his testimony. As the state asserts, given the limited description of Diaczuk's work history adduced during

direct examination, the jury might easily—and erroneously—have assumed Diaczuk's firm consulted on forensic matters. Furthermore, because defense counsel was properly trying to establish Diaczuk's status as an expert—while the state properly sought to probe the limitations of his forensics expertise—we cannot say that the prosecutor's statement that defense counsel was "making [Diaczuk] out to be a renowned expert" was an improper commentary on the credibility of the witness.[9]

We likewise disagree with the defendant that the prosecutor's characterization of Diaczuk's work on this case as a "maiden voyage" constituted an "ad hominem attack." It is entirely appropriate for the state to elicit on cross-examination facts from which the jury may draw inferences about a witness' experience and credibility. See *State* v. *Fauci*, 282 Conn. 23, 49, 917 A.2d 978 (2007); see also *State* v. *Stevenson*, supra, 269 Conn. 587 ("[a] prosecutor may invite the jury to draw reasonable inferences from the evidence, however, he or she may not invite sheer speculation unconnected to evidence" [internal quotation marks omitted]). Moreover, unlike the improprieties conceded by the state, there is little to suggest that the purpose of this question was to "mock" or "belittle" Diaczuk. Cf. *State* v. *Salamon*, supra, 287 Conn. 564. Likewise, because Diaczuk had described De Forest as a "mentor" who had "urg[ed]" him to return to John Jay, the prosecutor's characterization that Diaczuk was "hanging out" with him and "helping him do his experiments, basically," accurately characterizes Diaczuk's role as a subordinate and does not clearly suggest an attempt to diminish Diaczuk unfairly in the eyes of the jury.

2

Name-Calling

The defendant argues that the prosecutor improperly engaged in name-calling by referring to Diaczuk as (1) "Pete the carpenter" or "Peter the carpenter," (2) a "piece of work," and (3) "smart guy."

During closing argument, defense counsel stated: "McGourn came in here and you know, he's whatever he is—thirteen felony convictions, larcenies, failure[s] to [appear]. He's a piece of work, and he knows what he's got to do to get out of jail and he did it." During rebuttal, the prosecutor stated: "I kinda chuckled when [defense counsel] called . . . McGourn a 'piece of work.' It's up to you to determine someone's credibility. I submit to you the only piece of work you heard from was the guy that came in here yesterday afternoon. Pete the carpenter, that fired a bunch of guns . . . . [I]t was very clear from his testimony that he's the only piece of work that came before you. He's the only one that—if you want to say that he's the one that's trying to make it fit for him, you know, the one that's conforming their

evidence to smart guy." Later, the prosecutor added: "[T]he piece of work, Mr. Diaczuk, Peter the carpenter, comes in and says, well it's two feet." In total, the prosecutor referred to Diaczuk as a "piece of work" six times.

It is improper for the prosecutor to engage in name-calling for the purpose of disparaging a witness. See, e.g., *State* v. *Salamon*, supra, 287 Conn. 564 (prosecutor's gratuitous use of sarcasm directed at defense witness "ran afoul" of proscriptions on prosecutors); see also *United States* v. *Benter*, 457 F.2d 1174, 1175 (2d Cir.) (prosecutor's repeated mocking of defendant, on trial for accepting bribes, as "Honest Phil," improper), cert. denied, 409 U.S. 842, 93 S. Ct. 41, 34 L. Ed. 2d 82 (1972).

The state concedes that the prosecutor's use of the phrase "Pete the carpenter" or "Peter the carpenter" constituted impropriety, but challenges the defendant's claim that the prosecutor's use of the phrase "a piece of work" was improper, arguing that defense counsel, having first used this phrase against McGourn, cannot now cry foul over the prosecution's use of the same phrase in rebuttal. Moreover, the state contends, the prosecutor used the phrase "innocuously" to imply "little more than the proper notion that [Diaczuk] was not credible." The defendant argues that the frequency and severity of defense counsel's use of the phrase pales in comparison to that of the prosecutor. Specifically, the defendant argues that defense counsel used the phrase once, in reference to a convicted felon, whereas the prosecutor used it six times, in reference to a forensic scientist. Both arguments are specious.

With respect to the defendant's argument, this court never has held that convicted felons are incredible witnesses as a matter of law. To the contrary, we rejected the very same argument in *State* v. *Thompson*, 305 Conn. 412, 436, 45 A.3d 605 (2012). In *Thompson*, the defendant challenged as unreliable the testimony of a jailhouse informant, which the trial court largely had credited, notwithstanding the informant's "undeniable . . . [hope] to derive a . . . significant benefit from his cooperation . . . ." (Internal quotation marks omitted.) Id. Notwithstanding the witness' "motive to fabricate," we held that "the trial court was entitled to find, and did find, on the basis of [the informant's] in-court demeanor, that his testimony was for the most part credible, and we must defer to that assessment." Id. It is for the fact finder to determine the credibility of witnesses, felons and forensic scientists alike.

Turning to the state's argument, it is well settled that "[impropriety] is [impropriety], regardless of its ultimate effect on the fairness of the trial; whether that [impropriety was harmful and thus] caused or contributed to a due process violation is a separate and distinct question . . . ." (Internal quotation marks omitted.)

State v. *Outing*, supra, 298 Conn. 81. Therefore, insofar as the state claims that the prosecutor's use of the phrase "a piece of work" was not improper because the defendant invited it, the state conflates the first and second steps of the *Williams* analysis, namely, the finding of an impropriety and its harmfulness.[10] Moreover, the state's claim that the prosecutor's use of the phrase was "innocuous," because it implied "little more" than the proper notion that Diaczuk was not credible, is tantamount to a *concession* of impropriety. The prosecutor's repeated use of this phrase was improper because it was an impermissible and persistent comment on the credibility of the witness. See, e.g., *State* v. *Outing*, supra, 86 (prosecutor's comment that witness' credibility was " 'zilch,' " was improper). Indeed, at one point, the prosecutor baldly stated: "This is why *I think* he's a piece of work . . . ." (Emphasis added.) On another occasion, the prosecutor bookended Diaczuk's name with the epithets "the piece of work" and the concededly improper "Peter the carpenter," which also was improper.

Finally, the prosecutor's statement, "[h]e's the only one that—if you want to say that he's the one that's trying to make it fit for him, you know, the one that's conforming their evidence to smart guy," although not grammatical, clearly denigrates Diaczuk. In context, "smart guy" is either a sarcastic reference to Diaczuk himself or denigrates Diaczuk as the party attempting to "conform" his work to that of an unnamed person of superior intelligence. We therefore find impropriety. See, e.g., *United States* v. *Benter*, supra, 457 F.2d 1177 ("the flinging of . . . epithets at a defendant that might be commonplace in a second-rate movie or television script" is improper).

3

Improper Commentary during Cross-Examination

Next, the defendant argues that the prosecutor improperly commented on Diaczuk's credibility during cross-examination by (1) offering his sarcastic "congratulations" to Diaczuk upon the completion of his first unsupervised muzzle distance testing, (2) stating that he was "eliminating [Diaczuk's graduate] course work" because "everybody goes to college," and (3) suggesting that the acceptance process to which Diaczuk's research presentation was subjected did not constitute "peer review."

As we already have stated, "[a] basic and proper purpose of cross-examination of an expert is to test that expert's credibility." (Internal quotation marks omitted.) *State* v. *Copas*, supra, 252 Conn. 327. The prosecutor, however, may not "comment unfairly on the evidence in the record." *State* v. *Fauci*, supra, 282 Conn. 49.

The state concedes that the prosecutor's sarcastic

"congratulations," offered three times and over defense counsel's objection, constituted "an excessive and inappropriate use of sarcasm." We conclude, however, that the prosecutor did not diminish Diaczuk's testing experience, as the defendant alleges, by "eliminating" his course work in the doctoral program at John Jay, or by stating that "everybody goes to college." First, we observe that the prosecutor used the phrase "eliminating your course work" in response to Diaczuk's answer to his previous question, that is "[i]f we're eliminating that training that I received from Dr. De Forest and Dr. Kubic." Second, the prosecutor's question was directed toward Diaczuk's *extracurricular* course work. When Diaczuk responded by discussing his course work *at John Jay*, the prosecutor clarified that the state's expert also had trained in a forensic science program and that he was "trying to compare apples to apples," a comment that, if anything, suggested parity between O'Brien and Diaczuk.

We likewise reject the defendant's argument that the prosecutor "demoted" the acceptance review process to which Diaczuk's presentation was subjected before the American Academy of Forensic Sciences by distinguishing it from "peer review." It is clear from the colloquy between the prosecutor and Diaczuk that each heard the phrase "peer review" to suggest two related, but distinct, processes, and were talking past each other. Diaczuk was referring to an acceptance review process, conducted by his peers, to qualify for presentation at an academic conference, whereas the prosecutor was attempting to ask whether Diaczuk's findings had been independently *verified*. That the prosecutor merely asked whether Diaczuk's work had been subjected to independent verification was hardly an improper commentary on Diaczuk's credibility.

4

Improper Commentary on the Evidence during Closing Argument

The defendant alleges that the prosecutor improperly commented on Diaczuk's testimony during closing argument by (1) comparing Diaczuk to a "fourth grader," (2) stating that Diaczuk had "wasted an hour of our lives," (3) urging the jury to "[j]ust disregard everything [Diaczuk] told [it]," (4) stating "he wants to show you, '[h]ey, I'm this expert and you should look at the particles,' " (5) stating that there was "no evidence [that Diaczuk] knows anything about forensics," and (6) stating that Diaczuk was "riding someone's coattails."

In closing argument, defense counsel stated: "McGourn came in here and you know, he's whatever he is—thirteen felony convictions, larcenies, failure[s] to [appear]. He's a piece of work, and he knows what he's got to do to get out of jail and he did it." During rebuttal, the prosecutor stated: "[Y]ou could question

what [Diaczuk] did because there's no evidence that he knows anything about forensics. Did he get a degree? Yes. Did he take twelve hours of a forty hour course in gunshot residue and distance reconstruction in Arizona a couple of years ago? Yes. Did he take a class in Miami—about eight hours for distance determination? Yes. I guess that's true. He told us that. But all of the other stuff that he testified to about his experience, well, I guess he was riding someone's coattails, and it was very clear from his testimony that he's the only piece of work that came before you. He's the only one that—if you want to say that he's the one that's trying to make it fit for him, you know, the one that's conforming their evidence to smart guy. You know he's the one that came up with two feet. How did he get it, though, ladies and gentlemen? This is why I think he's a piece of work. He said it was the statistical mean between one and three. I have a fourth grader, and she can add one and three and divide by two to come up with the mean. That's what that piece of work did. That's what he wants you to believe that's why it was two feet.

"Here's the thing that doesn't matter in this case. It doesn't matter one foot, two foot, three foot, four foot. It doesn't. Why? Because Fred . . . fixes the gun—and we know there was only one—in the doorway in [the defendant's] hand."

Thereafter, the prosecutor added: "[T]he piece of work, Mr. Diaczuk, Peter the carpenter, comes in and says, well it's two feet. Well, that helps them—yeah, it does. Just disregard everything he told you. I mean, he had nice charts and nice, 'look at this sweatshirt. I shot at this. I shot at that.' It doesn't mean anything, ladies and gentlemen. He did that—his testimony—for demonstrative evidence to show you to look at the patterns I'm looking at. He wasted an hour of our lives showing us the boards that he shot at and the—again, if it's such a big deal and he wants to show you, '[h]ey, I'm this expert and you should look at the particles.' You remember all the sweatshirts that he brought in? If it's a big deal about keeping the evidence separate and not shaking it because that could dislodge particles—and I want to show you what I did, why would he put 'em all together in the same package? He ripped it open right here in front of you—pulled out six different things. He didn't show us anything. An hour of our lives that we're never going to get back. He's a piece of work."

The state concedes that the prosecutor's gratuitous analogy of Diaczuk to a fourth grader constituted "an excessive and unnecessary use of sarcasm." The state likewise concedes that the prosecutor's statement that Diaczuk "wasted an hour of our lives" improperly aligned the prosecutor with the jury and improperly directed outrage at Diaczuk.

The prosecutor's comment that the jury should "[j]ust disregard everything [Diaczuk] told [it]," although sus-

pect in isolation, constituted fair argument when considered in context. The prosecutor made this statement just before urging the jury to credit Fred's testimony, which "fix[ed] the gun . . . in the doorway in [the defendant's] hand," and is, thus, a comment on the weight of the evidence. As "[t]he state may . . . properly respond to inferences raised by the defendant's closing argument"; (internal quotation marks omitted) *State* v. *Ceballos*, 266 Conn. 364, 400, 832 A.2d 14 (2003); and as defense counsel had just argued that the forensic evidence exposed inaccuracies in Fred's testimony, the prosecutor was entitled to respond to this inference and urge a different conclusion on the basis of the evidence. The statement, "I'm this expert and you should look at the particles," likewise invited the jurors to question Diaczuk's conclusions on the basis of the evidence, namely, that Diaczuk had intermingled and handled his samples, notwithstanding his testimony that such handling could dislodge gunshot particles.[11]

The statement that there was "no evidence [Diaczuk] knows anything about forensics," likewise was a comment on the weight of the evidence but was, as the state concedes, an exaggeration. Importantly, the prosecutor quickly amended this statement, listing a number of Diaczuk's credentials but arguing that the jury should consider his relative inexperience in assessing his credibility, or as the prosecutor put it, his "riding [the] coattails" of his mentors. Here again, the prosecutor was entitled to rebut the inference that defense counsel urged the jury to draw, namely, that despite Diaczuk's relative inexperience, his testimony was credible.[12] The inference the prosecutor conveyed to the jury was a permissible one, indeed, one conceded by defense counsel, that is, that Diaczuk was a relative novice. Although the prosecutor's wording was blunt, we cannot conclude that this statement was improper. *State* v. *Reynolds*, 264 Conn. 1, 162, 836 A.2d 224 (2003) (it is well established that, "[w]hen making closing arguments to the jury . . . [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument" [internal quotation marks omitted]), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004).

In summary, we conclude that the prosecutor improperly (1) repeatedly offered his sarcastic congratulations to Diaczuk on completing his first unsupervised muzzle distance tests using a Glock, (2) asked if Diaczuk's work as a "forensic consultant, casework assistant" consisted of "carry[ing his mentor's] bags," (3) engaged in persistent name-calling ("piece of work," "Pete the carpenter," and "smart guy"), (4) sarcastically compared Diaczuk to a fourth grader, and (5) aligned himself with the jury and directed outrage at Diaczuk by stating that he had "wasted an hour of our lives."

B

Due Process Analysis

Having identified five improprieties, we now must determine whether those improprieties were so harmful as to deprive the defendant of a fair trial. In so doing, we apply the six factors enumerated by this court in *Williams*: "the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Citations omitted.) *State* v. *Williams*, supra, 204 Conn. 540.

We begin by determining whether the improprieties were invited by defense counsel during the trial. We conclude that the comments referring to Diaczuk as a "piece of work" were invited by defense counsel but that the other improprieties were not.

We next consider whether the improprieties were frequent or severe. We conclude that most of the improprieties were infrequent but observe that the prosecutor twice stated that Diaczuk "wasted an hour" of the jurors' lives, "congratulated" Diaczuk three times, and called him a "piece of work" six times. With respect to the severity of the improprieties, we observe that few of the foregoing improprieties were the subject of contemporaneous objection. "To the extent that defense counsel failed to raise an objection, that fact weighs against the defendant's claim that the improper conduct was harmful." *State* v. *Salamon*, supra, 287 Conn. 566. "A failure to object demonstrates that defense counsel presumably [did] not view the alleged impropriety as prejudicial enough to jeopardize seriously the defendant's right to a fair trial." (Internal quotation marks omitted.) *State* v. *Fauci*, supra, 282 Conn. 51. "Given the defendant's failure to object [to the majority of the improprieties now alleged], only instances of grossly egregious misconduct will be severe enough to mandate reversal." (Internal quotation marks omitted.) *State* v. *Bermudez*, 274 Conn. 581, 600–601, 876 A.2d 1162 (2005).

We observe that only two of the prosecutor's improper comments, the offers of "congratulations," and the reference to "carry[ing] [the mentor's] bags," were the subject of timely objection, and we conclude that the jury could not have formed a lasting misperception from those comments. Although it was improper for the prosecutor to offer his sarcastic "congratulations" to Diaczuk on Diaczuk's completion of his first unsupervised muzzle distance determinations, defense counsel *conceded* that it was, in fact, Diaczuk's first time and properly argued to the jurors that they could nevertheless credit the results of his testing.[13] With

respect to the other comment, Diaczuk himself clarified that, far from "carry[ing] his [mentor's] bags," he assisted De Forest with "case[s] involving firearms," including "function or trajectory analysis or firearms-related case work." We conclude that the other improprieties, while reflecting poorly on the prosecutor in light of his special role in our judicial system, did not rise to the level of grossly egregious misconduct.

It is the fourth factor, however—whether the misconduct was central to the critical issues in the case—that is ultimately dispositive of the issue of harmfulness. Simply put, the prosecutor's improper statements to and about Diaczuk could not have affected the outcome of the trial because there was no material dispute between the parties' forensic experts regarding the distance from which the fatal shot was fired. The core of the defendant's forensic defense was that Fred's testimony placed the defendant in the doorway, too far from the victim to have been the shooter under the maximum muzzle distance determination of *either* expert witness. Indeed, in his closing argument, defense counsel stated: "We had the gunshot people in here; three feet, four feet, two feet. *It really doesn't matter because four feet doesn't work for that shot either*." (Emphasis added.) Significantly, defense counsel's use of the phrase "the gunshot people" only underscores the fungibility of Diaczuk's and O'Brien's testimony.[14]

Moreover, even if the jury could have placed the defendant in the doorway at the time the final shot was fired, no evidence fixes the location of the *victim* at the time of the fatal shot with any precision. At trial, the defense relied on a number of "exact measurements" taken by a private investigator whom the defense had employed to establish that the defendant was too far from the victim to have been the shooter. The record reveals that some of these exact measurements were taken from outside the open door—thus contemplating the truth of Fred's testimony that the defendant was leaning against the open door at the time of the shooting—whereas others were taken between imprecisely defined, and apparently randomly chosen, points inside the hallway.[15] Even if the jury credited Fred's testimony, without knowing the location of the *victim* at the time of the fatal shooting, no evidence supports the conclusion that the defendant stood too far from him to have been the shooter. The jury certainly was entitled not to credit these measurements.

Instead, the jury could have relied on Thivierge's testimony. Referring to one of the state's exhibits depicting the front hallway and vestibule, Thivierge testified that the fight began toward the back of the hallway and advanced closer to the door, with both the victim and the defendant moving toward the front as the fight progressed. At one point, Thivierge testified that the defendant "walk[ed] past the fight" toward the door-

way. Ultimately, Thivierge testified that *she* stood in the doorway facing out, while the defendant stood inside the building "by the window," and the victim wrestled Gonzalez "by the mailboxes." On the basis of Thivierge's testimony and the state's exhibit, a reasonable jury could have concluded that the defendant stood mere feet from the victim at the time of the fatal shooting.[16] In fact, the jury appears to have done precisely that. On October 8, 2009, the jury sent the trial judge a note stating: "We would like to hear . . . Thivierge's full testimony on October 6, 2009." The court played back the requested testimony and then excused the jury for lunch. Shortly thereafter, the jury reached its verdict.

"We have recognized that a request by a jury may be a significant indicator of [its] concern about evidence and issues important to [its] resolution of the case." (Internal quotation marks omitted.) *State* v. *Devalda*, 306 Conn. 494, 510, 50 A.3d 882 (2012). This request strongly suggests that the jury did not, as the defendant argues, dismiss the forensic evidence out of hand but, rather, credited the testimony of a witness that put the defendant within a few feet of the victim and, thus, within the muzzle distance range estimated by *both* expert witnesses. Accordingly, Diaczuk's credibility was not a central issue at trial, and the prosecutor's statements, although improper, had no bearing on the jury's consideration of the ultimate issue in this case.

Turning to the fifth factor, the strength of any curative measures taken, we note that defense counsel did not request any specific measures, and no specific curative instructions were given. The trial court, however, did admonish the jury both before and after closing arguments that "the lawyers are not allowed to express their opinions about the facts," and that an attorney's personal opinion "doesn't mean anything."[17] We are confident that the trial court's thorough instruction was sufficient to alleviate any prejudice the defendant could have suffered as a result of the improprieties in this case.

Finally, we conclude that the state's case was strong. After pleading with the defendant to spare the victim's life, Fred saw the defendant, whom he had known since the defendant was a young child, shoot the victim. In the present case, as in *State* v. *Outing*, supra, 298 Conn. 86, we conclude that this eyewitness identification constitutes "strong evidence of the defendant's guilt."[18] Moreover, notwithstanding McGourn's status as a convicted felon, the jury certainly could have credited his testimony in light of its specificity, its consistency with the testimony of other witnesses, and its suggestion of the defendant's motive. See *State* v. *Coleman*, 304 Conn. 161, 169, 37 A.3d 713 (2012) ("we must defer to the jury's assessment of the credibility of the witnesses based on its firsthand observation of their conduct,

demeanor and attitude'' [internal quotation marks omitted]); see also *State* v. *Thompson*, supra, 305 Conn. 436 (trial court entitled to credit testimony of jailhouse informant on basis of in-court demeanor, notwithstanding informant's motive to lie). Accordingly, having considered the *Williams* factors, we conclude that the defendant was not deprived of his right to a fair trial by the prosecutorial improprieties identified in this case.

We caution, however, that the improprieties in the present case might well have amounted to a deprivation of due process if Diaczuk's testimony had differed materially from that of the state's expert or otherwise proved material to the outcome of the trial. Although the prosecutor's persistent, strident and improper denigration of Diaczuk did not ultimately deprive the defendant of a fair trial, it far exceeded the "generous latitude in argument''; (internal quotation marks omitted) *State* v. *Reynolds*, supra, 264 Conn. 162; entrusted to those who represent the people of this state, and was beneath the dignity of the prosecutor's high public office.

C

Supervisory Authority

Alternatively, the defendant argues that this court should invoke its supervisory authority over the administration of justice to deter what the defendant characterizes as " 'flagrant prosecutorial misconduct.' " *State* v. *Ubaldi*, 190 Conn. 559, 571, 462 A.2d 1001, cert. denied, 464 U.S. 916, 104 S. Ct. 280, 78 L. Ed. 2d 259 (1983). We decline to do so.

"[W]e may invoke our inherent supervisory authority in cases in which prosecutorial [impropriety] is not so egregious as to implicate the defendant's . . . right to a fair trial . . . [but] when the prosecutor deliberately engages in conduct that he or she knows, or ought to know, is improper. . . . We have cautioned, however, that [s]uch a sanction generally is appropriate . . . only when the [prosecutor's] conduct is so offensive to the sound administration of justice that only a new trial can effectively prevent such assaults on the integrity of the tribunal. . . . Accordingly, in cases in which prosecutorial [impropriety] does not rise to the level of a constitutional violation, we will exercise our supervisory authority to reverse an otherwise lawful conviction only when the drastic remedy of a new trial is clearly necessary to deter the alleged prosecutorial [impropriety] in the future. . . . Thus, [r]eversal of a conviction under [our] supervisory powers . . . should not be undertaken without balancing all of the interests involved: the extent of prejudice to the defendant; the emotional trauma to the victims or others likely to result from reliving their experiences at a new trial; the practical problems of memory loss and unavailability of witnesses after much time has elapsed; and the availability of other sanctions for such [impropriety]."

(Internal quotation marks omitted.) *State* v. *Warholic*, 278 Conn. 354, 405–406, 897 A.2d 569 (2006). "We exercise our supervisory authority in order to protect the rights of defendants and to maintain standards among prosecutors throughout the judicial system rather than to redress the unfairness of a particular trial." *State* v. *Payne*, 260 Conn. 446, 452, 797 A.2d 1088 (2002).

We conclude that the foregoing factors do not favor the invocation of this court's supervisory authority in the present case. First, as we noted in the part IV B of this opinion, the prosecutor's comments, although improper, did not result in unfair prejudice to the defendant. Second, the potential for emotional trauma to the family of the victim is significant. After the defendant's first trial ended in a mistrial, Fred testified, for the second time, that he had seen the victim gunned down after his pleas to spare him were ignored. The fact that this was a second trial likewise suggests practical problems such as memory loss and the unavailability of witnesses. Finally, our precedent does not support the invocation of our supervisory authority. See, e.g., id., 451 ("reversal is appropriate when there has been a *pattern* of misconduct *across trials*, not just within an individual trial" [emphasis added]). Finding no pattern of misconduct in this case, we decline to invoke our supervisory authority.

The judgment is affirmed.

In this opinion the other justices concurred.

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

[1] General Statutes § 53a-54a provides in relevant part: "(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person . . . ."

[2] On January 2, 2008, the defendant was served with an arrest warrant and was charged with murder in violation of § 53a-54a and held on $1,500,000 bond. The defendant was arraigned the following day. On March 25, 2008, probable cause was found, and, following a hearing, the defendant pleaded not guilty and elected a jury trial. On April 6, 2009, the state filed a long form information charging the defendant with murder in violation of § 53a-54a.

[3] "[Defense Counsel]: When you pled guilty on May 8 of 2008 to that felony conviction, what was your maximum possible exposure for that charge?

"[The Prosecutor]: Objection—relevance. It's not.

"[Defense Counsel]: Your Honor, he received a period of incarceration that is significantly less than the maximum exposure. After a record of his magnitude, I think the jury should get an understanding of what that was.

"[The Prosecutor]: Since he just did it through the question, I'm still objecting, Judge.

"The Court: I'm going to sustain the objection."

[4] Specifically, the trial court instructed the jury: "In evaluating an informant's testimony, you should consider any benefit that the state may have promised or given him in exchange for his testimony.

"You should also consider any benefit, which he hoped to receive, from the state in exchange for his testimony. Even if you find that the state never expressly promised or gave him such benefit. It may be that you will not believe a person who receives, or hopes to receive, a benefit in exchange for his testimony as much as you would believe . . . another witness.

"An informant may have such an interest in the outcome of the case that his testimony may have been colored by that fact. Therefore, you must review the testimony of an informant with particular scrutiny and weigh it with greater care than you would the testimony of an ordinary witness. You should determine the credibility of the informant in light of any motive he may have for testifying falsely and inculpating the accused."

[5] Moreover, we note that, in addition to the defendant's own ability to rebut such testimony, the prosecution itself is obligated to correct any testimony from cooperating witnesses that it knows or should know to be false or misleading. As we explained in *State* v. *Ouellette*, 295 Conn. 173, 989 A.2d 1048 (2010), "[d]ue process is . . . offended if the state, although not soliciting false evidence, allows it to go uncorrected when it appears. *Napue* v. *Illinois*, [360 U.S. 264, 269, 79 S. Ct. 1173, 3 L.Ed. 2d 1217 (1959)]. If a government witness falsely denies having struck a bargain with the state, or substantially mischaracterizes the nature of the inducement, the state is obliged to correct the misconception. *Giglio* v. *United States*, [405 U.S. 150, 153, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)]; *Napue* v. *Illinois*, supra, 269–70. Regardless of the lack of intent to lie on the part of the witness, *Giglio* and *Napue* require that the prosecutor apprise the court when he knows that his witness is giving testimony that is substantially misleading. *United States* v. *Harris*, 498 F.2d 1164, 1169 (3d Cir.), cert. denied sub nom. *Young* v. *United States*, 419 U.S. 1069, 95 S. Ct. 655, 42 L. Ed. 2d 665 (1974). . . . *State* v. *Satchwell*, 244 Conn. 547, 560–61, 710 A.2d 1348 (1998)." (Citations omitted; internal quotation marks omitted.) *State* v. *Ouellette*, supra, 186.

[6] As Robert K. O'Brien, the state's gunshot residue expert, testified: "Typically, when a weapon is [discharged in very close contact to] a garment, we're going to be getting ripping and tearing, soot-like material, gunpowder particles, perhaps, in that particular area. Most noticeably, soot-like material and ripping and tearing [are typically seen] with a very close contact-type discharge." Similarly, Peter Diaczuk, the expert witness called by the defense, testified that, "[w]hen a firearm is discharged, in addition to the bullet leaving the barrel, there will be an amount of unburned and partially burned particles—gunpowder particles—that will come out in addition to smoke material. And by smoke material, I would mean completely burned particles that have been combusted in their entirety, and also some vaporized lead very often as well. . . . Depending [on] the density and amount of those particles in test targets, it is possible to derive an approximation of the distance that the muzzle of the gun was to the target."

[7] "Once prosecutorial impropriety has been alleged . . . it is unnecessary for a defendant to seek to prevail under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and it is unnecessary for an appellate court to review the defendant's claim under *Golding*." *State* v. *Fauci*, 282 Conn. 23, 33, 917 A.2d 978 (2007).

[8] Because the state concedes the impropriety of this remark, we need not address the defendant's argument that this remark improperly injected nonevidence into the trial record.

[9] Because the defendant opened the door to Diaczuk's work experience from 1983 to 2003, we reject the argument that the prosecutor "injected an irrelevant, extraneous matter" into the trial by questioning Diaczuk about that same experience on cross-examination. See *State* v. *Victor O.*, supra, 301 Conn. 189.

[10] We consider the impact of the defendant's having invited this impropriety at the second step of the *Williams* analysis in part IV B of this opinion.

[11] The defendant also challenges this statement on the ground that it constitutes impropriety as a misstatement of the law. Specifically, the defendant alleges that the prosecutor committed impropriety by misstating the legal principle that the jury should consider all the evidence before choosing whether to accept it, and should evaluate the evidence on the basis of reason rather than on the basis of emotional considerations. As we have explained, "[w]hen the prosecutor appeals to emotions, he invites the [jurors] to decide the case, not according to a rational appraisal of the evidence, but on the basis of powerful and irrelevant factors which are likely to skew that appraisal." (Internal quotation marks omitted.) *State* v. *Rizzo*, supra, 266 Conn. 255. Insofar as the defendant argues that the prosecutor extended this invitation expressly, rather than impliedly, however, the transcript does not support this claim.

[12] During closing argument, defense counsel stated: "Diaczuk came in here; everybody's got their first time. He had his first trial. I had my first trial one day. We've all had our first experiences. He's clearly a very knowledgeable guy. He brought the testing here. He let you all see it, what he did."

[13] See footnote 12 of this opinion.

[14] We reject the defendant's argument that O'Brien's testimony allowed for an inference that there was a longer distance between the shooter and the victim than did Diaczuk's testimony because O'Brien testified that he had seen gunshot residue particles adhere to fabric from a muzzle distance

as far as seven feet on some occasions. This argument misreads O'Brien's testimony. First, as the state notes, O'Brien never said *this* was one of those occasions. Second, although the cited quotation does not specify a weapon, O'Brien testified that he has had several experiences "*with Glocks* and other handguns of this nature, and gunpowder typically comes out *to the max*, distance-wise, three [to] four feet away depending [on] the length of the barrel, the dirtiness of the gun—those types of variables which [he] didn't have in this particular case." (Emphasis added.) O'Brien added that, in reaching the maximum distance of four feet, he "err[ed] on the side of conservati[sm]," and that, "to be conservative," he "[had] to err on the side of [estimating a] *longer* [*distance*] . . . ." (Emphasis added.)

[15] One such measurement was taken "from somewhere in the middle of [the hallway as depicted in one of the state's exhibits] by the green towels, let's say the yellow towel, along that wall."

[16] Moreover, given both Fred's and Thivierge's testimony that the fight progressed from the back to the front of the hall, with the defendant at one point walking "past the fight," the jury could have rejected defense counsel's argument that the angle of the shot meant that he could not have been the shooter.

[17] After closing arguments, the court again instructed the jurors that "[t]he law prohibits the [prosecutor] or defense counsel from giving personal opinions as to whether the defendant is guilty or not guilty. It is not their assessment of the credibility of the witnesses that matters, only yours. . . . Certain things are not evidence, and you may not consider them in deciding what the facts are, and these include . . . arguments and statements by lawyers, the lawyers are not witnesses, what they have said in their closing arguments is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls. It is not proper for the attorneys to express their opinions on the ultimate issues in the case or to appeal to your emotions."

[18] Although this court recently has questioned the reliability of eyewitness identifications *made by strangers*; see generally *State* v. *Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012); in light of the fact that Fred and the defendant had known each other for many years and, indeed, had greeted each other by name shortly before the shooting, we find those concerns inapposite in the present case. See id., 259–60 ("although there are exceptions, identification of a person who is well-known to the eyewitness generally does not give rise to the same risk of misidentification as does the identification of a person who is not well-known to the eyewitness").