STATE OF CONNECTICUT *v.* ANGEL LUIS SANCHEZ
(SC 18799)

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

*Argued October 22, 2012—officially released March 5, 2013*

*Katherine C. Essington*, special public defender, for the appellant (defendant).

*Mitchell S. Brody*, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *David L. Zagaja*, senior assistant state's attorney, for the appellee (state).

*Charles D. Ray*, *Matthew A. Weiner* and *Shawn S. Smith* filed a brief for the Connecticut Innocence Project as amicus curiae.

*Opinion*

HARPER, J. In *State* v. *Ledbetter*, 275 Conn. 534, 575, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006), this court determined that, because of an increased risk of misidentification when an eyewitness is not advised that the perpetrator of a crime may or may not be present in the identification procedure, we would exercise our supervisory authority to require trial courts to provide an instruction to the jury regarding this risk in cases in which the identification procedure administrator had failed to provide such a warning, unless no significant risk of misidentification existed (*Ledbetter* instruction). The sole issue in this certified appeal is whether the Appellate Court properly concluded that the trial court's failure to give a *Ledbetter* instruction, sua sponte, did not present the type of extraordinary circumstance that warrants reversal under the plain error doctrine. *State* v. *Sanchez*, 301 Conn. 919, 21 A.3d 465 (2011). The defendant, Angel Luis Sanchez, appeals, upon our grant of certification, from the Appellate Court's judgment affirming the trial court's judgment of conviction, rendered after a jury trial, of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A), kidnapping in the first degree in violation of § 53a-92 (a) (2) (B), attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-134 (a) (3) and 53a-49, and assault in the first degree in violation of General Statutes § 53a-59 (a) (1). *State* v. *Sanchez*, 128 Conn. App. 1, 3, 15 A.3d 1182 (2011). We affirm the judgment of the Appellate Court.

The Appellate Court opinion sets forth the following facts that the jury reasonably could have found. "On July 18, 2003, Nancy Tong was working alone at Will Mart, a convenience store in Manchester. At approximately 11 a.m., a man . . . entered the store. The [man][1] removed some merchandise from the shelves, including paper towels, boxes of trash bags, cleaning products, duct tape and a pail, and placed the merchandise on the store counter. Although Tong placed the merchandise into bags, the [man] did not pay for the merchandise. The [man] instead left the store, stood for a while outside and then came back inside the store. After the [man] repeated this behavior a couple of times, Tong asked the [man] if he planned to pay for the items. The [man] responded that he worked for CJ Landscaping and was waiting for his boss to arrive and pay for the merchandise. Tong responded, 'okay,' because she was familiar with the landscaping company and the owners of the company, who lived behind the Will Mart store. Tong was also familiar with the [man] because she had seen him three times inside the Will Mart store over the [previous] few weeks.

"Tong observed the [man] repeatedly exit the store, stand alone outside and reenter the store. At approxi-

mately 1 p.m., while Tong was positioned near the cash register and the bagged merchandise for which the [man] had not yet paid, [the man] approached Tong and told her that he was armed with a gun and that he wanted her to go to the back of the store. As the [man] grabbed Tong and pushed her toward the back of the store, Tong told him that if he wanted money, she would give money to him. The [man] told Tong that he wanted to tie her up. While in the back of the store, the [man] began to stab Tong with a knife. Tong fought back, attempting to grab the knife. Two customers then entered the store and began screaming and asking what was happening. The [man] dropped the knife and fled.

"Tong sought assistance at a nearby restaurant and was thereafter taken to a nearby hospital where she underwent surgery. Paul Lombardo and James Graham, detectives with the Manchester police department, arrived at the hospital at approximately 9:30 p.m. and interviewed Tong. Tong provided the detectives with a written statement, which included a physical description of the perpetrator. The state forensic laboratory found a single latent fingerprint on a roll of duct tape that the [perpetrator] had placed on the store counter. A photograph of the fingerprint was entered into a computer program, known as the automated fingerprint identification system, which is a national database that matches latent fingerprints found at crime scenes with fingerprint samples taken from individuals when they are arrested and supplies a list of 'candidates' whose fingerprints are a possible match. The database system did not yield, at that time, any possible matches to the fingerprint found on the duct tape. In November, 2003, the police suspended the investigation.

"In July, 2004, Lombardo revived the investigation. During that month, Tong worked with Lombardo to develop a sketch of the perpetrator. Lombardo concluded that Tong had 'very good recall of what her assailant looked like.' In October, 2004, [following a conversion to a more technologically advanced fingerprint identification computer program] the state forensic laboratories contacted Lombardo and informed him that the computer database revealed possible matches to the fingerprint found on the duct tape. Michael J. Supple, a fingerprint examiner, matched the fingerprint to the defendant's based on seven shared points of identification. Supple testified at trial that there were additional shared points of identification, but seven is all that is needed for an identification.

"In November, 2004, Tong went to the Manchester police station, and Lombardo showed her a photographic array that he had compiled. The photographic array consisted of the most recent photograph that Lombardo had of the defendant as well as photographs of seven other individuals. All eight photographs depicted individuals with facial hair. Lombardo noticed that Tong

was having difficulty and asked her if she was 'having a problem' because the perpetrator was clean shaven and the individuals in the photographic array all had facial hair. Tong responded affirmatively and did not make an identification from the first array. Subsequently, Lombardo spent fifteen to twenty minutes compiling a second photographic array. In compiling the second photographic array, Lombardo gathered together photographs of individuals with facial features similar to those of the defendant. The second photographic array consisted of eight individuals, including one photograph of the defendant. All individuals in this photographic array appeared relatively clean shaven. The defendant was the only individual whose photograph was included in both photographic arrays. The photograph of the defendant that was used in the second photographic array was different from the photograph of him that was used in the first photographic array. Tong selected the defendant's photograph from the second array then signed and dated the photograph." Id., 3–6.

The record reveals the following additional facts that the jury reasonably could have found and the relevant procedural history. Lombardo interviewed the defendant, after apprising him of his rights. The defendant acknowledged that he had worked for CJ Landscaping for a couple of months in the summer of 2003. When asked whether he was responsible for stabbing Tong, the defendant initially claimed that he never had been to the Manchester Will Mart. As the interview progressed, the defendant stated that he might have been at the Will Mart to buy some cigarettes and later stated that the only time he ever had been in any store in Manchester was a long time ago, to buy cigarettes. After Lombardo told the defendant that his fingerprint had been identified from evidence at the scene, and then asked the defendant whether he remembered that he had not worn gloves on the day of the incident, the defendant appeared visibly upset. Shortly thereafter, the defendant stated that he would not talk any more and ran out of the interview room.

Prior to trial, the defendant filed a motion to suppress any pretrial or in-court identification of him, claiming that the identification procedure had been unnecessarily suggestive, that an in-court identification would be irretrievably tainted by the prior illegal identification, and that any identification would be unreliable. The court deferred ruling on the motion until trial. In an evidentiary hearing on the motion held shortly after the state commenced presentation of its case, the trial court acknowledged that the defendant's photograph had been included in both arrays and that the procedure may have been suggestive in that some of the people pictured in the second array looked younger than the defendant. The court nonetheless determined that the identification had been reliable because, at the time of

the incident, Tong had had the opportunity over the course of several hours to observe the perpetrator when there was plenty of light and to converse with him. Accordingly, the trial court denied the motion to suppress. Thereafter, the state introduced evidence regarding Tong's identification of the defendant as the perpetrator at the police station and in court.

The jury found the defendant guilty of two counts of kidnapping in the first degree, one count of attempt to commit robbery in the first degree and one count of assault in the first degree. The trial court merged the two kidnapping convictions[2] and imposed a total effective sentence of forty years imprisonment, execution suspended after twenty-five years, and five years probation.

The defendant appealed from the judgment of conviction to the Appellate Court,[3] claiming with respect to the identification procedure that: (1) the trial court improperly had denied his motion to suppress Tong's identification of him in violation of his right to due process under the state and federal constitutions; id., 6; and (2) although he had failed to request a *Ledbetter* instruction, it was plain error for the trial court to have failed to provide one, sua sponte, to the jury. Id., 11–12. The Appellate Court rejected both claims. With respect to the defendant's constitutional claim, the court concluded that, even if the photographic identification procedure had been unduly suggestive, Tong's identification nonetheless was reliable for the purposes of admissibility. Id., 11. In particular, the Appellate Court noted the circumstances under which Tong had observed the defendant prior to and during the commission of the crime, the fairly accurate description of the defendant that Tong initially had provided to the police, and reasonable similarities between the features of the person in the composite sketch composed from Tong's later description and those of the defendant. Id., 9–11.

With respect to the defendant's unpreserved *Ledbetter* claim, the Appellate Court concluded that, even if it assumed that the trial court indisputably was required to give a *Ledbetter* instruction in the present case, its failure to do so sua sponte did not constitute the type of extraordinary situation that compelled reversal. Id., 14. In so concluding, the Appellate Court pointed to not only Tong's observations of the perpetrator prior to the commission of the crimes, but also to evidence wholly independent of Tong's identification linking the defendant to the crimes. Id., 14–15. Accordingly, the Appellate Court affirmed the judgment of conviction. Id., 20. This court thereafter granted the defendant's petition for certification to appeal to this court limited to the issue of whether the Appellate Court improperly concluded that the trial court's failure to provide a *Ledbetter* instruction to the jury, sua sponte, was not the type of extraordinary circumstance that warrants

reversal under the plain error doctrine. *State* v. *Sanchez*, supra, 301 Conn. 919.

Before setting forth the parties' specific contentions relating to this issue, to provide context, we briefly outline the relevant contours of our decision in *State* v. *Ledbetter*, supra, 275 Conn. 534, which was decided after the identification procedures at issue in the present case, but three years before the defendant's trial. In that case, this court acknowledged an ever growing body of empirical research demonstrating that eyewitnesses often engage in a relative judgment process, under which they "tend to identify the person from the lineup who, in the opinion of the eyewitness, looks most like the culprit relative to the other members of the lineup . . . ." (Internal quotation marks omitted.) Id., 571–72. This research concluded that "[t]he problem with the relative judgment process . . . is that it includes no mechanism for deciding that the culprit is none of the people in the lineup," which, in turn, leads to a higher percentage of false identifications. (Internal quotation marks omitted.) Id., 572. The research further concluded that the tendency to apply relative judgment could be significantly reduced when the administrator informed the witness that the perpetrator may or may not be present in the identification procedure. Id., 573. Although this court agreed that the trial court, as part of its analysis, should consider whether such a warning had been given, the court determined that a per se rule deeming unnecessarily suggestive any identification procedure lacking such a warning to the witness should not be adopted. Id., 574–75. The court further determined that it should continue to be the province of law enforcement agencies to implement procedures under which police would provide such a warning.[4] Id., 574.

Nonetheless, recognizing the importance of eyewitness identifications in the criminal justice system and the risks of misidentification, this court concluded that it was appropriate for us to take some action pursuant to our supervisory authority to mitigate these risks. Id., 575. Accordingly, this court held that, "*unless there is no significant risk of misidentification*, we direct the trial courts of this state to incorporate an instruction in the charge to the jury, warning the jury of the risk of misidentification, in those cases where: (1) the state has offered eyewitness identification evidence; (2) that evidence resulted from an identification procedure; and (3) the administrator of that procedure failed to instruct the witness that the perpetrator may or may not be present in the procedure." (Emphasis added.) Id., 579.

In his certified appeal in the present case, the defendant makes two principal claims.[5] First, he contends that the trial court was required to give a *Ledbetter* instruction because there was a significant risk of misidentification, an issue the Appellate Court assumed in the defendant's favor but did not decide. Second, he

contends that the Appellate Court improperly applied a type of harmless error analysis when it determined that failure to give the instruction was not plain error. Specifically, the defendant contends that the failure to follow a court prescribed rule is tantamount to failure to follow a statute or rule of practice mandating a procedure, which appellate case law has recognized as plain error without regard to the evidence in the case. The defendant contends that this principle has even greater force in the present case because the instruction was mandated pursuant to this court's supervisory authority, which is exercised only to address a matter of utmost seriousness and in a manner deemed necessary to protect the fairness of the judicial system. Alternatively, the defendant contends that the Appellate Court improperly considered the strength of the evidence adduced by the state, when plain error permits the court to consider only whether the jury otherwise was made aware of the issue that the omitted instruction was intended to address, which did not occur in the present case. Even if such evidence could be considered, however, the defendant contends that the evidence on which the Appellate Court did rely was of limited probative value. Accordingly, the defendant contends that the omission of the *Ledbetter* instruction constituted plain error warranting a new trial.

In response, the state not only disagrees with these claims but also asks this court as a threshold matter to overrule or modify *Ledbetter* and to determine that there was no error on that basis. The state's principal contention in support of this request is that, as long as a trial court properly has determined that the identification is sufficiently reliable to be admitted into evidence, despite any unnecessarily suggestive procedure by which that identification has been obtained, there can be no significant risk of misidentification that would necessitate a *Ledbetter* instruction.[6] We conclude that, even if we were to assume, arguendo, that the trial court was required to give a *Ledbetter* instruction, the Appellate Court properly determined that the failure to have given one under the facts of the present case does not rise to the level of plain error. In light of this conclusion, we need not address the state's suggestion to overrule or modify *Ledbetter*.

"[The plain error] doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for

reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review." (Internal quotation marks omitted.) *State* v. *Myers*, 290 Conn. 278, 289, 963 A.2d 11 (2009).

"An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record.

"Although a complete record and an obvious error are prerequisites for plain error review, they are not, of themselves, sufficient for its application. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice. . . . In *State* v. *Fagan*, [280 Conn. 69, 87, 905 A.2d 1101 (2006), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007)], we described the two-pronged nature of the plain error doctrine: [An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Myers*, supra, 290 Conn. 287–88.

Before turning to the question of whether the Appellate Court properly concluded that the defendant is not entitled to prevail under the plain error doctrine, we note that in *Finley* v. *Aetna Life & Casualty Co.*, 202 Conn. 190, 196, 520 A.2d 208 (1987), overruled on other grounds by *Curry* v. *Burns*, 225 Conn. 782, 626 A.2d 719 (1993), this court purported to apply an abuse of discretion standard to such a question, and, in several recent decisions this court has assumed the correctness of that standard. See, e.g., *State* v. *Myers*, supra, 290 Conn. 286–87; *State* v. *Pierce*, 269 Conn. 442, 451, 849 A.2d 375 (2004); *State* v. *Fitzgerald*, 257 Conn. 106, 111, 777 A.2d 580 (2001). Having critically examined the reasoning in *Finley*, we now conclude that this court's adoption of a deferential standard of review in that case was predicated on a misconception about the rules of

practice, as well as the purpose and nature of the plain error doctrine.

In *Finley*, this court simply reasoned: "Practice Book § 3063 [the predecessor to § 60-5] sets forth a discretionary standard under which the Supreme and Appellate Courts '*may*' *review* claims not properly raised in the trial court 'in the interests of justice.' . . . On certification, therefore, the scope of our review is limited to determining whether the Appellate Court abused its discretion in granting review under the plain error doctrine." (Citations omitted; emphasis added.) *Finley* v. *Aetna Life & Casualty Co.*, supra, 202 Conn. 196. The word "may," however, simply is intended to reflect the court's inherent jurisdiction over such matters; it has no bearing on the nature of the particular claim presented or the review of decisions on such claims. More fundamentally, however, the rules of practice are not intended to address the subject of standards of review. Indeed, because the language in the Practice Book on which *Finley* relied was added prior to the establishment of the Appellate Court in 1982, review of an Appellate Court's decision simply could not have been contemplated when drafting that language.

Subsequent to *Finley*, this court clarified and emphasized that the plain error doctrine "is not . . . a rule of reviewability. It is a rule of reversibility." *State* v. *Cobb*, 251 Conn. 285, 343 n.34, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000). Indeed, as our previous discussion indicates, our jurisprudence *mandates* reversal when the reviewing court determines that manifest injustice has resulted from a trial court's unpreserved error. See *State* v. *Myers*, supra, 290 Conn. 289 ("invocation of the plain error doctrine is reserved for occasions *requiring* the reversal of the judgment under review" [emphasis added; internal quotation marks omitted]). When considering the manifest injustice question, this court has the same vantage point over the record as did the Appellate Court. Moreover, the rationale for deference to a lower court's decision is wholly absent in such cases, which require no particular expertise over the facts of the case, credibility of the parties or management of the court's docket. Cf. *Skakel* v. *State*, 295 Conn. 447, 486, 991 A.2d 414 (2010) (trial court's determination as to witness credibility reviewed for abuse of discretion); *Dimmock* v. *Lawrence & Memorial Hospital, Inc.*, 286 Conn. 789, 799 n.4, 945 A.2d 955 (2008) ("[i]n exercising its discretion in granting or denying a request to amend a complaint during or after trial, the trial court has its unique vantage point in part because it is interpreting the plaintiff's allegations not in a vacuum, but in the context of the development of the proceedings and the parties' understanding of the meaning of those allegations"); *Alliance Partners, Inc.* v. *Voltarc Technologies, Inc.*, 263 Conn. 204, 210–11, 820 A.2d 224 (2003) (reviewing Appellate Court's denial of motion to file

late appeal for good cause for abuse of discretion). Accordingly, we now hold that, to the extent that *Finley* held that an Appellate Court's decision whether to reverse a judgment under the plain error doctrine is reviewed under the abuse of discretion standard, that holding is hereby overruled.

Applying a plenary standard of review, we now turn to the question of whether the Appellate Court properly determined that, even if the trial court was required to give a *Ledbetter* instruction, sua sponte, the failure to do so in the present case did not present the type of extraordinary circumstance that warrants reversal under the plain error doctrine. *State* v. *Myers*, supra, 290 Conn. 292, is instructive in that the plain error question was raised in the context of the trial court's failure to comply strictly with a rule of practice intended to protect a defendant's right to due process. In *Myers*, the Appellate Court had concluded that the trial court committed plain error when it sentenced the defendant as a repeat offender under General Statutes § 21a-277 (a) without first obtaining a plea from the defendant and, if necessary, conducting a trial on the issue as Practice Book § 42-2 requires. Id., 280. The Appellate Court had reasoned: "We have held generally that a mandatory provision of the rules of practice . . . must be implemented fully to avoid trampling on a defendant's constitutional rights, which would constitute plain error and require, as a consequence, reversal of the judgment. . . . A court commits plain error when it fails to implement properly the mandatory provisions of clearly applicable rules of practice." (Citation omitted; internal quotation marks omitted.) *State* v. *Myers*, 101 Conn. App. 167, 185, 921 A.2d 640 (2007). In reversing the Appellate Court's judgment as to this issue, this court explained: "[A]part from the trial court's failure to comply strictly with the applicable rule of practice, which we do not condone, the defendant has failed to raise any doubt with respect to the validity of his prior conviction. *A trial court's failure to comply with a rule of criminal procedure, without more, is insufficient to require reversal for plain error.*[7] See, e.g., *State* v. *Suggs*, 194 Conn. 223, 226–27, 478 A.2d 1008 (1984) ([n]ot every deviation from the specific requirements of a Practice Book rule necessitates reversal); cf. *State* v. *Fernandez*, 254 Conn. 637, 647, 758 A.2d 842 (2000) (violation of rules of practice not ground for reversal when defendant was not deprived of his constitutional rights), cert. denied, 532 U.S. 913, 121 S. Ct. 1247, 149 L. Ed. 2d 153 (2001)." (Emphasis added; internal quotation marks omitted.) *State* v. *Myers*, supra, 290 Conn. 290–91. This court concluded that the failure to comply with the mandate of the rule of practice did not violate the defendant's constitutional rights under the particular facts of the case and, in turn, that the plain error doctrine had not been satisfied. Id., 296–300.

Similarly, the question of whether a trial court's failure to provide court mandated instructions is plain error involves an examination of the particular facts in the case to determine whether the consequence of the omission has resulted in manifest injustice to the defendant. Although our appellate courts have considered whether the substantive concern underlying the instruction otherwise had been brought to the jury's attention, another significant factor has been whether there is independent evidence of the defendant's guilt. See, e.g., *State* v. *Moore*, 293 Conn. 781, 825–26, 981 A.2d 1030 (2009) (noting when concluding that absence of specific accomplice credibility instruction was not harmful plain error that "accomplice testimony was corroborated by substantial independent evidence of the defendant's guilt" as well as that "the potential motives of the accomplices for falsifying their testimony were brought to the jury's attention"), cert. denied, U.S. , 130 S. Ct. 3386, 177 L. Ed. 2d 306 (2010); *State* v. *Brown*, 187 Conn. 602, 613–14, 447 A.2d 734 (1982) (failure to give accomplice instruction harmless under plain error doctrine because jury was made aware of possibility of accomplice's personal interest in outcome of case during cross-examination, accomplice testimony was corroborated by testimony of other witnesses, and state presented overwhelming evidence of defendant's guilt); *State* v. *Santiago*, 103 Conn. App. 406, 412–17, 931 A.2d 298 (trial court's failure to give credibility of accomplice instruction harmless under plain error analysis, in part because of "substantial independent evidence of the defendant's guilt"), cert. denied, 284 Conn. 937, 937 A.2d 695 (2007). If the failure to bring the concern underlying the mandate for the instruction is dispositive, any discussion of the independent evidence of the defendant's guilt would be wholly superfluous.

In addition, although this court reserves the exercise of its supervisory authority for "matters that are of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole"; (internal quotation marks omitted) *State* v. *Diaz*, 302 Conn. 93, 106, 25 A.3d 594 (2011); the fact that the instruction in the present case was mandated pursuant to an exercise of that authority does not, in and of itself, establish the existence of manifest injustice necessary for plain error. This court and the Appellate Court previously have rejected claims of plain error in cases in which an instruction had been mandated under the exercise of our supervisory authority in light of the evidence in the case. See, e.g., *State* v. *Smith*, 275 Conn. 205, 240, 881 A.2d 160 (2005) ("We directed the trial courts to discontinue the use of the challenged instruction . . . because we were concerned that it could give rise to a danger of juror misunderstanding. . . . Nevertheless, we are not convinced that the potential danger of misunderstanding in the present case was so significant as to affect the fairness

and integrity of or the public confidence in the proceeding, especially where intent was not a contested issue in the case." [Citation omitted; internal quotation marks omitted.]); *State* v. *Nims*, 70 Conn. App. 378, 385, 797 A.2d 1174 (The court stated that in the context of a plain error challenge on the basis of inclusion of "ingenuity of counsel" language in a charge that had been prohibited by this court: "The issue that presents itself is whether this directive by our Supreme Court, issued pursuant to its supervisory powers, requires an automatic reversal when not followed in a criminal matter. We conclude that it does not and, under the particular circumstances of this case, we deem reversal to be inappropriate. Although the court committed a flagrant, albeit unintentional, violation of the clear directive, we conclude that the fairness and integrity of the proceedings have not been affected and that no manifest injustice has occurred."), cert. denied, 261 Conn. 920, 806 A.2d 1056 (2002).

To find plain error without regard to the evidence in the case would be inconsistent with the requirement of showing manifest injustice. For example, if evidence unaffected by the omitted instruction included multiple reliable confessions by the defendant and DNA evidence conclusively linking the defendant to the crime, it would be exceedingly difficult to justify a conclusion that the patent error so affected the fairness and integrity of and public confidence in the judicial proceedings as to require reversal of the judgment. Indeed, in the absence of a circumstance like structural error, which defies harmless error analysis; *State* v. *Lopez*, 271 Conn. 724, 738–39, 859 A.2d 898 (2004); we are unaware of a framework under which this court would reverse a criminal conviction without considering the harmfulness of the impropriety in light of the entire case. See, e.g., *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989) (final prong of test for reversal of unpreserved constitutional claim is "if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt").

Therefore, we turn to the evidence in the present case to determine whether, assuming that it is not debatable that there was a substantial risk that Tong could have misidentified the defendant due to the absence of a warning during the identification procedure, the Appellate Court properly concluded that the omitted jury instruction did not result in manifest injustice. Undoubtedly, the identification was an important piece of evidence. Had the *Ledbetter* instruction been given, however, it seems exceedingly unlikely that the jury would have found this risk of misidentification to have been realized and to discredit Tong's identification on that basis when that identification was bolstered by other evidence unaffected by the deficient identification procedure.[8] Indeed, even if we were to assume that the

jury would have discredited the identification, this other evidence would have been sufficient to sustain the verdict. Prior to that procedure, Tong had assisted in developing a composite sketch that looked substantially like the defendant, as evidenced by the fact that the defendant's closing argument suggested that the sketch artist consciously or subconsciously may have influenced Tong's description. The two individuals who interrupted the commission of the crime gave police descriptions consistent with the defendant's appearance. The perpetrator had told Tong that he worked for CJ Landscaping, and the defendant admitted that he had worked for that company for a limited period that included the time at which the incident occurred. A fingerprint found on an item that the perpetrator had placed on the counter was matched with the defendant's. Finally, the defendant's conduct during the police interview evidenced consciousness of guilt. His story changed in the course of the interview from his never having been to the Manchester Will Mart to having possibly been there a long time before the incident to buy cigarettes. When confronted with the possibility that he had not worn gloves and that, as a result, police were able to locate his fingerprint at the scene, the defendant appeared visibly shaken.[9] Although the defendant offers various theories to undermine the probative value of each piece of evidence, these theories not only seem implausible when viewed in isolation, but would have us accept a remarkable group of coincidences.[10]

The defendant's arguments regarding the fingerprint evidence merit further comment. He advances a broad attack on the reliability of fingerprint evidence due to the methodology used and concerns of subjectivity, citing two reports and a law review article in support of his argument. We conclude that, whatever the merits might be to such a claim, the defendant must first have presented these arguments, as well as chain of custody concerns, to the trial court, both to develop the necessary factual record for our review and to allow the state to present rebuttal evidence. We first note that the defendant does not present the well developed body of research and case law analyzing such evidence of which this court took judicial notice in *Ledbetter*. See *State* v. *Ledbetter*, supra, 275 Conn. 568. Second, there appear to be some differences between the methodology at issue in these reports and the one applied in the present case. We also note that, in the present case, the defendant concedes that "[i]t is not clear from Supple's testimony . . . whether his results were independently verified by another examiner." Not only could the parties have explored this question had it been raised at trial, but Supple also could have been asked about additional points of identification that matched the defendant but which were not needed to meet the standard that Supple had applied. Accordingly, we conclude that the Appellate Court properly concluded that the defen-

dant has not demonstrated that the failure to give a *Ledbetter* instruction was plain error.

The judgment of the Appellate Court 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] Because the defendant challenges the propriety of admission of evidence of Tong's identifications of him as the perpetrator in the photographic array and in court, we have changed the Appellate Court's references from the defendant to a "man" in its recitation of the facts, except where the defendant's identity is undisputed.

[2] The merged convictions were for violations of § 53a-92 (a) (2) (A) and (B), respectively, under which "[a] person is guilty of kidnapping in the first degree when he abducts another person and . . . (2) he restrains the person abducted with intent to (A) inflict physical injury upon him or violate or abuse him sexually; or (B) accomplish or advance the commission of a felony . . . ."

[3] Pursuant to General Statutes § 51-199 (b) (3), the defendant filed a direct appeal to this court raising several claims in addition to the omission of the *Ledbetter* instruction, and this court thereafter transferred the appeal to the Appellate Court pursuant to Practice Book § 65-1.

[4] Subsequent to our decision in *Ledbetter* and the trial in the present case, the legislature enacted No. 11-252 of the 2011 Public Acts, entitled "An Act concerning Eyewitness Identification," which was codified at General Statutes (Sup. 2012) § 54-1p and requires municipal police departments and the department of public safety to adopt procedures, inter alia, requiring an eyewitness to be instructed prior to the identification procedure that the perpetrator may not be among the persons in the photographic lineup or the live lineup. The statute does not prescribe a remedy in the event that such procedures are not adopted or not followed.

[5] The defendant also contends that he did not implicitly waive his right to challenge the adequacy of the trial court's jury instructions under *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011), because there is no record of the charging conference to make a determination as to whether the defendant had an adequate opportunity to review the charge. The state does not contend that it is appropriate to treat the defendant's challenge as waived. Therefore, we need not address the question raised in recent cases regarding the application of the implied waiver doctrine to claims of plain error. See, e.g., *State* v. *Darryl W.*, 303 Conn. 353, 371–72 n.17, 33 A.3d 239 (2012) (noting tension between some of our cases as to this question).

[6] The state contends, inter alia, that the reasoning of *Ledbetter* was flawed because "the eyewitness whose identification has been deemed reliable for purposes of the due process test and, therefore, admissible has exercised 'absolute judgment' by virtue of making a selection based on a reliable memory of the culprit, which avoids the pitfalls of 'relative judgment.' " At oral argument before this court, the state also asserted that the concerns relating to the reliability of eyewitness identifications have been addressed by subsequent developments in our case law regarding eyewitness identifications. The state points in particular to *State* v. *Guilbert*, 306 Conn. 218, 221, 49 A.3d 705 (2012), in which we overruled earlier cases and held that "testimony by a qualified expert on the fallibility of eyewitness identification is admissible under *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), when that testimony would aid the jury in evaluating the state's identification evidence." The Connecticut Innocence Project filed an amicus curiae brief in the present case arguing against the rejection or modification of the *Ledbetter* instruction.

The state also contends that plain error is inapplicable to a trial court's failure to apply a rule that is applied on a case-by-case basis. Specifically, because the *Ledbetter* instruction is mandated only if the trial court determines that there is a substantial risk of misidentification, this exercise of discretion could not constitute plain error in the state's view. We need not reach these arguments in the present case in light of our conclusion that the defendant cannot prevail for other reasons.

[7] Many of the cases cited by the defendant for a contrary proposition are ones in which the court conflated the two-pronged plain error test, the problem that this court attempted to correct in *State* v. *Myers*, supra, 290 Conn. 287–89. We note, however, that, in several of these cases, the manifest

injustice was obvious. See, e.g., *Hartford Federal Savings & Loan Assn.* v. *Tucker*, 181 Conn. 607, 609, 436 A.2d 1259 (1980) (trial court rendered default judgment in foreclosure action as result of oversight of clearly applicable statute under which defendant's pleadings would have been timely). This court contributed to the confusion by stating unconditionally in a 1981 decision: "This court has held that a trial court's failure to follow the mandatory provisions of a statute prescribing trial procedures is plain error. *State* v. *Burke*, 182 Conn. 330, 331–32, 438 A.2d 93 (1980). The failure to follow a procedural rule is similarly erroneous. See *LaReau* v. *Reincke*, 158 Conn. 486, 492–93, 264 A.2d 576 (1969)." *State* v. *Pina*, 185 Conn. 473, 482, 440 A.2d 962 (1981). Although technically correct, the sweeping statement in *Pina* did not acknowledge that *Burke* underscored that the case involved a statute enacted to overrule holdings by this court and to effectuate a fundamental right, and that *LaReau* involved a rule relating to this court's jurisdiction.

[8] We note that the Appellate Court had identified, in addition to some of the evidence to which we refer, the fact that Tong had an opportunity to view the defendant prior to the crime and had recognized him as a prior customer. *State* v. *Sanchez*, supra, 128 Conn. App. 14–15. Because these facts directly relate to the reliability of Tong's identification of the defendant from the photographs in the array, reliance on these facts is inconsistent with the presumption that the trial court would have found a substantial risk of misidentification in the photographic array. Therefore, we do not consider these facts in our analysis.

[9] We note that the Appellate Court also had cited the fact that, after the defendant manifested this reaction, he ran out of the interview room. Because, the defendant's departure immediately followed the invocation of his right to remain silent, it would appear that such evidence could raise due process concerns under *State* v. *Montgomery*, 254 Conn. 694, 710–21, 759 A.2d 995 (2000), and *State* v. *Plourde*, 208 Conn. 455, 462–70, 545 A.2d 1071 (1988), cert. denied, 488 U.S. 1034, 109 S. Ct. 847, 102 L. Ed. 2d 979 (1989), under which this court determined that the state improperly had elicited testimony regarding the defendant's nonverbal actions and demeanor that constituted an impermissible use of the defendant's invocation of his right to remain silent. We note that the defendant did not object to the admission of this testimony at trial. Moreover, the Appellate Court did not rely on the defendant's silence in reaching its conclusion. Nonetheless, given the obvious due process question, we decline to rely on the fact that the defendant ran out of the interview room, and limit our consideration to the defendant's conduct preceding his invocation of his right to remain silent, because it appears that there was a sufficient time lapse between his reaction to Lombardo's statement regarding the discovery of the defendant's fingerprint at the crime scene and his invocation of his right to remain silent to attenuate the direct connection between those acts. We note, however, that our conclusion would be the same irrespective of any consciousness of guilt evidence.

[10] For example, the defendant suggests that the fingerprint, if it actually was his, could have gotten on the duct tape in his visit to the store long before the incident, despite the fact that he claimed to have been at the store to buy cigarettes. Although cigarettes are located behind the cash register and the tape was somewhere in the store aisles, the defendant opines that during his visit, he could have gone down the aisle and touched the same roll of duct tape that the perpetrator happened to bring to the register.