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STATE OF CONNECTICUT *v.* JAMES T. WARD
(SC 18897)

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

*Argued March 19—officially released , 2012***

Bruce R. Lockwood, senior assistant state's attorney, with whom, on the brief, were *Patricia M. Froehlich*, state's attorney, *Matthew A. Crockett*, assistant state's attorney, and *Andrew J. Slitt*, deputy assistant state's attorney, for the appellant (state).

Pamela S. Nagy, special public defender, for the appellee (defendant).

Opinion

PALMER, J. A jury found the defendant, James T. Ward, guilty of the crimes of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), and kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A).¹ The trial court rendered judgment in accordance with the jury's verdict as to the charge of sexual assault in the first degree, but granted the defendant's motion for judgment of acquittal on the kidnapping charge on the ground that the state had failed to prove beyond a reasonable doubt that the defendant intended to prevent the liberation of the victim² for a longer period of time or to a greater degree than that which was necessary to commit the sexual assault as required by *State v. Salamon*, 287 Conn. 509, 542, 949 A.2d 1092 (2008).³ The state, with the trial court's permission, appeals from the judgment of the trial court vacating the jury's verdict of guilty on the kidnapping charge. We conclude that the trial court improperly granted the defendant's motion for judgment of acquittal and rendered judgment of not guilty on the charge of kidnapping in the first degree. In addition, we disagree with the defendant's claim that the judgment may be affirmed on the alternate ground that the kidnapping statute, as applied to the defendant's conduct, is unconstitutionally vague. We also disagree with the defendant's claim that the trial court's instructions on the charge of kidnapping in the first degree were misleading and that, as a result, he is entitled to a new trial. Accordingly, we reverse the judgment of the trial court only as to the kidnapping charge and remand the case to that court with direction to render judgment in accordance with the jury verdict.

The jury reasonably could have found the following facts, which are set forth in our decision in the defendant's separate appeal challenging his conviction of sexual assault in the first degree.⁴ "On November 21, 1988, the defendant sexually assaulted the victim at her home in Killingly. On that date the victim, a married twenty year old woman, was home alone. The house, located in a rural area near Route 101, was a small cape-style building with an unfurnished second floor and exterior doors located in the kitchen and living room. At approximately 11:45 a.m., while the victim was cleaning the house, she heard the kitchen doorbell ring. When the victim opened the kitchen door, she expected to see her neighbor and close friend who frequently visited. Instead, she saw the defendant at the door, whom she had never seen before. The defendant was approximately twenty-four years of age with brown shoulder length hair. He was approximately five feet and eleven inches in height and weighed approximately 190 pounds. In contrast, the victim was a little more than five feet tall and weighed approximately 100 pounds. The defendant told the victim that his car had

overheated and he asked for some water. The defendant also asked if he could use the bathroom. The victim agreed. While the defendant was using the bathroom, the victim filled a large glass jar with water from the kitchen sink. When the defendant returned from the bathroom, he stated that he might need to use the telephone. The only telephone in the house was located in the living room near the hallway. After deciding not to use the telephone, the defendant grabbed the jar of water that the victim had left on the kitchen counter and left. When the victim looked outside to see where the defendant had gone, she saw him outside pacing. The victim then resumed cleaning.

“Approximately five minutes later, the kitchen doorbell rang again. When the victim opened the door, she saw the defendant standing there with the empty jar. He asked for more water. The victim took the empty jar, left the defendant standing outside, closed the door, but did not lock it, and went to the sink to fill the jar. As she was filling the jar at the kitchen sink, the defendant pushed open the kitchen door and quickly came to her. The defendant grabbed a metal knife sharpening tool from the butcher block of knives on the kitchen counter. [The metal knife sharpening tool was approximately one foot in length and had a point on the end.] He then wrapped his arms around the victim and held the knife sharpening tool to her neck. He told the victim that ‘if you don’t do . . . what I tell you to do, I’m going to kill you. And if you do do what I say, then everything will be okay.’ The defendant started to drag the victim toward the hallway. The victim could not escape because the defendant was significantly larger and held her ‘very tightly.’ While holding the metal knife sharpening tool against her neck, the defendant dragged and pushed the victim down the hallway into the master bedroom [which contained a window]. The defendant pushed the victim down onto the bed and unbuttoned her shirt. The defendant took off the victim’s pants and underwear and threw them onto the floor. The victim continued to plead for him to stop. The defendant pulled the victim from the bed onto the floor. The defendant made the victim lie on her back with one of her hands over her head. The defendant laid on top of the victim [still holding the knife sharpening tool]. The defendant then stuck his tongue in the victim’s mouth and tried to kiss her. Next, he stuck his tongue inside the victim’s vagina. [The victim estimated that this occurred for one minute or less.] The defendant then took his pants off, got on top of the victim, and rubbed his penis against her vagina. After that, he ejaculated on the victim’s stomach. [According to the victim, this took place within less than one minute.] The defendant then got up, put on his pants and left the house. The victim estimated that she was in the bedroom with the defendant for approximately ‘[ten] to [fifteen] minutes.’

“A few minutes after the defendant had left the room, the victim put her clothes on and cleaned herself in the bathroom. She then proceeded into the kitchen and discovered that the defendant had left with the knife sharpening tool and water jar. She then telephoned her neighbor, who arrived shortly thereafter and found the victim crying ‘like a little baby.’ Thereafter, the police were summoned and obtained a statement from the victim. In her statement, the victim indicated that, after the defendant had finished sexually assaulting her, he ran out the door. The victim also indicated in her statement that when she looked out the window to see if the defendant was gone, she saw him running across the road.

“As part of the investigation, the police took the victim’s clothing and photographed her home. The police also made a composite sketch based upon the victim’s description of the defendant. In addition, the police obtained blood and DNA samples from the victim. . . .

“The state police closed the case in March, 1990. Subsequently, on June 2, 2005, the state police reopened the case after receiving information indicating that the defendant . . . might have been involved in the crime. Pursuant to a search warrant, the police obtained an oral swab and palm prints from the defendant. This evidence was submitted to the Connecticut state forensic laboratory.

“A subsequent examination of the victim’s blouse and sweater conducted at the state forensic laboratory detected the presence of semen. In 2006, DNA testing and comparison with known samples from the victim, her husband and the defendant revealed that the defendant’s DNA profile was consistent with the DNA profile of the semen on the victim’s clothing. The likelihood that someone else had the same DNA profile was less than one in three hundred million.” *State v. Ward*, 306 Conn. , , A.3d (2012).

In early 2007, the police arrested the defendant and charged him with one count of sexual assault in the first degree in violation of § 53a-70 (a) (1) and one count of kidnapping in the first degree in violation of § 53a-92 (a) (2) (A). The defendant was then tried before a jury. He elected not to testify at trial. As to the charge of first degree sexual assault, defense counsel conceded during closing argument that the defendant sexually assaulted the victim.⁵ After the jury found the defendant guilty of both charges, the defendant filed a motion for judgment of acquittal with respect to the kidnapping charge.⁶ Shortly before sentencing, the trial court granted the motion, concluding, in reliance on *State v. Salamon*, supra, 287 Conn. 509, that “no reasonable jury could have found under [the facts adduced at trial] that the defendant kidnapped the victim as defined by our statutes.” The trial court rendered judgment of

guilty as to the sexual assault charge and sentenced the defendant to a term of twenty years imprisonment on that count. With respect to the kidnapping charge, however, the trial court vacated the guilty verdict and rendered judgment of not guilty. This appeal by the state followed. Additional facts will be set forth as necessary.

I

The state claims that the trial court improperly granted the defendant's motion for judgment of acquittal after the jury had found the defendant guilty of kidnapping in the first degree. Specifically, the state argues that the jury reasonably could have found from the evidence adduced at trial that the defendant's restraint of the victim was not merely incidental to the sexual assault, but exceeded the restraint that was necessary to commit that crime. We agree.

The following additional facts and procedural history are relevant to the state's claim. The trial court issued instructions to the jury in accordance with the principles set forth in *Salamon*.⁷ The court explained, inter alia, that in order "[t]o establish that the defendant intended to prevent [the victim's] liberation, the state must prove that the defendant intended to prevent the [victim's] liberation for a longer time or to a greater degree than that which was necessary to commit the crime of sexual assault in the first degree." The court further charged that "[w]hether the movement or confinement of the [victim] was merely incidental to the sexual assault is a question of fact for you to determine. There is no minimal period of confinement or degree of movement necessary to establish kidnapping." Finally, the court stated: "In determining whether the defendant intended to prevent the [victim's] liberation beyond the degree necessary to commit the crime of sexual assault, you may consider all the relevant facts and circumstances of the case, including, but not limited to, the following factors: [1] The nature and duration of the [victim's] movement or confinement by the defendant; [2] whether that movement or confinement occurred during the commission of a separate offense; [3] whether the restraint was inherent in the nature of the separate offense; [4] whether the restraint prevented the [victim] from summoning assistance; [5] whether the restraint reduced the defendant's risk of detection; and finally, [6] whether the restraint created a significant danger or increased the [victim's] risk of harm independent of that posed by the separate offense."

Following the court's instructions, the jury returned a verdict of guilty as to both the sexual assault and the kidnapping charges. The defendant later filed a motion for judgment of acquittal with respect to the kidnapping conviction. During a hearing before the court, the defendant claimed that the state had failed to prove beyond a reasonable doubt that the defendant prevented the

victim's liberation for a longer period of time or to a greater degree than that which was necessary to commit the sexual assault. According to the defendant, "[t]he evidence presented at trial established that the movement of the victim by the defendant from the kitchen to the bedroom was minimal, and his restraint of her, was done for the sole purpose of committing the sexual assault."

In response, the state argued that the defendant could have sexually assaulted the victim in the kitchen, but instead, he "chose to threaten her, place a sharpening tool to her neck, and then move her from the kitchen sink area to the hallway." The state claimed that although the defendant could have sexually assaulted the victim at the "beginning of the hallway . . . he did not. He moved her further down the hall against her will to the master bedroom. . . . He could have sexually assaulted her on the floor in the bedroom, but he didn't do that at first. He pushed her to the bed, removed some clothing. Again, he could have sexually assaulted her on the bed, but did not. He moved her to the floor. On the floor, he didn't immediately sexually assault her. He threatened her, he kissed her against her will, he removed some more clothing, he then sexually assaulted her." According to the state, the defendant's actions indicated his intent to restrain the victim to a greater degree than was required to commit the underlying crime, and the jury, viewing this evidence in the light most favorable to the state, reasonably could have found the defendant guilty of kidnapping.

Following argument by counsel, the trial court granted the motion for judgment of acquittal, concluding that the evidence did not support a separate conviction of kidnapping in the first degree. The court emphasized that the incident had occurred during a period of only ten to twenty minutes, that the victim's house was very small, so that the distance from the kitchen to the first bedroom was short, and that the use of the weapon was "incidental and minimal as far as the crime of kidnapping would be concerned." In addition, the trial court indicated that it had reviewed this court's decision in *Salamon*, and stated that our decision in that case adopted the " 'modern approach' " employed by the majority of state courts, including California and New York.⁸ After reviewing cases from these two states, the court concluded that appellate courts in those jurisdictions, confronted with the facts of the present case, would find that the allegations of kidnapping were incidental to the underlying crime of sexual assault. Accordingly, the court set aside the verdict and rendered judgment of not guilty as to the kidnapping charge.

It is well established that the court has an inherent power to set a verdict aside. *State v. Avcollie*, 178 Conn. 450, 456, 423 A.2d 118 (1979), cert. denied, 444 U.S.

1015, 100 S. Ct. 667, 62 L. Ed. 2d 645 (1980). “That power, however, is subject to specific limitations. The trial court should not set a verdict aside where there was some evidence upon which the jury could reasonably have based its verdict, but should not refuse to set it aside where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles, or as to justify the suspicion that [the jurors] or some of them were influenced by prejudice, corruption or partiality. . . . Within these parameters, furthermore, the trial court may set a verdict aside even if the evidence was conflicting and there was direct evidence in favor of the party who prevailed with the jury. . . . The authority of the trial court to set aside a verdict that is against the weight of the evidence is grounded in the fact that the action of a jury may be as unreasonable, and as suggestive of being produced by improper influences, in passing upon the credibility of witnesses and in the weighing of conflicting testimony, as in any other respect. It is one of the duties of a judge, in the due performance of his [or her] part in jury trials, to see to it that such influences, apparently operating upon the jury, do not prevail, and manifest injustice thereby be done.” (Citation omitted; internal quotation marks omitted.) *State v. Griffin*, 253 Conn. 195, 200–201, 749 A.2d 1192 (2000).

“ ‘In passing upon a motion to set aside a verdict, the trial judge must do just what every juror ought to do in arriving at a verdict.’ ” *State v. Avcollie*, supra, 178 Conn. 456. Because “[t]he trial judge can gauge the tenor of the trial, as we, on the written record, cannot, and can detect those factors, if any, that could improperly have influenced the jury . . . an appellate court’s inquiry must focus on whether the trial court abused its broad discretion in acting on a motion to set aside a verdict that allegedly is contrary to the weight of the evidence.” (Citations omitted; internal quotation marks omitted.) *State v. Griffin*, supra, 253 Conn. 202. Ultimately, however, in determining whether the verdict should be set aside, the question is “whether the jury could reasonably have concluded, upon the facts established and the inferences reasonably drawn therefrom, that the cumulative effect of the evidence established guilt beyond a reasonable doubt.” (Internal quotation marks omitted.) *State v. Avcollie*, supra, 457–58; see also Practice Book § 42-51.

In order to find the defendant guilty of kidnapping in the first degree in violation of § 53a-92 (a) (2) (A), the jury was required to find that the state had proven beyond a reasonable doubt that the defendant abducted and restrained the victim with the intent to abuse her sexually. As previously noted, in *State v. Salamon*, supra, 287 Conn. 542, this court reconsidered its prior interpretation and construction of the kidnapping statutes and concluded that “[o]ur legislature . . .

intended to exclude from the scope of the more serious crime of kidnapping and its accompanying severe penalties those confinements or movements of a victim that are merely incidental to and necessary for the commission of another crime against that victim. Stated otherwise, to commit a kidnapping in conjunction with another crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime."

Although our holding in *Salamon* constituted a significant change with respect to our interpretation of the kidnapping statutes, we emphasized that "[o]ur holding does not represent a complete refutation of the principles established by our prior kidnapping jurisprudence. First, in order to establish a kidnapping, the state is not required to establish any minimum period of confinement or degree of movement. When that confinement or movement is merely incidental to the commission of another crime, however, the confinement or movement must have exceeded that which was necessary to commit the other crime. [T]he guiding principle is whether the [confinement or movement] was so much the part of another substantive crime that the substantive crime could not have been committed without such acts In other words, the test . . . to determine whether [the] confinements or movements involved [were] such that kidnapping may also be charged and prosecuted when an offense separate from kidnapping has occurred asks whether the confinement, movement, or detention was merely incidental to the accompanying felony or whether it was significant enough, in and of itself, to warrant independent prosecution." (Citation omitted; internal quotation marks omitted.) *Id.*, 546–47.

Guided by these principles, we rejected the defendant's claim in *Salamon* that he was entitled to a judgment of acquittal on the charge of kidnapping. *Id.*, 548–49. The defendant in that case, Scott Salamon, had assaulted the fifteen year old victim in a train station at night. As the victim ascended the stairs, Salamon approached the victim from behind. He grabbed her on the back of the neck, causing her to fall, and held her on the ground by her hair. As the victim screamed for him to let her go, Salamon punched the victim once in the mouth and attempted to thrust his fingers down her throat. The victim, who was able to free herself, estimated that she remained on the ground for at least five minutes. *Id.*, 515, 549. In determining whether the jury reasonably could have found Salamon guilty of kidnapping, we stressed that whether the confinement or movement of a victim is merely incidental to or necessary for the underlying crime depends on the particular facts and circumstances of each case. *Id.*, 547. We concluded that on the basis of these facts, a juror reasonably could find that Salamon's restraint of the

victim was not merely incidental to his assault of the victim. *Id.*, 549. In reaching that conclusion, we noted that the victim had testified that Salamon, after attacking her, held her down for five minutes or more. *Id.* We further observed that, although Salamon punched the victim once and shoved his fingers into her mouth, “that conduct was very brief in contrast to the extended duration of [his] restraint of the victim. In light of the evidence, [we further concluded that] a juror reasonably could [have found] that [Salamon] pulled the victim to the ground primarily for the purpose of restraining her, and that he struck her and put his fingers in her mouth in an effort to subdue her and to prevent her from screaming for help so that she could not escape. In such circumstances, we [could not] say that [Salamon’s] restraint of the victim necessarily was incidental to his assault of the victim.” *Id.*, 549–50.

Because the question of whether Salamon’s conduct constituted a kidnapping was a factual question for determination by a properly instructed jury, and because the jury had not received such an instruction, we concluded that Salamon was entitled to a new trial on the kidnapping charge. *Id.*, 550. We explained that “[f]or purposes of making that determination, the jury should be instructed to consider the various relevant factors, including the nature and duration of the victim’s movement or confinement . . . whether that movement or confinement occurred during the commission of the separate offense, whether the restraint was inherent in the nature of the separate offense, whether the restraint prevented the victim from summoning assistance, whether the restraint reduced the defendant’s risk of detection and whether the restraint created a significant danger or increased the victim’s risk of harm independent of that posed by the separate offense.” *Id.*, 548. Of course, this list of factors is nonexclusive, and the jury is free to consider any other facts or circumstances that are relevant to its determination.

In sum, our decision in *Salamon* clearly established that the key question in such cases is not whether the victim was confined or restrained for a lengthy period of time or moved a significant distance, but whether the confinement or movement was incidental to and necessary for the commission of another crime. Equally important, we established that the jury is entrusted to make that complex factual determination upon consideration of the various relevant factors, including those set forth in *Salamon*. *Id.*

Shortly after we issued our decision in *Salamon*, we considered a defendant’s challenge to his conviction of kidnapping in the first degree, and concluded that the defendant’s confinement of the victim was merely incidental to and necessary for the sexual assault and could not be charged separately under § 53a-92 (a) (2) (A). *State v. Sanseverino*, 287 Conn. 608, 620, 949 A.2d 1156

(2008), overruled in part by *State v. DeJesus*, 288 Conn. 418, 437, 953 A.2d 45 (2008), superseded in part after reconsideration by *State v. Sanseverino*, 291 Conn. 574, 969 A.2d 710 (2008).

In *Sanseverino*, the defendant, Paolino Sanseverino, followed the victim to the back room of a bakery and grabbed her. When the victim told him to get away, Sanseverino “grabbed [the victim’s] arms, pushed her against the wall, pinned her arms over her head with his arm, and pressed his body against hers so she could not move. She twice yelled at him to stop, but he did not. She testified that she became afraid and that she froze. While still keeping her pinned [with one hand], he pulled her pants down, then pulled his pants down. He inserted his penis inside her vagina and then, prior to climaxing, pulled out and ejaculated on the floor.” (Internal quotation marks omitted.) *Id.*, 615. He then let the victim go. After scrutinizing the record, this court found no evidence that Sanseverino restrained the victim to any greater degree than that necessary to commit the sexual assault. *Id.*, 625. This court explained that “[n]one of the restraint that [Sanseverino] applied to [the victim] was for the purpose of preventing her from summoning assistance nor did it significantly increase the risk of harm to [the victim] outside of that created by the assault itself.” *Id.* We also emphasized that the facts in *Sanseverino* were in “direct contrast” to the facts in *Salamon*, in which the jury reasonably could have concluded that Salamon “pulled the victim to the ground *primarily* for the purpose of restraining her, and that he struck her and put his fingers in her mouth in an effort to subdue her and to prevent her from screaming for help so that she could not escape.”⁹ (Emphasis in original; internal quotation marks omitted.) *Id.*, 626.

Guided by our analysis in *Salamon* and *Sanseverino*, we turn to the question of whether the jury in the present case reasonably could have concluded, based upon the facts and the reasonable inferences drawn therefrom, that the evidence established the defendant’s guilt beyond a reasonable doubt. As previously indicated, the evidence adduced at trial established that the defendant approached the victim from behind while she was at the kitchen sink, grabbed a knife sharpening tool from a butcher block on the kitchen counter, wrapped his arms around her and held the knife sharpening tool to her neck. The defendant threatened that if she did not follow his instructions, he would kill her. Although the defendant was twice the victim’s size and held her very tightly so that she could not escape, the defendant continued to hold the knife sharpening tool against her neck as he dragged her from the kitchen to the hallway and from the hallway to the master bedroom. Once in the master bedroom, the defendant pushed the victim onto the bed. He later pulled her from the bed to the floor. The defendant laid on top of the victim with the

knife sharpening tool, stuck his tongue in her mouth and tried to kiss her before he took his pants off, rubbed his penis against her vagina and ejaculated on her stomach. Although the victim estimated that she was in the bedroom for ten to fifteen minutes, she believed that the entire sexual assault lasted only two minutes.

Although this is a close case, we conclude that the jury, which had been instructed on the applicable legal principles in accordance with *Salamon*, reasonably could have found that the defendant's confinement or movement of the victim was not merely incidental to the sexual assault. The victim, who weighed a mere 100 pounds, testified that she could not escape because the defendant was twice her size and held her very tightly. By moving the victim away from the kitchen door, the defendant made the possibility of escape even more remote. From this testimony, it was reasonable for the jury to conclude that the defendant could have sexually assaulted the victim without threatening to kill her and without continuously holding the knife sharpening tool to her neck, and, therefore, that the force used by the defendant exceeded the amount necessary to commit the sexual assault. It was also reasonable to infer that the defendant, by engaging in this conduct, intended to frighten and subdue the victim to prevent her from struggling, trying to escape or summoning assistance. In light of the evidence, the jury also reasonably could have concluded that the defendant increased the risk of harm to the victim by holding the pointed metal knife sharpening tool to her neck and by moving her away from the kitchen door, which not only made it less likely that she would escape, but also made it less likely that the crime would be detected.¹⁰ *State v. Reyes*, 695 N.W.2d 245, 258 (S.D. 2005) (“‘most movement of [sexual assault] victims by their attackers is designed to seclude the victim from possible assistance and to prevent escape—which inevitably increases the risk of harm to the victim’”). Moreover, given the disparity in size and strength between the defendant and the victim, it was reasonable for the jury to conclude that the defendant did not need to move the victim from the kitchen in order to sexually assault her. If he intended to move her to a location that was more comfortable for him, he could have quickly moved her to the bedroom and onto the bed. Instead, he moved her from the kitchen to the bedroom, and ultimately onto the floor. Finally, although the incident lasted ten to fifteen minutes, the sexual assault itself lasted only two minutes.

Although the defendant asserts that there was no evidence that he moved the victim to avoid discovery because he did not move the victim from a public area to an isolated area, the defendant's decision to move the victim away from the kitchen door to the more secluded bedroom supported the reasonable inference that he sought to avoid detection. That inference gains

additional support from the fact that the defendant moved the victim from the bed to the floor so that they would not be visible through the window in the master bedroom.

In short, although the defendant did not confine the victim for a lengthy period of time or move her a significant distance, the facts and circumstances of the present case, considered as a whole, support the jury's determination that the restraint of the victim was not merely incidental to or an inherent part of the sexual assault.¹¹ Our decision is not based on any single fact, but on the cumulative effect of the evidence adduced at trial.¹² Admittedly, the fact specific nature of the inquiry makes it difficult to draw a precise line between cases in which the evidence as a whole supports an independent kidnapping conviction and cases in which a separate kidnapping conviction cannot stand. As in all cases that require a careful assessment of the facts, however, "we must defer to the jury's assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *State v. Coleman*, 304 Conn. 161, 169, 37 A.3d 713 (2012); see also *State v. White*, 362 S.W.3d 559, 577 (Tenn. 2012) (emphasizing that whether evidence establishes each and every element of kidnapping beyond reasonable doubt is question for jury properly instructed under law, and jury, "whose primary obligation is to ensure that a criminal defendant has been afforded due process, must evaluate the proof offered at trial and determine whether the [s]tate has met its burden").

Our conclusion finds additional support in the decisions of courts in other jurisdictions that have adopted the so-called "modern approach" with respect to the crime of kidnapping.¹³ In many of those decisions, in determining whether the movement or confinement of the victim was incidental to the underlying crime, courts have focused on factors that are set forth in *Salamon*, such as whether the movement or confinement lessened the risk of detection or increased the likelihood of harm to the victim; *State v. Salamon*, supra, 287 Conn. 548; as well as whether the movement or confinement made the underlying crime easier to commit.

In *Faison v. State*, 426 So. 2d 963, 964 (Fla. 1983), for instance, the Supreme Court of Florida upheld the defendant's convictions of kidnapping and sexually assaulting two women in two separate incidents. In the first incident, the defendant dragged the victim, who was alone in a small office building, from her desk in front of a large window to the back of the office. He sexually assaulted her, moved her to a restroom and assaulted her again. The defendant then broke into the home of the second victim and dragged her from the kitchen down a hallway into a bedroom. When the victim was nearly unconscious from fighting, the defen-

dant sexually assaulted her. *Id.* The court emphasized that, in both incidents, the defendant had dragged the victims from “an area where the [assault] could have been more easily observed through a window—in the first victim’s office, and the second one’s kitchen—to the ‘relative seclusion’ of the rear and restroom of the office and the bedroom of the home, respectively. Moreover, each asportation removed the victim from access to a door—again, in the office and in the kitchen—through which she might have escaped. Hence, each made the sexual [assault] substantially easier to commit *and* substantially reduced the danger of detection. Compare *Simpkins v. State*, [395 So. 2d 625, 626 (Fla. App. 1981)] (mere forced movement from bedroom to living room to accomplish sexual [assault] not kidnapping). The fact that relatively short distances were involved makes no difference.” (Emphasis in original.) *Faison v. State*, *supra*, 966; see also *People v. Shadden*, 93 Cal. App. 4th 164, 169, 112 Cal. Rptr. 2d 826 (2001) (although defendant moved victim only nine feet when he moved her from front of store to back room, movement placed her out of public view, making it less likely that crime would be discovered and making it easier for him to sexually assault and injure her); *Kent v. State*, 702 So. 2d 265, 266–68 (Fla. App. 1997) (kidnapping conviction upheld when defendant broke into victim’s home by knocking down front door, dragged her down hall to bedroom, threatened her with knife and sexually assaulted her; movement of victim was not merely incidental to sexual assault, but made crime easier to commit or lessened the risk of detection), review denied, 717 So. 2d 533 (Fla. 1998); *State v. Reyes*, *supra*, 695 N.W.2d 257–58 (upholding kidnapping conviction despite defendant’s claim that eight year old victim followed him voluntarily from public sidewalk to shed in backyard and that movement posed no risk of harm greater than that posed by intended sexual assault; jury reasonably could have inferred, from victim’s young age and all circumstances in case, that defendant’s conduct involved implied physical force or fear, and movement of victim to shed, which secluded victim from possible assistance and to prevent escape, increased risk of harm to victim).

The facts and analysis in these cases reinforce our conclusion that the jury, in determining whether the defendant’s conduct constituted a kidnapping, reasonably could have concluded that the defendant’s confinement and movement of the victim exceeded that which was necessary to sexually assault her, increased the risk of harm to her and were intended to impede her ability to escape or to summon assistance. Because the jury reasonably could have concluded that the evidence adduced at trial established that the defendant was guilty of kidnapping in the first degree beyond a reasonable doubt, the trial court improperly granted the defendant’s motion for judgment of acquittal and its judgment

as to the kidnapping charge must be reversed.¹⁴

II

The defendant claims that the trial court's judgment may be affirmed on the alternate ground that § 53a-92 (a) (2) (A) is unconstitutionally vague as applied to his conduct, in violation of his constitutional right to due process.¹⁵ In particular, he contends that the terms “‘[r]estrain’” and “‘[a]bduct’” in General Statutes § 53a-91 (1) and (2)¹⁶ are impermissibly vague, leaving a person of ordinary intelligence to guess at their meaning and providing no notice of when the movement or confinement of a person results in an abduction.¹⁷ The defendant does not claim that he did not know that his conduct was criminal but, rather, that if “a different state's attorney [had] been assigned to prosecute this case, [he] might have been charged with unlawful restraint and not kidnapping.” We conclude that the judgment may not be affirmed on this alternate ground.

Whether a statute is unconstitutionally vague presents a question of law over which we exercise plenary review. *State v. Winot*, 294 Conn. 753, 759, 988 A.2d 188 (2010). A statute is not void for vagueness “unless it clearly and unequivocally is unconstitutional, making every presumption in favor of its validity. . . . To demonstrate that [a statute] is unconstitutionally vague as applied to him, the [defendant] therefore must . . . demonstrate beyond a reasonable doubt that [he] had inadequate notice of what was prohibited or that [he was] the victim of arbitrary and discriminatory enforcement. . . . [T]he void for vagueness doctrine embodies two central precepts: the right to fair warning of the effect of a governing statute . . . [or regulation] and the guarantee against standardless law enforcement. . . . References to judicial opinions involving the statute, the common law, legal dictionaries, or treatises may be necessary to ascertain a statute's meaning to determine if it gives fair warning.” (Internal quotation marks omitted.) *Id.*

The primary question, then, is whether the defendant had fair warning in 1988 that his movement of the victim could constitute the basis for an independent kidnapping conviction. We conclude that he did. At that time, we routinely held that “because the statutory definitions of the terms restrain and abduct contain no time or distance specifications, the offense of kidnapping does not require proof that the victim was confined for any minimum period of time or moved any minimum distance.” (Internal quotation marks omitted.) *Id.*, 761–62; *id.*, 764–65 (citing cases that upheld kidnapping convictions when victim was moved short distance and/or confined for brief time period). Given our kidnapping jurisprudence at the time, there is no question that the defendant had fair warning in 1988 that his movement of the victim could support an independent kidnapping conviction.

The defendant argues, however, that because our decision in *Salamon* “undermined the holding of . . . prior cases that rejected void for vagueness claims under the kidnapping statute where the defendant claimed that the restraint was incidental to the underlying crime,” and because the defendant “did not have the benefit of the *Salamon* court’s interpretation” of the terms restrain and abduct, it would be inappropriate to consider cases that predate *Salamon* when evaluating whether the defendant had proper notice. To the extent that we understand this claim, we reject it. We are not willing to turn a blind eye to whether the defendant actually had fair warning when he decided to commit the crime in 1988 simply because we restricted our interpretation of the kidnapping statute twenty years after his decision to act, especially when the defendant received the benefit of that more restrictive interpretation when the jury was instructed on the *Salamon* factors.¹⁸

We also reject the defendant’s claim that § 53a-92 (a) (2) (A) is unconstitutionally vague because the statute was enforced in an arbitrary and discriminatory manner. Not only is it well established that prosecutors have “‘broad discretion in determining what crime or crimes to charge in any particular situation’ ”; *State v. Golodner*, 305 Conn. 330, 356, A.3d (2012); but, by the time the defendant was prosecuted in 2009, this court had clarified in *Salamon* that an independent kidnapping conviction cannot stand on restraint that is merely incidental to and necessary for the commission of another crime. *State v. Salamon*, supra, 287 Conn. 542. Most importantly, the defendant was found guilty of kidnapping in the first degree by a jury instructed in accordance with *Salamon*. On the basis of the foregoing, we cannot conclude that the defendant has met the substantial burden of showing that § 53a-92 (a) (2) (A) provided inadequate notice that his conduct was prohibited or that he was subjected to arbitrary law enforcement.

III

Finally, the defendant claims that if his kidnapping conviction is reinstated, he is entitled to a new trial on the ground that the trial court’s instructions on kidnapping were misleading. We disagree.

The following facts and procedural history are relevant to the defendant’s claim. The defendant filed a written request to charge that suggested specific language concerning the crime of kidnapping and the effect of the factors in *Salamon*. During the charge conference, the trial court indicated that it would use its own language and gave both parties a copy of that language. The next day, the defendant objected to the court’s proposed instruction. The defendant first noted that the court’s proposed instructions provided that “[w]hether

the movement or confinement of the [victim] was merely incidental to the sexual assault is a question of fact for you to determine.” (Internal quotation marks omitted.) He then argued that this single reference to the word “incidental” in the charge was inadequate to highlight to the jury “the importance of that word,” and failed to explain to the jury that it was required to find the defendant not guilty of the kidnapping charge if it found “that the conduct was incidental [to the commission of the sexual assault].” The court noted the defendant’s objection but declined to alter the charge.

In its actual instructions to the jury, the court first explained that in order to find the defendant guilty of kidnapping in the first degree, the state was required to prove beyond a reasonable doubt the elements of that crime, which included, inter alia, the requirement that “the defendant abducted another person. Abduct means to restrain a person with the intent to prevent her liberation by using or threatening to use physical force or intimidation.” The court subsequently instructed: “To establish that the defendant intended to prevent [the victim’s] liberation, the state must prove that the defendant intended to prevent the [victim’s] liberation for a longer time or to a greater degree than that which was necessary to commit the crime of sexual assault in the first degree.

“Whether the movement or confinement of the [victim] was merely incidental to the sexual assault is a question of fact for you to determine. There is no minimal period of confinement or degree of movement necessary to establish kidnapping.

“In determining whether the defendant intended to prevent the [victim’s] liberation beyond the degree necessary to commit the crime of sexual assault, you may consider all the relevant facts and circumstances of the case, including, but not limited to, the following factors: [1] The nature and duration of the [victim’s] movement or confinement by the defendant; [2] whether that movement or confinement occurred during the commission of a separate offense; [3] whether the restraint was inherent in the nature of the separate offense; [4] whether the restraint prevented the [victim] from summoning assistance; [5] whether the restraint reduced the defendant’s risk of detection; and finally, [6] whether the restraint created a significant danger or increased the [victim’s] risk of harm independent of that posed by the separate offense.” At the conclusion of its charge on kidnapping in the first degree, the court again named the elements of the crime and stated: “If you unanimously find that the state has proved beyond a reasonable doubt each of these elements of the crime of kidnapping in the first degree, then you shall find the defendant guilty. On the other hand, if you unanimously find that the state has failed to prove beyond a reasonable doubt any of the elements, then you shall find the

defendant not guilty.”

After the court had given its instructions, the defendant reiterated that the “instructions don’t tell the jury what their verdict has to be if they find that the conduct was incidental to the commission of a sexual assault. And if I didn’t say it before, we’re asking the court to instruct the jury that if they find incidental conduct, that their verdict has to be not guilty.” The court declined to give an additional instruction because the original instruction made it “clear that they need to find that the defendant intended to prevent her liberation and they can’t find that if they find that it was incidental. So I think that that’s covered.”

Under the well established standard of review for claims of instructional impropriety, “we examine the [trial] court’s entire charge to determine whether it is reasonably possible that the jury could have been misled by the omission of the requested instruction. . . . While a request to charge that is relevant to the issues in a case and that accurately states the applicable law must be honored, a [trial] court need not tailor its charge to the precise letter of such a request.” (Internal quotation marks omitted.) *State v. Golodner*, supra, 305 Conn. 351. “[I]ndividual jury instructions should not be judged in artificial isolation, but must be viewed in the context of the overall charge. . . . The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Thus, [t]he whole charge must be considered from the standpoint of its effect on the [jurors] in guiding them to the proper verdict . . . and not critically dissected in a microscopic search for possible error.” (Internal quotation marks omitted.) *State v. Peeler*, 271 Conn. 338, 360–61, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005).

On appeal, the defendant concedes that the trial court instructed the jury with respect to the factors set forth in *Salamon*, and does not claim that the instructions were inaccurate. Rather, the defendant asserts that the trial court’s instructions were misleading because they omitted language that would have “clarified the purpose of applying the *Salamon* factors,” and failed to include the explanation that if the jury concluded that the defendant’s restraint of the victim was merely incidental to the commission of the sexual assault, it was required to find the defendant not guilty of kidnapping in the first degree. We disagree. Indeed, we rejected such a claim in *State v. Terwilliger*, 294 Conn. 399, 417, 984 A.2d 721 (2009) (rejecting claim that constitution requires that trial court must also instruct jury about consequences of state’s failure to meet its burden). Moreover, the defendant points to no authority indicating that the court must use the exact language proposed by the defendant. The court’s instructions in the present

case properly informed the jury that the state must prove that the defendant intended to prevent the victim's liberation for a longer time or to a greater degree than that which was necessary to commit the crime of sexual assault in the first degree. The charge informed the jurors that this was a question of fact for the jury to determine, and set forth the nonexclusive list of factors to be considered in making this determination. Finally, the court charged that if the state failed to meet its burden of proof with respect to any of the elements of kidnapping in the first degree, it must find the defendant not guilty. Considering the charge as a whole, we cannot conclude that it was reasonably possible that the jury was misled by the omission of the defendant's suggested language from the trial court's instruction.

The judgment is reversed only with respect to charge of kidnapping in the first degree, and the case is remanded with direction to render judgment of guilty in accordance with the jury's verdict.

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.

** September 10, 2012, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

¹ General Statutes § 53a-92 provides in relevant part: "(a) 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) . . . abuse him sexually"

² In accordance with our policy of protecting the privacy interests of the victims of sexual assault, we decline to identify the victim by name. See General Statutes § 54-86e.

³ As we explain more fully hereinafter, in *State v. Salamon*, supra, 287 Conn. 542, we reconsidered our prior interpretation and construction of the kidnapping statutes and concluded that when a defendant's movement or confinement of a victim is "merely incidental to and necessary for the commission of another crime against that victim," the incidental movement or confinement cannot support an independent conviction of kidnapping.

⁴ Our opinion in that appeal, in which we affirm the judgment of conviction of sexual assault in the first degree, was released on the same date as our opinion in the present appeal. See *State v. Ward*, 306 Conn. 306, 310 A.3d 1000 (2012).

⁵ Although conceding the sexual assault, defense counsel asserted in closing argument that the five year statute of limitations period had run and that the state had failed to prove that the defendant had fled the jurisdiction, which would have tolled the statute of limitations. See *State v. Ward*, supra, 306 Conn. 306.

⁶ The defendant first filed a motion for judgment of acquittal after the close of the state's case, but the trial court denied that motion.

⁷ The defendant argues that the trial court's charge was misleading and argues that, as a result, he would be entitled to a new trial in the event his kidnapping conviction is reinstated. We disagree with his claim for the reasons discussed in part III of this opinion.

⁸ In *State v. Salamon*, supra, 287 Conn. 544, we explained that the majority of state courts have concluded that "the crime of kidnapping does not include conduct involving a restraint that is merely incidental to the commission of some other crime" The states that have adopted this viewpoint, called the "'modern' approach"; id., 546; "share a common theme, namely, that it is unlikely that the legislature intended to expose an accused to a kidnapping conviction, and the severe sanctions accompanying such a conviction, when the restraint involved is merely incidental to the commission of a separate, underlying crime." Id. Despite that common philosophy, however, the cases from the various jurisdictions involve different statutory formulations and analyses. Id. Consequently, while cases from other jurisdictions that have adopted the modern approach may be instructive, they do not establish one

unified method for assessing whether the jury reasonably could infer from the facts of a certain case that the defendant's restraint of the victim was merely incidental to the underlying crime. See *State v. Stouffer*, 352 Md. 97, 110, 721 A.2d 207 (1998) (although different courts focus on different factors and employ different tests, “[t]he one thing that seems clear from the decisions following the majority view is that most of them are fact-specific [and] [w]hether the confinement or movement of the victim is merely incidental to another crime depends, in nearly every case, on the circumstances, even when [different types of] guidelines . . . are applied”).

⁹ In *State v. Sanseverino*, supra, 287 Conn. 625, 641, we concluded that because there was insufficient evidence to support the kidnapping conviction in light of the standard adopted in *Salamon*, the judgment must be reversed and the case remanded to the trial court with direction to render a judgment of acquittal. We later recognized in *State v. DeJesus*, supra, 288 Conn. 437, that we were wrong to have remanded the case for a judgment of acquittal, and that the proper remedy was to remand the case for a new trial. In response to the state's motion for reconsideration of *Sanseverino*, we issued a second opinion; *State v. Sanseverino*, supra, 291 Conn. 577; explaining that the state was entitled to the opportunity to adduce additional evidence on retrial, if such evidence was available, sufficient to support a kidnapping conviction. *Id.*, 579, 589–90 and n.10. We recognized that it was unlikely that the state could produce such evidence given the factual circumstances of the crime, but explained that the decision whether to proceed with a new trial, at least in the first instance, was one for the state, and not for this court, to make. *Id.*, 589 n.10. In addition, we noted that the state, in its motion for reconsideration, did not challenge our determination that, under *Salamon*, the defendant was entitled to reversal of his conviction of kidnapping in the first degree. *Id.*, 585 n.7. Accordingly, although we reversed “that portion of our judgment in *Sanseverino* ordering that a judgment of acquittal be rendered on [the kidnapping] charge”; *id.*, 579; our conclusion that no reasonable jury could have found Sanseverino guilty of kidnapping in the first degree on the basis of the facts proffered at trial remains valid.

¹⁰ We reject the defendant's claim that “the knife sharpening tool did not increase the risk of harm above and beyond the crime of sexual assault because one of the elements of that crime the state had to prove was the threat of the use of force against the [victim].” Even if, as the defendant claims, the use of the knife sharpening tool coupled with the threat to kill the victim forced the victim to submit to the sexual assault and established that element of the crime, the victim's testimony indicated that the sexual assault lasted only two minutes. As a result, it was also reasonable for the jury to infer that the continuous use of the knife sharpening tool throughout the ten to fifteen minute incident increased the risk of harm beyond the harm associated with the sexual assault. *State v. Coleman*, 304 Conn. 161, 169, 37 A.3d 713 (2012) (“the jury's function is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical”).

¹¹ The defendant contends that “it defies logic that the slight movement of [the victim] from the kitchen to her bedroom would amount to kidnapping. To so find would eviscerate the holding of *Salamon*” As we explained in *Salamon*, however, “in order to establish a kidnapping, the state is not required to establish any minimum period of confinement or degree of movement.” *State v. Salamon*, supra, 287 Conn. 546. The question is whether the confinement or movement *exceeded* that which was necessary to commit the other crime and whether the confinement or movement “was so much the part of another substantive crime that the substantive crime could not have been committed without such acts” (Internal quotation marks omitted.) *Id.* Here, as in *Salamon*, it is significant that although the defendant did not restrain the victim for a lengthy period of time or move the victim a significant distance, the assault itself was brief in contrast to the duration of the restraint of the victim. *Id.*, 549. In the present case, as in *Salamon*, the jury reasonably could have found that the defendant sought to prevent the victim from summoning help and from trying to escape. *Id.* In addition, the evidence here goes beyond the evidence in *Salamon*, because the jury in the present case also could have found that the defendant increased the risk of harm to the victim beyond that posed by the sexual assault by using a weapon and by moving the victim away from the door that represented her best chance for escape or for discovery.

¹² Indeed, we might not reach the same result in the absence of any one of the facts on which the state relied to persuade the jury that the defendant

had kidnapped the victim in addition to sexually assaulting her.

¹³ See footnote 8 of this opinion.

¹⁴ Because we conclude that the trial court improperly granted the defendant's motion for judgment of acquittal and disagree with the defendant's alternative arguments; see parts II and III of this opinion; it is not necessary to reach the state's claim that the trial court should have modified the judgment to reflect a conviction of the lesser included offense of unlawful restraint in the second degree in violation of General Statutes § 53a-96.

¹⁵ The defendant does not raise a distinct vagueness claim under the state constitution. Previously, we have applied the same analysis to vagueness claims brought pursuant to both the state and the federal constitutions. *State v. Winot*, 294 Conn. 753, 758 n.5, 988 A.2d 188 (2010).

¹⁶ General Statutes § 53a-91 provides in relevant part: "(1) 'Restrain' means to restrict a person's movements intentionally and unlawfully in such a manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent. . . .

"(2) 'Abduct' means to restrain a person with intent to prevent his liberation by either (A) secreting or holding him in a place where he is not likely to be found, or (B) using or threatening to use physical force or intimidation. . . ."

¹⁷ Because the defendant failed to raise this claim at trial, he seeks to prevail under *State v. Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). The defendant has satisfied the first two prongs of *Golding* by providing an adequate record for review and by alleging the violation of his constitutional right to due process. See *State v. Indrisano*, 228 Conn. 795, 800–801, 640 A.2d 986 (1994). Our analysis focuses on the third prong, which asks whether the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial. *Id.*, 801.

¹⁸ Of course, "[t]here can be no doubt that a deprivation of the right of fair warning can result . . . also from an unforeseeable and retroactive judicial *expansion* of narrow and precise statutory language." (Emphasis added.) *State v. Courchesne*, 296 Conn. 622, 722, 998 A.2d 1 (2010). The defendant makes no such claim in the present case, however, because in *Salamon*, we interpreted the kidnapping statute more restrictively than we had at the time the defendant engaged in the criminal conduct at issue here.
