STATE OF CONNECTICUT *v.* MICHAEL G. MAGUIRE
(SC 18828)

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

Argued January 10—officially released November 19, 2013

Richard Emanuel, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom were *Sharmese L. Hodge*, assistant state's attorney, and, on the brief, *Stephen J. Sedensky III*, state's attorney, for the appellee (state).

Opinion

PALMER, J. A jury found the defendant, Michael G. Maguire, guilty of risk of injury to a child, in violation of General Statutes § 53-21 (a) (2), and of sexual assault in the fourth degree, in violation of General Statutes § 53a-73a (a) (1) (A). The trial court rendered judgment in accordance with the jury verdict, and the defendant appealed.[1] On appeal, the defendant seeks a new trial, claiming that (1) the deputy assistant state's attorney (prosecutor) made certain improper statements during closing arguments and in connection with defense counsel's cross-examination of the key state's witness, (2) the trial court improperly admitted into evidence a video recording and transcript of a forensic interview of the then eight year old female victim[2] under the tender years exception to the hearsay rule, codified at General Statutes § 54-86*l* (a)[3] and § 8-10 of the 2009 edition of the Connecticut Code of Evidence,[4] without first conducting a hearing, as required by those provisions, to determine whether the circumstances surrounding the interview provided particularized guarantees of trustworthiness and that the interview was not conducted in preparation of a legal proceeding, and (3) the trial court improperly permitted the state to adduce certain testimony as substantive evidence of guilt under the tender years hearsay exception because such testimony was admissible solely as constancy of accusation evidence; see Conn. Code Evid. § 6-11 (c);[5] and, thus, for the limited purpose of corroborating the victim's testimony. We agree with the defendant's claim of prosecutorial impropriety and, on that basis, reverse the trial court's judgment. With respect to the defendant's remaining claims, which we address because they are likely to arise again at a new trial, we agree with the defendant that the trial court improperly admitted the forensic interview evidence without first conducting a hearing to determine whether the victim's statements during the interview were trustworthy and were not elicited in preparation of a legal proceeding. We further conclude that the trial court properly admitted the tender years testimony as substantive evidence of guilt.

The state's evidence against the defendant, which the jury reasonably could have credited, may be summarized as follows. The victim's mother, S, met the defendant in 2005, having been introduced by S's girlfriend, G. At the time, the defendant was living in California. In October, 2007, the defendant relocated to Connecticut to be closer to his family. Shortly thereafter, he began dating S's cousin, D. The defendant and D spent a great deal of time socializing with S and G, and both the defendant and D occasionally helped S with her children.

When the defendant arrived in Connecticut in October, 2007, S was in the midst of an acrimonious divorce

from the victim's father, F. A stay-at-home mother, S hired the defendant to help her with the victim and the victim's three brothers. In particular, S paid the defendant to care for the children and to act as a buffer between her and F on the days that F would come to pick up the children. The defendant would transition the children from the house to F's car so that S would not have to interact with F. S also hired the defendant to transcribe threatening telephone conversations between her and F that she secretly had recorded for possible use in court. In the conversations, F often threatened S about her relationship with G and what he was willing to do to obtain custody of the children.

On the days that the defendant went to the victim's home to transition the children to F's care, the defendant would play with the children until F arrived. In February, 2008, S and G went to Indonesia for one month, and the defendant and D housesat for S while she was away. Although the children spent that month with F, the school bus would drop them off each afternoon at S's house, where F's housekeeper would meet them and take them back to F's house. The defendant never spent the night at the victim's home when the children were there. In April, 2008, F filed a motion for sole custody of the children because he objected to S's romantic relationship with G. He also filed a motion for an order prohibiting G from spending the night at S's house. From February to June, 2008, the defendant and D lived at G's house because G spent most of her nights at S's house.

On June 25, 2008, the victim was playing outside with her ten year old brother, B.[6] Their adult cousin, C, who recently had moved in with the family, was babysitting for them while S was out. While playing, the victim told B that, a few weeks earlier, the defendant had placed his hand inside her underwear and then smelled his fingers. Upon learning about this incident, B ran into the house to tell C what the victim had told him. The victim ran after B to stop him from telling C but was unable to catch B before he told C. After speaking to B, C then spoke to the victim, who confirmed that B's account of what the victim had told him was accurate and truthful. The victim grew very upset when C told her that he was going to inform S what the victim had told B about the defendant. When S returned home later that evening, C informed her about the victim's allegations. The next morning, S called a family therapist that she and F had been seeing and scheduled an emergency session. S and F met with the therapist later that day to discuss the victim's allegations against the defendant. As a mandatory reporter, the therapist reported the allegations to the Department of Children and Families (department), which, in turn, forwarded the information to the Redding Police Department. Later that afternoon, S and F went to the Redding police station to file a formal complaint against the defendant.

While there, they spoke with Officer Anthony Signore. After taking their statement, Signore contacted the Danbury Regional Child Advocacy Center (child advocacy center) to schedule a forensic interview of the victim by a multidisciplinary investigative team (MIT). An MIT consists of mental health and law enforcement professionals, as well as department employees, all of whom work collaboratively to investigate and treat cases of reported sexual abuse.

On July 1, 2008, Donna Meyer, the director of the MIT program at the child advocacy center, conducted a forensic interview of the victim while Signore and a department caseworker watched from behind two-way glass that was tinted to prevent the victim from seeing them. During the interview, which was video recorded and transcribed for subsequent investigative and trial use, Meyer asked the victim whether anyone ever had tried to touch her on her "private." She responded that the defendant had touched her private once. Meyer asked the victim to tell her everything that she remembered about the incident, beginning with where she was when it happened. The victim responded that the defendant had put his hand inside her pants on one occasion while the two of them were sitting on the couch in the television room at S's house. Meyer asked the victim whether the defendant had wanted her to do anything to his body. She responded, "I think he pulled out this thing and then it was poking out of his pants." Meyer then asked the victim, "[s]o you saw his private?" The victim responded in the affirmative.

When Meyer asked the victim to demonstrate on an anatomically correct doll what the defendant had done to her, the victim put her hand inside the underwear of the doll and moved her hand around. Later, when Meyer asked at what point the defendant had shown her his "private," the victim responded, "well . . . I didn't see it." When asked whether the defendant had tried "to get [her] to touch his private or do anything to [him]," the victim responded that he had not. When Meyer asked the victim whether the defendant had done "anything to his private," she responded that he had not. When asked whether the defendant had touched her on the inside or outside of her private, the victim responded that she did not know. The victim also told Meyer that her younger brother was in the room playing the drums when the incident occurred but that she did not think that he saw it.

After the forensic interview, Signore went to the defendant's home to inform him of the victim's allegations and to obtain a statement from him. According to Signore, the defendant seemed shocked by the allegations and denied ever touching any of S's children inappropriately, including the victim. Later that same day, the defendant called Signore and told him that there must have been some misunderstanding, that S's chil-

dren were always jumping on him and that he thought that the victim had a crush on him, which might explain her statements about him. Signore himself did not interview the victim because it was department policy for the MIT to interview alleged victims of child abuse. Shortly after the forensic interview, the victim's parents reconciled.

The defendant was charged with one count of attempt to commit sexual assault in the first degree, one count of sexual assault in the fourth degree, and two counts of risk of injury to a child, one based on sexual contact and the other based on an act likely to impair the health and morals of a child. At the defendant's trial, a video recording and transcript of the forensic interview of the victim, as well as B's and C's testimony relating the victim's statements to them about the defendant's misconduct, were admitted into evidence pursuant to the tender years exception to the hearsay rule over defense counsel's objection. The victim, who was ten years old at the time of trial, also testified, as did the defendant, who vehemently denied the victim's allegations. At the conclusion of the trial, the jury found the defendant guilty of the risk of injury count based on sexual contact and sexual assault in the fourth degree but found him not guilty of the other risk of injury count and of attempt to commit first degree sexual assault. The trial court sentenced the defendant to a term of imprisonment of twelve years, execution suspended after six and one-half years, and fifteen years probation with special conditions. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

We first address the defendant's claim that prosecutorial impropriety deprived him of a fair trial. Specifically, the defendant claims that the prosecutor engaged in impropriety by repeatedly asserting, during rebuttal closing argument, that both the defendant and defense counsel were asking the jury to "condone child abuse" and by claiming, inter alia, that defense counsel had "lied" to the victim during cross-examination, that the defendant's testimony was "coached," and that the defense strategy was a game of "smoke and mirrors . . . ." (Internal quotation marks omitted.) The defendant also contends that the prosecutor engaged in impropriety during defense counsel's cross-examination of Meyer by suggesting, contrary to defense counsel's assertions, that redacted portions of the transcript of the forensic interview revealed that Meyer did in fact question the victim about inconsistent statements that the victim made as to whether she actually had seen the defendant's penis. The defendant maintains that, because these improprieties bore directly on the central issue in the case, namely, the defendant's credibility, they very easily could have tipped the balance in a case

that turned entirely on whom the jury found to be more credible, the defendant or the victim. The state contends that the prosecutor's arguments were not improper and that, even if they were, any such improprieties were harmless. We agree with the defendant.

The following additional facts are relevant to our analysis of this claim. Prior to Meyer's testimony, and after reviewing the entire transcript of the forensic interview with the trial court and defense counsel, the prosecutor agreed to redact those portions of the interview that were not relevant to the charged offenses. This accounted for approximately one-half of the transcript of the fifteen minute interview. During his cross-examination of Meyer, defense counsel questioned her as to whether she ever had challenged the victim regarding her conflicting statements about seeing the defendant's penis. Specifically, defense counsel asked Meyer whether she ever had "[told the victim] . . . that [Meyer was] confused when [the victim] . . . said she [both] saw and didn't see [the defendant's] penis . . . . Did you tell her that that didn't make sense to you?" The prosecutor objected to this question, stating in relevant part: "He's asking her about the full interview, and that's not in evidence. We could put the full interview in evidence, and the jury could decide if . . . Meyer fully challenged the child . . . on an inconsistent statement. But the . . . full forensic interview . . . is not in evidence." After excusing the jury, the court asked the prosecutor whether it was her contention that "there's a portion of the transcript that's been redacted in which [such a] conversation took place?" The prosecutor responded, "Yes, Your Honor." The court then asked the prosecutor to identify where in the transcript Meyer had questioned the victim about such an inconsistency, but the prosecutor was unable to do so. At this point, defense counsel interjected: "Judge, there is no such place . . . and the [s]tate [previously] agreed that all pertinent portions [of the transcript] were [before the jury]."

Defense counsel then moved for a mistrial, arguing that the state had "an obligation not simply to strike hard blows, but fair blows . . . ." Counsel argued that for the prosecutor "to suggest to this jury that something was withheld that is material to [a] claim . . . [is] simply dishonest and ought not to be tolerated." The court denied the motion for a mistrial, and defense counsel then requested that the jury be instructed "that the state [has] agreed that all portions of the interview relating to sexual misconduct were . . . shown to [the jury]. Otherwise, the state is creating the impression that I'm playing some game with [the jury], and . . . that's . . . patently untrue . . . ." The prosecutor objected to defense counsel's requested instruction, arguing that counsel had opened the door to her objection by questioning Meyer about portions of the transcript that were not in evidence. Without hearing any

explanation from the prosecutor as to what she meant by this argument, the trial court indicated that it had heard enough and overruled the prosecutor's objection. The jury then returned to the courtroom. The court did not give the curative instruction that defense counsel had requested but, instead, instructed the jury simply "to disregard [the prosecutor's] objection and not to consider it in [its] deliberations." The next day, defense counsel reiterated his concern that the prosecutor had created a serious misimpression about the record by suggesting that the defendant or defense counsel was trying to hide something from the jury.

Thereafter, following the conclusion of the evidentiary portion of the trial and the prosecutor's initial closing argument, defense counsel stated at the beginning of his closing argument to the jury: "I'm asking you to acquit [the defendant]. I'm asking you to acquit [the defendant] not out of sympathy for him, and not because we condone the abuse of . . . children or the rape of innocence . . . but because . . . justice and the law [require] it . . . ." Shortly thereafter, defense counsel stated: "If there is no hesitation [as to the defendant's guilt] as you deliberate together and consider the evidence, then . . . we have no hope. You have no choice but to convict [the defendant] and give him over to the judge to do what the law requires." Defense counsel argued, however, that the state's evidence fell far short of that which was necessary to convict. Counsel then went through the evidence, pointing out weaknesses in the state's case and explaining, on the basis of the evidence, why the victim would be motivated to fabricate her claim against the defendant.

In particular, defense counsel argued that, according to the defendant's testimony, the victim developed a strong attachment to him during the eight months that he and S were friends, always wanting to sit next to him at a restaurant or in a movie theatre. Counsel further argued that the defendant was the unwitting victim of a family in turmoil, "torn by wayward desires and accusations" and F's suspicions that S "had taken up with another woman," namely, G, in the family home. In particular, he argued that, during the relevant time period, the victim's household "had a certain sexual charge to it" and that the victim may have been reacting to it or expressing a repressed desire for the defendant, to whom she had grown quite attached. Defense counsel posited that what began as a small lie told to an older brother in the backyard took on a life of its own when B repeated it to an adult. Defense counsel also asserted that the lie had the immediate effect of reuniting the victim's parents, who, until that moment, had been "at war" with one another, a fact that could not have been lost on the victim. Counsel also underscored inconsistencies in the victim's statements about the alleged incident, noting that the victim's account changed in material respects in the two years that had elapsed

between the forensic interview and the trial, with significant details being added at trial.

Defense counsel also argued that "[t]here's no easy or good way to come to a jury of ordinary people and say [that] an eight year old is not to be trusted. But we're asking you to use her own words to doubt what she said . . . ." Counsel observed, among other things, that, in the forensic interview, which had been conducted shortly after the alleged abuse, the victim could not remember any details of that abuse except that the defendant had touched her on one occasion while they were sitting on the couch in the television room. By contrast, in her trial testimony two years later, the victim stated that the incident began in her bedroom and then continued in the television room, while she was playing the drums and while she was sitting upside down on the couch with her feet in the air. Counsel also noted that, whereas the victim told Meyer during the forensic interview that her younger brother was in the room playing the drums when the incident occurred, she testified at trial that he was not in the room. According to counsel, she also explained that she did "[n]ot really" have a memory of having seen the defendant's penis.[7]

At the conclusion of his argument, defense counsel stated: "As to the claims of risk of injury and [sexual assault in the fourth degree], if you conclude [that the defendant] put his hand down [the victim's] pants, and you're satisfied beyond a reasonable doubt, then you will convict him, and there's nothing that I can do to persuade you otherwise. I won't ask you to disregard the law. . . . If [the defendant] abused [the victim] he deserves your scorn; but if he didn't, he deserves your pity . . . . The state has not proven its case beyond a reasonable doubt and your duty is to acquit." Defense counsel concluded his argument by stating: "I don't ask you for pity. I don't ask you for mercy. I ask you for justice. I ask you to set [the defendant] free."

The prosecutor began her rebuttal closing argument as follows: "Ladies and gentlemen, that's not what he's asking you for. What he's asking you for is to condone child abuse. What he's asking you for is to allow a world in which a forty-one year old man sticks his hand down the front of an eight year old's pants, claims to tickle her . . . [t]akes his hand out, smells it while his erect penis is sticking out of his pants, and, because he did that to an eight year old child, because he did it in a room where no one else was present, because he did in it in a house where mom and dad were separated and there was a woman staying the night . . . you can't find him guilty. That's what defense [counsel and the defendant want] you to believe. That's what they want you to do. They want you to condone child abuse in this courtroom. They don't want you to look at that little girl that sat on the stand and testified before you

. . . . They don't want you to look at her testimony. . . . They want you to say, hey, guess what? Because she's eight [years old] and it was just her [testimony alone, you should find the defendant not guilty]." After asserting that defense counsel had "lied to [the victim]" when he told her that his questions were not intended to trick her, the prosecutor returned to her earlier theme, stating: "So when [defense counsel] sits here and says to you today, we're not here to condone child abuse or we're not trying to beat up . . . on the [victim], listen to that. . . . Is he telling you the truth . . . when he says that?" Later, when the prosecutor asked the jury if defense counsel "[i]s . . . giving you a magic trip or is he really giving you reasonable doubt," she characterized defense counsel's hypothesis as to why the victim had falsely accused the defendant as "stuff that . . . [counsel] has tried to throw against the wall" and repeatedly asserted that counsel had attempted to divert the jury's attention by seeking to have it look the other way: "Look over here, look over here. . . . Don't look over here at the [facts of the case]. Look over there."

Finally, the prosecutor made the following argument with respect to the defendant's own testimony: "I would assume what you wanted to hear was the truth, not a bunch of excuses, not . . . a big cloud of smoke and mirrors . . . . You wanted to hear the truth. That's not what you heard. You heard a . . . coached conversation between a defense attorney and his client." The prosecutor further argued: "[I]t's not a secret that child abuse is a crime. But what counsel's asking you to do is to say that . . . child abuse that happens in secret is legal, and that is not the law. I ask you to find the defendant guilty . . . ." Defense counsel did not object to any portion of the prosecutor's rebuttal closing argument.

The following legal principles guide our analysis of the defendant's claim. "In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry." (Citations omitted.) *State* v. *Fauci*, 282 Conn. 23, 32, 917 A.2d 978 (2007). "[W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show . . . that the remarks were improper . . . ."[8] (Internal quotation marks omitted.) *State* v. *Taft*, 306 Conn. 749, 762, 51 A.3d 988 (2012).

We turn first to the initial step of the due process analysis, namely, whether the prosecutor engaged in impropriety. With respect to the defendant's claim that such impropriety occurred during the prosecutor's rebuttal argument to the jury, "we previously have recognized . . . [that] prosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however] [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based [on] the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Moreover, [i]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument. . . .

"Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. [The prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . By reason of his office, he usually exercises great influence [on] jurors. His conduct and language in the trial of cases in which human life or liberty [is] at stake should be forceful, but fair, because he represents the public interest, which demands no victim and asks [for] no conviction through the aid of passion, prejudice, or resentment. If the accused [is] guilty, he should [nonetheless] be convicted only after a fair trial, conducted strictly according to the sound and well-established rules which the laws prescribe. While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment [on], or to suggest an inference from, facts not in evidence, or to present matters which the jury ha[s] no right to consider." (Internal quotation marks omitted.) *State* v. *Luster*, 279 Conn. 414, 428–29, 902 A.2d 636 (2006).

Furthermore, "a prosecutor may not express her own opinion, either directly or indirectly, as to the credibility of a witness or the guilt of the defendant. . . . Such expressions of personal opinion are a form of unsworn and unchecked testimony. . . . These expressions of opinion are particularly difficult for the jury to ignore because of the special position held by the prosecutor. . . . A prosecutor's voucher for a witness is particularly dangerous for two reasons. First, such comments may convey the impression that the prosecutor is aware of

evidence supporting charges against the defendant of which the jury has no knowledge. . . . Second, the prosecutor's opinion carries with it the imprimatur of the [state] and may induce the jury to trust the [state's] judgment rather than its own view of the evidence." (Citations omitted; internal quotation marks omitted.) *State* v. *Alexander*, 254 Conn. 290, 304–305, 755 A.2d 868 (2000). "[I]t is axiomatic that a prosecutor may not advance an argument that is intended solely to appeal to the jurors' emotions and to evoke sympathy for the victim or outrage at the defendant. . . . An appeal to emotions, passions, or prejudices improperly diverts the jury's attention away from the facts and makes it more difficult for it to decide the case on the evidence in the record. . . . When the prosecutor appeals to emotions, he invites the jury to decide the case, not according to a rational appraisal of the evidence, but on the basis of powerful and irrelevant factors [that] are likely to skew that appraisal. . . . An improper appeal to the jurors' emotions can take the form of a personal attack on the defendant's character . . . or a plea for sympathy for the victim or her family." (Citations omitted; internal quotation marks omitted.) *State* v. *Long*, 293 Conn. 31, 59, 975 A.2d 660 (2009).

We agree with the defendant that the prosecutor's repeated assertions, during her rebuttal closing argument, that the defendant and defense counsel were asking the jury to "condone child abuse" and to find "that . . . child abuse that happens in secret is legal," and, further, that defense counsel was lying when he stated otherwise, were highly improper and intended not only to appeal to the jurors' emotions but also to demean the defendant and defense counsel in the eyes of the jurors. In characterizing the defense theory of the case as she did, the prosecutor sought to demonstrate, unfairly, and without a factual basis, that the defense was illegitimate and wholly unworthy of consideration, for no juror reasonably could be expected to credit a defense predicated on condonation or approval of child sexual abuse. Equally inappropriate were the prosecutor's comments questioning the veracity of defense counsel by urging the jury to conclude that counsel was not "telling [the jury] the truth" when he stated that neither he nor the defendant condoned child abuse. Nothing in the record supports this assertion, which, in fact, was a blatant misrepresentation of the theory of the defense, namely, that the defendant never had engaged in any inappropriate conduct toward the victim. There also is nothing in the record to support the prosecutor's assertion that defense counsel had "lied" to the victim when he told her that he was not trying to trick her with his questions, and the prosecutor's unsubstantiated accusation to that effect undoubtedly was intended to undermine defense counsel's effectiveness as an advocate by denigrating his integrity and disparaging his veracity.

We find no merit in the state's contention that the prosecutor's remarks were invited by defense counsel's closing argument. On the contrary, as we explained, defense counsel began his argument to the jury by stating that it should find the defendant not guilty "not out of sympathy for him, and not because we condone the abuse of . . . children . . . but because . . . justice and the law [require] it," and he followed these remarks by reminding the jurors that they had a duty to find the defendant guilty if they determined that the state had proven its case beyond a reasonable doubt. Defense counsel concluded his argument in a similar manner, asserting, inter alia, that the defendant deserved to be convicted if the jury were to find that the state had proven its case. In light of the foregoing, we are puzzled by the state's contention that the prosecutor's remarks, when viewed in context, constituted a fair response to defense counsel's closing argument. In fact, what the prosecutor did was to seize upon certain remarks that defense counsel had made in his argument to the jury and to twist them into a disparaging refrain, which she then repeated over and over for dramatic effect. Indeed, short of an explicit plea by defense counsel for the jury to approve of or ignore criminal behavior, we are hard-pressed to imagine any defense argument that properly could be described by the state in the provocative terms that the prosecutor used in the present case.

Nor do we find any merit in the state's contention that the jury likely would have recognized that the prosecutor's comments were not intended to disparage the integrity or role of defense counsel or to denigrate the defense theory through mischaracterization but, rather, to challenge the theory of defense "by focusing the jury on the fact that, contrary to the defendant's assertion, justice and the law . . . supported the defendant's guilt." Again, we are perplexed by the state's claim because a prosecutor never is justified in intentionally mischaracterizing the defense theory of the case or in falsely accusing defense counsel of lying to the victim and the jury, and there is no mistaking the improper purpose of such argument by the prosecutor in the present case and its intended effect on the jury.

In a similar vein, the state also maintains that the prosecutor's use of the term "smoke and mirrors" was not improper because it was responsive to defense counsel's arguments as to why the victim might have fabricated her claims against the defendant. We previously have expressed our disapproval of a prosecutor's use of that term, "even as an isolated reference . . . because it implie[s], to whatever degree, that defense counsel had not based his argument on fact or reason . . . but had intended to mislead the jury by means of an artfully deceptive argument." (Internal quotation marks omitted.) *State* v. *Outing*, 298 Conn. 34, 85, 3 A.3d 1 (2010), cert. denied, U.S. , 131 S.

Ct. 1479, 179 L. Ed. 2d 316 (2011). Indeed, as the Appellate Court has explained, a prosecutor who uses the phrase "smoke and mirrors" "implie[s] that the defendant's attorney intended to deceive and thereby impugn[s] the integrity of the defendant's attorney." *State* v. *Orellana*, 89 Conn. App. 71, 103, 872 A.2d 506, cert. denied, 274 Conn. 910, 876 A.2d 1202 (2005); accord *State* v. *Serrano*, 91 Conn. App. 227, 238, 880 A.2d 183, cert. denied, 276 Conn. 908, 884 A.2d 1029 (2005). The effect of this impropriety undoubtedly was compounded by the prosecutor's rebuttal argument, in which she stated that defense counsel had taken the jury on a "magic trip," that he had coached the defendant, and that he had attempted to sidetrack the jury through misdirection and by all of the "stuff" that he "tried to throw against the wall" during his closing remarks to the jury.[9] Of course, if the prosecutor had wished to focus the jury on weaknesses in the defendant's theory of defense, there were ample ways for her to do so that would not have involved belittling remarks or personal attacks on the credibility of the defendant and defense counsel. Cf. *State* v. *Stevenson*, 269 Conn. 563, 585–86, 849 A.2d 626 (2004) ("[The assistant state's attorney's statement that the defense witnesses had a motive to lie was not improper because the] remarks underscored an inference that the jury could have drawn entirely on its own, based on the evidence presented. . . . The assistant state's attorney was not saying that she vouched for her witnesses' truthfulness and the defendant's witnesses' lack of truthfulness; rather, she was urging the jury to find that they were truthful or untruthful for the reasons stated. Her remarks drew on facts in evidence and did not rely on her special position as an assistant state's attorney and, therefore, were not improper."). For example, the prosecutor could have argued that defense counsel's assertion that the victim's claims likely were the product of a child's sexual fantasy was merely self-serving speculation, unsupported by the evidence.

We also agree with the defendant that the prosecutor's objection during defense counsel's cross-examination of Meyer, indicating that redacted portions of the transcript of the forensic interview refuted defense counsel's assertion that Meyer did not challenge the victim with respect to inconsistencies in the victim's claims against the defendant, was improper. The state does not dispute that, moments before Meyer's testimony, the prosecutor, after reviewing the transcript of the forensic interview with defense counsel and the trial court, agreed to redact those portions of the interview that were not relevant to the charged offenses. The state nevertheless contends that the prosecutor "cannot be faulted" for her objection because defense counsel's question was "reasonably susceptible to an interpretation" that he was asking Meyer whether she had challenged the victim about *any* inconsistencies

in her statements at *any* point during the interview, including those parts of the interview that were redacted.

We reject as unfounded the state's contention that defense counsel's question was susceptible of more than one interpretation. As we have explained, defense counsel asked Meyer whether she ever had "[told the victim] . . . that [Meyer was] confused when [the victim] . . . said she [both] saw and didn't see [the defendant's] penis . . . . Did you tell her that that didn't make sense to you?" Meyer responded, "Not at that particular moment. No, I don't think so." Defense counsel then stated: "Not at any . . . moment, correct?" When Meyer responded, "[o]kay," the prosecutor objected, arguing that defense counsel was "asking [Meyer] about the full interview, and that's not in evidence. We could put the full interview in evidence, and the jury could decide if . . . Meyer fully challenged the [victim] . . . on an inconsistent statement. But . . . the full forensic interview is not in evidence." In light of the foregoing, it strains credulity for the state to argue that the prosecutor was confused by defense counsel's question and may have believed that defense counsel was asking Meyer whether she had challenged the victim about some *other* inconsistency in her statements. Indeed, one would fully expect the state to support such an argument by *identifying* some other inconsistency in the victim's statements to which the prosecutor reasonably might have been referring, but the state has failed to do so. Moreover, our review of the video recording and transcript of the forensic interview reveals no such inconsistency. We must conclude, therefore, consistent with the defendant's contention, that the prosecutor's objection was intended to create the impression, contrary to defense counsel's assertions, that Meyer had questioned the victim about inconsistences in her statements even though the prosecutor knew that Meyer had done no such thing. Our conclusion is bolstered by the fact that the prosecutor had reviewed the redacted portions of the transcript shortly before her objection, rendering highly implausible any claim that she could have been confused about their content.

Having concluded that prosecutorial impropriety occurred, we now must determine whether it deprived the defendant of his due process right to a fair trial. "In determining whether prosecutorial [impropriety] was so serious as to amount to a denial of due process, this court, in conformity with courts in other jurisdictions, has focused on several factors. Among them are the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's

case." (Internal quotation marks omitted.) *State* v. *Stevenson*, supra, 269 Conn. 573. "Regardless of whether the defendant has objected to an . . . [impropriety], a reviewing court must apply [these] . . . factors to the entire trial, because there is no way to determine whether the defendant was deprived of his right to a fair trial unless the [impropriety] is viewed in light of the entire trial." Id.

"This does not mean, however, that the absence of an objection at trial does not play a significant role in the application of the [foregoing] factors. To the contrary, the determination of whether a new trial or proceeding is warranted depends, in part, on whether defense counsel has made a timely objection to any [incident] of the prosecutor's improper [conduct]. When defense counsel does not object, request a curative instruction or move for a mistrial, he presumably does not view the alleged impropriety as prejudicial enough to jeopardize seriously the defendant's right to a fair trial." (Internal quotation marks omitted.) Id., 575.

We agree with the defendant that the prosecutor's improprieties violated his right to due process. Indeed, the only consideration that weighs in favor of the state is defense counsel's failure to object to all but one of the claimed improprieties.[10] The other relevant factors, however, support the defendant's claim that he is entitled to a new trial. Although the trial court charged the jury in its final instructions that the law prohibits the prosecutor from offering her personal opinion as to the credibility of any witness, the trial court gave no curative instructions at the time of the improper remarks, which, in our view, were relatively severe because they demeaned the integrity of defense counsel by improperly calling into question his veracity and denigrated the defense theory of the case by mischaracterizing it.[11] As we also explained, this argument clearly was not invited by defense counsel. Furthermore, as the defendant maintains, the state's case was not particularly strong. Significantly, there was no physical evidence of abuse, and there was no eyewitness testimony other than that of the victim, whose testimony at times was both equivocal and vague. See, e.g., *State* v. *Ritrovato*, 280 Conn. 36, 57, 905 A.2d 1079 (2006) ("a sexual assault case lacking physical evidence is not particularly strong, especially when the victim is a minor").

In addition, each instance of prosecutorial impropriety bore directly on the central issue in the case, namely, the credibility of the defendant and his theory of defense. As the defendant maintains, because the state's case rested entirely on the victim's credibility, any improper remarks by the prosecutor that tended to bolster her credibility, or to diminish that of the defendant, may very well have had a substantial impact on the verdict. See id. ("[b]ecause there was no independent physical evidence of the assault and no other witnesses

to corroborate [the victim's] testimony, her credibility was crucial to successful prosecution of the case"); *State* v. *Iban C.*, 275 Conn. 624, 641–42, 881 A.2d 1005 (2005) (when there was no physical or medical evidence of abuse and no eyewitness testimony other than victim's testimony, victim's credibility was central to state's case). Indeed, each instance of impropriety, including the prosecutor's objection during Meyer's testimony, conveyed to the jury that the defendant or defense counsel was not to be trusted. As this court previously has stated, "the prosecutor's opinion carries with it the imprimatur of the [state] and may induce the jury to trust the [state's] judgment rather than its own view of the evidence. . . . Moreover, because the jury is aware that the prosecutor has prepared and presented the case and consequently . . . may have access to matters not in evidence . . . it is likely to infer that such matters precipitated the personal opinions." (Citation omitted; internal quotation marks omitted.) *State* v. *Thompson*, 266 Conn. 440, 462, 832 A.2d 626 (2003). The prosecutor's repeated assertions that the defendant and defense counsel were asking the jury to condone child abuse was particularly harmful because, in a close case, the jurors may have felt compelled to find the defendant guilty, lest they be viewed by the state as condoning such contemptible conduct.[12] The defendant therefore is entitled to a new trial.

II

Because the issue may arise again at a new trial, and in order to clarify the law governing the issue, we also address the defendant's claim that the trial court improperly permitted the prosecutor to adduce certain testimony by Meyer concerning her interview of the victim, as well as the video recording and transcript of that interview, under the tender years exception to the hearsay rule. In particular, the defendant contends that, under General Statutes § 54-86*l* (a) and § 8-10 (a) of the Connecticut Code of Evidence, the trial court, before admitting that evidence, first was required to find, following a hearing, that the circumstances surrounding the interview provided particularized guarantees of its trustworthiness and that the interview was not conducted in preparation of a legal proceeding. The state does not dispute that no such hearing occurred in the present case and that, ordinarily, prior to the admission of evidence under the tender years exception, such a hearing is required so that the court may determine whether the evidence is trustworthy and was not generated in preparation of a legal proceeding. Indeed, General Statutes § 54-86*l* (a) and § 8-10 (a) of the Code of Evidence could hardly be clearer as to those requirements. See General Statutes § 54-86*l* (a); Conn. Code Evid. (2009) § 8-10 (a). The state contends, however, that the trial court cannot be deemed to have abused its discretion in admitting the challenged evidence without the required hearing and finding because, under our

case law, such evidence was admissible as a matter of law. According to the state, the statements that the victim made during the interview were properly admitted under *State* v. *Arroyo*, 284 Conn. 597, 635, 935 A.2d 975 (2007), a recent child sexual abuse case in which this court concluded that statements made during the forensic interview at issue in that case were nontestimonial, and therefore admissible, for purposes of *Crawford* v. *Washington*, 541 U.S. 36, 68–69, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004),[13] the seminal United States Supreme Court case concerning the sixth amendment prohibition against the admission of testimonial hearsay. The state argues that, because the standard of admissibility under *Crawford* and for purposes of General Statutes § 54-86*l* and § 8-10 of the Connecticut Code of Evidence is identical and, further, because the forensic interviews in both the present case and *Arroyo* were conducted under similar protocol, the interview of the victim in the present case was admissible under *Arroyo*. We reject the state's claim because *Arroyo* did not adopt a blanket rule of admissibility for all forensic interviews conducted under the auspices of an MIT or under similar protocol but, rather, only those interviews that are conducted for the primary purpose of providing medical assistance to the victim.

As we noted, *Arroyo* involved a confrontation clause challenge to the admission of a forensic interview. See *State* v. *Arroyo*, supra, 284 Conn. 625. We previously have indicated, however, that the tender years exception must be read consistently with the sixth amendment bar against testimonial hearsay, as explained in *Crawford*. See *State* v. *Cameron M.*, 307 Conn. 504, 514–15, 55 A.3d 272 (2012), cert. denied, U.S. , 133 S. Ct. 2744, 186 L. Ed. 2d 194 (2013). The prohibition of the tender years exception against statements made in preparation of a legal proceeding is simply another way of saying that, to be admissible, the statement must be nontestimonial for purposes of *Crawford*. See id., 515; see also Conn. Code Evid. (2009) § 8-10, commentary (noting that tender years exception "address[es] the exclusion of testimonial statements prohibited by *Crawford*"). We therefore agree with the state that the standard of admissibility under *Crawford* is the same as the standard to be applied under the tender years exception. Our agreement with the state ends there, however.

In *Arroyo*, we addressed a claim that the trial court improperly had permitted a forensic interviewer "to recount, during her testimony, the statements that the victim had made to her during the forensic interviews that [she had] conducted with the victim." *State* v. *Arroyo*, supra, 284 Conn. 625. The defendant, Miguel Arroyo, contended that the victim's statements to the interviewer were testimonial in nature, and therefore inadmissible under *Crawford*, because law enforcement personnel not only had observed the interviews

but also had made and retained audio recordings of them. Id. The facts relative to the interview in *Arroyo*, which are important because they serve to distinguish that case from the present one, may be summarized as follows. The victim in *Arroyo*, who was five years old at the time of the alleged sexual abuse, was diagnosed with chlamydia after experiencing prolonged irritation in her vaginal area. Id., 602–603. She subsequently was brought to the Yale Sexual Abuse Clinic (clinic) at Yale-New Haven Hospital, where, over a period of several months, she was treated by a pediatric nurse practitioner and, on three occasions, was interviewed by a licensed clinical social worker and forensic interviewer employed by the clinic. Id., 603–605. During the course of her treatment, the victim had a reoccurrence of chlamydia for which she had been treated at the clinic. See id., 605. Shortly thereafter, the victim finally identified Arroyo as her abuser. Id.

In concluding that the statements elicited from the victim during the forensic interviews were not testimonial in nature, we applied the fact intensive "primary purpose" test articulated in *Davis* v. *Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Under that test, "the determining factor resolving whether . . . statements are testimonial or nontestimonial is the primary purpose of the interrogation between the declarant and the witness whose testimony the state later seeks to introduce regarding the declarant's statements; that is, whether the interrogation is primarily intended to provide assistance to the declarant or to further investigation and preparation for prosecution. . . . Put another way, statements taken by government actors who are not members of law enforcement are testimonial if the interview is the functional equivalent of police interrogation with the primary purpose of establishing or proving past events potentially relevant to later criminal prosecution." *State* v. *Arroyo*, supra, 284 Conn. 629. Applying these principles, we concluded that, "[u]nder the facts [presented] . . . it [was] clear that the primary purpose of [the forensic] interviews was to provide medical assistance to the victim." Id., 632.

In reaching our conclusion, we noted that "[t]he 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 [on] 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*." (Emphasis added.) Id., 632–33. We further observed that "[t]here [was] no evidence in the record to indicate that the [forensic] interviews . . . were at the instruction or request of law enforcement. Instead, the record reflect[ed] that . . . the victim and the victim's mother [were initially brought] to the clinic for examinations. Moreover, there [was] no indication that [the forensic interviewer] was in the employ of a law enforcement agency and no evidence that she cooperated or assisted in the investigation of [Arroyo]. The purpose of her interviews was related solely to securing the welfare of the child." Id., 635. "On the basis of these facts, we conclude[d] that the primary purpose of the interviews was not to build a case against [Arroyo] . . . but *to provide the victim with assistance in the form of medical and mental health treatment*." (Emphasis added.) Id. Thus, we made it clear in *Arroyo* that the interviews in that case were admissible only because of their predominantly medical purpose. See id.

In reaching this determination, we acknowledged "that other jurisdictions have concluded that statements made to a forensic interviewer are testimonial."[14] Id., 630 n.20. We explained, however, that the majority of those cases were "factually distinguishable . . . because most involve[d] much more significant involvement in and control of the subject interviews by law enforcement." Id. Recently, in *State* v. *Cameron M.*, supra, 307 Conn. 504, we observed that *Arroyo* "continues to represent a minority position on [the issue of whether forensic interviews are testimonial under *Crawford*] . . . ." Id., 523 n.20. We also noted that, subsequent to *Arroyo*, the United States Supreme Court decided *Michigan* v. *Bryant*, U.S. , 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011), "which . . . shift[ed] [the focus] away from the declarant's intent [and] toward [the intent] of the interrogator [for purposes of the determination of] whether the primary purpose of the statement is testimonial . . . . [*Bryant*] 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 [in which] 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) . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Cameron M.*, supra, 524 n.20.

In light of the foregoing, we take this opportunity to clarify that, under the standard adopted in *Arroyo*, a victim's statements during a forensic interview may be

deemed nontestimonial only if the essential purpose of the interview is to provide medical assistance to the victim. We emphasized in *Arroyo* that this standard was satisfied in that case because there was no evidence that the interviewer "was in the employ of a law enforcement agency and no evidence that she cooperated or assisted in the investigation of [Arroyo]. The purpose of her interviews was related solely to securing the welfare of the child." *State* v. *Arroyo*, supra, 284 Conn. 635. Indeed, statements made in the course of a forensic interview that satisfy the criteria for admission under the tender years exception are similar to statements made to a physician in the course of medical treatment, which are admissible under the medical treatment and diagnosis exception to the hearsay rule, including statements that reveal the identity of the abuser. See, e.g., *State* v. *DePastino*, 228 Conn. 552, 565, 638 A.2d 578 (1994) ("[I]n cases of sexual abuse in the home, hearsay statements made in the course of medical treatment which reveal the identity of the abuser, are reasonably pertinent to treatment and are admissible. . . . If the sexual abuser is a member of the child victim's immediate household, it is reasonable for a physician to ascertain the identity of the abuser to prevent recurrences and to facilitate the treatment of psychological and physical injuries." [Citation omitted; internal quotation marks omitted.]); see also Conn. Code Evid. § 8-3 (5), commentary (noting that, in cases involving domestic child abuse, statements as to identity of abuser may be admitted under § 8-3 [5]); cf. *State* v. *Cruz*, 260 Conn. 1, 7, 792 A.2d 823 (2002) ("[t]he rationale underlying the medical treatment exception to the hearsay rule is that the patient's desire to recover his health . . . will restrain him from giving inaccurate statements to a [health care professional] employed to advise or treat him" [internal quotation marks omitted]).

We finally note that we are skeptical that the state will be able to satisfy *Arroyo*'s stringent standard for the admission of forensic interview evidence. In marked contrast to *Arroyo*, there is nothing in the present record of this case to suggest that the primary or overriding purpose of Meyer's interview was to provide the victim with assistance in the form of medical or mental health treatment. In fact, the record is devoid of any suggestion that the victim or S, the victim's mother, sought or obtained such treatment at any time following the victim's disclosure of abuse. There also is strong evidence that Meyer was acting at the behest of law enforcement personnel during the interview. Nevertheless, because the trial court failed to conduct a hearing to determine, in light of *Arroyo*, whether the victim's statements to Meyer satisfy the criteria for admission under General Statutes § 54-86*l* (a) and § 8-10 (a) of the Code of Evidence, it is conceivable that the state did not present all of the evidence on this issue. It therefore will have an opportunity to do so in connection with a

new trial.[15]

III

Because it is also likely to arise again at a new trial, we next consider the defendant's claim that the trial court improperly admitted the testimony of B, the victim's brother, and C, the victim's cousin, relating the victim's statements to them on June 25, 2008, concerning the defendant's misconduct, as substantive evidence of guilt under the tender years exception. The defendant contends that such evidence was admissible only as constancy of accusation evidence to corroborate the victim's testimony and not for substantive purposes. In support of this contention, the defendant argues that the limitations imposed on constancy of accusation evidence under *State* v. *Troupe*, 237 Conn. 284, 304, 677 A.2d 917 (1996),[16] and § 6-11 (c) of the Connecticut Code of Evidence also must apply to tender years evidence, lest the state be permitted to "transform constancy evidence into substantive evidence of guilt simply by offering it as tender years evidence . . . ." Contrary to the defendant's claim, we conclude that evidence admissible under the tender years exception is admissible for substantive purposes.[17]

The following legal principles guide our analysis of this claim. "To the extent [that] a trial court's admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary." *State* v. *Saucier*, 283 Conn. 207, 218, 926 A.2d 633 (2007). "In construing the [Connecticut] [C]ode [of Evidence], we apply well established principles of statutory interpretation. . . . We first consider the text and accompanying commentary of the section of the [C]ode . . . and its relationship to other sections. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the [Code] shall not be considered."[18] (Citation omitted; footnote omitted; internal quotation marks omitted.) *State* v. *DeJesus*, 288 Conn. 418, 442, 953 A.2d 45 (2008).

Because the defendant claims that the constancy of accusation doctrine limits the scope of admissibility of tender years evidence, we begin our analysis with the language of that doctrine, which, as we noted previously, is codified at § 6-11 (c) of the Connecticut Code of Evidence. That subsection provides: "A person to whom a sexual assault victim has reported the alleged assault may testify that the allegation was made and when it was made, provided the victim has testified to the facts of the alleged assault and to the identity of the person or persons to whom the assault was reported. Any testimony by the witness about details of the assault shall be limited to those details necessary to associate the victim's allegations with the pending charge. The testimony of the witness is admissible only

to corroborate the victim's testimony and not for substantive purposes." Conn. Code Evid. § 6-11 (c). Thus, by its express terms, § 6-11 (c) allows the admission of constancy of accusation evidence solely for the purpose of corroborating the victim's testimony in a sexual assault case.

By contrast, § 8-10 of the Connecticut Code of Evidence places no such restriction on the use of tender years evidence. Indeed, "hearsay" is by definition "a statement, other than one made by the declarant while testifying at the proceeding, *offered in evidence to establish the truth of the matter asserted*." (Emphasis added.) Conn. Code Evid. § 8-1 (3). It is well established that "[h]earsay is inadmissible, except as provided in the Code [of Evidence], the General Statutes or the Practice Book." Conn. Code Evid. § 8-2. All of the recognized exceptions to the hearsay rule are contained in article VIII of the Connecticut Code of Evidence, including the tender years exception. We previously have stated that any statement that is admitted into evidence under one of these exceptions "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."[19] (Internal quotation marks omitted.) *State* v. *Cameron M.*, supra, 307 Conn. 525–26.

That the drafters intended for testimony admitted under the tender years exception to be treated like all other evidence admissible under a hearsay exception—i.e., as substantive evidence that is admissible to prove the truth of the matter asserted—is demonstrated by the fact that tender years evidence is not admissible unless two significant conditions have been met, namely, that the evidence is trustworthy and that it was not generated in preparation of litigation. See Conn. Code Evid. (2009) § 8-10 (a) (1) and (2). These prerequisites to admissibility would not be necessary except to ensure that evidence admitted under the tender years exception, like evidence admitted under any other hearsay exception, is sufficiently reliable and trustworthy to surmount the concerns normally attendant to hearsay statements.

Although the tender years exception is a relatively new addition to the Connecticut Code of Evidence,[20] there is nothing in its language to suggest that its drafters intended tender years evidence to be limited by the constancy of accusation doctrine. Indeed, under our rules of statutory interpretation, we must assume that, if the drafters had intended such a result, they would have indicated that intent expressly, as they did in § 6-11 (c) of the Connecticut Code of Evidence. Cf., e.g., *Windels* v. *Environmental Protection Commission*, 284 Conn. 268, 299, 933 A.2d 256 (2007) (legislature knows how to convey its intent expressly).

The commentary to § 8-10 of the Connecticut Code

of Evidence bolsters the conclusion that the tender years exception is not to be treated differently from other exceptions to the hearsay rule but, rather, that the provision was intended to supplement other hearsay exceptions. That commentary provides in relevant part: "This section addresses the unique and limited area of statements made by children concerning alleged acts of sexual assault or other sexual misconduct against the child, or other alleged acts of physical abuse against the child by a parent, guardian or other person with like authority over the child at the time of the alleged act. It recognizes that children, because of their vulnerability and psychological makeup, are not as likely as adults to exclaim spontaneously about such events, making Section 8-3 (2) [of the Connecticut Code of Evidence] unavailable to admit statements about such events, and are not as likely to seek or receive timely medical diagnoses or treatment after such events, making Section 8-3 (5) unavailable, and provides more specific guidance for this category of statements than the residual hearsay exception of Section 8-9. . . ." Conn. Code Evid. (2009) § 8-10, commentary. The commentary also provides: "Subdivision (1) of subsection (c) prohibits expanded interpretations of other hearsay exceptions when statements covered by this section are not admissible. It is not intended to limit exceptions that heretofore have been legally applied to such statements. Subdivision (2) of subsection (c), however, prohibits the use of the residual hearsay exception for statements treated by this section." Conn. Code Evid. (2009) § 8-10, commentary. Thus, the commentary makes clear that the tender years exception was promulgated because other hearsay exceptions had proven to be inadequate to accommodate the legitimate interests of a party seeking to introduce into evidence, for substantive purposes, the trustworthy, nontestimonial, out-of-court statement of a child of tender years. Accordingly, because there is nothing in the text of § 8-10 of the Connecticut Code of Evidence or its accompanying commentary to suggest that tender years evidence is admissible solely to corroborate the victim's testimony, it would be manifestly improper for us to read such a limitation into that provision.

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

In this opinion the other justices concurred.

[1] The defendant appealed to the Appellate Court from the judgment of the trial court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

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

[3] General Statutes § 54-86*l* provides: "(a) Notwithstanding any other rule of evidence or provision of law, a statement by a child twelve years of age or younger at the time of the statement relating to a sexual offense committed against that child, or an offense involving physical abuse committed against that child by the child's parent or guardian or any other person exercising

comparable authority over the child at the time of the offense, shall be admissible in a criminal or juvenile proceeding if: (1) The court finds, in a hearing conducted outside the presence of the jury, if any, 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, (3) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement including 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, at such time as to provide the adverse party with a fair opportunity to prepare to meet it, and (4) either (A) the child testifies and is subject to cross-examination at the proceeding, or (B) the child is unavailable as a witness and (i) there is independent nontestimonial corroborative evidence of the alleged act, and (ii) the statement was made prior to the defendant's arrest or institution of juvenile proceedings in connection with the act described in the statement.

"(b) Nothing in this section shall be construed to (1) prevent the admission of any statement under another hearsay exception, (2) allow broader definitions in other hearsay exceptions for statements made by children twelve years of age or younger at the time of the statement concerning any alleged act described in subsection (a) of this section than is done for other declarants, or (3) allow the admission pursuant to the residual hearsay exception of a statement described in subsection (a) of this section."

[4] Section 8-10 of the 2009 edition 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 of 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 the residual hearsay exception statements described in the first paragraph of subsection (a)."

The foregoing version of § 8-10 was the version in effect at the time of the defendant's trial in 2010. Section 8-10 of the 2009 edition of the Connecticut Code of Evidence subsequently was amended to "harmonize it with

[§ 54-86*l*]." Conn. Code Evid. § 8-10, commentary (effective January 1, 2011), in 72 Conn. L.J., No. 2, p. 240C (July 13, 2010). This amendment has no bearing on the merits of this appeal. Hereinafter, all references to § 8-10 are to the 2009 edition of the Connecticut Code of Evidence.

[5] Section 6-11 of the Connecticut Code of Evidence provides in relevant part: "(c) Constancy of accusation by a sexual assault victim. A person to whom a sexual assault victim has reported the alleged assault may testify that the allegation was made and when it was made, provided the victim has testified to the facts of the alleged assault and to the identity of the person or persons to whom the assault was reported. Any testimony by the witness about details of the assault shall be limited to those details necessary to associate the victim's allegations with the pending charge. The testimony of the witness is admissible only to corroborate the victim's testimony and not for substantive purposes."

[6] At this time, the victim was eight years old.

[7] As we previously noted, the victim was ten years old at the time of the trial. She testified that, when the defendant used to babysit for her, they would "play and stuff." When the prosecutor asked the victim whether there ever came a time when she no longer enjoyed playing with the defendant, the victim responded: "Well, once I was in my room, and [the defendant] came upstairs, and I was on my bed, and he put his—and it all started when we were just pushing each other around . . . . [H]e put his hands in my pants and underwear, and he was going like, tickle, tickle and everything, and then I told him I needed to go upstairs to do my drums, and he kind of followed me up. I did a little bit of drums, but then I kind of got off, and like sat on his lap, and then he started doing the tickle, tickle thing again, and he took his thing out of his pants and like stuck it out of his pants on the side. . . . And then . . . I kind of moved to go [to] the couch, and I sat upside down with my feet up and everything, like, because, we were kind of still playing. He was on the other side of the couch, and, while his thing was out of his pants, he was trying to put my foot over there, and then, you know, I think he did the tickle, tickle thing like one more time, like, put his hand in my pants and everything, and then I got up and . . . was going [toward] the drum set or the brown chair . . . and I saw my dad's [i.e., F's] car coming . . . because it was a Friday, and I had to go to his house for the weekend. So, I had to go downstairs and go home." When the prosecutor asked the victim what the defendant did after he touched her private, the victim stated: "Oh, oh, yeah. After he did that, he—before I left to go down the stairs, I saw him smell his hand."

When the victim was questioned about whether she had "ask[ed] [the defendant] why he did that," the victim responded that she did not ask him and that she "just thought in [her] head, like, okay then, bye." The victim did not tell F what had happened because she "just thought it was weird and decided to move on." The victim also stated that, although she had told Meyer during the forensic interview that her younger brother was in the room when the incident occurred, she now remembered that he "definitely was not [in the room]."

On redirect examination, the prosecutor asked the victim whether she actually had seen the defendant's "privates . . . ." The victim responded that she did see them but "just for a second." She then stated, however, that she did "[n]ot really" have a memory of seeing them, "like I do, but, like, I don't remember what [they were] like . . . ."

[8] As we explain more fully hereinafter, although defense counsel did not object to the prosecutor's statements during closing argument, the defendant nevertheless is entitled to review of his unpreserved due process claim predicated on those statements. See, e.g., *State* v. *Skakel*, 276 Conn. 633, 742–44, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006).

[9] We do not suggest that these additional statements by the prosecutor, standing alone, necessarily were improper because, to varying degrees, they were linked to facts in the record. We nevertheless recite them because, in both tone and content, they are consistent with the disparaging theme that marked the prosecutor's rebuttal closing argument.

[10] As we explained, defense counsel did object to the prosecutor's improper argument concerning the portion of Meyer's interview that was not admitted at trial.

[11] Although the trial court did inform the jury to ignore the prosecutor's comments indicating that defense counsel was attempting to conceal certain portions of the transcript of Meyer's interview with the victim, the court did not issue a curative instruction along the lines requested by defense counsel.

[12] The state contends that, because the jury found the defendant not guilty of the two more serious charges, including attempt to commit sexual assault in the first degree, it is apparent that the jury was not unduly influenced by the prosecutor's comments. We reject this reasoning because it is just as likely, if not more likely, that the prosecutor's repeated assertions that neither the defendant nor defense counsel was trustworthy tipped the balance in favor of the state with respect to the two offenses of which the defendant was found guilty.

[13] "Under *Crawford* v. *Washington*, supra, 541 U.S. [68–69], the hearsay statements of an unavailable witness that are testimonial in nature may be admitted under the sixth amendment's confrontation clause only if the defendant has had a prior opportunity to cross-examine the declarant. Hearsay statements that are nontestimonial in nature are not governed by the confrontation clause, and their admissibility is governed solely by the rules of evidence. . . . Thus, the threshold inquiry for purposes of the admissibility of such statements under the confrontation clause is whether they are testimonial in nature." (Citation omitted; footnote omitted.) *State* v. *Slater*, 285 Conn. 162, 169–70, 939 A.2d 1105, cert. denied, 553 U.S. 1085, 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008).

[14] In *Arroyo*, we acknowledged the following cases, which had held that statements made to a forensic interviewer are testimonial in nature: "*United States* v. *Gardinier*, 65 M.J. 60, 66 ([C.A.A.F.] 2007) (victim's statements to sexual assault nurse examiner during forensic medical examination [were deemed] testimonial [when] sheriff's office arranged for examination and paid for examination and [when examination] was performed with needs of law enforcement and prosecution in mind); *People* v. *Sharp*, 155 P.3d 577, 581 (Colo. [App.] 2006) (victim's statements during [video recorded] interview with forensic interviewer [were deemed] testimonial [when] police arranged . . . and . . . directed interview by [instructing] interviewer to ask specific questions and interviewer sought victim's permission to bring police detective into interview room) [cert. dismissed, Colorado Supreme Court, Docket No. 07SC169 (Colo. March 30, 2007)]; *State* v. *Henderson*, 284 Kan. 267, 284–85, 160 P.3d 776 (2007) ([victim's statements during] interview [that was] conducted jointly by social worker and detective [were deemed] testimonial [when] detective continually [was] involved in interview process, initiated interview and [was] involved in decision not to interview or attempt to locate anyone besides defendant); *State* v. *Justus*, 205 S.W.3d 872, 876 (Mo. 2006) (statements made to forensic interviewer [were deemed] testimonial [when] interviewer testified that interviews she conducted were for law enforcement and served investigatory, fact-finding purpose); *State* v. *Pitt*, 209 Or. App. 270, 277–79, 147 P.3d 940 (2006) ([statements during video recorded] interviews with forensic interviewer at child advocacy center . . . [were deemed] testimonial [when] interviewer [was] former police officer, center operate[d] in partnership with district attorney's office, interviews were conducted with express purpose of furthering police investigation, and interviews were structured to elicit information from [victim] that would be relevant to prosecution); *In* [*re*] *S.R.*, 920 A.2d 1262, 1263–64 (Pa. Super. 2007) (statements during interview with forensic interview specialist were [deemed] testimonial [when] specialist was contacted initially by police, interview was carried out under direction of police, who were consulted during interview, which was conducted expressly for purposes of investigation and potential prosecution)." *State* v. *Arroyo*, supra, 284 Conn. 630–31 n.20.

[15] The defendant also claims that the trial court improperly denied his request that the victim be required to testify prior to the admission of the forensic interview. Although acknowledging that a " 'sequence of testimony' " claim is typically decided on a case-by-case basis under an abuse of discretion standard, the defendant nevertheless contends that, when a defendant makes a specific and reasonable request that the victim be called by the state prior to the admission of a forensic interview, that request should be honored by the trial court in light of the powerful and potentially damaging nature of the interview. Of course, this claim will arise at a new trial only if the trial court determines that the forensic interview in the present case satisfies the criteria for admission. If that should occur, however, we see no reason to adopt a blanket rule pursuant to which the defendant may dictate the sequence of the state's evidence merely because the defendant may view that evidence as particularly damaging.

[16] In *Troupe*, we concluded that "a person to whom a sexual assault victim has reported the assault may testify . . . with respect to the fact and timing of the victim's complaint . . . [but that] any testimony by the witness

regarding the details surrounding the assault must be strictly limited to those necessary to associate the victim's complaint with the pending charge, including, for example, the time and place of the attack or the identity of the alleged perpetrator. . . . [In addition], such evidence is admissible only to corroborate the victim's testimony and not for substantive purposes." (Footnote omitted.) *State* v. *Troupe*, supra, 237 Conn. 304. Our holding in *Troupe* has been codified at § 6-11 (c) of the Connecticut Code of Evidence. See footnote 5 of this opinion.

[17] For the same reason, to the extent that the defendant claims that statements elicited from a child during the course of a forensic interview that satisfy the requirements for admission under the tender years exception are admissible only as constancy of accusation evidence subject to the temporal limitations imposed on such evidence under *State* v. *Samuels*, 273 Conn. 541, 551–52, 871 A.2d 1005 (2005) (constancy of accusation evidence limited to statements made by victim to witness prior to victim's report of sexual abuse to police), that claim also lacks merit.

[18] Although our review focuses on the defendant's claim under § 8-10 of the Connecticut Code of Evidence, our interpretive analysis and conclusion are equally applicable to General Statutes § 54-86*l* because there is nothing in the language, legislative history or genealogy of § 54-86*l* to suggest otherwise.

[19] We note that the constancy of accusation doctrine is set forth in article VI of the Connecticut Code of Evidence and in the same section governing prior consistent statements. See Conn. Code Evid. § 6-11 (a) and (b). Although we previously "have characterized the constancy of accusation doctrine as an exception to the hearsay rule"; *State* v. *Troupe*, supra, 237 Conn. 291 n.7 (citing cases); we observed in *Troupe* "that [c]onstancy evidence is properly viewed as a peculiar species of evidence [not readily conformed] . . . to evidentiary rules designed for other classes of evidence . . . . Because constancy of accusation testimony is admissible only to assist the jury in evaluating the credibility of the alleged victim and not to prove the truth of the facts recited, the doctrine, strictly speaking, is not a hearsay exception." (Citations omitted; internal quotation marks omitted.) Id.

[20] Section 8-10 of the Connecticut Code of Evidence was adopted by the judges of the Superior Court on June 30, 2008, and became effective on January 1, 2009. General Statutes § 54-86*l* was enacted into law in 2007; see Public Acts 2007, No. 07-143, § 11; and was thereafter amended in 2007; Public Acts, Spec. Sess., June, 2007, No. 07-5, § 42; and in 2009. See Public Acts 2009, No. 09-63, § 1.