STATE OF CONNECTICUT *v.* MIGUEL C.*
(SC 18690)

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

Argued March 14—officially released July 3, 2012

Elizabeth M. Inkster, senior assistant public defender, and *James Siewert*, certified legal intern, for the appellant (defendant).

Linda F. Currie-Zeffiro, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Cornelius P. Kelly*, senior assistant state's attorney, for the appellee (state).

Opinion

ROGERS, C. J. The defendant, Miguel C., was convicted, after a jury trial, of three counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2),[1] and three counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2).[2] The defendant appealed from the judgment of conviction directly to this court[3] claiming that he is entitled to a new trial because the complainant improperly testified about an alleged confession by the defendant to his wife. We conclude that the contested portion of the complainant's testimony was improperly admitted and that the verdict was substantially affected by that testimony. Accordingly, the judgment of conviction is reversed and a new trial is ordered.[4]

The record reveals the following facts and procedural history. At the time of the alleged assaults, the complainant, then age ten, was residing in Fairfield with her mother and sister after the family had moved there from their native Ecuador. The house in which they were residing was owned by the defendant and his wife, who is the complainant's maternal aunt. The defendant and his wife lived in the house with their children, as well as the complainant's maternal grandmother.

The complainant testified at trial that, on two occasions in May, 2008, the defendant had kissed her on the lips and embraced her. The complainant further testified that, on three occasions in June and August, 2008, she and the defendant had engaged in sexual intercourse.[5] Each of the incidents described by the complainant took place while she and the defendant were alone in the basement of the defendant's house, where the complainant occasionally slept and watched television.

Although the complainant's aunt had never witnessed any physical contact between the defendant and the complainant, at some point in time she became concerned about their interactions, and began to question the complainant repeatedly about whether she and the defendant had developed an intimate relationship. In March, 2009, the complainant's aunt called the complainant's cell phone while the complainant was riding the bus home from school and again questioned her about her relationship with the defendant. In particular, the complainant testified that her aunt told her that the defendant had admitted to sexually assaulting the complainant. The complainant then told her aunt about the defendant's sexual advances and that she and the defendant had had sexual intercourse on three occasions.

On March 12, 2009, the complainant's aunt took the complainant and the complainant's mother to the Fairfield police station, where they spoke with Detective Fred Caruso. A subsequent investigation of the defen-

dant's house, including the basement, produced no physical evidence of the alleged assaults. On March 23, 2009, the complainant was examined by Janet Murphy, a pediatric nurse practitioner. The complainant repeated her allegations against the defendant to Murphy during the examination. The examination of the complainant found no physical evidence of sexual trauma or assault.

The defendant was arrested on March 31, 2009, and charged by substitute information with three counts of sexual assault in the first degree and three counts of risk of injury to a child. On April 9, 2010, the state called the complainant to testify at the trial. On direct examination of the complainant, the prosecutor sought to elicit testimony regarding how the alleged assaults had come to light. The following colloquy between the prosecutor and the complainant ensued:

"Q. . . . [D]o you ever remember talking to people about what happened, about what [the defendant] did to you?

"A. Yeah.

"Q. Okay. And who was the first person that you told?

"A. My aunt.

"Q. Okay. And could you explain how that came about where you told your aunt about this stuff?

"A. *Like she told me he had told her*." (Emphasis added.)

The court interrupted the prosecutor's questioning, indicating that it had not heard the complainant's response. The prosecutor asked the complainant to repeat what she had said, but before she could respond, defense counsel objected on the basis of hearsay. The court then asked:

"The Court: Can I hear the question again and see if there's an objection. The question was, who did she tell? I thought she said her aunt.

"[The Prosecutor]: Her—her aunt, Your Honor. And I asked her to explain the situation as to how—

"The Court: As to how that occurred?

"[The Prosecutor]: Right.

"The Court: There's an objection?"

Defense counsel then reiterated her objection, arguing that the question was "going to elicit a hearsay response from the defendant's wife." The trial court overruled the objection and the prosecutor continued his direct examination of the complainant:

"[The Prosecutor]: . . . [I]f you can, repeat what you just said before. . . .

"[The Complainant]: My aunt called me on my cell phone and *told me that he had told her*, so she asked me.

"[The Prosecutor]: Okay. And when your aunt said that stuff to you, did you tell your aunt what happened?

"[The Complainant]: Yes." (Emphasis added.)

The prosecutor asked the complainant four more questions, and, thereafter, the trial court again stopped the questioning and stated:

"The Court: All right. I'm sorry. I'm sorry. You said you got a [tele]phone call from your aunt?

"[The Complainant]: Yeah.

"The Court: And she said that she had spoken to the defendant?

"[The Complainant]: Yeah.

"The Court: And she then asked you—

"[The Complainant]: Yes.

"The Court: —what happened, and you told her?

"[The Complainant]: Yes."

The court then, sua sponte, revisited its ruling on defense counsel's objection, stating: "Just one minute, no. Ladies and gentlemen, I'm going to sustain the objection as to what it is the [complainant] says her aunt told her. All right. So much of it as it relates to she got a [tele]phone call from her aunt and as a result of that [tele]phone call she said certain things to her aunt—all right—is evidence in the case that you can consider. But what the aunt may have said to her—all right—disregard that from any part in this case."

Thereafter, in delivering its final charge to the jury, the trial court instructed the jurors that, regarding "[t]estimony that ha[d] been excluded or stricken . . . [a]nd . . . testimony or exhibits [that] ha[d] been received for limited purposes, you must follow [the court's] limiting instruction." After charging the jury, the court sent it to deliberate. During deliberations, the jury sent the court a note containing three questions, the first of which is relevant to this appeal. Specifically, the jury stated, in relevant part, as read by the trial court: " 'During [the complainant's] testimony she said she received a call from her aunt and that *her aunt now knew about the alleged activity* between [the defendant] and [the complainant]. We would like to rehear that portion of the testimony, including the prior question.' " (Emphasis added.)

In response to the jury's request, defense counsel objected to the replaying of the contested testimony, arguing "what happens in that exchange is that impermissible testimony comes in, the jury hears it, and then th[e] objection is sustained, and then they're told to disregard it." Defense counsel requested that, rather than replaying the entire discussion about the telephone call, the court only replay the portion following the

court's ultimate ruling on the matter.[6] The prosecutor, on the other hand, requested that the court replay the testimony in its entirety, including the stricken hearsay in order to provide "context," noting that, "Your Honor [did] point out to [the jury] as to how they're to treat that information . . . ."

The trial court ultimately edited the audiotape to be played back in an attempt to answer the jury's question without replaying the stricken testimony or references to it. The trial court stated that it would play back "the very beginning of the line of questions," but not the portion of the complainant's testimony that it had ultimately instructed the jury to disregard. After the audiotape was edited, defense counsel requested that the court replay it outside of the jury's presence one more time, describing it as "critically important because the part that comes out is the part where [the defendant] allegedly confesses." The trial court noted defense counsel's objection, but declined to replay it another time, explaining that, if necessary, it would simply tell the jury to disregard any impermissible testimony as it had when the complainant testified. The edited audiotape, as played back to the jury, included the prosecutor's question: "And when your aunt said *that stuff* to you, did you tell your aunt what happened?"[7] (Emphasis added.)

Following deliberations, the jury returned a verdict of guilty on all charges. The court accepted the verdict, and the defendant was sentenced to a total effective term of fourteen years incarceration, followed by ten years of special parole. This appeal followed.

The defendant claims on appeal that he is entitled to a new trial because the trial court improperly permitted the complainant to testify that her aunt, in effect, had told her on the telephone that the defendant had confessed to the assaults. Consistent with defense counsel's objection at trial, which the trial court initially overruled,[8] the defendant first claims on appeal that the complainant's statement constituted inadmissible hearsay. The defendant further contends that, even if used for a nonhearsay purpose, the evidence was inadmissible because the prejudicial impact outweighed the probative value of the statement.[9] The state does not dispute that the complainant's testimony indicated that the defendant had confessed to his wife that he had engaged in improper conduct with the complainant. The state responds, however, that the contested statement did not constitute hearsay because it was used for a nonhearsay purpose, namely, to show the effect on the hearer, the complainant. The state further asserts that the defendant was not prejudiced because the trial court cured any harm resulting from the initial admission of the evidence by revisiting, and ultimately sustaining, defense counsel's objection. Although we agree that the contested statement was not hearsay, we never-

theless conclude that it was inadmissible because its probative value to show the effect on the complainant is outweighed by the prejudicial effect of the high risk that the jury would use it for an inadmissible hearsay purpose. We further conclude that the initial admission of the statement into evidence substantially affected the verdict, notwithstanding the trial court's subsequent instruction to the jury to disregard it.

We begin by setting forth the applicable standard of review. "To the extent [that] a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion." (Citation omitted; internal quotation marks omitted.) *State* v. *Boyd*, 295 Conn. 707, 739, 992 A.2d 1071 (2010), cert. denied, U.S. , 131 S. Ct. 1474, 179 L. Ed. 2d 314 (2011). "In other words, only after a trial court has made the legal determination that a particular statement is or is not hearsay, or is subject to a hearsay exception, is it vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which admission is being sought." *State* v. *Saucier*, 283 Conn. 207, 219, 926 A.2d 633 (2007).

Turning to the merits, we first address the defendant's claim that the complainant's statement was hearsay. " 'Hearsay' means a statement, other than one made by the declarant while testifying at the proceeding, offered in evidence to establish the truth of the matter asserted." Conn. Code Evid. § 8-1 (3). "The hearsay rule forbids evidence of out-of-court assertions to prove the facts asserted in them. If the statement is not an assertion or is not offered to prove the facts asserted, it is not hearsay." (Internal quotation marks omitted.) *State* v. *Carpenter*, 275 Conn. 785, 837, 882 A.2d 604 (2005), cert. denied, 547 U.S. 1025, 126 S. Ct. 1578, 164 L. Ed. 2d 309 (2006). "This exclusion from hearsay includes utterances admitted to show their effect on the hearer." (Internal quotation marks omitted.) Id., 838; see, e.g., *Dinan* v. *Marchand*, 279 Conn. 558, 572, 903 A.2d 201 (2006) (admitting out-of-court threats made by testator's daughter, not to show truth of matter asserted, but to show effect on testator, i.e., that he had signed codicil because he had been threatened); *State* v. *Colon*, 272 Conn. 106, 196, 864 A.2d 666 (2004) (admitting police officer's testimony regarding out-of-court statement by victim's sister, not to show truth of matter, but, rather, why officer had asked defendant to go to police station), cert. denied, 546 U.S. 348, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005).

The contested evidence consists of two levels of out-of-court statements. The first level is the defendant's alleged confession to his wife, the complainant's aunt. This level is hearsay, but is subject to the hearsay exception permitting admission of statements by party opponents, because it was spoken by the defendant himself.[10] See Conn. Code Evid. § 8-3 ("[t]he following are not excluded by the hearsay rule . . . (1) . . . [a] statement that is being offered against a party and is (A) the party's own statement").

The second level of out-of-court statements in the contested testimony is the statement by the complainant's aunt to the complainant that she already knew about the alleged sexual assaults, which the state purportedly introduced into evidence to prove the effect on the complainant. The state argues that the statement by the complainant's aunt was not hearsay because it was not offered to prove the truth of the matter asserted—i.e., that the defendant *did* actually confess to the complainant's aunt—but rather to explain why, after keeping the alleged abuse a secret for more than six months, the complainant finally decided to reveal it in March, 2009. According to the state, the contested statement bore on the complainant's credibility by showing that she finally reported the sexual abuse only because her aunt's statement led her to believe that the assaults were no longer a secret. In other words, by merely asking the complainant to confirm that she and the defendant had had sexual intercourse, the complainant's aunt gave the complainant the impression that her secret had already been revealed, so she might as well explain what had really happened. For this limited purpose, therefore, the state asserts that the evidence was not hearsay.

We agree that, if used for the purported purpose of demonstrating the effect of the aunt's statement on the complainant, the contested testimony was not hearsay. Because, however, the effect on the hearer rationale may be misapplied to admit facts that are not relevant to the issues at trial; C. Tait & E. Prescott, Connecticut Evidence (4th Ed. 2008) § 8.8.2, pp. 472–73; courts have an obligation to ensure that a party's purported nonhearsay purpose is indeed a legitimate one. See, e.g., *State* v. *Vega*, 48 Conn. App. 178, 185–87, 709 A.2d 28 (1998) (victim's out-of-court statement to police officer indicating that defendant had inflicted injury upon victim two days earlier inadmissible to prove effect on hearer when police officer's state of mind is irrelevant to determining defendant's guilt).

"Evidence is only admissible when it tends to establish a fact in issue or to corroborate other direct evidence in the case." *State* v. *Robinson*, 213 Conn. 243, 259, 567 A.2d 1173 (1989), rev'd on other grounds by *State* v. *Colon*, 257 Conn. 587, 599, 778 A.2d 875 (2001). Accordingly, an out-of-court statement is admissible to

prove the effect on the hearer only when it is relevant *for the specific, permissible purpose for which it is offered*. See *State* v. *Burney*, 288 Conn. 548, 565, 954 A.2d 793 (2008).

Because sexual assault cases usually depend upon the credibility of the complainant, evidence of an out-of-court statement's effect on the hearer is relevant to the ultimate question of whether a sexual assault occurred when it bears on a complainant's credibility. See id., 566. In the present case, because the state claims that the aunt's statement was offered to show that the complainant's testimony against the defendant was credible, we conclude that the statement was relevant for the limited purpose of proving the effect on the hearer.

The determination that the contested statement was relevant, however, does not end our inquiry into whether it was properly admitted into evidence. See *Morris* v. *Costa*, 174 Conn. 592, 597–98, 392 A.2d 468 (1978) ("[when] the trial court reaches a correct decision but on mistaken grounds, this court has repeatedly sustained the trial court's action if proper grounds exist to support it"). Even if the court deems evidence relevant for a limited, nonhearsay purpose, such evidence is still inadmissible when its probative value is outweighed by the danger of unfair prejudice. *State* v. *Burney*, supra, 288 Conn. 565; see also Conn. Code Evid. § 4-3 ("[r]elevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence"). When conducting this analysis, the court must contrast the probative value of the evidence *for its specific, nonhearsay purpose* against the likelihood that the jury will improperly consider the evidence for its inadmissible hearsay purpose, despite jury instructions to do otherwise. See C. Tait & E. Prescott, supra, § 8.8.2, p. 473 ("[t]he real danger in admitting such irrelevant evidence is that the jury will accept such statements as true, despite any charge to the contrary").

"To be unfairly prejudicial, evidence must be likely to cause a disproportionate emotional response in the jury, thereby threatening to overwhelm its neutrality and rationality to the detriment of the opposing party. . . . A mere adverse effect on the party opposing admission of the evidence is insufficient. . . . Evidence is prejudicial when it tends to have some adverse effect [on] a defendant beyond tending to prove the fact or issue that justified its admission into evidence." (Citations omitted; internal quotation marks omitted.) *State* v. *Burney*, supra, 288 Conn. 565–66.

The probative value of the contested statement in this case is minimal when used for its limited, nonhearsay purpose. As we have stated previously, the state's pur-

ported use of the evidence was to demonstrate why the complainant decided to reveal the sexual abuse to her aunt in March, 2009, after having kept it a secret for so long, which according to the state bore on the complainant's credibility. We conclude, however, that the effect of the contested statement on the hearer, while relevant, was not highly probative of the complainant's credibility. Although, in general, sexual assault cases depend greatly upon the state's ability to prove the complainant's credibility, we note that, in contrast, the defendant in this case did not rely heavily at trial upon impeaching the complainant on the basis of her failure to report the alleged sexual abuse sooner.[11] Furthermore, it should be noted that, despite the state's assertion that the contested statement supports a finding that the complainant is credible, the fact that the complainant's aunt told the complainant that she already knew about the assaults may demonstrate why the complainant *ultimately decided to report the assaults*, but not why the complainant *delayed in reporting them in the first place*. It is the reason for the complainant's delay in reporting the events that, if explained, would have bore heavily upon her credibility. The contested statement, however, shed light on the complainant's reason for eventually reporting them, rather than for failing to report them sooner. For these reasons, the probative value of the evidence to show the effect on the hearer, while relevant, is limited.

The risk of undue prejudice, meanwhile, is highly significant because the contested statement contains an alleged confession by the defendant to the crimes with which he was charged. "A confession is like no other evidence. Indeed, the defendant's own confession is probably the *most probative and damaging evidence* that can be admitted against him." (Emphasis added; internal quotation marks omitted.) *Arizona* v. *Fulminante*, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). After all, "[t]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct." (Internal quotation marks omitted.) Id. Here, then, the risk that the jury would improperly consider the contested testimony for the truth of the matter asserted—i.e., that the defendant did in fact commit the sexual assaults to which he allegedly confessed—is extremely high.

Finally, it is of particular significance that we need not speculate about the prejudicial effect that the evidence could have had on the jury in this case, because the jury's note to the court during deliberations provides insight into the facts that the jury considered when it was reaching its verdict. Specifically, by asking to rehear the portion of the testimony where the complainant testified that "she [had] received a call from her aunt and that *her aunt now knew about the alleged activity*," the jury evidenced its belief that the stricken

testimony was significant. (Emphasis added.) By the time the jury requested the playback, the court already had given limiting instructions to the jurors, informing them that they must disregard anything that the complainant's aunt had said to the complainant on the telephone. In light of these facts, we do not presume that the trial court's limiting instructions cured, or even mitigated, the prejudicial effect of the evidence for its hearsay purpose. We conclude therefore that the contested testimony was inadmissible because the probative value of its effect on the hearer, the complainant, was outweighed by the risk of prejudice to the defendant caused by the likelihood that the jury considered it for its hearsay purpose.

Having determined that the contested testimony was inadmissible, we next examine whether the error was harmless. "[W]hen an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [the improper admission of a witness' testimony] is harmless in a particular case depends upon 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 [improperly admitted] evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 558–59, 34 A.3d 370 (2012).

The defendant claims that the improperly admitted evidence substantially affected the verdict because "the [trial] court did not and indeed could not cure the prejudicial effect of erroneously allowing the complainant to testify, via inadmissible hearsay, that the defendant had allegedly confessed confidentially to his wife." The defendant further asserts that "[t]he jury's request to play back the stricken testimony is evidence that it found the testimony important." The state, on the other hand, argues that the error was harmless because the trial court ultimately sustained defense counsel's objection and instructed the jury to disregard that portion of the complainant's testimony. Specifically, the state contends that the defendant's claim "overlooks the fact that [this] [c]ourt has stated repeatedly [that] [t]he jury [is] presumed to follow the court's directions in the absence of a clear indication to the contrary." (Internal

quotation marks omitted.) We agree with the defendant.

We begin by noting that the contested testimony was not cumulative, but, rather, was the sole means by which the state was able to make the alleged confession known to the jury.[12] Although the complainant's aunt did testify at trial, the trial court determined that the marital communications privilege prevented her from testifying about the defendant's alleged confession to the assaults,[13] which he had made to her in confidence. In addition, the state's case against the defendant was not particularly strong, as it relied almost exclusively upon the testimony of the complainant. "Although the absence of conclusive physical evidence of sexual abuse does not automatically render the state's case weak where the case involves a credibility contest between the victim and the defendant . . . a sexual assault case lacking physical evidence is not particularly strong, especially when the victim is a minor." (Citation omitted.) *State* v. *Ritrovato*, 280 Conn. 36, 57, 905 A.2d 1079 (2006).

Most importantly, the jury's note to the court during deliberations demonstrates that the verdict was impacted by the admission of the improper testimony. Even under ordinary circumstances, confessions have a particularly profound impact on the jury, "so much so that we may justifiably doubt [the jury's] ability to put them out of mind even if told to do so." (Internal quotation marks omitted.) *Arizona* v. *Fulminante*, supra, 499 U.S. 296. Such doubt is manifest in this case given the unusual course of events that took place during the trial. The jury's request to rehear the inadmissible testimony evidenced the jury's belief that the alleged confession was necessary to its deliberations, as well as its inability to disregard that portion of the complainant's testimony, despite the court's instruction to do so. It is only "[*i*]*n the absence of evidence to the contrary*," that we presume that the jury has properly followed the trial court's limiting instructions. (Emphasis added.) *State* v. *Cutler*, 293 Conn. 303, 314, 977 A.2d 209 (2009). The presumption is inapplicable in this case because the jury's note presented clear evidence to the contrary. We conclude therefore that the error was harmful.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other justices concurred.

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

[1] General Statutes § 53a-70 (a) provides in relevant part: "A person is guilty of sexual assault in the first degree when such person . . . (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person . . . ."

[2] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts . . . of a child under the age

of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health and morals of such child . . . shall be guilty of . . . a class B felony . . . ."

[3] The defendant brought his appeal to this court pursuant to General Statutes § 51-199 (b) (3).

[4] The defendant also claims on appeal that the prosecutor deprived him of a fair trial by improperly commenting on his failure to testify in his own defense and that his due process and confrontation rights were violated when the trial court denied his motion for an in camera inspection of the complainant's mental health records. In light of our conclusion that the defendant's first claim entitles him to a new trial, in remanding the case, we express no opinion about whether the statements by the prosecutor, or the trial court's denial of the defendant's motion, was improper. Since we express no opinion regarding the denial of an in camera inspection, the defendant is free to renew his motion on retrial.

[5] The alleged assaults took place on June 23, 2008, August 12, 2008, and August 13, 2008.

[6] Specifically, defense counsel requested that the court simply play back the testimony of the complainant that occurred after the trial court had revisited and sustained the objection. That testimony provided as follows:

"[The Prosecutor]: . . . [Y]ou spoke to your aunt on the [tele]phone?

"[The Complainant]: Yeah.

"[The Prosecutor]: Okay. And did you tell her what had happened? Did you agree—well, I'll withdraw it. Did you tell her what had happened?

"[The Complainant]: No, she said that we had to speak at home. . . .

"[The Prosecutor]: All right. So at some point in time after you get the [tele]phone call, do you ever speak to your aunt in person about what happened?

"[The Complainant]: Yes.

"[The Prosecutor]: And do you tell her what happened?

"[The Complainant]: Yes."

[7] Although the record does not include the exact language of the court's playback to the jury, the transcript does indicate the court's discussion with the court monitor about which portions the jury would rehear, including this question by the prosecutor. The state does not dispute the defendant's claim that this question was in fact included in the playback to the jury.

[8] We note that, when it overruled defense counsel's objection, the trial court indicated that it had not heard the complainant's response, and asked the prosecutor whether the complainant had merely stated that she had told her aunt about the alleged assaults. Instead of informing the court about the substance of the complainant's response to the question posed, the prosecutor responded to the court that he had "asked [the complainant] to explain the situation as to how [the conversation between her and her aunt had occurred]." Finding this explanation to be sufficient, the trial court overruled defense counsel's objection. Although it has no bearing on our decision in the present case, we note that attorneys, as officers of the court, are bound not to knowingly withhold material facts from the tribunal. See *State* v. *Chambers*, 296 Conn. 397, 419, 994 A.2d 1248 (2010).

[9] The defendant also claims that the playback of the related testimony following the jury's question improperly reminded the jury of the stricken evidence, thereby exacerbating the error. Specifically, the defendant asserts that the playback referenced the inadmissible statement because it included the prosecutor's question: "And when your aunt said *that stuff* to you, did you tell your aunt what happened?" (Emphasis added.) Although defense counsel objected to the trial court's decision not to replay once more the edited audiotape outside the presence of the jury, defense counsel did not object to the replaying of this question by the prosecutor. We, therefore, do not address this claim by the defendant because it was not properly preserved. As we explain later in this opinion; see footnote 13 of this opinion; the defendant did assert the marital communications privilege with respect to his wife's testimony, albeit unsuccessfully in part.

[10] We note that, as a statement made in confidence between spouses, namely, the defendant and the complainant's aunt, his wife, the contested statement was most likely inadmissible under the marital communications privilege. See *State* v. *Christian*, 267 Conn. 710, 729–30, 841 A.2d 1158 (2004). Consistent with this observation, the defendant contends in his brief to this court that "[i]mproperly allowing [the complainant] to testify as to the alleged contents of a conversation between spouses circumvented the common-law [marital communications privilege] . . . ." Because defense

counsel did not object to the complainant's testimony on the basis of the marital communications privilege at trial, however, we do not address this unpreserved claim on appeal.

[11] A review of the record indicates that defense counsel touched upon the complainant's failure to immediately report the incidents only briefly while cross-examining the complainant; (on cross-examination, defense counsel asked complainant: "And you never told anyone about that particular incident . . . on that day or at any time during that summer?" and "[A]fter that encounter, you didn't . . . tell your mom . . . your aunt . . . your grandmother . . . [or] your cousin . . . ?"); and did not reference the complainant's delay or the reasons for her subsequent disclosure during closing argument.

[12] The state asserts in its brief that the defendant's confession was not subject to the marital communications privilege, and that the defendant's wife should have been required to answer questions regarding the confession, because her "subsequent communication of the confession to the [complainant] negated the confidential aspect of the communication." The state thus appears to argue that the contested testimony would have been cumulative, and thus harmless, but for the trial court's improper exclusion of the evidence when it prevented the defendant's wife from testifying about the alleged confession. While we note our serious reservations regarding the state's argument that the defendant's alleged confession was not confidential in nature based on his wife's subsequent decision to disclose it to a third party; see *State* v. *Beavers*, 290 Conn. 386, 408 n.23, 963 A.2d 956 (2009) ("a communication is confidential if, at the time of the communication, *the communicator* could have had a reasonable expectation of confidentiality" [emphasis added; internal quotation marks omitted]); we decline to address this claim because the state did not file a cross appeal challenging the trial court's partial grant of the defendant's motion in limine.

[13] In partially granting the defendant's motion in limine, the trial court recognized the distinction between the spousal testimony privilege and the marital communications privilege. "The adverse spousal testimony privilege, which is codified at [General Statutes] § 54-84a, belongs to the 'witness spouse.' . . . Under that privilege, the husband or wife of a criminal defendant has a privilege not to testify against his or her spouse in a criminal proceeding, provided that the couple is married at the time of trial." (Internal quotation marks omitted.) *State* v. *Christian*, 267 Conn. 710, 725, 841 A.2d 1158 (2004). The marital communications privilege, on the other hand, is a "broader and more abstract" common-law privilege that protects "information privately disclosed between husband and wife in the confidence of the marital relationship—once described . . . as 'the best solace of human existence.' " Id., 728–30.

In light of the charges brought against the defendant in the present case, the complainant's aunt was prevented from asserting her spousal testimony privilege to avoid testifying against the defendant pursuant to General Statutes (Rev. to 2009) § 54-84a, which, at the time of the 2010 trial, provided in relevant part that "the spouse of one who is charged with violation of any of sections 53-20, 53-21, 53-23, 53-304, 53a-70, 53a-70a, 53a-71 and 53a-83 to 53a-88, inclusive, may . . . be compelled to testify in the same manner as any other witness." (We note that § 54-84a was amended subsequent to the proceedings in the present case. See Public Acts 2011, No. 11-152, § 14.) The trial court did grant the defendant's motion in limine in part, however, after concluding that the marital communications privilege prevented the defendant's wife from testifying about statements he had made to her in confidence.