STATE OF CONNECTICUT *v.* CAMERON M.*

(SC 18829)

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

Argued April 25—officially released November 20, 2012

William F. Gallagher, with whom, on the brief, were *Hugh D. Hughes* and *T. Stevens Bliss*, for the appellant (defendant).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, state's attorney, and *Deborah Mabbett*, senior assistant state's attorney, for the appellee (state).

Opinion

NORCOTT, J. The defendant, Cameron M., appeals[1] from the judgment of the trial court, rendered after a jury trial, convicting him of one count of risk of injury to a child in violation of General Statutes § 53-21 (a) (1) and one count of risk of injury to a child in violation of § 53-21 (a) (2).[2] On appeal, the defendant claims that: (1) the trial court improperly admitted into evidence a video recording and transcript of a forensic interview of the victim (forensic interview) pursuant to the tender years exception to the hearsay rule; see Conn. Code Evid. § 8-10 (tender years exception);[3] in violation of *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); and (2) his multiple risk of injury convictions for the same act under both the situation and conduct prongs of § 53-21 (a) violate his constitutional protections against double jeopardy. Relying on the state's proffered alternate ground for affirmance, we conclude that the forensic interview was admissible substantively as a prior inconsistent statement under the rule set forth in *State* v. *Whelan*, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986); see also Conn. Code Evid. § 8-5 (1) (*Whelan* rule);[4] and that the defendant's confrontation rights under *Crawford* were not violated because the victim appeared and testified at trial, where she could have been subjected to cross-examination. We further conclude that the record is inadequate for review of the defendant's unpreserved double jeopardy claims. Accordingly, we affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. The jury reasonably could have found that, over the course of several months between 2006 and 2007, the defendant engaged in oral sexual contact with the buttocks and genitals of the victim, his daughter, when she was approximately two and one-half to three years old. These acts occurred while the defendant was caring for the victim and her older sister, H, pursuant to a joint custody arrangement with their mother, S, who is the defendant's former wife. The defendant's acts came to light in April, 2007, after the victim, while being dressed by S, spontaneously reported to S that "Daddy kisses me in my butt," and subsequently demonstrated on a doll that the defendant had kissed her between her legs. S, on the advice of Sherry D'Elia, a family therapist, reported the victim's allegations to the department of children and families (department).

Shortly thereafter, the department referred the victim to the Danbury Regional Child Advocacy Center (child advocacy center), to be interviewed and examined by a multidisciplinary investigative team, constituted pursuant to General Statutes § 17a-106a,[5] consisting of professionals from mental health, law enforcement and the department working collaboratively to investigate and

treat cases of reported sexual abuse. Donna Meyer, the director of the teams program at the child advocacy center, conducted the forensic interview[6] of the victim in the child advocacy center's interview room, which other team members, including Danielle Williams, a clinical psychologist employed by the child advocacy center, and Joseph Bukowski, a state police detective investigating the allegations against the defendant, watched from behind one-way glass.[7] The forensic interview was recorded on video and transcribed for subsequent investigative and trial use.[8]

During the forensic interview, while discussing with Meyers where various relatives kiss her, the victim stated that the defendant "kiss right on my butt," including on her "butt cheeks." She then demonstrated using anatomically correct dolls that the defendant would kiss "inside" and "put his [face] in my butt," indicating that the defendant would put his mouth between her legs and bite and kiss her genital area.[9] After the forensic interview, the victim made similar statements during the first of her thirteen after care counseling sessions with Williams,[10] reporting spontaneously[11] that the defendant "kisses her butt."

The state charged the defendant in a four count information with: (1) one count of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A); (2) one count of risk of injury to a child in violation of § 53-21 (a) (2) for having "contact with the intimate parts of [the victim] . . . in a sexual and indecent manner likely to impair [her] health or morals"; (3) one count of risk of injury to a child in violation of § 53-21 (a) (2) for causing the victim to contact the defendant's genital area; and (4) one count of risk of injury to a child in violation of § 53-21 (a) (1), for "[wilfully] and unlawfully causing [the victim] to be placed in such a situation that [her] morals . . . were likely to be impaired . . . ."

Prior to trial, the state filed notice of its intent to offer into evidence numerous out-of-court statements of the victim, namely, her disclosures to S and the forensic interview. With respect to the forensic interview, the state claimed its admissibility under two hearsay exceptions, namely, the tender years exception and the *Whelan* rule. The defendant objected, contending specifically that the forensic interview was inadmissible under the sixth amendment's confrontation clause under the tender years exception or the *Whelan* rule as applied consistently with *Crawford* v. *Washington*, supra, 541 U.S. 36, because it had been conducted in conjunction with a police investigation. The trial court then held a hearing on the state's motion, at which S and Meyer testified, but reserved decision on that motion until after the victim had testified before the jury out of concern that the victim might be retraumatized should she make an unexpected disclosure of abuse

during her testimony.

At trial, the victim, who was then six years old, testified that she remembered the interview taking place, but not its content,[12] and did not remember anything from when she was three years old, going to the defendant's house, wearing diapers or "playing any games" with the defendant. She further testified that she remembers the defendant hugging and kissing her on her head, but not any place else. She also testified that no one "bites" her and that the defendant is a "nice daddy" who has never been a "bad daddy."[13] The defendant elected not to cross-examine the victim.

After the victim testified, the trial court concluded that her disclosures to S, and the forensic interview, were admissible under both *Crawford* and the tender years exception. In so concluding, the court relied on *State* v. *Arroyo*, 284 Conn. 597, 935 A.2d 975 (2007); see footnote 19 of this opinion; and specifically rejected the defendant's claim that the forensic interview was "testimonial" or "made in preparation for a legal proceeding."[14] The court further relied on *State* v. *Simpson*, 286 Conn. 634, 945 A.2d 449 (2008), and determined that the victim was available for cross-examination under *Crawford*, notwithstanding her lack of memory in court. Thereafter, the forensic interview was published to the jury.

After the trial court denied the defendant's motion for a judgment of acquittal on the basis of insufficient evidence,[15] the jury returned a verdict finding the defendant not guilty on counts one and three of the information, and guilty on counts two and four, namely, risk of injury to a child in violation of § 53-21 (a) (1) and (2). The trial court rendered a judgment of conviction in accordance with the jury's verdict and sentenced the defendant to a total effective sentence of fifteen years imprisonment, execution suspended after five years, along with sexual offender registration and fifteen years of probation with special conditions. This appeal followed.

On appeal, the defendant claims that: (1) the trial court improperly admitted the forensic interview into evidence; and (2) his convictions on counts two and four of the information violate his constitutional protections against double jeopardy.

I

ADMISSIBILITY OF THE FORENSIC INTERVIEW

We begin with the defendant's claims that the forensic interview was inadmissible under both *Crawford* v. *Washington*, supra, 541 U.S. 36, and the tender years exception as a statement made in preparation for a legal proceeding. Specifically, the defendant argues that: (1) the interview was inadmissible under the tender years exception, which must be read consistently with the preclusion in *Crawford* of testimonial hearsay, and that

our decision in *State* v. *Arroyo*, supra, 284 Conn. 597, concluding that statements made during a multidisciplinary forensic interview were not testimonial, is both distinguishable and wrongly decided; and (2) his rights under *Crawford* were violated because the victim was "functionally unavailable" for cross-examination by virtue of her lack of memory at trial.

Before turning to the defendant's specific *Crawford* claims, we note that, as "a general matter, hearsay statements may not be admitted into evidence unless they fall within a recognized exception to the hearsay rule. . . . In the context of a criminal trial, however, the admission of a hearsay statement against a defendant is further limited by the confrontation clause of the sixth amendment. Under *Crawford* v. *Washington*, supra, 541 U.S. 59, hearsay statements of an *unavailable witness* that are testimonial in nature may be admitted in accordance with the confrontation clause only if the defendant previously has had the opportunity to cross-examine the unavailable witness. Nontestimonial statements, however, are not subject to the confrontation clause and may be admitted under state rules of evidence. . . . Thus, the threshold inquiries that determine the nature of the claim are whether the statement was hearsay, and if so, whether the statement was testimonial in nature, questions of law over which our review is plenary." (Citations omitted; emphasis added.) *State* v. *Smith*, 289 Conn. 598, 618–19, 960 A.2d 993 (2008).

A

"Unavailability" of the Victim under *Crawford*

We begin with the defendant's claim that the victim was "functionally unavailable" for purposes of *Crawford* because, although she testified at trial, she could not remember anything regarding the forensic interview or the allegations as a consequence of the difference in her age, namely, as a three year old child when she allegedly was abused and participated in the forensic interview, and as six year old child when she testified at trial, and, therefore, the jury could not appropriately draw inferences about her reliability.[16] The defendant contends that there "essentially was no opportunity to cross-examine the declarant at all" because of this memory loss. In response, the state argues that there was no *Crawford* violation because the victim testified at trial, notwithstanding her inability to remember the events in question, and the defendant's theory of "functional unavailab[ility]" has been rejected in our past decisions, namely, *State* v. *Simpson*, supra, 286 Conn. 634, and *State* v. *Pierre*, 277 Conn. 42, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006). We agree with the state and conclude that the victim was available at trial for cross-examination as contemplated by *Crawford*.

Specifically, our decision in *State* v. *Simpson*, supra, 286 Conn. 634, is dispositive of the defendant's *Crawford* claims. In that case, we rejected a defendant's claims that a child sexual assault victim, who was five years old at the time of the assaults and could not remember whether the acts forming the basis for the allegations against the defendant had occurred, was " 'functionally unavailable' for cross-examination because she testified that she did not recall making the statements on the videotape" of her interview. Id., 651. Following, inter alia, *State* v. *Pierre*, supra, 277 Conn. 42, after concluding that the victim's statements properly were admitted into evidence pursuant to the *Whelan* rule; see also part I B of this opinion; we emphasized that "*Crawford* makes clear . . . that, when the declarant appears for cross-examination at trial, the [c]onfrontation [c]lause places no constraints at all on the use of his prior testimonial statements. . . . It is therefore irrelevant that the reliability of some out-of-court statements cannot be replicated, even if the declarant testifies to the same matters in court. . . . The [c]lause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it."[17] (Internal quotation marks omitted.) *State* v. *Simpson*, supra, 652–53. Relying on sister state case law in rejecting the defendant's argument that *Pierre* was "distinguishable because that case involved a witness who subsequently changed his mind about testifying against his friend, whereas [*Simpson*] involved a child witness who received statutorily mandated special accommodations . . . and was unable to answer questions about the videotaped statement during cross-examination"; (citation omitted) id., 654 n.19; we emphasized that "[t]he principle articulated in *Pierre* has been held equally applicable to cases involving young victims of sexual assault who, at trial, did not recall making statements contained in videotaped interviews." Id. Thus, we concluded that, despite her memory lapses, the defendant was not denied an opportunity to cross-examine the victim "because she was not 'functionally unavailable' under *Crawford*." Id., 654.

In the present case, the defendant does not contend that *Simpson* is no longer good law or seek its overruling,[18] although at oral argument before this court, he posited that *Simpson* is distinguishable because the defendant therein engaged in a relatively lengthy cross-examination that tested the victim's memory, perception and understanding of the concepts of truth and fantasy; see id., 654–55; while in the present case, the defendant elected not to cross-examine the victim. This distinction does not operate to save the defendant's confrontation clause claims. "[A] defendant cannot assert that he was denied his right of confrontation unless he first attempts to cross-examine the witness on the core accusations in the case. Because [the] defendant had the opportunity to cross-examine the child at

trial about her out-of-court testimony implicating him in the crime but chose not to do so, he cannot claim that he was denied his right of confrontation." *State* v. *Nyhammer*, 197 N.J. 383, 389, 963 A.2d 316, cert. denied, U.S. , 130 S. Ct. 65, 175 L. Ed. 2d 48 (2009). Thus, lack of cross-examination in this case results from a strategic election by the defendant; that the victim *could* have been cross-examined on, for example, her memory and understandings of truth and fantasy, was sufficient to render her available for confrontation purposes under *Crawford*. See id., 414 ("[D]efense counsel chose not to cross-examine [the child witness] about the core accusations in the taped interview, perhaps for good reason, fearing that such questioning might have elicited the type of damning responses that eluded the prosecutor on [direct examination]. That counsel decided to forgo critical cross-examination because of [the child witness'] unresponsiveness to many questions on direct does not mean that [the] defendant was denied the opportunity for cross-examination."); see also, e.g., *Davis* v. *State*, Docket No. CR-10-1143, 2011 Ark. LEXIS 474, *6 (Ark. September 22, 2011) ("The fact that [the witness] was unable to recall the details of her out-of-court statement on direct examination is of no consequence in this particular case where [the defendant] declined the opportunity to cross-examine the witness. That [the defendant] chose not to cross-examine the witness does not mean that he was denied the opportunity to do so."); *People* v. *Lewis*, 223 Ill. 2d 393, 405, 860 N.E.2d 299 (2006) (defendant had opportunity to cross-examine witness about out-of-court identification, despite fact that he "may have declined" to do so "based on trial strategy"). Accordingly, we conclude that the defendant's confrontation clause rights under *Crawford* were not violated by the admission of the forensic interview.

B

Evidentiary Basis for Admission of the Forensic Interview

Having determined that the admission of the forensic interview into evidence did not violate the defendant's confrontation clause rights under *Crawford* v. *Washington*, supra, 541 U.S. 36, because the victim testified at trial, we next turn to the defendant's claim that the forensic interview was inadmissible under the rules of evidence. Noting that the tender years exception, which does not apply to "statement[s] . . . made in preparation of a legal proceeding," must be read consistently with the preclusion of "testimonial" hearsay under *Crawford*, the defendant contends that, in admitting the forensic interview into evidence, the trial court improperly relied on our decision in *State* v. *Arroyo*, supra, 284 Conn. 597, which had concluded that statements made during a multidisciplinary team forensic interview were not testimonial in nature.[19] Specifically,

the defendant contends that *Arroyo*: (1) is distinguishable, because the record in the present case demonstrates that the forensic interview was not therapeutic in nature but, rather, plainly was conducted in contemplation of a criminal trial, and Meyer simply was a surrogate for the police rather than a participant in the victim's treatment; and (2) is wrongly decided and should be overruled. In response, the state concedes that the tender years exception must be read consistently with the preclusion in *Crawford* of testimonial hearsay, but contends in its main brief and a supplemental brief filed after the transfer of this appeal to this court that *Arroyo* is both controlling and good law. The state also contends, in the alternative, that the forensic interview properly was admitted into evidence pursuant to the *Whelan* rule. See *State* v. *Whelan*, supra, 200 Conn. 743; Conn. Code Evid. § 8-5 (1). Inasmuch as our conclusion in part I A of this opinion obviates the need to consider whether the forensic interview was testimonial for confrontation clause purposes under *Crawford*, which is an issue that remains a question of considerable factual and legal complexity notwithstanding our now five year old decision in *Arroyo*;[20] see footnote 19 of this opinion; we conclude that the defendant's evidentiary claim can be resolved on the basis of the state's alternate ground for affirmance under *Whelan*.[21]

The state, relying heavily on our decision in *State* v. *Simpson*, supra, 286 Conn. 634, contends that the forensic interview was admissible substantively as a prior inconsistent statement under the *Whelan* rule because the victim's failed memory at trial created the requisite inconsistency, and the video recording satisfied *Whelan*'s need for a signed document. In response, the defendant contends that the state's *Whelan* claim is unreviewable on appeal because the trial court, by not ruling on the state's *Whelan* arguments, never exercised its discretion to determine whether the necessary inconsistency exists, and the state never sought an articulation to rectify this deficiency in the record. Relying on the distinction raised in *State* v. *Meehan*, 260 Conn. 372, 388, 796 A.2d 1191 (2002), the defendant also contends that *Whelan* applies only to feigned or evasive losses of memory, rather than ordinary lapses such as may have been experienced by the victim herein. We agree with the state and conclude that the interview properly was admitted under the *Whelan* rule.

Now codified in § 8-5 (1) of the Connecticut Code of Evidence; see *State* v. *Simpson*, supra, 286 Conn. 642 n.12; see also footnote 4 of this opinion; "[i]n *State* v. *Whelan*, supra, 200 Conn. [753], this court determined that an out-of-court statement is admissible as substantive evidence if (1) the statement is a prior inconsistent statement, (2) it is signed by the declarant, (3) the declarant has personal knowledge of the facts stated therein, and (4) the declarant testifies at trial and is subject to cross-examination. . . . Under *State* v.

Woodson, 227 Conn. 1, 21, 629 A.2d 386 (1993), the signature of a witness is unnecessary for the admission of a tape-recorded statement offered under *Whelan*." (Citation omitted; internal quotation marks omitted.) *State* v. *Outing*, 298 Conn. 34, 40 n.3, 3 A.3d 1 (2010), cert. denied, U.S. , 131 S. Ct. 1479, 179 L. Ed. 2d 316 (2011). "The *Whelan* hearsay exception applies to a relatively narrow category of prior inconsistent statements . . . [and was] carefully limited . . . to those prior statements that carry such substantial indicia of reliability as to warrant their substantive admissibility. As with any statement that is admitted into evidence under a hearsay exception, a statement that satisfies the *Whelan* criteria may or may not be true in fact. But, as with any other statement that qualifies under a hearsay exception, it nevertheless is admissible to establish the truth of the matter asserted because it falls within a class of hearsay evidence that has been deemed sufficiently trustworthy to merit such treatment. Thus, as with all other admissible nonhearsay evidence, we allow the fact finder to determine whether the hearsay statement is credible upon consideration of all the relevant circumstances. Consequently, once the proponent of a prior inconsistent statement has established that the statement satisfies the requirements of *Whelan*, that statement, like statements satisfying the requirements of other hearsay exceptions, is presumptively admissible." (Internal quotation marks omitted.) *State* v. *Simpson*, supra, 642–43.

We begin with the defendant's claim that the state's alternate ground for affirmance is unreviewable because the trial court, by not ruling on the state's *Whelan* arguments, never exercised its discretion to determine whether the necessary inconsistency exists, and the state never sought an articulation to rectify this deficiency in the record. We disagree and conclude that the state's failure to seek an articulation by the trial court is not fatal to its reliance on *Whelan* as an alternate ground for affirmance. First, the defendant raises no claim that the interview was not sufficiently reliable to be admitted under *Whelan*, a claim that would have required the trial court to act as a gatekeeper. See, e.g., *State* v. *Simpson*, supra, 286 Conn. 644–45 and n.14 (describing trial court's responsibility to conduct hearing under *State* v. *Mukhtaar*, 253 Conn. 280, 306, 750 A.2d 1059 [2000], to determine reliability of *Whelan* material). Second, in upholding the decision of the trial court on alternate grounds that were raised before it and are supported by well established case law, but not formally acted upon by the trial court, we do not act to usurp or disturb the trial court's discretion, thus obviating any issues of potential ambuscade occasioned by our deciding this issue in the first instance, particularly because this issue is "one [on which] the trial court would have been forced to rule in favor of the appellee." (Internal quotation marks omitted.) *Vine* v. *Zoning*

Board of Appeals, 281 Conn. 553, 568–69, 916 A.2d 5 (2007).

Turning to the merits of the *Whelan* issue, in light of a long line of decisions from this court and the Appellate Court released after *State* v. *Meehan*, supra, 260 Conn. 388, in 2002, we disagree with the defendant's reliance on that case for the proposition that whether the *Whelan* rule should be limited to feigned loss of memory, rather than the genuine loss of memory experienced by the victim herein, remains an open question. Rather, the trial court would have had no choice but to rule for the state on the *Whelan* issue; see *Vine* v. *Zoning Board of Appeals*, supra, 281 Conn. 568–69; because, as was noted at oral argument before this court, the defendant's claim is controlled by *State* v. *Simpson*, supra, 286 Conn. 634, wherein we followed two Appellate Court decisions, namely, *State* v. *Luis F.*, 85 Conn. App. 264, 856 A.2d 522 (2004), and *State* v. *Francis D.*, 75 Conn. App. 1, 815 A.2d 191, cert. denied, 263 Conn. 909, 819 A.2d 842 (2003). In *State* v. *Francis D.*, supra, 18, the Appellate Court observed that "[t]he victim's inability to recall material facts . . . clearly satisfies the inconsistency element" of *Whelan*.[22] In *Simpson*, we concluded that a videotaped interview of a five year old sexual assault complainant properly was admitted pursuant to *Whelan* because, "even after attempts to refresh her memory, [the complainant] testified at trial that she did not remember the defendant [sexually assaulting her]. Because it is well settled that failures of memory and omissions in trial testimony satisfy the inconsistency element of *Whelan*, we conclude that the trial court did not abuse its broad discretion by relying on *State* v. *Luis F.*, supra, [269–70], in admitting portions of the videotaped interview into evidence." (Internal quotation marks omitted.) *State* v. *Simpson*, supra, 650–51. Thus, because the victim in this case testified that she remembered going to the forensic interview, but could not remember anything from the interview or the time period surrounding the abuse and denied any abusive behavior by the defendant, we conclude that *Whelan* provides a proper alternate evidentiary basis for the admission of the forensic interview into evidence.

II

DOUBLE JEOPARDY CLAIM

We next address the defendant's claim that we should vacate his conviction under count four of the information, alleging a violation of the situation prong of the risk of injury statute, § 53-21 (a) (2), because his convictions under that prong and the conduct prong, § 53-21 (a) (1), for the same conduct violate his constitutional protections against double jeopardy. In response, the state acknowledges the potential for a double jeopardy violation for multiple punishments for the same conduct under both the situation and conduct prongs, but argues that the record is inadequate for review of this unpre-

served claim under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), because nothing in the record, such as a bill of particulars, closing argument or jury instructions, indicates the factual basis for the jury's verdict on count four, particularly given the factual inconsistency in the jury's verdict on counts one and two. We agree with the state and conclude that the record is inadequate for review of the defendant's double jeopardy claim under *Golding*.

"A defendant's double jeopardy claim presents a question of law, over which our review is plenary. . . . The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. The double jeopardy clause [applies] to the states through the due process clause of the fourteenth amendment. . . . This constitutional guarantee prohibits not only multiple trials for the same offense, but also multiple punishments for the same offense in a single trial. . . . Although the Connecticut constitution does not include a double jeopardy provision, the due process guarantee of article first, § 9, of our state constitution encompasses protection against double jeopardy. . . .

"Double jeopardy analysis in the context of a single trial is a two-step process. First, the charges must arise out of the same act or transaction. Second, it must be determined whether the charged crimes are the same offense. Multiple punishments are forbidden only if both conditions are met." (Citation omitted; internal quotation marks omitted.) *State* v. *Gonzalez*, 302 Conn. 287, 315–16, 25 A.3d 648 (2011). "The defendant on appeal bears the burden of proving that the prosecutions are for the same offense in law and fact." (Internal quotation marks omitted.) *State* v. *Alvaro F.*, 291 Conn. 1, 6, 966 A.2d 712, cert. denied, U.S. , 130 S. Ct. 200, 175 L. Ed. 2d 140 (2009).

Because the defendant's double jeopardy claim implicates his constitutional rights, we may review it pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40, despite his failure to raise it before the trial court.[23] See, e.g., *State* v. *D'Antonio*, 274 Conn. 658, 715, 877 A.2d 696 (2005). "[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. In the absence of any one of these conditions, the defendant's claim will fail." *State* v. *Golding*, supra, 239–40.

We agree with the state that the defendant's claim fails under the first prong of *Golding* because the record is inadequate for review of the double jeopardy claims given the multiplicity of charged acts in the information, unamplified by a bill of particulars,[24] particularly when viewed in conjunction with the jury's factually inconsistent verdict. Specifically, the state charged the defendant: (1) in the first count with sexual assault in the fourth degree in violation of § 53a-73a (a) (1) (A), for "intentionally subject[ing the victim] to sexual contact," without specifying the particular underlying act; (2) in the second count with risk of injury to a child under the conduct prong of that statute, alleging "contact with the intimate parts of a child under the age of sixteen years in a sexual and indecent manner likely to impair the health or morals of such child," namely, "contact with a three year old female child's genital area, inner thighs, buttocks, or breasts in violation of . . . § 53-21 (a) (2)"; (3) in the third count with risk of injury to a child under the conduct prong of that statute, alleging that the defendant "subjected a child under sixteen years of age to contact with the intimate parts of [the defendant] in a sexual and indecent manner likely to impair the health or morals of such child," namely, "contact between a three year old female child and the defendant's genital area, in violation of . . . § 53-21 (a) (2)"; and (4) in the fourth count with risk of injury to a child under the situation prong, when the defendant "[wilfully] and unlawfully caused a child under the age of sixteen years to be placed in such a situation that the morals of such child were likely to be impaired, in violation of . . . § 53-21 (a) (1)." After trial, the jury returned a factually inconsistent verdict finding the defendant not guilty on the first count, sexual assault in the fourth degree in violation of § 53a-73a (a) (1) (A), and not guilty of the third count, risk of injury under the conduct prong, alleging that the defendant had subjected the victim to contact with his genitals, but guilty of two counts of risk of injury on the second count under the conduct prong, § 53-21 (a) (1), for contact with the victim's genitals, and also under the fourth count alleging the broadly charged situation prong, § 53-21 (a) (2).

Given the factual inconsistencies in the jury's verdict, it is unclear which charged conduct served as the bases for the defendant's convictions. Specifically, we note that, although the jury found, by virtue of the fact that it found the defendant guilty on count two, that the defendant had engaged in sexually inappropriate contact with the victim's genitals, that verdict is factually and logically inconsistent with the jury's verdict acquitting him of the first charged count, namely, sexual assault in the fourth degree. Given this logical inconsistency, and the lack of a bill of particulars elaborating on the allegations supporting the fourth count of the information, it is conceivable that the other charged

conduct, namely, the victim's contact with the defendant's genital area, may well have formed the basis for his conviction under the situation prong of the risk of injury statute, notwithstanding his acquittal on the third count. Thus, the record is not clear as to whether the defendant's risk of injury convictions are based on the same act or transaction, thereby precluding us from reviewing his double jeopardy claim under the first prong of *Golding*, let alone concluding that he has carried his burden of proving that the convictions are for the same offense in law or fact.[25]

The judgment is affirmed.

In this opinion the other justices concurred.

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

[1] The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[2] General Statutes § 53-21 (a) provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child, or (2) has contact with the intimate parts, as defined in section 53a-65, 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 or morals of such child . . . shall be guilty of a class C felony for a violation of subdivision (1) or (3) of this subsection and a class B felony for a violation of subdivision (2) of this subsection, except that, if the violation is of subdivision (2) of this subsection and the victim of the offense is under thirteen years of age, such person shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court."

Although § 53-21 was amended in 2007; see Public Acts 2007, No. 07-143, § 4; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[3] Section 8-10 of the Connecticut Code of Evidence provides: "(a) A statement made by a child, twelve years of age or under at the time of the statement, concerning any alleged act of sexual assault or other sexual misconduct of which the child is the alleged victim, or any alleged act of physical abuse committed against the child by the child's parent, guardian or any other person exercising comparable authority over the child at the time of the act, is admissible in evidence in criminal and juvenile proceedings if:

"(1) the court finds, in a hearing conducted outside the presence of the jury, that the circumstances of the statement, including its timing and content, provide particularized guarantees of its trustworthiness;

"(2) the statement was not made in preparation for a legal proceeding; and

"(3) the child either

"(A) testifies and is subject to cross-examination in the proceeding, either by appearing at the proceeding in person or by video telecommunication or by submitting to a recorded video deposition for that purpose, or

"(B) is unavailable as a witness, provided that

"(i) there is independent corroborative evidence of the alleged act that does not include hearsay admitted pursuant to this section, and

"(ii) The statement was made prior to the defendant's arrest or the institution of juvenile proceedings in connection with the act described in the statement.

"(b) A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party the proponent's intention to offer the statement, the content of the statement, the approximate time, date and location of the statement, the person to whom the statement was made, and the circumstances surrounding the statement

that indicate its trustworthiness. If the statement is in writing, the proponent must provide the adverse party a copy of the writing; if the statement is otherwise recorded by audiotape, videotape, or some other equally reliable medium, the proponent must provide the adverse party a copy in the medium in the possession of the proponent in which the statement will be proffered. Except for good cause shown, notice and a copy must be given sufficiently in advance of the proceeding to provide the adverse party with a fair opportunity to prepare to meet the statement.

"(c) This section does not prevent admission of any statement under another hearsay exception. Courts, however, are prohibited from:

"(1) applying broader definitions in other hearsay exceptions for statements made by children twelve years of age or under at the time of the statement concerning any alleged act described in the first paragraph of subsection (a) than they do for other declarants; and

"(2) admitting by way of a residual hearsay exception statements described in the first paragraph of section (a)."

Section 8-10 of the Code of Evidence was amended, as explained in the commentary, effective January 1, 2011, "to harmonize it with the general statutes. As amended, and to be consistent with the 2009 amendment to General Statutes § 54-86*l*, it no longer explicitly provides that the cross-examination of the child may be by video telecommunication or by submitting to a recorded video deposition for that purpose; it does not require the proponent to provide the adverse party a copy of the statement in writing or in whatever other medium the original statement is in and is intended to be proffered in; and, it does not provide a good cause exception to the obligation to provide the adverse party with advance notice sufficient to permit the adverse party to prepare to meet the statement. These changes do not limit the discretion of the court to impose such requirements." Amendments to the Connecticut Code of Evidence, 72 Conn. L.J., No. 2, p. 240C (July 13, 2010). This appeal does not concern topics affected by the 2011 amendments to § 8-10.

[4] Section 8-5 of the Connecticut Code of Evidence provides in relevant part: "The following are not excluded by the hearsay rule, provided the declarant is available for cross-examination at trial:

"(1) Prior inconsistent statement. A prior inconsistent statement of a witness, provided (A) the statement is in writing or otherwise recorded by audiotape, videotape or some other equally reliable medium, (B) the writing or recording is duly authenticated as that of the witness, and (C) the witness has personal knowledge of the contents of the statement. . . ."

[5] General Statutes § 17a-106a provides in relevant part: "(a) The Commissioner of Children and Families, may as department head of the lead agency, and the appropriate state's attorney establish multidisciplinary teams for the purpose of reviewing particular cases or particular types of cases or to coordinate the prevention, intervention and treatment in each judicial district to review selected cases of child abuse or neglect. The purpose of such multidisciplinary teams is to advance and coordinate the prompt investigation of suspected cases of child abuse or neglect, to reduce the trauma of any child victim and to ensure the protection and treatment of the child. The head of the local law enforcement agency or his designee may request the assistance of the Division of State Police within the Department of Public Safety for such purposes.

"(b) Each multidisciplinary team shall consist of at least one representative of each of the following: (1) The state's attorney of the judicial district of the team, or his designee; (2) the Commissioner of Children and Families, or his designee; (3) the head of the local or state law enforcement agencies, or his designee; (4) a health care professional with substantial experience in the diagnosis and treatment of abused or neglected children, who shall be designated by the team members; (5) a member, where appropriate, of a youth service bureau; (6) a mental health professional with substantial experience in the treatment of abused or neglected children, who shall be designated by the team members; and (7) any other appropriate individual with expertise in the welfare of children that the members of the team deem necessary. Each team shall select a chairperson. A team may invite experts to participate in the review of any case and may invite any other individual with particular information germane to the case to participate in such review, provided the expert or individual shall have the same protection and obligations under subsections (f) and (g) of this section as members of the team. . . .

"(d) All criminal investigative work of the multidisciplinary teams shall be undertaken by members of the team who are law enforcement officers

and all child protection investigative work of the teams shall be undertaken by members of the team who represent the Department of Children and Families, provided representatives of the department may coordinate all investigative work and rely upon information generated by the team. The protocols, procedures and standards of the multidisciplinary teams shall not supersede the protocols, procedures and standards of the agencies who are on the multidisciplinary team. . . .''

[6] Meyer testified that a forensic interview is a ''developmentally appropriate fact-finding interview . . . used to gather information from a child in a neutral nonleading way.'' The purpose of the collaborative approach is to implement the ''child first doctrine,'' which minimizes the number of times that a child complainant is potentially retraumatized through the interview process, by providing an opportunity for a single properly conducted forensic interview to be used subsequently by the multiple law enforcement, child protection and medical providers who typically address a report of child sexual abuse.

[7] With respect to his role in the forensic interview and investigation, Bukowski testified that Meyer, who is not a law enforcement employee, determines how many times to interview a child complainant, attempting to minimize that number, and he does not participate in that process beyond observing forensic interviews from behind the one-way glass because he is ''not qualified to interview the children.'' Although Bukowski did not deem it necessary to direct or suggest any of Meyer's questions of the victim in this case, he could have done so if he had determined that particular questions were needed for the investigation. Meyer did, however, consult briefly with Bukowski before conducting the forensic interview in order to get a ''general idea'' of the allegations in this case.

After the forensic interview concluded, Bukowski conducted further investigation by visiting the defendant at his home that same day, and questioning him as to whether he had given inappropriate ''raspberries'' or otherwise kissed or touched his children, and particularly the victim, inappropriately. The defendant denied those allegations and gave the police written and verbal statements to that effect.

[8] S testified that, at Meyer's instruction, she did not watch the video or read the transcript of the forensic interview because she was likely to be a witness at the trial.

[9] The victim also indicated during the forensic interview that she had oral contact with the defendant's genitalia, which formed the specific basis for count three of the information. The defendant, however, was acquitted on that count. But see part II of this opinion.

[10] Williams counseled the victim because, after making her disclosure in the forensic interview, the victim began acting clingy to S, having nightmares, soiling herself and acting aggressively, which were behaviors that she had not exhibited previously. These behaviors, which Williams noted might also have been the result of the victim missing the defendant or otherwise have been developmentally caused, subsided by the conclusion of the counseling sessions as Williams suggested ''closure'' techniques.

[11] Although Williams is a trained forensic interviewer, she testified that she would not interview a child whom she counsels because of a ''conflict of interest'' created by the dichotomy between the roles of the therapist and interviewer; ''the forensic interviewer's job is to gather information. The therapist's job is to explore feelings, identify feelings, and . . . [t]hey're completely separate.'' Rather, Williams indicated that she uses her training to gather additional information in a nonleading and nonsuggestive way if, during a therapy session, a child begins to ''give me more information about what has happened to them . . . .'' Williams testified that, although she did not intend to ask about the allegations during the therapy session, children frequently are ''triggered'' to share information based on their previous experience in the interview room.

[12] The victim initially testified that she did not remember the ''feelings lady'' in the ''feelings room'' in which the forensic interview was conducted, but, upon having her memory refreshed by watching a short portion of the video, remembered the interview room and playing with dolls there, but did not remember anything that was discussed.

[13] Williams testified that young children have short memories, and typically will forget memories if they are not specifically discussed with them, unless triggered by other events, which frequently occur around puberty. Williams testified that it would not be unusual for a six year old child to not remember things that had happened to her at the age of three.

[14] In so concluding, the trial court found that ''[t]here was no other parent

in the room. In fact, there was no one else in the room besides Meyer, that it was a controlled interview, that . . . Meyer asked the questions, that [the victim] was not . . . fed questions by the police, that . . . this procedure is done in every case, that is, [Myers'] procedure for interviewing a child of that age, that the police observed but did not participate, that the court finds it was not to assist police." The court further determined that the "purpose of the interview primarily was the best interest of the [victim] to minimize trauma of multiple interviews, that it was fact-finding and neutral, and that it was conducted by an independent organization whose primary goal was the [victim's] welfare. The court sees . . . that the [victim] had no opportunity to fabricate. Again, that it was a neutral atmosphere with a pleasant interviewer."

[15] In his testimony at trial, the defendant denied ever kissing the victim's genital area. Although the defendant testified that he had given his children "raspberries," he denied ever giving them in an inappropriate way, stating they were only on their bellies as infants.

[16] Consistent with our well established general practice of not "addressing constitutional questions unless their resolution is unavoidable"; *State* v. *McCahill*, 261 Conn. 492, 501, 811 A.2d 667 (2002); we ordinarily first determine whether a nonconstitutional basis under the rules of evidence exists for resolving the evidentiary issues presented by an appeal. See, e.g., *State* v. *Devalda*, 306 Conn. 494, 516, A.3d (2012). In this appeal, however, we begin with the defendant's constitutional claim under the unavailability prong of *Crawford* because: (1) the defendant's evidentiary claim is analytically identical to his constitutional claim under the testimonial prong of *Crawford*; and (2) resolution of the defendant's claim under the unavailability prong of *Crawford* only requires the application of well settled principles, and could obviate the need to decide the far more complicated and unsettled constitutional issues discussed in footnote 20 of this opinion and the accompanying text.

[17] In *Pierre*, we emphasized our "agree[ment] with those jurisdictions that have interpreted 'availability for cross-examination' under *Crawford* as needing to be synthesized with the United States Supreme Court's holdings in *United States* v. *Owens*, [484 U.S. 554, 561–62, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988)], and *Delaware* v. *Fensterer*, [474 U.S. 15, 20, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985)]. Specifically, although 'availability' was not defined in *Crawford*, *Owens* and *Fensterer* make clear that the right to cross-examination does not imply a right to cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. This theme also runs through the existing cases in Connecticut wherein a witness has been deemed subject to cross-examination at trial for *Whelan* purposes despite a claimed inability to remember the details surrounding his or her prior statement. In sum, we conclude that a witness' claimed inability to remember earlier statements or the events surrounding those statements does not implicate the requirements of the confrontation clause under *Crawford*, so long as the witness appears at trial, takes an oath to testify truthfully, and answers the questions put to him or her during cross-examination." *State* v. *Pierre*, supra, 277 Conn. 86.

Thus, in "*Pierre*, we rejected the defendant's contention that, despite the fact that [the witness] took the stand and answered questions, he was functionally unavailable for cross-examination as to the contents of his statement because of his claimed memory loss and statement that he had signed the document only to keep the police from harassing him. . . . We noted that the defendant's argument equates a declarant's inability or unwillingness to remember prior statements made to the police with a general unavailability from cross-examination in its entirety. . . . We relied on our previous *Whelan* jurisprudence, and sister state decisions that had interpreted *Crawford*'s availability element . . . and concluded that a witness' claimed inability to remember earlier statements or the events surrounding those statements does not implicate the requirements of the confrontation clause under *Crawford*, so long as the witness appears at trial, takes an oath to testify truthfully, and answers the questions put to him or her during cross-examination." (Citations omitted; internal quotation marks omitted.) *State* v. *Simpson*, supra, 286 Conn. 653.

[18] Sister state decisions published after *Simpson*, including those in the child sexual abuse context, conclude similarly, and with near uniformity, that a testifying "witness who forgets both the underlying events and her prior statements nonetheless appears for cross-examination at trial" for purposes of *Crawford*. *State* v. *Santos*, 124 Haw. 130, 145, 238 P.3d 162 (2010); see also, e.g., *State* v. *Lopez*, 217 Ariz. 433, 438, 175 P.3d 682 (App.

2008), review denied, 2008 Ariz. LEXIS 253 (Ariz. December 5, 2008); *People* v. *Garcia-Cordova*, Ill. App. , 963 N.E.2d 355, 368–69 (2011), appeal denied, 968 N.E.2d 84 (Ill. 2012); *State* v. *Holliday*, 745 N.W.2d 556, 567–68 (Minn.), cert. denied, 555 U.S. 856, 129 S. Ct. 124, 172 L. Ed. 2d 95 (2008); *State* v. *Reid*, 161 N.H. 569, 574, 20 A.3d 298 (2011); *State* v. *Stokes*, 381 S.C. 390, 402, 673 S.E.2d 434 (2009); *State* v. *Toohey*, 816 N.W.2d 120, 128, (2012); *Abney* v. *Commonwealth*, 51 Va. App. 337, 350–51, 657 S.E.2d 796 (2008); *Woodall* v. *State*, 336 S.W.3d 634, 644 (Tex. Crim. App. 2011); *Bush* v. *State*, 193 P.3d 203, 212 (Wyo. 2008); *Williams* v. *People of United States Virgin Islands*, 56 V.I. 821, 829–30 (2012).

The only cases our research has revealed holding at all to the contrary are *Goforth* v. *State*, 70 So. 3d 174 (Miss. 2011), and *State* v. *Nyhammer*, 396 N.J. Super. 72, 932 A.2d 33 (App. Div. 2007), rev'd, 197 N.J. 383, 963 A.2d 316, cert. denied, U.S. , 130 S. Ct. 65, 175 L. Ed. 2d 48 (2009), neither of which is persuasive in the present case. In *Goforth*, the Mississippi Supreme Court concluded that a confrontation clause violation had occurred under the state constitution when the witness, "though physically present at trial, did not have the requisite, minimal ability or capacity to act" when that witness "had no recollection of the underlying events surrounding his statement, and he could not even remember having known [the defendant] or [the victim]. . . . This total lack of memory deprived [the defendant] any opportunity to inquire about potential bias or the circumstances surrounding [the witness'] statement. In sum, [the defendant] simply had no opportunity to cross-examine [the witness] about his statement." *Goforth* v. *State*, supra, 186. *Goforth* is distinguishable because the present case does not involve an independent request for greater protection under the state constitution, and the victim's memory loss herein was not as profound as that in *Goforth*, inasmuch as she remembered all of the actors involved in the charged events and the recorded statement in the forensic interview, including the defendant and Meyers. In *Nyhammer*, the New Jersey Appellate Division concluded that a child victim's "complete inability to present current beliefs about any of the material facts, or to testify about her prior statements, is distinguishable from a situation where a trial witness for the prosecution simply has a bad memory." *State* v. *Nyhammer*, supra, 396 N.J. Super. 89. The Appellate Division's decision in *Nyhammer* appears, however, to be both inconsistent with the weight of authority as exemplified by our controlling decision in *Simpson*, and in any event not good law in New Jersey, as that state's Supreme Court subsequently concluded, after granting leave to appeal, that no confrontation clause violation had occurred because the defendant had failed to cross-examine the child at trial about the statement at issue. *State* v. *Nyhammer*, supra, 197 N.J. 389.

[19] In *State* v. *Arroyo*, supra, 284 Conn. 597, we addressed, in the context of a claim likely to arise on remand; id., 601 n.3; a defendant's claim that the trial court improperly permitted, in violation of *Crawford* v. *Washington*, supra, 541 U.S. 36, a forensic interviewer, a licensed clinical social worker, at the Child Sexual Abuse Clinic at Yale-New Haven Hospital, "to recount, during her testimony, the statements that the victim had made to her during the forensic interviews that [she] conducted with the victim . . . because law enforcement personnel observed [the] interviews with the victim and were allowed to make and retain audiotapes of those interviews." (Citation omitted.) *State* v. *Arroyo*, supra, 625.

In determining that the victim's statements during the forensic interview in *Arroyo* were not testimonial in nature, we relied on the "primary purpose" test articulated in *Davis* v. *Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), calling it "apparent from this formulation of the test that the timing of the statements in relation to the subject events is crucial to the determination of the testimonial nature of the statements," and observing that "[d]eclarants who make statements, even regarding a possible crime, in order to obtain assistance, do not do so with the intent or expectation of assisting the state in building a case against a defendant, nor do the recipients of such statements act with such intent or expectation." *State* v. *Arroyo*, supra, 284 Conn. 629. We further noted that, "in focusing on the primary purpose of the communication, *Davis* provides a practical way to resolve what *Crawford* had identified as the crucial issue in determining whether out-of-court statements are testimonial, namely, whether the circumstances would lead an objective witness reasonably to believe that the statements would later be used in a prosecution." Id., 629–30. We then rejected decisions from other jurisdictions concluding that "statements made to a forensic interviewer are testimonial," finding them either "factually distinguishable . . . because most involve much more significant involve-

ment in and control of the subject interviews by law enforcement" or "unpersuasive" for failing to account for the solely post hoc role of the forensic interviewer as compared to a police officer. See id., 630 n.20 (criticizing *State* v. *Blue*, 717 N.W.2d 558 [N.D. 2006]); see also *State* v. *Arroyo*, supra, 632 n.20 ("[t]he mere fact that police are involved, as in the present case, because they are made privy to the information obtained in the interview, is not sufficient, without more, to render the interviews testimonial").

Thus, in concluding that there was no *Crawford* violation in *Arroyo*, we determined that the "primary purpose of [the forensic] interviews [at issue] was to provide medical assistance to the victim. The clinic's system, in each case of alleged sexual abuse, of pairing a forensic interviewer who specializes in mental health assessment and treatment with a medical care provider, suggests that the clinic views the treatment of the victim's mental and physical harms suffered due to the abuse as closely linked. This conclusion is bolstered by the fact that the medical care provider relies upon the forensic interviewer's work in examining the child, by the repeated communications and consultations between the medical care provider and the forensic interviewer, and by the participation of the forensic interviewer in the ultimate diagnosis and formulation of a treatment plan for the child. The structure of the clinic's treatment of alleged victims of sexual abuse leads us to conclude that [the] forensic interviewer . . . was an integral part of the chain of medical care." *State* v. *Arroyo*, supra, 284 Conn. 632–33. We further emphasized the advantages of the multidisciplinary approach under § 17a-106a; see footnote 5 of this opinion; with respect to avoiding retraumatizing the child victim, and emphasized that "[t]here is no evidence in the record to indicate that the victim's interviews . . . were at the instruction or request of law enforcement. Instead, the record reflects that . . . an investigator with the department, initially brought the victim and the victim's mother to the clinic for examinations. Moreover, there is no indication that [the interviewer] was in the employ of a law enforcement agency and no evidence that she cooperated or assisted in the investigation of the defendant. The purpose of her interviews was related solely to securing the welfare of the child. . . . On the basis of these facts, we conclude that the primary purpose of the interviews was not to build a case against the defendant, but to provide the victim with assistance in the form of medical and mental health treatment." *State* v. *Arroyo*, supra, 635.

[20] Numerous prudential reasons cause us to decline to consider, in the context of an evidentiary claim under the tender years exception, whether the forensic interview was testimonial for confrontation clause purposes under *Crawford*, particularly because it appears that we would have to overrule *State* v. *Arroyo*, supra, 284 Conn. 597, in order for the defendant to be successful on this claim. First, given well established stare decisis considerations, "[w]e do not lightly overrule our existing precedent." *State* v. *Lockhart*, 298 Conn. 537, 549, 4 A.3d 1176 (2010). Second, it is well established that this "court has a basic judicial duty to avoid deciding a constitutional issue if a nonconstitutional ground exists that will dispose of the case." (Internal quotation marks omitted.) *State* v. *Ritrovato*, 280 Conn. 36, 50, 905 A.2d 1079 (2006). Thus, in light of our determination in part I A of this opinion that there was no *Crawford* violation because the victim testified and was available for cross-examination at trial, we decline to engage in unnecessary constitutional analysis in determining whether *Arroyo*, which continues to represent a minority position on this point, is still good law. See, e.g., *Coronado* v. *State*, 351 S.W.3d 315, 324 (Tex. Crim. App. 2011) ("[v]irtually all courts that have reviewed the admissibility of forensic child-interview statements or videotapes . . . have found them to be 'testimonial' and inadmissible unless the child testifies at trial or the defendant had a prior opportunity for cross-examination"); see also *State* v. *Arroyo*, supra, 630 n.20; cf. *State* v. *Arnold*, 126 Ohio St. 3d 290, 303, 933 N.E.2d 775 (2010) (recognizing "dual capacities" of forensic interviewers at child advocacy centers and requiring trial courts to parse interviews to redact testimonial portions, namely, those not specifically made for medical diagnosis and treatment). This is particularly so given subsequent decisions, especially *Michigan* v. *Bryant*, U.S. , 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011), which, with its shift away from the declarant's intent toward including that of the interrogator in determining whether the "primary purpose" of the statement is testimonial; see *Davis* v. *Washington*, supra, 547 U.S. 822; has been predicted "to further restrict the admissibility of children's hearsay statements in sexual abuse prosecutions." D. Paruch, "Silencing the Victims in Child Sexual Abuse Prosecutions," 28 Touro L. Rev. 85, 89 (2012); see also id., 133 (noting that shift under *Bryant* "from the declarant's intent to

that of the interrogator, particularly in situations where the declarant is found to be operating under a disability, should result in an increased number of children's hearsay statements being found to be testimonial"); id., 141–42 ("Even more compelling arguments can be made that children's statements obtained in response to questioning by [sexual assault nurse examiners] or members of multidisciplinary teams that operate in hospitals and specialized clinics should be considered testimonial. Not only are these professionals state actors but they are frequently so closely aligned with law enforcement as to be considered an arm of law enforcement."). Thus, we leave this significant constitutional issue for another day.

[21] Accordingly, we need not consider the state's other proffered alternate ground for affirmance, namely, that the interview was admissible under the medical treatment exception to the hearsay rule. See Conn. Code Evid. § 8-3 (5).

[22] We noted that, "[w]hether there are inconsistencies between the two statements is properly a matter for the trial court. . . . Inconsistencies may be shown not only by contradictory statements but also by omissions. In determining whether an inconsistency exists, the testimony of a witness as a whole, or the whole impression or effect of what has been said, must be examined. . . . *Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement . . . and the same principle governs the case of the forgetful witness. . . . A statement's inconsistency may be determined from the circumstances and is not limited to cases in which diametrically opposed assertions have been made. Thus, inconsistencies may be found in changes in position and they may also be found in denial of recollection.* . . . The trial court has considerable discretion to determine whether evasive answers are inconsistent with prior statements." (Emphasis added; internal quotation marks omitted.) *State* v. *Simpson*, supra, 286 Conn. 649, quoting *State* v. *Whelan*, supra, 200 Conn. 748–49 n.4.

[23] The state, citing *In re Melody L.*, 290 Conn. 131, 154, 962 A.2d 81 (2009), contends that the defendant has failed properly to seek review of his unpreserved claim under *State* v. *Golding*, supra, 213 Conn. 239–40, by failing to make an affirmative request to that effect in his main brief, noting that *Golding* review cannot be requested for the first time in a reply brief. For purposes of this appeal, we decline to address the state's arguments on this issue, and assume, without deciding, that the defendant's brief adequately makes an "affirmative request" for *Golding* review of his unpreserved constitutional claim. But see *State* v. *Elson*, 125 Conn. App. 328, 353–54, 9 A.3d 731 (2010) (en banc) ("interpreting the affirmative request requirement associated with *Golding* [to] eschew the notion that it necessarily includes the use of talismanic words or phrases, such as a citation to the *Golding* opinion or a recitation of any specific language from that opinion in an analysis of the reviewability of the claim," and emphasizing that, "what is required in making an affirmative request for review, is that a party present an analysis consistent with the principles codified in *Golding* for the review of unpreserved claims of constitutional magnitude"), cert. granted, 300 Conn. 904, 12 A.3d 572 (2011) (certified appeal argued September 24, 2012).

[24] "The function of the bill of particulars . . . is to enable the defendant to obtain a more precise statement of the offense charged in the information in order to prepare a defense." (Internal quotation marks omitted.) *State* v. *Sims*, 12 Conn. App. 239, 247, 530 A.2d 1069, cert. denied, 206 Conn. 801, 535 A.2d 1315 (1987).

[25] The defendant contends in his reply brief that the "possibility of an inconsistent verdict in this case is so remote as to be nonexistent" given the jury's rejection of the charge in count three, positing that, "[f]or the record to be unclear, the jury had to have found the defendant not guilty of subjecting [the victim] to contact with his own intimate parts for purposes of count three but guilty of doing that very thing for purposes of count four," positing that the state "in order to create confusion, thinks it [is] possible that the jury found that very fact under the more generally charged count four." The defendant's argument, however, fails to account for the equally illogical verdict on counts one and two, finding the defendant guilty of improper contact with the victim's intimate parts under the risk of injury statute, but not guilty of sexual assault in the fourth degree. Inasmuch as a jury verdict need not be factually or logically consistent to be valid; see, e.g., *State* v. *Arroyo*, 292 Conn. 558, 583, 973 A.2d 1254 (2009), cert. denied, U.S. , 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010); we decline to speculate as to the exact factual basis for the defendant's conviction on the fourth count.