
STATE OF CONNECTICUT
SUPREME COURT

S.C. 20429

STATE OF CONNECTICUT

vs.

BRUCE JOHN BEMER

DEFENDANT-APPELLANT'S BRIEF

TO BE ARGUED BY:

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OR
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INTRODUCTION

In order to convict the Defendant in this case, the State was required to prove beyond a reasonable doubt that he *knew or reasonably should have known* that the individuals he hired as prostitutes had been trafficked by a third party. The State failed to meet that burden. There is not a single piece of evidence in the record to show — directly or by reasonable inference — that, if those individuals were trafficked, the Defendant knew or should have known anything about it. The judgment below must therefore be reversed, and the case remanded with direction to enter a judgment of acquittal.

The Defendant alternatively is entitled to a new trial because the trial court's instructions to the jury on "coercion" — the foundation of the State's case on trafficking — were incorrect as a matter of law and thus constitutionally defective. The relevant portion of the statute requires the State to prove beyond a reasonable doubt that the actual trafficker, Robert King, instilled a fear in the prostitutes that he would "expose any secret" tending to "impair any person's credit." Conn. Gen. Stat. § 53a-192(a)(3). The trial court did not charge the jury on the essential element of exposing a secret — instead charging only that coercion could be accomplished by a threat to impair credit. The court never mentioned exposing a secret in its instructions, the State never introduced any evidence of a secret, and the jury therefore never considered it.

The trial court also improperly charged that to "impair . . . credit" effectively covers debt bondage, when the language of the statute does not support that construction. Although the court also charged on trafficking by fraud as an alternative to coercion, a verdict cannot stand when the jury possibly relied on a legally inadequate theory of liability. *Griffin v. United States*, 502 U.S. 46, 59 (1991); *State v. Chapman*, 229 Conn. 529, 539–40 (1994). As a result, the judgment must be reversed, and a new trial ordered.

NATURE OF PROCEEDINGS AND FACTS OF CASE

In Counts 1 to 4 of a Substitute Long Form Information dated April 4, 2019 (Court Ex. III), the Defendant was charged with Patronizing a Trafficked Person in violation of Conn. Gen. Stat. § 53a-83(c) (Rev. to 2016) at various times between October 2013 and 2016. In Count 5, he was charged with Trafficking in Persons as an accessory, in violation of § 53a-192a (Rev. to 2016) and § 53a-8 in the same time period. (App. A011).

The Defendant pleaded not guilty and claimed a trial by jury. At the close of the State's case, the Defendant moved for a judgment of acquittal on all counts. (Tr. 6/8/18 at 8–11; App. A013-16). The trial court denied that motion. (*Id.* at 16–17; A019-20). After a day and a half of deliberations, the jury returned a verdict of guilty on all counts. (Tr. 4/10/19 at 3–5; App. A023-25). The Defendant then moved for a judgment of acquittal or in the alternative for a new trial under Practice Book § 42-51 et seq. (App. A027). The trial court denied that motion and imposed a sentence of 10 years imprisonment on each of the first four counts and 20 years imprisonment suspended after 10 years with 5 years of probation on the fifth count, all sentences to run concurrently. (App. A075–78). The Defendant then filed this timely appeal. (App. A083).

Additional facts will be added in the Argument as appropriate.

ARGUMENT

I. **The Evidence is Insufficient to Show that the Defendant Knew or Should Have Known that the Prostitutes He was Patronizing were the Victims of Conduct of Another Person that Constituted Trafficking in Persons by Means of Fraud or Coercion.**

Standard of Review: “In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict.” (Internal quotation marks omitted.) *State v. Leniart*, 166 Conn. App. 142, 169–70 (2016), *aff'd in part, rev'd in part*, 333 Conn. 88 (2019) (quoting *State v. Allan*, 311 Conn. 1, 25 (2014)).

The Evidence is Insufficient.

For the verdict to stand, the evidence must be sufficient to establish beyond a reasonable doubt that, at the time of the alleged offenses, the Defendant knew or reasonably should have known that the victims were “trafficked,” i.e., that they engaged in prostitution because they had been compelled or induced by means of fraud or coercion, the latter limited by agreement to § 53a-192(a)(3), by their pimp, Robert King.¹

To prove the coercion claim as charged by the trial court,² the State was required to prove beyond a reasonable doubt that:

¹ It was undisputed at trial that, if the victims were subject to fraud or coercion, it was their pimp, Robert King, who engaged in that conduct. There was no evidence or claim by the State that the Defendant himself directly engaged in fraud or coercion, or that any other individual did so. The State did not charge the Defendant with trafficking in Counts 1–4, and although it charged him with trafficking in Count 5, it was strictly as an accessory to King's primary conduct.

² The trial court's charge on coercion was fatally flawed. (See Issues II and III.) That error does not alter the Defendant's sufficiency claim, however, because the jury was correctly charged that the Defendant knew or reasonably should have known about the trafficking, and there is no evidence, under any construction of the statute, suggesting that the Defendant knew or should have known that the prostitutes were trafficked.

- (1) Robert King “instilled fear” in the victims. In other words, that he made a threat that in fact frightened them.
- (2) The threat that created the victims’ fear was a specific threat to impair the credit of “any person.”
- (3) The Defendant actually knew, or reasonably should have known, at the time he hired the victims as prostitutes, that they were acting as prostitutes because King instilled in them a fear that King would impair someone’s credit.

The State failed to prove that the Defendant knew or reasonably should have known anything about any conduct by King that constituted coercion as the court defined it.

Alternatively, the State alleged and attempted to prove beyond a reasonable doubt that King defrauded the victims into engaging in prostitution, and that the Defendant knew or reasonably should have known of the fraud at the time the prostitution occurred. “Fraud” was not a substantial aspect of the State’s case, however, and the State offered little argument or evidence to support the claim – “coercion” was plainly the central focus. To the extent there was any evidence of fraud, the State again completely failed to demonstrate that the Defendant knew or should have known anything about it.

The following is the statutory scheme in place at the time of the alleged offenses.

The patronizing statute, § 53a-83 (Rev. to 2016),³ provides in relevant part:

(a) A person is guilty of patronizing a prostitute when: . . . (3) he solicits or requests another person to engage in sexual conduct with him in return for a fee.

(b) Except as provided in subsection (c) of this section, patronizing a prostitute is a class A misdemeanor.

(c) Patronizing a prostitute is a class C felony if such person *knew or reasonably should have known at the time of the offense* that such other person . . . (2) was the victim of conduct of another person that constitutes (A) *trafficking in persons in violation of section 53a-192a*

(App. A091; emphasis added).

³ It is undisputed that the general statutes as of the 2016 revision are the relevant substantive statutes in this case.

The trafficking statute, § 53a-192a (Rev. to 2016), provides in turn that:

- (a) A person is guilty of trafficking in persons when such person (1) compels or induces another person to engage in conduct involving more than one occurrence of sexual contact with one or more third persons, . . . , by means of (A) the use of force against such other person or a third person, or by the threat of use of force against such other person or a third person, (B) *fraud*, or (C) *coercion*, as provided in section 53a-192

(App. A093; emphasis added).

The trafficking statute does not provide a definition of “fraud.” The coercion statute, § 53a-192, provides:

- (a) A person is guilty of coercion when he compels or induces another person to engage in conduct which such other person has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which such other person has a legal right to engage, by means of *instilling in such other person a fear that*, if the demand is not complied with, *the actor or another will*: (1) Commit any criminal offense; or (2) accuse any person of a criminal offense; or (3) *expose any secret tending* to subject any person to hatred, contempt or ridicule, or *to impair any person's credit* or business repute; or (4) take or withhold action as an official, or cause an official to take or withhold action.

- (b) It shall be an affirmative defense to prosecution based on subdivision (2), (3) or (4) of subsection (a) of this section that the actor believed the accusation or secret to be true or the proposed official action justified and that his purpose was limited to compelling the other person to behave in a way reasonably related to the circumstances which were the subject of the accusation, exposure or proposed official action, as by desisting from further misbehavior or making good a wrong done.

(App. A092; emphasis added).

Based on this statutory scheme, the trial court correctly charged the jury that in order to convict the Defendant on the charge of patronizing a trafficked person, it must first find beyond a reasonable doubt that “the Defendant paid a fee in exchange for an agreement to engage in sexual conduct with [an]other person” in violation of § 53a-83(a)(3). (Tr. 4/8/19 at 131). There is no dispute that this element was satisfied.

Next, the trial court correctly charged pursuant to § 53a-83(c)(2) that the jury must also find beyond a reasonable doubt that “the Defendant knew or reasonably should have known that at the time of the offense such other person or prostitute was a victim of the conduct by Robert King that constitutes trafficking in persons in violation of § 53a-192a.” (*Id.* at 132). Having concluded that the State presented no evidence on the use of force or the

threat of use of force under § 53a-192a(a)(1)(A), the trial court charged only on subsections (a)(1)(B) and (a)(1)(C): “A person is guilty of trafficking in persons when such person compels or induces another person to engage in conduct involving more than one occurrence of sexual contact with one or more third persons by means of fraud or coercion.” (*Id.* at 133).

The trial court then instructed that “[c]ompel’ means to force or constrain to do something,” and “[i]nduce’ means to move to action by persuasion or by influence.” (*Id.* at 133). It defined “fraud” as “a deliberately planned purpose and intent to cheat or deceive or unlawfully deprive someone of some advantage, benefit or property.” (*Id.* at 134).

With respect to coercion as defined in § 53a-192(a), the trial court correctly determined that the State had introduced no evidence that King had instilled fear concerning (1) any threat that he would commit a crime, (2) a threat to accuse a person of a criminal offense, or (4) a threat to take or withhold official action. It thus determined that it should charge only on § 53a-192(a)(3). On that subdivision, it charged as follows:

“A person is guilty of ‘coercion’ when he compels or induces another person to engage in conduct which such other person has a legal right to abstain from engaging in by means of instilling in such other person a fear that if the demand is not complied with, the actor or another will impair any person’s credit.”

(*Id.* at 134; App. A176).⁴

The State’s theory of guilt under these statutes was that Robert King took advantage of the prostitutes’ histories of drug addiction and mental health problems to leverage them into debt by providing them with drugs, and then compelling or inducing them to attempt to satisfy that debt by performing sex acts with the Defendant for money. The State’s theory was misguided, because although it describes a kind of debt bondage that some states have criminalized, that crime is not encompassed within the relevant statutes here. (See Issue III.)

⁴ This charge was incorrect because it did not accurately reflect the elements of the offense as set forth in the statute, omitting an essential element – the threat to expose a secret. (See Issue II.) The statute criminalizes coercion by way of a threat to expose a secret tending to impair a person’s credit – it does not define coercion as the very different act of actually impairing credit, without the predicate threat, and it does not include all threats in its narrow definition.

But King's conduct—despite its prominence in the State's case—is an aside. The State failed to show that the Defendant ever knew or should have known anything about King inducing or compelling the prostitutes by fraud or coercion, or anything about their interactions with King beyond the fact that King acted as their pimp. There was thus no basis from which the jury could have concluded that the Defendant knew or reasonably should have known about King's alleged trafficking of the prostitutes.

Given the clear statutory mandate, one would expect the State to have made every effort to present evidence that the Defendant knew or should have known of King's trafficking, if such evidence existed. King, for example, would have been an obvious source of such evidence, particularly after pleading guilty to Conspiracy to Commit Trafficking in Persons on August 24, 2018 and not being sentenced until June 19, 2019. (App. A155). But the State did not call King to testify. In fact, the State offered no witness to provide evidence of any conversations or other relevant communications or interactions between the Defendant and King, or between the Defendant and the prostitutes. The State presented nothing to suggest that the Defendant knew or should have known that King ever induced or compelled the prostitutes to have sex with him by fraud or coercion.

No witness offered even a single piece of evidence to suggest that the Defendant knew anything about the prostitutes' alleged drug debt with King or that King supposedly took advantage of their mental or physical health histories. None suggested the Defendant himself ever engaged in any aggressive or threatening conduct. None testified to being threatened in any way by the Defendant or to ever telling the Defendant they were threatened. None testified to being defrauded by the Defendant or to telling the Defendant they had been defrauded. None suggested that the Defendant knew or should have known anything at all about the manner in which King allegedly defrauded or coerced the victims to participate in acts of prostitution with the Defendant.

The evidence established that the Defendant knew that the victims were prostitutes and knew that King had arranged for them to meet the Defendant for that purpose. If there

was a plan between King and the Defendant, some knowledge by the Defendant about King's alleged tactics in obtaining the prostitutes, or even some spoken or unspoken understanding between King and the Defendant, the jury could only have guessed at it, because there was no evidence to support even the inference.

While the State put on substantial evidence about King's activity as a pimp, that is insufficient. The case is not about soliciting prostitution (or the role of a pimp in that process). The State readily conceded as much during closing argument: "It's not just prostitution. It's so much more than that." (Tr. 4/8/19 at 102).⁵ The State was required to prove beyond a reasonable doubt what the Defendant knew or should have known – specifically that he knew or should have known that King threatened to impair someone's credit, or that King defrauded the victims; i.e. that he knew or should have known about trafficking. But it did not. Indeed, if the evidence in this case is sufficient to convict the Defendant, every person patronizing a prostitute is likely to be vulnerable to a trafficking charge.

The State presented Dan T. (John Doe #1), who testified about his problems with drug abuse, his relationship with King, and the fact that King had arranged for him to meet the Defendant in order to exchange money for sex. (Tr. 4/4/19 at 11-17). He testified that he may have had the Defendant's telephone number at one point, but that "I don't remember speaking with him." (*Id.* at 23). He described the sex acts that he had engaged in with the Defendant (see, e.g., *id.* at 17-20) and he described some conversations he had with the Defendant concerning helicopters, cars, and motorcycles – nothing more. (*Id.* at 24-25).

Dan T. explained that when he went to see the Defendant, he knew why he was going because King had explained it to him. (Tr. 4/4/19 at 71). But he never suggested that the

⁵ After making that statement, however, the State's attorney went on to describe the variety of unorthodox sex acts that were performed during the exchanges with the Defendant, as if to suggest that the variety of acts, alone, necessarily change prostitution to trafficking. (*Id.* at 102-03). While that premise may spark some sympathy or shock in jurors who are unaccustomed to hearing a litany of sex acts described in open court, the premise is false, and the resulting sympathy or shock is an inappropriate basis for a verdict.

Defendant knew anything about his personal life or his interactions with King. He did not describe any conversations between himself and the Defendant in which he discussed his drug abuse, mental health issues or alleged debt to King. He did not offer any evidence that the Defendant had been aware of any of his history or interactions with King, or any evidence from which the jury could conclude that he reasonably should have been aware.

Brian I. (John Doe #3) similarly testified to his history of drug abuse, his relationship with King and the fact that King had arranged for him to see the Defendant in order to exchange sex for money. He never described any conversation between King and the Defendant. He suggested he “kind of” felt forced to engage in prostitution because he was a drug addict, owed a debt to King, and had no other way of getting money to repay the debt. (Tr. 4/2/19 at 77–78). But he never did or said anything to suggest that his debt was not self-induced or self-imposed. He never testified that King was the only source from which he could obtain drugs, never explained why he had no other way to get money, and never suggested that King prohibited him from either quitting drugs or earning money some other way. Further, he *never* suggested that the Defendant had known or had reason to know about his debt. He acknowledged the debt was with King and not the Defendant. (*Id.* at 78).

Brian I. never described any conversation or other communication in which he explained any part of his situation or his relationship with King to the Defendant, or in which King explained it, and he never suggested that the Defendant had been aware of that situation or that relationship in any other way. He said he discussed cars with the Defendant. (*Id.* at 90). He also testified that, when he went to see the Defendant, he had to “hide the drug” because he knew that the Defendant did not want to have anything to do with drugs. (*Id.* at 76). He did not explain whether he knew this because King told him, or from some other source.

At one point he testified:

Q: On the times when you said no [to going to the Defendant] and frankly didn't want to, did Bob King ever threaten to involve your family?

A: Yes.

Q: Not what he said, but were you taken – was your mother ever involved?

A: Yes.

Q: Okay. How so?

A: . . . Yeah. Yes. Um, I would tell my mother elaborate stories to have her give Bob money of all sorts, because I didn't have any other way of getting it.

(*Id.* at 64–65). This confusing testimony is not evidence that King threatened to impair someone's credit, or of any specific threat by King at all. At most, this testimony suggests that Brian I. involved his family by asking his mother for money. But even if it did have anything to do with a threat to impair someone's credit, the testimony does not even begin to prove that the Defendant knew or should have known about whatever the victim is describing.

William W. (John Doe #8) testified that King saw him on the news after a local station had done a report on homeless persons. (Tr. 4/3/19 a.m. at 15-17). He described a relationship with King that was similar to the other prostitutes. He used drugs provided by King and incurred a debt that King ultimately suggested he could pay off by seeing the Defendant to exchange sex for money. (*Id.* at 20–21). He explained that King sent the Defendant a text message with his photograph in it, asking if the Defendant wanted to meet him. (*Id.* at 24–25). He was asked to testify about the Defendant's response to the text message, and the Defendant's response to a follow-up telephone call that King made to him, but after the Court explained that he could only testify about things he specifically had seen and heard, William W. testified that he could not recall Defendant's responses. (*Id.* at 25).

Like the others, William W. offered lengthy testimony on his interactions with King, including the statement that he felt "forced" into the encounters with the Defendant. (*Id.* at 51). But he never suggested that the Defendant knew or should have known anything about that, or had known anything at all about his history or his relationship with King.

Michael F. (John Doe #11) also offered testimony that was comparable to the others. He described a history of drug abuse and explained that he had incurred a debt with King that he ultimately agreed to pay off by providing sex for money. (Tr. 4/2/19 at 110). He explained that King had arranged for him to see the Defendant for sex, (*id.* at 110-12), and

that he had agreed in order to pay debts he owed to King. Like the others, Michael F. did not offer any evidence suggesting that the Defendant had known about his relationship with King. Nor did he relate to the Defendant any of his conversations with King or describe any of the things King may have done to encourage him to engage in prostitution. He did not testify to any substantive conversations between the Defendant and King. Nor did he testify that he had ever discussed or explained his history or relationship with King with the Defendant.

D.T. (John Doe #5) (not otherwise identified, but not the same person as Dan T.), testified so unfavorably for the State — he said, for example, that he was a friend of King's (Tr. 4/3/19 p.m. at 3) — that the State withdrew the count as to him. The State also attempted to withdraw two counts as to two other John Does when no evidence was presented at all, whereupon the trial court, over the State's objection, granted a judgment of acquittal on those three counts. (Tr. 4/8/19 at 6-8).

Danbury police officer Daniel Trompetta and FBI agent Kurt Siuzdak also testified. Neither offered any evidence that the Defendant had been or reasonably should have been aware of the prostitutes' histories or of their relationships with King. Agent Siuzdak testified at several points that he worked on "human trafficking" investigations (see, e.g., Tr. 4/4/19 at 88), but explained to the jury that the purpose of his investigation was to determine whether trafficking was going on in the first place. He testified that "it's possible that they are doing it [prostitution] of their own volition and it's possible that they are, actually, being forced to do it. So we had these names and we were trying to determine what was - what was, actually, going on here and, you know, how - how this - this worked." (*Id.* at 95). He testified that King was "leading" the sex for money operation (*id.* at 101) but did not offer any testimony or other evidence indicating that the Defendant had been aware of King's financial arrangements with the prostitutes.

During Agent Siuzdak's testimony, the State offered an "extraction report" showing cell phone communications between King and the Defendant. (Ex. 46B; App. A134-39). The State indicated that the exhibit was not admitted for the truth of the statements contained

therein, but only to demonstrate that there had been communication by cell phone between King and the Defendant. (*Id.* at 125-26). Even if it had been admitted for the truth, the exhibit offers no direct or circumstantial evidence that the Defendant had been aware of any acts that could constitute trafficking. All it proves is that King showed pictures of the prostitutes for the Defendant to review and presumably select.

Agent Siuzdak explained that he found during his investigation “that drugs were used to control an individual’s behavior.” (*Id.* at 159). Neither he nor any other witness testified that the Defendant had been aware of any drug sale or drug debt between King and any prostitute (or other party) at any time. Nor did Agent Siuzdak specify which “individuals” behavior may have been “controlled” by drugs, or the manner in which that supposedly occurred.

The Defendant did not testify. King originally was on the State’s witness list, but he ultimately did not testify either, even though he was available at Cheshire Correctional Institution. (Tr. 4/8/19 at 22). Neither the notes of the Defendant’s FBI interview (Ex. A; App. 140-42) nor the phone extraction report (Ex. 46B) says anything about whether the Defendant knew about King’s methods or his relationships with the prostitutes. The prostitutes offered no evidence of the Defendant’s knowledge, because none of them heard the Defendant say anything relevant on the issue to King or to anyone else, and none of them testified that, if they were coerced or defrauded, they discussed the subject with the Defendant. The testimony of the investigating officers was similarly silent on the question of knowledge. The Defendant paid the prostitutes, as would be the case with any patronizing charge, and knew that King would get his cut, (Tr. 4/1/19 at 105-06), but that was it.

Throughout the trial, the issue of impairing any person’s credit was the central theme of the State’s case. The State’s attorney made only one mention of fraud in her closing. (Tr. 4/8/19 at 71). She instead pressed the idea that King had encouraged drug addiction and then coerced the prostitutes through a drug debt. She repeatedly told the jury that the “only way” the drug addicted prostitutes could get more drugs was through their “credit” and their “tab” with King. (None of the victims testified that King was their only source of drugs.) “They

had to have it; they had to have these drugs; they had to have, okay, the access to these substances, and the only way to get access to these substances was through Robert King.” (*Id.* at 68.) “Robert King gives them a tab. He extends them this -- this credit, builds it up, builds it up, builds it up, and then says this is what you gotta do, there’s only one option, there is no other way.” (*Id.* at 69). (None of the victims testified that King ever said anything like that.) “Bruce Bemer didn’t hold a gun to their head. Well, no, no. That’s not this case, and that’s unfair to -- to characterize it in that way. In this case, it was much subtler, right. It’s that debt, the building up of the debt, that no other options, that -- that ... that model that says these individuals have nowhere else to go but to Bruce Bemer.” (*Id.* at 70). “[S]o it’s just this constant cycle. They’re not getting out of debt.” (*Id.* at 71).

In this way, the State’s attorney described what she believed to be acts of trafficking by King and repeatedly told the jury that the Defendant knew about it. (Tr. 4/8/19 at 70–71). But even in that context, the State could only offer unsupported conclusions. “That was done by Robert King, but Bruce Bemer knew about it. He knew about it.” (*Id.*) The prosecutor did not (and could not) point to any actual evidence supporting this claim, failing to mention any evidence on which the jury could conclude, or even reasonably infer, that the Defendant in fact knew or should have known. She didn’t even try; she just returned her argument to the subject of coercion by King. (*Id.*) Because no witness *ever* said what the Defendant knew, counsel had no other choice.

The State’s attorney also pointed out that the prostitution had been going on for 20-25 years (*id.* at 102) and that the Defendant, having seen certain prostitutes on numerous occasions, must have known about the “quality of these individuals.” (*Id.* at 66). Whatever that means, and whatever the State believes the Defendant should have known about the individuals’ qualities or deficiencies, that is not evidence that the Defendant knew or should have known something about King defrauding or coercing them. It is possible that the Defendant could have used King to provide prostitutes for years and never known anything

about his methods. The length of time alone is insufficient to remove the question from the realm of speculation.

Ultimately, the State's attorney suggested to the jury that there was a "camaraderie" between the Defendant and King, based primarily on the few text messages set out in Exhibit 46B (the call extraction report). (Tr. 4/8/19 at 100). A review of that document reveals almost nothing, and to divine "camaraderie" from it would be a stretch. But the fact is that the Defendant never denied knowing King. He never denied that King provided him with prostitutes. Those facts do not establish the crime with which the Defendant was charged. The State alleged King was a trafficker and the Defendant knew or reasonably should have known about it. It offered no evidence on that score. "Camaraderie" will not suffice.

"A claim of insufficient evidence implicates the constitutional right not to be convicted on inadequate proof." *State v. Sitaras*, 106 Conn. App. 493, 489, cert. denied, 287 Conn. 906 (2008) (citing *State v. Morgan*, 70 Conn. App. 255, 281, cert. denied, 261 Conn. 919 (2002)). As the trial court noted in its charge, evidence of the Defendant's knowledge typically can be established through an inference from other proved facts and circumstances. See *State v. Nunes*, 58 Conn. App. 296, 301, cert. denied, 254 Conn. 944 (2000). And a finder of fact "may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." *State v. Ledbetter*, 275 Conn. 534, 543 (2005), cert. denied, 547 U.S. 1082 (2006) (internal quotation marks omitted). "Nevertheless, "[b]ecause [t]he only kind of an inference recognized by the law is a reasonable one . . . any such inference cannot be based on possibilities, surmise or conjecture It is axiomatic, therefore, that [a]ny [inference] drawn must be rational and founded upon the evidence." *State v. Na'im B.*, 288 Conn. 290, 296–97 (2008) (internal quotation marks omitted), citing *State v. Niemeyer*, 258 Conn. 510, 518 (2001)).

With this standard in mind, a number of convictions have been overturned in recent years due to insufficient evidence, including the absence of evidence concerning the defendant's mental state. See, e.g., *State v. Carpenter*, 214 Conn. 77 (1990) (murder

conviction overturned due to insufficient evidence of intent to kill and judgment modified to manslaughter in the first degree); *State v. Maurice M.*, 303 Conn. 18, 29 (2011) (evidence was insufficient to prove violation of probation based on risk of injury to a child because defendant did not willfully permit his two year old child to exit his home where he was found by passersby; willfulness not proven because defendant did not know that injury would occur or recklessly disregard that potential consequence); *State v. Kalphat*, 134 Conn. App. 232, 241 (2012) (although evidence supported inference that defendant would sell marijuana in his possession, jury could only speculate that he intended to do so within 1500 feet of a school despite being arrested with the marijuana within 1500 feet of a school); *State v. Hedge*, 297 Conn. 621, 659–60 (2010) (large quantity of drugs in defendant's vehicle supported inference that he intended to sell drugs somewhere, but evidence was insufficient to prove that he intended to do so within 1500 of a public housing project despite being arrested within 1500 feet of one; coincidental stoppage of defendant while passing through a location does not permit inference that he intended to sell there); *State v. Jordan*, 314 Conn. 354, 388 (2014) (evidence insufficient to prove tampering with physical evidence since jury had to speculate that when defendant discarded his clothing and mask after bank robbery in an attempt to avoid capture, he believed it was probable he would be arrested).

The Court in *Hedge* rejected a similar rationale to the speculative one that the State advanced in this case. The Court concluded that the defendant's possession of narcotics in an area known for heavy drug trafficking did not permit an inference that the defendant intended to sell his narcotics in that location as opposed to elsewhere. *Hedge*, 297 Conn. at 660. The frequency of drug sales in that location may have made it more likely that the defendant intended to sell drugs there, but speculation remained the sole basis upon which to draw that conclusion. *Id.* at 660–61.

Here, there was no evidence that the Defendant had any knowledge that King compelled or induced the prostitutes or even that any of them owed him a debt. There was no evidence that the Defendant knew about the prostitutes' issues with money or debt, or its

relationship with drugs, and even if the evidence had been sufficient to establish that the Defendant knew or should have known about those issues, the State was required to prove that the Defendant knew or should have known that King had used fraud or coercion to compel or induce the prostitutes to meet with the Defendant. There was no evidence on that score. Nor was there evidence to establish beyond a reasonable doubt that the Defendant reasonably should have known.

While the jury would be permitted to draw all reasonable inferences to conclude that the State had established the Defendant's knowledge beyond a reasonable doubt, there was no evidence upon which any inference could have been based. The jury therefore could only have guessed about whether the Defendant was aware or should have been aware of King's alleged fraud or coercion with regard to one or more of the prostitutes, or the means King employed to get them to engage in prostitution.

In Count 5, the Defendant was charged with trafficking in persons in violation of Conn. Gen. Stat. §§ 53a-192a and 53a-8. The trial court instructed the jury that the Defendant was charged on this count as an accessory and properly instructed that, in order to find him guilty, the jury must find beyond a reasonable doubt that he acted with the mental state necessary to commit the crime of trafficking. (Tr. 4/8/19 at 137). Thus, for this Count, the State was required to prove that the Defendant not only was aware of the alleged trafficking, but that he specifically intended that it occur and specifically intended to aid in that endeavor. Because the evidence does not establish that the Defendant was aware of any activity by King that could have constituted trafficking, the State could not prove that he intentionally engaged in trafficking and intentionally acted to aid or abet King's efforts. The evidence was thus insufficient to find the Defendant guilty on any of the counts.

II. A Threat to “Expose Any Secret” is an Essential Element of a Coercion Charge on Patronizing a Trafficked Person under C.G.S. § 53a-192(a)(3).

Standard of Review: Statutory construction; review is plenary. *State v. Agron*, 323 Conn. 629, 634 (2016).

A. The Trial Court Improperly Charged on Coercion.

To understand this issue, the Court must look to § 53a-83, then to § 53a-192a, then to § 53a-192. As previously discussed, the operative statutory scheme required that the State prove that the Defendant patronized a prostitute whom he knew or reasonably should have known at the time of the offense was trafficked, which meant that the person had been compelled or induced to engage in conduct involving sexual contact with one or more third persons by means of fraud, or coercion, as provided in the coercion statute § 53a-192.

As previously discussed, § 53a-192 provides in relevant part:

(a) A person is guilty of coercion when he compels or induces another person . . . , by means of *instilling in such other person a fear that, if the demand is not complied with, the actor or another will: (1) Commit any criminal offense; or (2) accuse any person of a criminal offense; or (3) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair any person's credit or business repute; or (4) take or withhold action as an official, or cause an official to take or withhold action.*

(b) It shall be an affirmative defense to prosecution based on subdivision (2), (3) or (4) of subsection (a) of this section that the actor believed the accusation or secret to be true or the proposed official action justified and that his purpose was limited to compelling the other person to behave in a way reasonably related to the circumstances which were the subject of the accusation, exposure or proposed official action, as by desisting from further misbehavior or making good a wrong done.

(Emphasis added).

The only reasonable way to read this provision is that “expose any secret” is an essential element of any charge under subdivision (3). Furthermore, exposing any random secret will not suffice. The threat must be of exposing a secret and having a specified consequence.

Thus, the statute covers threatening, not the threatened conduct itself. It criminalizes the threat to reveal a secret that would tend to impair credit. It does not criminalize the actual impairing of credit, or the actual revealing of a secret. Nor does it encompass the actual

committing of a crime or accusing the victim of criminal conduct. Those things are covered elsewhere in the statutes and may or may not constitute crimes in themselves. But they do not stand as proper bases for a conviction under the coercion statute – you cannot coerce someone (under this statute) by committing a crime against them, by telling their secrets, or by impairing their credit. The threat to expose any secret is the thing.

But while concerning only threats, the statute does not encompass every threat. It does not cover a threat to impair credit that does not arise from exposing a secret. Nor does it criminalize a threat to accuse the victim of some noncriminal bad act, like philandering, or to expose some *other* secret, not dealing with the subjects set out in this statute. The statute is narrow and specific in its scope.

Nevertheless, the trial court incorrectly charged the jury as follows:

“A person is guilty of ‘coercion’ when he compels or induces another person to engage in conduct which such other person has a legal right to abstain from engaging in *by means of instilling in such other person a fear that if the demand is not complied with, the actor or another will impair any person’s credit.*”

(Tr. 4/8/19 at 134; App. A176; emphasis added). This simply is not what the statute says.

First, grammatically, § 53a-192(a)(3) requires (among other things) that the defendant instilled in the victim a fear that if the victim does not do what the defendant demands, the defendant or a third party will:

- (1) *Commit* any criminal offense; or
- (2) *accuse* any person of a criminal offense; or
- (3) *expose* any secret tending to subject any person to hatred, contempt or ridicule, or to impair any person's credit or business repute; or
- (4) *take or withhold* action as an official, or *cause an official to take or withhold* action.

Each of the four possible grounds of coercive behavior is identified by an action verb (italicized). The actions suggested by those verbs are essential to the statutory finding.

The construction of the statute as explained in the previous paragraph is a standard one in statutory interpretation. It is based on the widely acknowledged “convention of parallel usage” described in the Chicago Manual of Style § 5.212 (10th ed. 2010). Thus, central to each of the four § 53a-192(a) subdivisions is the action verb identified above. And within

§ 53a-192(a)(3), the parallel usage is the two infinitive phrases, namely, “to subject any person to hatred, contempt or ridicule” and “to impair any person's credit or business repute.” Each of the two infinitive phrases is the object of the participle “tending.”

Second, if “to impair any person’s credit or business repute” is an element separate from the threat “expose any secret,” then it must follow directly from the language preceding (1), (2), and (3). But the last preceding word is “will,” which cannot grammatically be followed by “to impair.” “Will expose” works; “will to impair” does not.

Third, if “to impair” is unrelated to a threat to “expose any secret tending,” it is odd that that provision is the only one of the four not put in a separate subdivision. It makes little sense to lump unrelated provisions together. Had the Legislature intended the “impair” language to be a separate basis for coercion untethered to a threat to “expose any secret,” it reasonably would have listed it as a fourth or fifth numbered ground on which coercion may be found.

Fourth, subsection (a) must be read in the context of subsection (b). That subsection raises an affirmative defense to subdivisions (2), (3), and (4) of (a) that “the actor believed the *accusation* or *secret* to be true or the proposed *official action* justified” and later refers to “the subject of the *accusation*, *exposure* or proposed *official action*” (Emphasis added). Thus (b) tracks the subject matter of three of the subdivisions of (a). The subject matter of (a)(3) therefore is “expose any secret” and focuses the affirmative defense for (a)(3) on the defendant’s belief that the secret was true.

In other words, to the extent that there is any doubt on whether the statute requires the revealing of a secret, reference should be made to subsection (b) for further clarity. *State v. Dudley*, 332 Conn. 639, 647 (2019) (“In determining what the legislature intended by [a specific term], we must carefully examine the entire text of the statute”). The statute is thus focused on the proscribed conduct, i.e., a threat regarding the accusation, the secret, or the official action, rather than the results of the threatened conduct.

Fifth, if the above four points leave some ambiguity, this Court should turn to the legislative history. *State v. Panek*, 328 Conn. 219, 238–39 (2018). The Model Penal Code,

on which § 53a-192 is based (see *infra* at 37), supports the Defendant's reading. Section 212.5 of the Code criminalizes coercion, in part, as a threat "to: . . . (c) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute;" Official Comment 3 to the Criminal Coercion section, p. 267, in describing a threat that "falls outside the permissible context of private bargain," refers to "a threat to *arrest* or to *accuse* of crime or to *expose a shameful secret* . . ." (emphasis added).

Finally, even if the legislative history still leaves the statute ambiguous, the rule of lenity in criminal cases supports the Defendant's reading of (a)(3). *Dudley*, 332 Conn. at 653. The rule of lenity "is a means of assuring fairness to persons subject to the law by requiring penal statutes to give clear and unequivocal warning in language that people generally would understand, concerning actions that would expose them to liability for penalties and what the penalties would be . . . [and] to protect the individual against arbitrary discretion by officials and judges." *Id.* (citation and internal quotation marks omitted) (quoting *State v. Cote*, 286 Conn. 603, 615 (2008)). Where the statute remains unclear, the rule of lenity requires it be strictly construed in favor of the defendant and against the State.

While no court appears to have directly construed this language, two courts have implicitly recognized that a threat to "expose any secret" is an essential element of (3). In *State v. Reynolds*, 118 Conn. App. 278, 311 (2009), cert. denied, 294 Conn. 933 (2010), the trial court "instructed the jury that the state bore the burden of proving beyond a reasonable doubt that the defendant had demanded that the victim go to his apartment and had induced her to do so by instilling in her a fear that he would *expose a secret* about her that would expose her to ridicule." (Emphasis added). The Appellate Court affirmed the coercion conviction and held that the State had presented sufficient evidence where "the jury could find that the defendant invited the victim to go to his apartment and instilled a fear in her that, if she did not go to his apartment, he would expose the secret images of her." *Id.* at 313. "The evidence amply supported a finding that the victim was fearful that the defendant would expose the images and that this fear induced her to go to his apartment." *Id.* at 315.

The Appellate Division of the New Jersey Superior Court has taken a similar view. Referring to language that was identical in relevant part to § 53a-192(a)(3), the New Jersey court upheld a lower court's grant of a restraining order in a domestic case *A.B.A. v. T.A.*, No. A-5500-15T4, 2018 WL 564396 (N.J. Super. Ct. App. Div. Jan. 26, 2018).

The Appellate Division held that the lower court “correctly found that plaintiff proved defendant criminally coerced him when she threatened to release the videotapes of his sexual activities to his employer in order to embarrass him and to jeopardize his employment if he did not pay her the court ordered attorney's fees totaling \$30,000.”

In short, a threat to “expose any secret” is an essential element in any charge under § 53a-192(a)(3).⁶ The trial court's mistake is crucial because, in order to convict under Counts 1 through 4, the State was required to prove beyond a reasonable doubt that the Defendant knew or should have known that the prostitutes were compelled or induced, through fraud or “coercion, as provided in § 53a-192.” Conn. Gen. Stat. § 53a-192a(a). To convict under Count 5, the Defendant not only had to have knowledge, but also had to intend that trafficking under § 53a-192a take place. This means that an omission of one of the essential elements of coercion infected all five counts. The failure to charge on that element was error.

B. The Court Should Reach the Merits of this Claim.

This Court should reach the merits of this issue because: 1) the error is plain; 2) the error was raised at trial, albeit after the verdict, and the trial court ruled on the merits of the issue; 3) the trial court found that the failure to raise the issue earlier was not the result of an effort to mislead the court; and 4) if under the circumstances of this case the claim of error is potentially waived under *State v. Kitchens*, 299 Conn. 447 (2011), then it should be overruled.

The omission of the element of a threat to expose a secret from the charge on the statutory definition of coercion was first raised after the verdict. During the trial, on Friday, April 5, 2019, the trial court emailed counsel a draft of the jury charge, which included a

⁶ This also is the conclusion of Professor William Eskridge, Jr. in a letter considered by the trial court in the posttrial proceedings. (Tr. 6/17/19 at 1; App. A150-52).

charge on all four subdivisions of § 53a-192(a). (App. A160-61). At the charge conference on April 8, the parties first agreed that the draft charge on (a)(1), (a)(2), and (a)(4) should be eliminated. (Tr. 4/8/19 at 46; App. A164). The Defendant then said that (a)(3) also should come out because there was no evidence to support it. (*Id.* at 47; App. A165). The State's attorney responded that there was a piece of evidence pertaining to one count to support the claim that King had threatened to expose a secret. (*Id.* at 47–48; App. A165-66).

The State's attorney then focused narrowly on the "impair any person's credit" language and said: "And I think that's a huge part of this case." (*Id.* at 48; App. A166). She then referred to "impairing any person's credit" as debt bondage. The Defendant argued to the contrary. (*Id.* at 48–51; App. A166-69). The parties did agree that "the business repute" phrase should come out. (*Id.* at 49; App. 167). The Defendant then argued that, if there was to be a charge on (a)(3) for a threat to expose a secret, it would only possibly apply to one count. (*Id.* at 50; App. A168). The State's attorney then decided that she did not want a charge on threatening to expose a secret at all and requested a charge on (a)(3) covering only "impairing any person's credit," because she believed it would apply to all counts. (*Id.* at 51–52; App. A169-70). The Defendant (mistakenly) agreed that "that's all that's left for the rest of them." (*Id.* at 52; App. A170). The trial court concluded the charge conference shortly thereafter. (*Id.* at 62). The court then immediately moved to closing arguments (*id.* at 63), took the lunch break (*id.* at 106), had a brief colloquy with counsel outside the presence of the jury on unrelated matters and proceeded to charge the jury. (*Id.* at 119). Prior to giving its charge, the trial court did not provide counsel with a written version of the "impairing any person's credit" charge that it had developed and changed during its conference with counsel just before lunch.

After the verdict was rendered, the Defendant raised the omission of the element of a threat to "expose any secret" in his Motion for Judgment of Acquittal or for New Trial. (App. A030-38). Following oral argument on the motion, the trial court ruled as follows:

I went back and listened to all of the arguments that were made at the time that we were drafting the charge to the jury, and in those arguments, we had much discussion in terms of the defendant's contesting that the jury be charged in general, all right, and I think we can all agree on that. Once we moved into the specifics of then how the jury would be charged on Coercion, what was apparent was that the Court, in its original draft to both sides -- in providing my draft version of the charge, had incorporated the language that counsel is now indicating should have been charged, and the discussion -- when it came down to the wording to be used, the State requested that that part be omitted and gave a sample of what the State felt was appropriate and the defendant agreed to that, and the only reason that I say this -- and I totally understand the defendant's argument in terms of *Kitchens*. I -- I -- *I'm not suggesting that this was done purposefully in -- in a manipulative manner in order to be able to have this appellate issue.* All right.

So, moving beyond that, what I think counsel does agree is that this issue was not raised at the time that we did the jury charge, but argues that *Kitchens* is not applicable because now it goes into a constitutional argument. The reason that I think the discussion on the manner and the wording should be used for purposes of the jury charge on this particular element is important in this case is because it's not simply a matter in which everybody overlooked this and there was no discussion on it and it just happened that it -- it -- it was charged that way. This was an area that I originally indicated I was going to charge with the language that counsel's now -- now asking for or now suggesting that should have been provided, that then there was a request to omit that, the Court omitted it based on that request, and therefore, there was -- there was absolute discussion and purposeful charging in this particular instance, and I think that's important to note for the record. *Nonetheless, it does -- the constitutional aspect is still, obviously, imperative and -- and needs to be addressed.*

In this Court's opinion, after review of the evidence in this case, after review of the statute, the legislative interpretation and analysis and the case law on it, I am of the opinion that the evidence as presented, when analyzed in accordance with this statute, provided a fair guidance by which the jury could deliberate and that the charge as given fairly comports and did comport and does comport with the law which was appropriate with regard to the timeframe in which the defendant was charged and did not mislead the jury in its deliberations on this matter, and for that reason, I deny the defendant's motion for a new trial.

(App. A076-78; emphasis added).

1. The Error is Plain.

Before making any consideration of *Kitchens* and *Golding*,⁷ this Court should determine that this issue is reviewable because the error is plain. Even in the face of a potential waiver, plain error trumps; *State v. McClain*, 324 Conn. 802, 814–15 (2017); and this error is plain.

⁷ *State v. Golding*, 213 Conn. 233 (1989), provides a four-prong test for determining when an appellate court will consider a constitutional issue not properly preserved in the trial court. *State v. Kitchens*, 299 Conn. 447 (2011), provides for an implicit waiver or jury charge issues notwithstanding *Golding* in certain situations.

A failure to charge the jury on an essential element of the crime is plain error. *State v. Hamilton*, 30 Conn. App. 68, 75 (1993), *aff'd*, 228 Conn. 234 (1994); *State v. Cotton*, 69 Conn. App. 505, 506 (2002). Such a failure is at least as serious as a failure to charge on a defendant's right not to testify, which *State v. Ruocco*, 322 Conn. 796, 803–04 (2016), held to be plain error. See also *McClain*, 324 Conn. at 814, which cites numerous other plain error cases.

Once § 53a-192(a)(3) is properly analyzed, there is only one way to read the language about a threat to expose any secret—it plainly applies whenever (a)(3) is charged. The State's attorney's final argument to the jury, focused almost exclusively on the incorrect charge, demonstrates why a failure to reverse would be a manifest injustice to the Defendant.

2. *Kitchens* and *Golding* Do Not Apply Because This Issue was Decided on the Merits by the Trial Court.

Because the trial court ruled on the merits of the motion, as it was entitled to do in the interests of justice under Practice Book § 42-53, the claim is properly preserved despite the fact that the issue was not raised until after the verdict. So even if *Kitchens*, 299 Conn. at 483, would otherwise be applicable to constrain appellate review, its logic does not constrain review *by the trial court* of a fundamental constitutional issue. And once the trial court has decided an issue on the merits, there is no reason to deny review on appeal. The main purpose of *Kitchens*, after all, is to protect the *trial court* from being sandbagged into giving the Defendant two bites at the apple because of his trial tactics. *Id.* at 475-85. *State v. Golding*, 213 Conn. 233 (1989) similarly applies to claims that the trial court has not had an opportunity to decide. As a result, this Court should reach the issue on the merits.

3. *Kitchens* Should Not Apply in Any Event, Because the Circumstances Do Not Warrant Its Application and the Trial Court Found That There Was No Attempt To Mislead the Court.

The trial court gave counsel a draft charge that included the element of exposing any secret. (App. A161). When the subsequent colloquy with the trial court about the charge on § 53a-192(a) is read as a whole, (Tr. 4/8, at pages 46–52), it shows: (i) that defense counsel

was focusing on two things, the lack of evidence on exposing any secret, and the meaning of “credit”; (ii) that what the trial court was going to charge and not charge on (a)(3) was evolving at a high speed; (iii) that defense counsel did not want a charge at all on (a)(3); (iv) that the prosecutor first wanted a charge on “expose a secret” and then changed her mind; (v) that there was no time for calm reflection on the changes made in the draft charge; (vi) that the charge was given the same day as the charge conference; (vii) that counsel were not given a written version of the revised charge to review between the time the court developed the charge and the time it instructed the jury; and (viii) thus, that the significance of taking out the “exposing any secret” language on page 52—that it would undermine *any* charge on (a)(3)—was missed.

The point of the rule in *Kitchens* is to prevent review of a claim that has been implicitly waived by counsel and to protect the trial court from appeal by ambush.

We conclude that, when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal.

Kitchens, 299 Conn. at 482–83.

The circumstances described in *Kitchens* did not exist here. Counsel did not receive a copy of the jury instructions after they were revised and did not have any meaningful opportunity to review the changes. In fact, the circumstances here closely mirror a description of circumstances that the *Kitchens* Court believed would *not* constitute implicit waiver:

In fact, there may be cases in which it is not the better practice to infer waiver on the basis of an on-the-record discussion. For example, defense counsel may agree to a last minute instructional change only to realize, upon further reflection after the trial, that he or she did not fully understand the change and that the instruction was incorrect, when the flaw might have been identified in time for counsel to object had there been an opportunity to review the change in writing and in less pressing circumstances before the jury was charged.

Kitchens, 299 Conn. at 485. That is precisely the situation that prevailed during the trial in this case.

Moreover, the trial court here expressed no need for such protection in any event. In response to the State's claim during the posttrial proceedings that the Defendant had waived the jury instruction issue under *Kitchens*, the court specifically found that the failure to raise the improper jury charge issue before the verdict was *not* an attempt to mislead or induce the Court into making an error. "I'm not suggesting that this was done purposefully in -- in a manipulative manner in order to be able to have this appellate issue." (App. A076). Thereafter the court proceeded to decide the constitutional issue on the merits.

The trial court is in the best position to determine the motivations of counsel and the effect of counsel's actions on the court. Its finding is therefore entitled to deference on appeal. In any event the finding is clearly correct. Accordingly, *Kitchens* does not apply, and this issue is properly before this Court pursuant to the four-prong test in *Golding*.⁸

The first *Golding* prong is that the record must be adequate. Here the record is adequate because it shows what the trial court charged and the relevance of the charge to the issues. The State in the posttrial proceedings did not claim otherwise. (App. A064-66).

The second prong is that the claim must be of constitutional magnitude. It is. The State did not claim otherwise. (*Id.*)

A defendant is constitutionally entitled to have the jury instructed on the essential elements of the crime charged and to be acquitted unless proven guilty of each element beyond a reasonable doubt.

State v. Thompson, 305 Conn. 806, 815 (2012) (citation omitted). See also *State v. Leniart*, 333 Conn. 88, 100 (2019) ("if the rule establishes, as a substantive matter, the type or degree of evidence necessary to establish that elements of a crime have been proven beyond a reasonable doubt, then the defendant's claim is reviewable on appeal regardless of whether

⁸ The Defendant submits that, because the trial court actually decided the issue on the merits, resort to the *Golding* test is not required. This Court should review the claim as it would any other claim involving the failure to charge an essential element of a criminal offense. (See discussion of error at pp. 17–21.) The Defendant recognizes, however, that the issue was not raised until after the verdict. Thus, to the extent that this Court does not agree that the error is preserved for appeal because the trial court decided it, the Defendant submits an analysis under *Golding*.

he raised it at trial.”) The statutory definition of coercion in § 53a-192(a)(3) is an essential element of the crime with which the Defendant was charged here because (a)(3) was the *only* portion of the coercion statute in issue.

The third prong is that the alleged constitutional violation must clearly exist and clearly deprive the defendant of a fair trial. In charging on (a)(3), the trial court omitted an essential element of the definition of “coercion,” namely, the threat to expose any secret. In making that omission, it committed a fundamental constitutional error. *State v. Devalda*, 306 Conn. 494, 501 (2012); *State v. Thompson*, *supra*.

In *Devalda*, as here, the trial court improperly omitted an essential element of the crime. The trial court failed to limit the definition of “restrain” in a kidnapping statute to victims under 16 or incompetent, neither of which included the victim in *Devalda*, 306 Conn. at 507. This was a *Golding* violation and the only contested issue was its fourth prong. *Id.* at 507-11. Likewise, in *Thompson*, an improper charge on larceny was held to be a *Golding* violation because it was incomplete. 305 Conn. at 814-15. *Thompson* then proceeded to the fourth prong. *Id.* at 815.

The fourth prong is whether the constitutional impropriety is harmless beyond a reasonable doubt. And the first question is whether this prong applies at all. “Moreover, because the incorrect instruction pertains to an element of the offense, and because there is no evidence in the record that the omitted element was uncontested, harmless error analysis does not apply.” *State v. Newton*, 330 Conn. 344, 371 (2018).

On direct appeal, “[i]t is well established that a defect in a jury charge which raises a constitutional question is reversible error if it is reasonably possible that, considering the charge as a whole, the jury was misled. . . . [T]he test for determining whether a constitutional error is harmless . . . is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained A jury instruction that improperly omits an essential element from the charge constitutes harmless error [only] if a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error”

Hinds v. Commissioner of Correction, 321 Conn. 56, 77–78 (2016) (citation and internal quotation marks omitted). Here, the omitted element was plainly contested.

In any event, “[a]n alleged defect in a jury charge that raises a constitutional question is reversible if it is reasonably possible that, considering the charge as a whole, the jury was misled.” *State v. Brown*, 299 Conn. 640, 660 (2011) (citation omitted).

In *Devalda*, the Court held it was reasonably possible that the “improper instruction had the effect of misleading the jury” and so ordered a new trial. *Devalda*, 306 Conn. at 511. The Court reached the same result in *State v. Flores*, 301 Conn. 77, 87 (2011), concerning an improper charge on kidnapping. On the other hand, in *Thompson* the Court held that the misdescription of the larceny statute applied to an issue that was “virtually uncontested by the defendant” and so did not order a new trial. *Thompson*, 305 Conn. at 822.

“A jury instruction that improperly omits an essential element from the charge constitutes harmless error if a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error” *Brown*, 299 Conn. at 661 (citations omitted). Here the words of the State’s attorney show it was more than reasonably possible that the jury was misled. *Devalda* rather than *Thompson* is the appropriate precedent.

In the colloquy with the trial court at the charge conference, the State’s attorney said of the credit issue: “that’s a huge part of this case.” (Tr. 4/8/19 at 48; App. A166). Had that not been so, she could have agreed with a charge only on fraud. Instead she pressed vigorously for a charge on coercion over the Defendant’s protest. She initially mentioned the evidence concerning a secret, but when the Defendant pointed out, as noted above, that that would apply, if at all, to only one count, she abandoned that point and successfully argued for a charge only on impairing any person’s credit. (*Id.* at 47–52; App. A165-70).

The issue of impairing any person’s credit thus became the central theme of the State’s case. As previously explained, the State’s attorney made only one mention of fraud in her closing. (Tr. 4/8/19 at 71). She instead vigorously pressed the idea that King had encouraged drug addiction and then coerced the prostitutes via a drug debt. (*Id.* at 67-70).

Reviewing the State's argument to the jury, it is readily apparent that the State's attorney was not exaggerating at the charge conference: the credit issue was a huge part of her case. She also clearly distanced herself from any reliance on a threat to "expose any secret." It is equally obvious that the precise language of the charge on the statute clearly mattered to the jury, who deliberated for a day-and-a-half, asked several questions, and requested six copies of the charge "from patronizing a trafficked person to the end of doc." (App. A143-49). See *State v. Miguel C.*, 305 Conn. 562, 581 (2012), and *DeMatteo v. City of New Haven*, 90 Conn. App. 305, 311, cert. denied, 275 Conn. 931 (2005), concerning the significance of a jury request in determining harmfulness.

Moreover, the State's case on the issue of coercion was far from overwhelming. Contrast *State v. Edwards*, 325 Conn. 97, 135 (2017). In fact, the Defendant has argued in Issue I that the evidence was nonexistent. The substantial weakness of the State's case is yet another factor that demonstrates the significant harm to the Defendant on this issue.

Because it is reasonably possible that the jury convicted on a legally impermissible basis, because the court failed to instruct the jury on an essential element of the crime charged, and because the jury did not consider that essential element, reversal for a new trial is required.

4. *Kitchens* Should Be Overruled.

If *Kitchens* applies here, it should be overruled. The concurring opinions by Chief Justice Rogers and Justice Palmer in *State v. Bellamy*, 323 Conn. 400, 454-525 (2016) explain in detail why *Kitchens* should be overruled, so the Defendant will only highlight certain points.

First, and most important, the doctrine of implied waiver created by *Kitchens* only for jury instructions—that if the trial court provides counsel with proposed instructions and gives adequate time for consideration and solicits comments, and if counsel affirmatively accepts them, then any issue, constitutional or otherwise, with respect to the charge is waived and

therefore unreviewable on appeal—implicitly overrules centuries of heretofore uncontroverted precedents, here and elsewhere, that waiver, implied or expressed, is the intentional relinquishment of a known right. *State v. Miranda*, 327 Conn. 451, 461 (2018); 28 Am. Jur. 2d *Estoppel and Waiver* § 183 (2019); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

What *Kitchens* is actually doing is applying the traditional law of forfeiture—the failure to make the timely assertion of a right through inadvertence or oversight; *Bellamy*, 323 Conn. at 456 n.3 (Rogers, C.J., concurring)—to the much stricter law of waiver. Because litigants do make honest mistakes however, even under the circumstances described in *Kitchens*, that application is improper. Under *Kitchens*, honest mistakes do not exist.

This leads to the second point to be highlighted. We now have two inconsistent definitions of waiver, one for the jury charge, and another for every other issue that is raised on appeal. For example, because *Kitchens* applies only to the charge, a failure to object to evidence, even though the prosecutor may have announced previously an intention to offer it and the trial court invited a response, or a failure to notice a sufficiency claim, will not bar *Golding* review unless the traditional test for waiver is met. In fact, in *Leniart*, 333 Conn. at 100, the Court proceeded to review the merits of an unpreserved insufficiency claim without pausing to consider whether the issue might have been implicitly waived under the strict *Kitchens* test.

The third point is that the two inconsistent definitions of waiver make *Kitchens* an outlier, not only on other issues of appellate review, but also in all litigation when an issue of waiver arises, such as cases involving contractual rights and duties.

The fourth point is that on most appellate issues, it does not matter why an issue was not properly preserved in the trial court; whether intentionally or inadvertently, the issue usually is unreviewable. But *Golding* has made an exception for constitutional issues, and for good reason: constitutional issues involve by definition fundamental rights and therefore are matters of considerable importance to the public as well as to the parties. Where

unpreserved issues already are excluded as a matter of course, there is no good reason to further limit review of claims that *Golding* would allow.

A litigant must jump through four hoops before *Golding* gives relief. But when he does so because the record is adequate for review, the claim is of constitutional magnitude, a violation clearly exists and deprives the defendant of a fair trial, and the State fails to show that the violation was harmless beyond a reasonable doubt, the public's interest, as well as the defendant's, in seeing that litigants not be deprived of their constitutional rights requires that the issue be addressed on the merits unless the traditional basis for finding a waiver is met. *Golding* did not create this exception for claims of constitutional magnitude out of the blue. There is a long history of such an exception. *Golding* follows *State v. Evans*, 165 Conn. 61 (1973), and *Evans* is based on a long line of federal cases. *Id.* at 69–70.

In *Mangiafico v. Farmington*, 331 Conn. 404, 424–27 (2019), this Court recently overruled two cases that incorrectly deviated from the law. *Kitchens* likewise incorrectly deviated from the law. It should be overruled.

5. The Fraud Charge Does Not Save the Conviction.

That the jury might have based their verdict on the fraud rather than the coercion charge does not change the *Golding* or plain error analysis. In *State v. Chapman*, 229 Conn. 529 (1994), the Supreme Court distinguished between the situation in which the claimed error is only a factual one—lack of evidence—and the situation in which the claimed error is an error of law, as it is in this case. This Court recently made this very distinction “between a legally invalid basis and a factually unsupported basis for a conviction.” *State v. Turner*, 190 Conn. App. 693, 707 (2019). *Turner* involves the latter situation. *Id.* at 707–09.

A verdict cannot stand when the jury possibly relied upon an inadequate legal theory. “Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally

inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.” *Chapman*, 229 Conn. at 539 (quoting *Griffin v. United States*, 502 U.S. 46, 59 (1991)) (emphasis added).

Chapman distinguished between circumstances in which a jury may have based a conviction on a legally impermissible ground and those in which the jury may have based a conviction on a factually unsupported ground. It found error in both, but held that only the former presented a constitutional violation. The practical difference between the two is that a constitutionally invalid instruction is evaluated for harmlessness beyond a reasonable doubt, whereas a merely erroneous instruction is evaluated to determine whether it is more probable than not that the error affected the result. *Chapman*, 229 Conn. at 543-44. Because jurors are in the best position to assess whether the State’s theory is supported by the evidence, a reviewing court on appeal will assume that it convicted the defendant under the supported allegation as opposed to an unsupported one. *Id.* The Court cannot make that assumption when the jury has been tasked with an instruction, one proper (fraud) and the other improper (coercion).

It also is important to recognize that the trial court did not require the jury to agree on finding fraud unanimously or on finding coercion unanimously. It is true, of course, that our courts “have not required a specific unanimity charge to be given in every case” *State v. VanDeusen*, 160 Conn. App. 815, 839 (citing *State v. Famiglietti*, 219 Conn. 605, 619-20 (1991)), cert. denied, 320 Conn. 903 (2015). But when it charged that the jury could find trafficking through either fraud or coercion, and did not provide a specific instruction that the jurors unanimously had to find fraud or unanimously had to find coercion, it is possible and even likely that some jurors believed that the evidence established fraud and some believed that it established coercion as charged, with their combined votes improperly resulting in a trafficking conviction.

The failure to charge on each element of the crime is a fundamental error requiring reversal. Either the Defendant has been convicted without the jury finding that all of the

elements of the crime have been established beyond a reasonable doubt — since the jury did not consider whether he knew or should have known that King threatened to reveal a secret, or he has been convicted of conduct that does not constitute the crime at all — since the jury was permitted to convict based on a finding that the Defendant knew or should have known King threatened to impair the prostitutes' credit, which, standing alone, does not constitute the crime of trafficking in persons. As the Supreme Court has stated:

Of course, any such error is not cured just because an appellate court is satisfied after the fact of conviction that sufficient evidence was before the jury so that it would or could have found that the state proved the missing element had the jury been properly instructed. After all, “when [the Defendant] exercised his constitutional right to a jury, he put the [State] to the burden of proving the elements of the crimes charged to a jury's satisfaction, not to ours or [the trial judge's].”

State v. Gabriel, 192 Conn. 405, 414 (1984) (alterations in original; citation omitted).

The trial court committed a fundamental constitutional error in its charge on § 53a-192(a)(3), and that error is neither harmless nor waived. The Defendant is entitled to a new trial on all counts. Since the State submitted no evidence that the Defendant knew or should have known that King instilled a fear that he would expose any secret tending to impair any person's credit, the new trial should be limited to a charge on fraud under § 53a-192a(a)(1)(B). In *State v. Salamon*, 287 Conn. 509, 548–49 (2008), the Court held that the defendant was not entitled to acquittal when he prevailed on appeal based on a jury charge issue because there was evidence that was sufficient to convict him if the jury had been properly instructed. Accord: *State v. DeJesus*, 288 Conn. 418, 438–39 (2008). Here there is no such evidence concerning the element of coercion.

Furthermore, there were no relevant evidentiary rulings and both sides had rested before the charge conference was held, so the State's attorney could not have relied on any rulings before or at the conference in deciding what evidence to produce. Moreover, in response to the Defendant's motion for judgment of acquittal or for new trial, the State never

claimed that there was such evidence. Accordingly, the State should not be permitted to resurrect the issue at a new trial.

III. “Impair Any Person’s Credit” in C.G.S. § 53a-192(a)(3) Does Not Include Debt Bondage.

Standard of Review: Statutory construction; review plenary. *State v. Agron, supra*.

As discussed, Conn. Gen. Stat. § 53a-192 provides in part:

- (a) A person is guilty of coercion when he compels or induces another person to engage in conduct which such other person has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which such other person has a legal right to engage, *by means of instilling in such other person a fear that, if the demand is not complied with, the actor or another will: . . . (3) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair any person’s credit or business repute; or (4) take or withhold action as an official, or cause an official to take or withhold action.*

(Emphasis added).

The State’s theory of its case was that Robert King supplied the prostitutes with drugs. Thereafter he told them they owed him money for the drugs. When, as expected, they responded that they had no money, he sent them to the Defendant to perform sexual acts so that they could repay King. (Tr. 4/8/19 at 66–72). At the charge conference, the State’s attorney claimed that this is “debt bondage” and is included in the definition of “impair any person’s credit.” (Tr. 4/8/19 at 48–50; App. A166–68). The Defendant disagreed:

But the real problem with [(a)(3)] is that she is – when she talks about out of state and she talks about what’s really going on is debt bondage. Well, if we were talking about today’s statute it would be something else. But we’re not talking – we’re talking about a statute that was enacted several years ago and she’s trying to fit debt bondage into this statute, but – which is a much narrower statute than that. So I don’t think – I don’t think this applies. I think – I think Coercion should not be charged at all, Your Honor.

(*Id.* at 50–51; App. A168–69).⁹

The trial court agreed with the State and charged as follows:

A person is guilty of “coercion” when he compels or induces another person to engage in conduct which such other person has a legal right to abstain from engaging in by means of instilling in such other person a fear that if the demand is not complied

⁹ Public Act 17-32, § 2, effective October 1, 2017, added a separate category of “sex trafficking” to § 53a-192a. However, even that Act does not use the phrase “debt bondage.”

with, the actor or another will impair any person's credit.

(*Id.* at 134; App. A176).

The Defendant excepted as follows:

The other thing is, I don't think there was any evidence to support the charge in coercion concerning impairing any person's credit and I object to a charge on that. And if that's out, then there should have been no charge on coercion whatsoever.

(*Id.* at 147).

The State's attorney was accurate in describing her claim as one of "debt bondage." That is a form of extortion that could apply in a situation like this one and that has been codified in the laws of several other states. But it is not a part of the relevant version of 53a-192(a)(3). Since debt bondage was the State's only claim of proof concerning "impairing a person's credit," and since debt bondage is not fairly included within the statutory language regarding a threat to reveal a secret tending to "impair any person's credit," the charge should not have been given.

First, the full clause concerns a threat to reveal a secret tending to "impair any person's credit or business repute;" and while the trial court properly did not charge on "business repute," that language inevitably affects the meaning of "credit". *State v. Agron*, 323 Conn. 629, 635 (2016) ("When determining the legislature's intended meaning of a statutory word, it is also appropriate to consider the surrounding words") (internal quotation marks omitted). The more natural meaning of "credit" in the context of "business repute" is that it refers to the prostitute's legitimate creditworthiness with someone other than King. It would not be an expected usage for the legislature to intend by this language to include an illegal and unenforceable drug debt.

Second, while the Legislature has modernized other prostitution statutes, notably §§ 53a-83 and 53a-192a, it has made no significant change in the language of § 53a-192 since

it was adopted as part of the Penal Code in 1969. Indeed, the *only* change to § 53a-192(a)(3) since 1969 was to replace “his” with “any person” for gender neutrality. If the Legislature wanted to include “debt bondage” in the definition of trafficking in persons, as other states have recently done; e.g., Cal. Penal Code § 236.1(h)(1) (added in 2012); Idaho Code § 18-8602(1)(a)(ii) (added in 2006); Minn. Stat. § 256J.08, subd. 90 (added in 2003); Okla. Stat. tit. 10a, § 1-1-105(70) (added in 2015); Wash. Rev. Code § 19.320.010(7) (added in 2016); it could have done so. It has not. None of these statutes defines “debt bondage,” but the Idaho, Minnesota, and Oklahoma statutes all include the phrase in the context of “subjection to involuntary servitude, peonage, debt bondage, or slavery.” This context shows the extreme nature and specificity of “debt bondage”.

Third, in 2007 the Legislature did in fact add “debt bondage” to a different statute, § 46a-170 (Rev. to 2016), which defines the role of the Trafficking in Persons Council. In doing so, the legislature both defined the term along the same severe lines that other states have used, and limited its applicability to the statute in question. Thus:

(g) For the purpose of *this* section, “trafficking” means all acts involved in the recruitment, abduction, transport, harboring, transfer, sale or receipt of persons, within national or across international borders, through force, coercion, fraud or deception, *to place persons in slavery or slavery-like conditions, forced labor or services, such as forced prostitution or sexual services, domestic servitude, bonded sweatshop labor or other debt bondage.*

(*Id.*; emphasis added).

This language fits exactly the story the State’s attorney was attempting to present here, but the Legislature did not see fit in 2007 to add this definition of trafficking to § 53a-192 and this Court should not take that liberty. This conclusion is bolstered by the use of the term “other” in 46a-170, suggesting that the legislature understood the meaning of “debt bondage” in relation to the items listed before it. None of those terms pertain to impairing any person’s credit, and all describe circumstances that are arguably far more severe. Like some of the

out-of-state statutes, the language in § 46a-170(i) suggests the same narrow focus that those other states have employed when referring to “debt bondage.”

Finally, while there is no prior Connecticut statute on which § 52a-192 is based, it is clear where the language “impair any person’s credit” came from in 1969: *all* the language of § 53a-192(a)(3) came verbatim, along with much of the rest of § 53a-192, from § 212.5, entitled “Criminal Coercion,” of the Model Penal Code. (App. A119). The significance of this history is that the official Comment to § 212.5: shows that “coercion” addresses a limited category of offenses:

Section 212.5 prohibits specific categories of threats made with the purpose of unlawfully restricting another’s freedom of action to his detriment. This section defines a residual offense designed to prohibit impermissible threats not proscribed elsewhere. . . . Obtaining the property of another by means of threat or intimidation may constitute robbery under Section 222.1, extortion under Section 223.4, or theft of services under Section 223.7.

The Model Code definition of criminal coercion limits the reach of this offense in two ways. First, liability requires proof of improper purpose. . . .

Second, Section 212.5 proscribes only certain threats. The categories of restricted threats are identified in four paragraphs. [The Comment then refers to the language now in § 53a-192(a)(1)(2)(3) and (4), but the only word it defines is “person”, meaning natural persons.]

The list of restricted threats stops short of the more comprehensive list in Section 223.4 of the Model Code, which defines theft by extortion. In that offense the essential wrong is obtaining property to which the actor knows he is not entitled.

Official Comment, “*Elements of Offense*,” pp. 264, 265, 266. (App. A121-23),

While the Comment does not define “impair any person’s credit,” it does make clear that any definition is a narrow one and does not cover the broader field of extortion. The Legislature could have included “extortion” broadly as an element in § 53a-192, but it did not. Thus the statutory language is intended to prevent extortion by someone in the position of King by protecting the private details that would tend to impair an individual’s credit or business repute from King’s disclosure of such details *to others*. In short, the statutory language has nothing to do with debt bondage.

Since the trial court permitted the jury to find the Defendant guilty on the basis of debt bondage, which is not a crime under § 53a-192(a)(3), that error implicates a fundamental constitutional right, requiring that his conviction be reversed. As in *Thompson*, 305 Conn. at 818, wherein the Court held that a misdescription of an element of an offense is analogous to an omission of an element, the trial court here clearly misdescribed the charge by allowing the jury to find that there was an impairing of any person's credit based on evidence of debt bondage. Moreover, the *Chapman* analysis concerning the significance of the charge on fraud is equally applicable here because the error is one of law where the jury was misled. Not only did the trial court omit an essential element (Issue II) but it inserted a term of its own making, allowing the jury to convict the Defendant of something that is not a crime.

The Defendant is entitled to a new trial on all counts. At that new trial, as with Issue II, in light of the rulings in *Salamon* and *DeJesus* discussed above, it would be error for the trial court to give an instruction on coercion because the State submitted no evidence supporting a proper charge on "impair any person's credit." It should not be permitted to relitigate the issue at a second trial.

CONCLUSION

The judgment of conviction should be reversed and the case remanded to the trial court with direction to enter a judgment of acquittal on all counts. In the alternative, a new trial should be ordered limited to the evidence of fraud pursuant to § 53a-192a(a)(1)(B).

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CERTIFICATION

Pursuant to Practice Book § 67-2(g), I hereby certify that: (1) the electronically submitted brief and appendix were emailed on October 2, 2019, to counsel of record listed below; and (2) that the brief and appendix do not contain any names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted.

Pursuant to Practice Book § 67-2(i), I hereby certify that: (1) in compliance with Practice Book § 62-7, a copy of the foregoing brief and appendix were mailed, postage prepaid, to the counsel of record listed below on October 2, 2019; (2) that the brief and appendix are true copies of the brief and appendix filed electronically pursuant to Practice Book § 67-2(g); (3) that the brief and appendix do not contain any names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted; (4) and that the brief complies with all provisions of Practice Book § 67-2(i).

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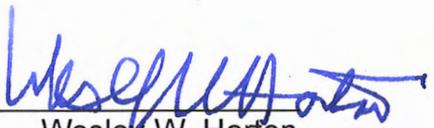
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