STATE OF CONNECTICUT *v.* BRUSHAUN THOMPSON
(SC 18670)

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

Argued February 8—officially released August 7, 2012

Jodi Zils Gagne, special public defender, for the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney,

with whom, on the brief, were *David I. Cohen*, state's attorney, and *Michael A. DeJoseph*, assistant state's attorney, for the appellee (state).

Opinion

McLACHLAN, J. The sole issue in this certified appeal is whether the Appellate Court properly concluded that "the impropriety in the jury instruction for larceny in the first degree was harmless beyond a reasonable doubt." *State* v. *Thompson*, 298 Conn. 906, 3 A.3d 73 (2010). The defendant, Brushaun Thompson, appeals from the judgment of the Appellate Court affirming, inter alia,[1] his conviction of two counts of larceny in the first degree by false pretenses in violation of General Statutes (Rev. to 2005) § 53a-122 (a) (2),[2] and General Statutes § 53a-119 (2).[3] *State* v. *Thompson*, 122 Conn. App. 20, 22, 996 A.2d 1218 (2010). The parties agree that the Appellate Court properly concluded that the trial court improperly failed to instruct the jury that, before it could aggregate the value of the property from each individual theft to determine whether the state had satisfied its burden to prove that the defendant had stolen property valued at more than $10,000—an element of the offense of larceny in the first degree—the jury first had to determine whether the state had satisfied its burden of proving that the aggregated property was stolen pursuant to "one scheme or course of conduct." General Statutes § 53a-121 (b). The defendant argues that the Appellate Court improperly concluded that the improper instruction was harmless beyond a reasonable doubt. In response, the state contends that the error was harmless because the defendant did not contest the issue and the evidence so overwhelmingly supported the determination that the individual thefts were part of a single scheme or course of conduct that no reasonable jury could have concluded otherwise. We agree with the state and affirm the judgment of the Appellate Court.

The Appellate Court opinion set forth the following relevant factual and procedural background. "In September, 2005, John Spalding, owner of ABC Moving, was hired by Decorator's Warehouse in Norwalk to deliver a couch and love seat to the defendant at 557 Atlantic Street in Bridgeport. When Spalding made the delivery he met the defendant for the first time. The defendant introduced himself as a 'caretaker for a doctor' who orders 'a lot of stuff.' The defendant inquired of Spalding as to whether he would like to start picking up deliveries for 'us.' The defendant explained that 'we're doing construction and because at the time we'd like to do some business with you because our current delivery service isn't working out.' The defendant told Spalding that he worked for 'Dr. Rosenblatt' and at another time for 'Mr. Murray.'[4] Spalding gave the defendant his business card. The defendant agreed to pay Spalding $100 for each delivery.

"On September 16, 2005, Betsy Nosara Conway, assistant manager of the Coach store in Westport, received a telephone call from a man who identified himself as

Larry Rosenblatt. Rosenblatt wanted to place an order for merchandise he had seen in a catalogue. He ordered a number of items totaling $2534.76[5] and charged them to an American Express account belonging to Elizabeth Pocsik, who did not make the purchase or authorize anyone else to do so. Rosenblatt told Conway that he would have a man by the name of John Spalding come to get the items. Rosenblatt represented that Spalding was a courier who often picked up things for Rosenblatt.

"In the meantime, the defendant had called Spalding and asked him to make a pickup at Coach in Westport. The defendant informed Spalding that Rosenblatt was throwing a party and did not have time to buy his wife a gift, so he sent Spalding to pick it up. When Spalding arrived at Coach, some of the associates helped him put the bags of merchandise in his truck. Spalding met the defendant in the parking lot of a Waldbaum's supermarket at the corner of North and Park Avenues in Bridgeport where the defendant took possession of the merchandise and paid Spalding $100.

"On September 17, 2005, Conway took another telephone call from the man who again identified himself as Rosenblatt. According to Rosenblatt, his family enjoyed the gifts, and he wanted to purchase more merchandise. These items totaled $2700.88, and Rosenblatt gave Conway a credit card number, but not the one he had used the day before. On September 21, 2005, the same so-called Rosenblatt called Coach twice and placed two additional orders with Conway. His first purchase on that day totaled $2789.92 and was charged to an American Express account belonging to Catherine Saldinger and Pierre Saldinger. Neither one of the Saldingers had authorized the use of their account for the purchase. Minutes after making the first call, the caller, identifying himself as Rosenblatt, yet again called Coach and ordered a diamond watch worth $2117.88. To purchase the watch, Rosenblatt used an American Express account belonging to Ronald Schectman, who had not authorized the use of the account for the purchase.

"From September 16 through 21, 2005, the defendant placed four orders with Coach in Westport, charged $10,203.44 to credit card accounts belonging to other persons and asked Spalding each day to pick up the merchandise at Coach and deliver it to him at the Waldbaum's parking lot in Bridgeport. Each time Spalding delivered the merchandise from Coach, the defendant paid him the agreed upon fee of $100. Among the items purchased from Coach, in this fashion, was a water buffalo billfold wallet.

"From September 16 through 22, 2005, the defendant asked Spalding to make six deliveries of merchandise from Lowe's in Newington to a garage below an apartment at 557 Atlantic Street in Bridgeport. The value of the merchandise delivered that week totaled

$37,558.55.[6] The defendant paid Spalding $400 for each Lowe's delivery, including one purchase valued at $278. . . . The defendant obtained the merchandise by using credit card accounts belonging to, among others, Bruce Angus, John Murray, Michael Morrissey, Estelle Nisson and Susan Seath.[7] None of those persons made a purchase at Lowe's in Newington and did not authorize the defendant to do so.

"Each time Spalding delivered the Lowe's merchandise to 557 Atlantic Street in Bridgeport, the defendant was waiting for him. The defendant again represented to Spalding that he was the caretaker for Rosenblatt, a contractor. According to Spalding, the defendant explained that 'they were going to pick them up the next day because they didn't want them on the job site, you know, because they wanted to install them the next day. That's what he told me.'

"On September 23, 2005, Donna Corra, manager of Coach in Westport, received a telephone call from a person complaining of an unauthorized charge on her credit card account. Corra subsequently notified the Westport police. Corra informed Conway of the call, as well. On September 26, 2006, Conway took a telephone call at Coach from someone identifying himself as attorney Gary Hertzberg, who placed a telephone order and used a credit card account number to make the purchase. When Conway processed the order, the credit card information was declined. Conway telephoned the Westport police, who went to the Coach store. When Spalding arrived at the store,[8] the police explained to him that a stolen credit card was used to place the order. Coach employees gave Spalding empty shopping bags, and Detective John Rocke accompanied Spalding in his pickup truck to the Waldbaum's parking lot in Bridgeport.

"Spalding and Rocke waited in the parking lot for the defendant to arrive. When the defendant drove up next to Spalding's truck, Spalding identified him to Rocke as the man who had hired him to deliver merchandise from Coach and Lowe's. Rocke got out of the truck carrying a shopping bag filled with empty Coach boxes. The defendant got out of the vehicle that he was driving and met Rocke. Rocke asked the defendant if the packages were his, and the defendant responded affirmatively. Rocke asked the defendant if he wanted the receipt, and the defendant said, 'yes.' Rocke reached into the bag as if to retrieve the receipt but pulled out a weapon and arrested the defendant. There was a passenger in the defendant's vehicle, Francis Beethoven, and the defendant indicated to Rocke that Beethoven was not involved. When Rocke searched the defendant, he found a Coach water buffalo double billfold wallet similar to the one that the man who identified himself as Rosenblatt had purchased on September 17, 2005. The wallet contained $110 in currency and two

credit cards in the name of Tamika Creer, who resided at 557 Atlantic Street.

"Following the defendant's arrest, he was released on a $25,000 bond, but he failed to report for his scheduled court date on January 11, 2006. Subsequently, a warrant was issued for his arrest. The defendant was taken into custody again on February 25, 2006." (Citation omitted.) *State* v. *Thompson*, supra, 122 Conn. App. 23–28. Following a jury trial, the defendant was convicted of two counts of larceny in the first degree by false pretenses in violation of §§ 53a-122 and 53a-119,[9] and one count of failure to appear in the first degree in violation of General Statutes § 53a-172 (a).[10] The defendant appealed from the judgment of conviction to the Appellate Court and that court affirmed the judgment. Id., 22. This appeal followed.

Preliminarily, we observe that the defendant concedes that his challenge to the jury charge is unpreserved and therefore he seeks review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), in which we held that "a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt."[11] As we previously have indicated, it is undisputed that the trial court improperly failed to charge the jury that, before it could aggregate the value of the property in each count of larceny, the state had to prove that the property at issue in each count was stolen pursuant to one scheme or course of conduct, which is part of an essential element of the offense. Therefore, the only prong of *Golding* at issue in this appeal is the fourth, that is, whether the state has demonstrated beyond a reasonable doubt that the improper failure to instruct the jury was harmless.

"A defendant is constitutionally entitled to have the jury instructed on the essential elements of the crime charged and to be acquitted unless proven guilty of each element beyond a reasonable doubt." *State* v. *Faust*, 237 Conn. 454, 469, 678 A.2d 910 (1996). "It is well established that a defect in a jury charge [that] raises a constitutional question is reversible error if it is reasonably possible that, considering the charge as a whole, the jury was misled. . . . [T]he 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. *Fields*, 302 Conn. 236, 245–46, 24 A.3d 1243

(2011). "[A] jury instruction that improperly omits an essential element from the charge constitutes harmless error if a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error . . . ." (Internal quotation marks omitted.) *State* v. *Rodriguez-Roman*, 297 Conn. 66, 90, 3 A.3d 783 (2010).

In assessing whether the error in the present case was harmless, it is helpful first to understand precisely how the omitted instruction—requiring the jury to find a single scheme or course of conduct before aggregating the value of the property in each individual theft—is related to the elements of larceny in the first degree. The five elements of the crime of larceny by false pretenses are: "(1) [t]hat a false representation or statement of a past or existing fact was made by the accused; (2) that in making the representation he knew of its falsity; (3) that the accused intended to defraud or deceive; (4) that the party to whom the representation was made was in fact induced thereby to act to her injury; and (5) that the false representation or statement was the effective cause of the accused receiving something of value without compensation." *State* v. *Farrah*, 161 Conn. 43, 47, 282 A.2d 879 (1971). The fifth element of larceny by false pretenses has two components. First, the state must prove a causal connection between the false representation or statement and the receipt of the stolen property. Second, the state must prove the requisite value of the property or service that was stolen, which, in the case of larceny in the first degree, must exceed $10,000.[12] General Statutes (Rev. to 2005) § 53a-122 (a) (2). In the present case, the state has relied on multiple thefts in order to meet the "value" requirement of the fifth element. The information alleges larceny in the first degree in two counts, with all of the thefts from Coach included in the first count, and all of the thefts from Lowe's included in the second count. It is undisputed that the state did not present evidence of a single, individual theft that exceeded $10,000 in value. Instead, the state alleged in each count that the total value of the property stolen from each store exceeded $10,000, and at trial the state presented evidence of multiple thefts at each store. Specifically, the state presented evidence that the defendant obtained a total of $10,203.44 in four individual thefts from Coach and a total of $37,558.55 in six different thefts from Lowe's.

In a case such as this one, where the state relies on the combined value of property stolen in multiple thefts in order to meet its burden to prove the defendant guilty of a particular grade of larceny, General Statutes § 53a-121 (b) provides: "Amounts included in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may

be aggregated in determining the grade of the offense." In other words, in the present case, the trial court properly should have instructed the jury that, because none of the individual thefts exceeded $10,000, it could find the defendant guilty of larceny in the first degree only if the aggregate value of the property exceeded $10,000, *and* that it could aggregate the value of the property only if it first determined that the thefts were undertaken pursuant to one scheme or course of conduct.

Because the trial court did instruct the jury on the fifth element of larceny, it technically did not "omit" an element in its charge to the jury.[13] The court's instruction did not discuss aggregation, however, and did not inform the jury that it could aggregate the value of the property only if it found that the thefts were part of a single scheme or course of conduct. Rather than an omission of an element, a more precise way to describe the error is that the court's instruction regarding the fifth element was incomplete given the facts of the case, resulting in an incorrect description of the element. That distinction, however, does not alter the nature or scope of our inquiry. The United States Supreme Court has recognized that the omission of an element and the "misdescription of an element" are analogous. (Internal quotation marks omitted.) *Neder* v. *United States*, 527 U.S. 1, 10, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). "In both cases—misdescriptions and omissions—the erroneous instruction precludes the jury from making a finding on the *actual* element of the offense." (Emphasis in original.) Id. Accordingly, the same harmlessness analysis applies in both situations. That is, our inquiry is whether "the [misdescribed] element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error . . . ." (Internal quotation marks omitted.) *State* v. *Rodriguez-Roman*, supra, 297 Conn. 90.

In order to determine whether the state presented overwhelming evidence that the thefts were pursuant to "one scheme or course of conduct" pursuant to § 53a-121 (b), we must explicate the meaning of that statutory phrase. This issue presents a question of statutory interpretation, over which we exercise plenary review. See, e.g., *Nyenhuis* v. *Metropolitan District Commission*, 300 Conn. 708, 719, 22 A. 3d 1181 (2011). "The principles that govern statutory construction are well established. When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1–2z directs us first to consider 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." (Internal quotation marks omitted.) *Scholastic Book Clubs, Inc.* v. *Commissioner of Revenue Services*, 304 Conn. 204, 213–14, 38 A.3d 1183 (2012).

Section 53a-121 does not define "one scheme or course of conduct," and our review of related statutes does not clarify the meaning of the phrase. When a statute does not provide a definition, "words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly." General Statutes § 1-1 (a). Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) defines "scheme" as "a plan or program of action; *esp*[*ecially*]: a crafty or secret one . . . ." (Emphasis in original.) "[C]ourse" is defined as "[a] progression through a development or period or a series of acts or events." Id. Both terms suggest an ordered, planned pattern of behavior. The common usage of the terms supports the conclusion that thefts are part of "one scheme or course of conduct"; General Statutes § 53a-121 (b); if the acts constituting the crime charged are a series of thefts committed in a similar manner and are closely related in time. Because the question of whether the accused committed the multiple thefts pursuant to one scheme or a course of conduct is an essential part of the element of the offense, in order for the jury to aggregate the value of property stolen in multiple thefts, it must first find that the state has proven beyond a reasonable doubt that the evidence supports the inference that an overall scheme existed in the defendant's mind, that the individual thefts were executed in furtherance of that plan and that no reasonable jury could have concluded to the contrary.

This conclusion is consistent with our reasoning in *State* v. *Desimone*, 241 Conn. 439, 441, 464, 696 A.2d 1235 (1997), in which we held that the trial court's failure to instruct the jury that it could aggregate the value of property stolen in multiple thefts only if it first determined that the thefts had been part of a single scheme or course of conduct constituted harmful error. In *Desimone*, the state presented evidence that the defendant had stolen three computers from his employer. Id., 447–48. In December, 1993, the defendant sold one of the computers to a third party. Id., 447. In January, 1994, the defendant sold the remaining two computers to the same person. Id., 448. The state charged the defendant with larceny in the first degree in connection with the theft of the three computers, and could have succeeded in proving the requisite value of $10,000 only if the jury aggregated the value of all three computers. Id., 463. Key to our conclusion that the failure to instruct the jury that it could aggregate

the value of the items only if it first found that the thefts had been part of a single scheme or course of conduct was harmful error was the gap in time between the sales of the computers, and, even more importantly, that "the evidence did not establish exactly when the defendant received the two computers or whether he received or possessed them at the same time. Thus, we cannot say that the evidence necessarily compelled the conclusion that the defendant's unlawful receipt of the two computers was part of a single scheme or course of conduct." Id., 464. Because the evidence in *Desimone* did not establish any specific time frame in which the defendant had stolen the computers, an alternate, equally reasonable inference could have been drawn—that the defendant had arbitrarily seized opportunities to steal computers from his employer when those opportunities presented themselves, and then later sold the stolen items.[14]

The evidence presented by the state supporting a determination that the individual thefts were part of a single scheme or course of conduct in the present case was overwhelming. All of the thefts took place within an eleven day period, beginning on September 16, 2005, and ending on September 26, 2005, when the defendant was arrested. Each of the thefts involved the use of stolen credit card numbers, virtually all of which were taken from customers of Advantage Waste Services (Advantage), where Arena Johnson, an acquaintance of the defendant, worked. All of the thefts were accomplished by the same method—placing a telephone call using a false name, sometimes the same false name, and with Spalding as the pick-up man. When the defendant first approached Spalding to engage his services, prior to the first theft, he indicated that he intended to use Spalding for more than just one delivery. He told Spalding that he was a caretaker for a physician who "order[ed] a *lot* of stuff," and asked Spalding if he "would . . . like to *start* picking up deliveries for . . . us because . . . we'd like to do *some* business with you because our current delivery service isn't working out." (Emphasis added.) He made his first call to Spalding to pick up items for delivery within a couple of days to one week after that first meeting. When the defendant made his first telephone call to Coach using Rosenblatt's name and told Conway that Spalding would be picking up the items, he told Conway that Spalding *often* picked up items for him. The defendant established two delivery locations, one for Coach items and another for Lowe's items. Those locations were used for all of the deliveries, and the defendant was there to receive delivery, each and every time. Moreover, the payment amounts also were according to a single scheme, with a set price for each store: $100 for each Coach delivery and $400 for each Lowe's delivery.

By contrast, the state's evidence demonstrating that the defendant acted pursuant to a single scheme was

virtually uncontested by the defendant, whose theory of defense was that the state had mistakenly identified him as the perpetrator of the offenses.[15] The only attempt the defendant made at trial to contest the issue was a brief line of questioning regarding two credit card numbers that belonged to Joseph Leek and Robert Johnson, who were not customers of Advantage. None of the counts of the information charged the defendant with any crime in connection with a credit card attributed to a person named Robert Johnson. The defendant was charged with identity theft in count twenty of the information in connection with a credit card attributed to Joseph Leek, who was not a customer of Advantage. Although it is unclear from the record whether Leek's credit card was used to purchase any of the items from Coach or Lowe's, even if it had been so used, the fact that the defendant used a single credit card number that he had obtained from a source other than the Advantage client list is insufficient to call into question the remaining, overwhelming evidence presented by the state, which taken together amounts to a virtual textbook case demonstrating a "scheme."[16] Because the state's evidence in support of the conclusion that the multiple thefts were part of a single scheme was so overwhelming, and because that evidence was uncontroverted by the defendant, we conclude that the trial court's improper failure to instruct the jury that it could aggregate the value of the property stolen in the individual thefts only if it first concluded that the thefts were part of one scheme or course of conduct did not contribute to the verdict.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

[1] The Appellate Court also affirmed the defendant's conviction of failure to appear in the first degree in violation of General Statutes § 53a-172 (a) (1). *State* v. *Thompson*, 122 Conn. App. 20, 22, 996 A.2d 1218 (2010). That portion of the Appellate Court's judgment is not at issue in this appeal.

[2] General Statutes (Rev. to 2005) § 53a-122 (a) (2) provides in relevant part: "A person is guilty of larceny in the first degree when he commits larceny, as defined in section 53a-119, and . . . the value of the property or service exceeds ten thousand dollars . . . ."

[3] General Statutes § 53a-119 (2) provides in relevant part: "A person obtains property by false pretenses when, by any false token, pretense or device, he obtains from another any property, with intent to defraud him or any other person."

[4] "The defendant used credit card accounts owned by Larry Rosenblatt, John Murray and others to make purchases. Each [victim] testified that he [or she] had not authorized the defendant to use his [or her] account." *State* v. *Thompson*, supra, 122 Conn. App. 23 n.3.

[5] "The following items were ordered: key chains, wallets, handbags, scarves, umbrellas and shoes." *State* v. *Thompson*, supra, 122 Conn. App. 24 n.4.

[6] "Spalding made deliveries of Lowe's merchandise to the defendant as follows: $5089.94 on September 16, 2005; $6602 on September 18, 2005; $5678.88 on September 19, 2005; $8252.09 on September 20, 2005; $278 on September 22, 2005; and $8657.64 on September 22, 2005.

"The defendant purchased a wide range of merchandise from Lowe's. For example, he purchased roofing coil nails, snow throwers, a ladder, a leveling laser, a range, a range hood, a microwave, a refrigerator, a dishwasher, a granite countertop, bathroom vanities, rakes, tarps, faucets, dryers, dryer ducts and a rug." *State* v. *Thompson*, supra, 122 Conn. App. 25 n.5.

[7] "The credit card accounts that the defendant used to make purchases at both Coach and Lowe's belonged to customers of Advantage Waste Services (Advantage). The individuals had provided Advantage with their credit card information so that their periodic payments for garbage removal could be charged directly to their accounts." *State* v. *Thompson*, supra, 122 Conn. App. 26 n.6. No evidence was presented that any of the individuals whose credit card numbers were wrongfully used were in any way connected with or knew the defendant. "Arena Johnson, an employee of Advantage, admitted having known the defendant for fifteen years but denied that she gave him any credit card information. Johnson, however, admitted that she was a convicted felon." Id.

[8] "Spalding later told police that the defendant had informed him that he was picking up merchandise for Hertzberg." *State* v. *Thompson*, supra, 122 Conn. App. 27 n.8.

[9] The first count of the state's long form information had charged the defendant with larceny in the first degree by false pretenses in connection with all of the property stolen from Coach between September 16, 2005, and September 26, 2005. The second count had charged the defendant with larceny in the first degree by false pretenses in connection with all of the property stolen from Lowe's between September 16, 2005, and September 26, 2005. Each count alleged that the value of the property stolen exceeded $10,000.

[10] "The defendant was found not guilty of ten counts of identity theft in the third degree in violation of General Statutes § 53a-129d and one count of identity theft in the second degree in violation of General Statutes § 53a-129c (a). The defendant received a total effective sentence of sixteen years in prison, execution suspended after fourteen years, and five years of probation." *State* v. *Thompson*, supra, 122 Conn. App. 22 n.1.

[11] The state does not claim that the defendant waived the challenge to the improper charge pursuant to *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011).

[12] The legislature subsequently amended § 53a-122 to increase the threshold values for each grade of larceny; the current requirement for larceny in the first degree is that the value of the property stolen must be in excess of $20,000. See Public Acts 2009, No. 09-138, § 1.

[13] As we have explained, it is undisputed that the trial court failed to instruct the jury that it could aggregate the value of the property stolen in each of the individual thefts, only if it first determined that the defendant had stolen the property pursuant to one scheme or course of conduct. It is also undisputed that it was improper for the court to so fail to instruct the jury. The entirety of the court's instruction to the jury with respect to the fifth element of larceny in the first degree was as follows: "The first count allegedly involves the Coach store . . . in Westport . . . and the second count allegedly involves the Lowe's store . . . in Newington . . . .

"The fifth element is that the false representation or statement was the effective cause of the defendant receiving something of value without compensation. The defendant must have obtained property of value exceeding $10,000. The word obtain here includes bringing about the transfer of property [to] the defendant. The word property includes money and the value of cash is its face value."

[14] The defendant contends that, because one of the facts we relied on in *Desimone* in concluding that the thefts were not part of a single scheme or course of conduct was the time lapse between the defendant's sale of the computers to a third party, our decision in that case supports the conclusion that the trial court's failure to instruct the jury pursuant to § 53a-121 (b) in the present case was harmful error. We disagree. Preliminarily, we observe that *Desimone* was decided before the United States Supreme Court held in *Neder* v. *United States*, supra, 527 U.S. 17, that the omission of an element in a jury charge constitutes harmless error if the element was both uncontested and supported by overwhelming evidence. Accordingly, in *Desimone*, we assumed, arguendo, that the improper failure to charge was subject to harmless error review. *State* v. *Desimone*, supra, 241 Conn. 464 n.34. We rested our conclusion that the error was harmful on our assessment of the strength of the state's evidence, which we found lacking primarily because that evidence did not establish precisely when the defendant had stolen or received the three different computers, the value of which had to be aggregated in order to subject the defendant to a charge of larceny in the first degree. Id., 464. In addition, the defendant had sold the computers to the third party at different times. Id. Without any information regarding when the defendant had stolen the computers *and* in the absence of a

simultaneous sale of the stolen computers, the state had failed to present overwhelming evidence of a single scheme or course of conduct. Id. By contrast, in the present case, the time frame of the thefts is not only well established by the state's evidence, it is a tight time frame of only eleven days and strongly supports the determination that the thefts were part of a single scheme or course of conduct.

[15] Although we conclude that the defendant did not contest the issue of whether the multiple thefts were undertaken pursuant to a single scheme or course of conduct, we do not agree with the state's claim that certain of defense counsel's remarks in the opening statement and closing argument amounted to a concession of the issue. Even if we were to rely on defense counsel's statements, which are not evidence, in assessing whether the defendant contested the issue, the statements in the present case lend themselves to multiple interpretations, not all of which are consistent with a conclusion that the defendant conceded that the thefts were pursuant to a single scheme and course of conduct pursuant to § 53a-121 (b). We construe those statements in the defendant's favor. Specifically, defense counsel in her opening statement told the jury that, "in this case, you're going to hear evidence and you're going to hear that a fraud occurred, that a fraud did take place . . . the evidence is not going to show that the [defendant] is responsible for this fraud." During closing argument, defense counsel argued that "somebody took great measures to avoid [detection]. Somebody else picked things up. Someone placed orders over phones that couldn't be traced using different names. It was so carefully planned . . . ." Although it is possible to read these statements as a concession that the multiple thefts were part of a single scheme, it is also possible to read the statements more broadly, as acknowledging that the state would argue that there was a single plan, and recognizing that whoever the perpetrator was, that person had taken great pains to avoid detection. Before interpreting counsel's statements during argument as a concession on one of the elements of the offense, we would require language that clearly and unambiguously makes such a concession.

[16] The defendant claims that, because the jury might have concluded, if it had been instructed pursuant to § 53a-121 (b), that the defendant did not have a scheme in place prior to committing the first few thefts, and because it is possible that the jury might not have believed all of Spalding's testimony, we should conclude that the state's evidence on the issue was not overwhelming. Our evaluation of the strength of the state's evidence cannot be based on speculation. That review must be confined to the record, which demonstrates that the state presented evidence that, before the defendant ever made the first telephone call, he had approached Spalding and made it clear to Spalding that he planned to hire Spalding's services for multiple deliveries. Indeed, during his first telephone call to Coach, the defendant stated that Spalding "often" picked up items for him, supporting the determination that the defendant already had his plan in place and intended to continue calling, making orders, and having Spalding pick up and deliver the stolen merchandise to him. Moreover, the fact that the jury convicted the defendant of larceny demonstrates that it believed Spalding, whose testimony was crucial in establishing that the defendant was the perpetrator of the thefts.

Similarly unpersuasive is the defendant's claim that, because the jury failed to convict him of identify theft, the fact that virtually all of the credit card numbers came from clients of Advantage cannot be relied on in determining whether the state presented overwhelming evidence of a single scheme. As we have previously stated, "[t]he general rule to which we subscribe is that factual [c]onsistency in the verdict is not necessary. Each count in an indictment is regarded as if it [were] a separate indictment." (Internal quotation marks omitted.) *State* v. *Hinton*, 227 Conn. 301, 313, 630 A.2d 593 (1993).