STATE OF CONNECTICUT *v.* SUSHIL GUPTA
(SC 18122)

Rogers, C. J., and Katz, Palmer, Vertefeuille, Zarella, McLachlan and Robinson, Js.*

Argued October 19, 2009—officially released June 29, 2010

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *Stacey M. Haupt*, assistant state's attorney, for the appellant (state).

Hugh F. Keefe, with whom, on the brief, was *Tara L. Knight*, for the appellee (defendant).

Opinion

KATZ, J. After a jury trial in three consolidated cases, the defendant, Sushil Gupta, was convicted in two cases of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (5),[1] sexual contact by means of a false representation by a health care professional that the sexual contact is for a bona fide medical purpose. The defendant appealed from the trial court's judgments of conviction to the Appellate Court, which reversed the judgments on the ground that the trial court had abused its discretion in consolidating the cases for trial and excluding certain medical treatises and instructional videotapes from evidence. See *State* v. *Gupta*, 105 Conn. App. 237, 256, 937 A.2d 746 (2008). We then granted the state's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court properly conclude that the trial court abused its discretion in consolidating the three cases against the defendant?"; (2) "Did the Appellate Court properly determine that the trial court improperly failed to admit certain medical treatises and videotapes?"; and (3) "Did the Appellate Court properly conclude that the defendant's conviction for the sexual assault of M[2] required reversal even though it was the 'most brutal and shocking' of the three assaults that were consolidated for trial?" *State* v. *Gupta*, 286 Conn. 907, 944 A.2d 980 (2008). We answer the first question, which is dispositive of this appeal, in the affirmative. We also reach the second question, and conclude that the Appellate Court's conclusion was improper with respect to the treatises, but proper with respect to exclusion of the videotapes. We therefore affirm in part the judgment of the Appellate Court.

The Appellate Court opinion sets forth the following facts that the jury reasonably could have found. "The defendant is a physician with a specialization in pulmonology. At the times relevant to this appeal, the defendant was affiliated with a group practice, the Cardiothoracic and Vascular Group (medical group). . . .

"On August 29, 2003, J was a college freshman. That morning, her father took her to her appointment with the defendant because she appeared to have a sinus infection and was suffering from allergies and asthma. Because J had had sinus infections in the past, she had seen the defendant once or twice previously. When the defendant entered the examining room, J revealed her symptoms to him. She also added that she was menstruating because some of the symptoms she was experiencing were common to both her sinus problems and menstruation. The defendant asked J if her breasts were tender while she was menstruating, and, as he asked her, he cupped his hands against his chest. The defendant then felt J's sinuses, looked in her ears, nose and throat and felt the glands in her neck. J then removed

her sweatshirt, and the defendant lifted the back of her tank top and placed a stethoscope on her back to listen to her lungs.

"When the defendant examined J's chest, he partially rolled up the front of J's tank top, exposing the lower half of her breasts. Surprised by this, J moved back and asked the defendant if he wanted her to roll up her tank top. The defendant nodded yes, and J rolled up the rest of her tank top. At this point, J was leaning back with her arms behind her on the examination table. First, the defendant touched J's left breast with his two fingers. Then the defendant placed both of his palms on her breasts simultaneously, and he began kneading or massaging her breasts, running his thumbs over the top of her nipples. While massaging J's breasts, the defendant made a grumbling or a low moaning sound. The defendant had not performed this type of breast examination during J's previous visits for sinus infections. After checking her abdomen, the defendant completed the examination and prescribed medications for her sinus infection. The defendant also recommended a follow-up appointment, which J made that day but cancelled shortly thereafter.

"After the examination, J did not tell her father about what had happened during her examination because she was not comfortable talking to him about it. J went home, however, and discussed the examination with her mother. J told her mother that she had a suspicion that she had been sexually assaulted. . . .

"On November 7, 2003, D was twenty-two years old. On that day, D saw the defendant because her primary care physician had referred her to him after an X ray had revealed spots on her lungs. When D entered the examination room, a nurse asked her to remove her shirt but to keep her bra on and gave her a gown to put on. When the defendant came in, he felt D's glands and listened to her lungs with a stethoscope. He then asked her to unhook her bra and to lie down on the examination table. The defendant first used two fingers to feel D's breasts, but then he felt both breasts, one at a time, with his full hand. He did this twice to each breast. After completing the examination, the defendant told D that he was very worried about her condition and that she should make another appointment for five days later.

"On November 12, 2003, D returned for her second appointment. After D took a pulmonary functions test, the defendant examined her. The defendant asked D to unhook her bra, and then she lay down on the table. He then repeated the same procedure he had done during her first examination. He first used two fingers to feel around her breasts and then felt first one breast and then the other breast with his full hand. He did this twice with each breast. At the end of the examination, the defendant made a comment to D about how she

was physically fit. After that appointment, D scheduled one more appointment for three weeks later. D was uncomfortable at the previous visit, but she returned regardless in an attempt to cure her illness. At this third appointment, the defendant performed the same examination he had performed during the two previous appointments. The defendant recommended that D schedule another appointment with him in March, 2004. Although she scheduled the appointment, she did not keep it. . . .

"In March, 2004, M was employed as a medical assistant by the medical group. She had been employed by the medical group for four years. M mainly worked in one office, but on March 26, 2004, M was filling in for the defendant's medical assistant in another office. Prior to this date, M had approached the defendant about her having an examination with him. She was concerned because her father had told her that her mother and her grandfather had had tuberculosis and that she had tested positive for it as a baby. As a result, the defendant suggested that she have a chest X ray, and she complied with the recommendation. The defendant subsequently looked at the X ray, which he determined was normal. Nevertheless, he told her that she should still have an examination. The defendant then approached her three times about her having an examination with him.

"On March 26, 2004, the defendant examined M. He directed her to an examination room where she sat down on the examination table. The defendant closed the door behind them and then closed the window blinds. At that point, the defendant approached M, grabbed her face, kissed both sides of her cheeks and thanked her for coming in to help him that day. He then examined her by checking the glands in her neck and looking into her mouth. Next, he used a stethoscope on her back to listen to her breathing. As he was doing that, he asked her if he could remove her laboratory coat and then went under her shirt to listen to her breathing. He then asked if he could undo her bra and proceeded to do so. He listened to her chest and then went under her shirt in the front and listened to her chest again. When he was finished, M pulled her shirt down. The defendant then asked M to lie down on the examination table. She lay down on the table, and he pulled her top up quickly, taking the bra with it and fully exposing her breasts. The defendant told M that he was going to check for lumps. He began to feel her breasts with his fingertips, but then he firmly grabbed both of her breasts with his hands and started to massage them. As he massaged her breasts, the defendant remarked to M that her breasts were soft and beautiful. Next, the defendant tapped M's stomach and remarked that her stomach was flat. With one hand, the defendant pulled back the bottom of her pants, taking the underwear with it and exposing the top of her 'private area.'

As he was tapping her pelvic bone, he commented that she was shaved and told her that she was 'so hot.' At that point, M asked the defendant if they were finished, and the defendant said it would only be a few more minutes.

"The defendant then again firmly massaged M's breasts with both of his hands. The defendant asked if he could kiss her breasts. Although M replied 'no,' the defendant proceeded to put his mouth on each breast and to suck on them briefly. He also pinched her nipples. At that point, M jumped up from the table, pulled down her shirt and said, 'No, we are done. That is enough.' The defendant then came up from behind M, put his hands underneath her shirt and grabbed her breasts, asking to feel her while she was sitting up. In response, M firmly took the defendant's hands, pulled them down and stated, 'No, we are done.' The defendant then told M she was fine and did not prescribe any medication for her.

"M walked out of the examination room, and the defendant followed her, asking if they could have lunch sometime. M responded 'sure,' and the defendant asked if she would have lunch at the office that day. She tried to tell him that she had to get back to the other office, but he was persistent in asking her until she agreed to stay. M stayed for a few minutes before deciding to leave. Before M left, the defendant grabbed her face and kissed both sides of her cheeks. He then attempted to kiss her on the lips, but she turned her head, so he bit at her cheek in a sexual manner.

"M reported the incident to her fiancé later that evening. They decided, first, to call a rape victims' hotline. Thereafter, M went to the police and gave a statement accusing the defendant of sexually assaulting her. As a result of the assault, M did not return to work at the medical group." *State* v. *Gupta*, supra, 105 Conn. App. 241–46.

The defendant was arrested and charged with sexual assault in the fourth degree in violation of § 53a-73a (a) (5) and sexual assault in the fourth degree in violation of § 53a-73a (a) (2)[3] in connection with his conduct toward M. After an article about the defendant's arrest appeared in the newspaper, J reported to the police that the defendant also had assaulted her. Shortly thereafter, D saw another newspaper article about the defendant's arrest and reported the defendant's conduct with her to the police. The defendant was then charged in separate informations with sexual assault in the fourth degree in violation of § 53a-73a (a) (2) and (5) in connection with his conduct with J and D.

Before trial, the state filed a motion to consolidate the three cases for trial claiming that the evidence would be cross admissible, and the defendant filed a motion to sever the cases claiming that he would suffer undue

prejudice if the cases were consolidated. After hearing argument on the motions, the trial court granted the state's motion to consolidate the cases and denied the defendant's motion to sever.

At trial, the state filed a motion in limine to preclude the defendant from introducing as evidence two instructional videotapes explaining the proper technique for performing a physical examination. After viewing the videotapes, the trial court granted the motion on the ground that the videotapes were irrelevant and possibly misleading. Thereafter, the defendant attempted to introduce several excerpts from medical treatises on the ground that they corroborated the opinion of his expert witness, Francoise Roux, a pulmonologist, that the defendant had performed a proper pulmonary examination on the three victims. The state objected to the evidence, and the trial court sustained the objection on the ground that the excerpts were irrelevant and potentially confusing. The court, however, allowed counsel for the defendant to read aloud whatever portions of the excerpts he deemed probative during his examination of Roux and to question her about them. Roux agreed that the excerpts supported her testimony and demonstrations as to the proper examination technique.

The jury found the defendant guilty of two counts of sexual assault in the fourth degree in violation of § 53a-73a (a) (5) with respect to the charges involving M and J and not guilty on a third count with respect to the charges involving D. The defendant then appealed from the judgments of conviction to the Appellate Court claiming that the trial court had abused its discretion in consolidating the cases for trial; see id., 246; and that the trial court had abused its discretion and deprived the defendant of his constitutional right to present a complete defense when it excluded the videotapes and excerpts from the treatises.[4] Id., 250. The majority of the Appellate Court agreed with both of the defendant's claims and, accordingly, reversed the defendant's convictions and ordered new trials in the cases involving J and M. Id., 256. In a concurring opinion, Judge Lavine determined that the trial court's consolidation of the cases was not improper, but agreed with the majority that the trial court improperly had excluded the evidence. Id., 256–58.

On appeal to this court, the state claims that the Appellate Court improperly concluded that the trial court had abused its discretion in: (1) consolidating the three cases for trial; and (2) excluding the videotapes and treatise excerpts. We disagree with the state's first claim and agree in part with its second claim and, therefore, we affirm in part and reverse in part the judgment of the Appellate Court.

I

We first address the state's claim that the Appellate Court improperly determined that the trial court had abused its discretion in consolidating the three cases. We conclude that the evidence in M's case was not cross admissible in the other two cases under the rule allowing evidence of other misconduct in cases involving sex crimes, that the denial of severance resulted in substantial injustice and that any resulting prejudice was beyond the curative power of the court's instructions. Accordingly, the Appellate Court properly determined that the trial court should not have consolidated M's case with the other two cases.

We begin with the law governing the consolidation of similar charges in pending cases against the same defendant. "General Statutes § 54-57[5] and Practice Book § 41-19[6] permit a trial court to join similar charges in pending cases against a common defendant. Our prior decisions have made clear that the trial court enjoys broad discretion in this respect and that its decision to consolidate will not be disturbed in the absence of manifest abuse of that discretion. *State* v. *McKenzie-Adams*, 281 Conn. 486, 519–20, 915 A.2d 822, cert. denied, 552 U.S. 888, 128 S. Ct. 248, 169 L. Ed. 2d 148 (2007). [T]his court consistently has recognized a clear presumption in favor of joinder and against severance . . . and, therefore, absent an abuse of discretion . . . will not second guess the considered judgment of the trial court as to the joinder or severance of two or more charges. . . . Id., 521. On appeal, [t]he defendant bears a heavy burden of showing that the denial of severance resulted in substantial injustice, and that any resulting prejudice was beyond the curative power of the court's instructions. . . . Id., 520.

"[When] evidence of one incident can be admitted at the trial of the other, separate trials would provide [a] defendant no significant benefit. It is clear that, under such circumstances, [a] defendant would not ordinarily be substantially prejudiced by joinder of the offenses for a single trial. *State* v. *Pollitt*, 205 Conn. 61, 68, 530 A.2d 155 (1987). We consistently have found joinder to be proper if we have concluded that the evidence of other crimes or uncharged misconduct would have been cross admissible at separate trials. *State* v. *McKenzie-Adams*, supra, 281 Conn. 520 (citing cases); see also *State* v. *Atkinson*, 235 Conn. 748, 765, 670 A.2d 276 (1996) (concluding that consolidation was proper, in part, because evidence of escape offense would have been admissible at trial to prove consciousness of guilt of other factually unrelated offenses); *State* v. *Greene*, 209 Conn. 458, 464, 551 A.2d 1231 (1988) ([t]he trial court properly joined the two cases for trial because, in the event of separate trials, evidence relating to each of the cases would have been admissible in the other); *State* v. *Pollitt*, supra, 72." (Internal quotation marks omitted.) *State* v. *Johnson*, 289 Conn. 437, 451–52, 958

A.2d 713 (2008).

With these principles in mind, we next turn to the law governing the admissibility of propensity evidence. "We recently have adopted an exception to § 4-5 (a) of the Connecticut Code of Evidence . . . allowing the admission of prior misconduct evidence to establish propensity in sex related cases if certain conditions are met. See *State* v. *DeJesus*, [288 Conn. 418, 470–74, 953 A.2d 45 (2008)]. Specifically, we concluded in *DeJesus* that evidence of uncharged sexual misconduct is admissible only if it is relevant to prove that [a] defendant had a propensity or a tendency to engage in the type of aberrant and compulsive criminal sexual behavior with which he or she [was] charged. Relevancy is established by satisfying the liberal standard pursuant to which [prior sex crimes] evidence previously was admitted under the common scheme or plan exception. Accordingly, evidence of uncharged misconduct [or other crimes] is relevant to prove that [a] defendant had a propensity or a tendency to engage in the crime charged only if it is: (1) . . . not too remote in time; (2) . . . similar to the offense charged; and (3) . . . committed [against] persons similar to the prosecuting witness. . . .

"[Such] [e]vidence . . . is admissible only if its probative value outweighs the prejudicial effect that invariably flows from its admission. . . . In balancing the probative value of such evidence against its prejudicial effect, however, trial courts must be mindful of the purpose for which the evidence is to be admitted, namely, to permit the jury to consider a defendant's prior bad acts in the area of sexual abuse or child molestation for the purpose of showing propensity." (Internal quotation marks omitted.) *State* v. *Johnson*, supra, 289 Conn. 452–53.

In the present case, the state argues that the trial court properly consolidated the cases involving D, J and M because, under *DeJesus*, the evidence in all three cases would have been cross admissible as propensity evidence. The state dismisses the reliance by the defendant and the Appellate Court on this court's holding in *State* v. *Ellis*, 270 Conn. 337, 852 A.2d 672 (2004), contending that the facts in that case are distinguishable from those in the present case.[7] We disagree with the state and consider the Appellate Court's assessment of the present case to be accurate and persuasive.

Although we concluded in *DeJesus* that evidence of uncharged sexual misconduct is admissible to prove that a defendant had a propensity or a tendency to engage in aberrant and compulsive criminal sexual behavior; *State* v. *DeJesus*, supra, 288 Conn. 422; we also underscored that this approach does not divest trial courts of their gatekeeping function and thereby allow the state to introduce *any* prior sexual misconduct evidence against an accused in sex crime cases.

Id., 472–74; see id., 472 (cautioning that "our approach does not vest trial courts with carte blanche to allow the state to introduce any prior sexual misconduct evidence against an accused in sex crime cases" [internal quotation marks omitted]). Instead, as the previous discussion of *DeJesus* clearly explains, the trial court must determine that two factors have been met. First, the evidence must be relevant to prove a propensity to commit the sexual acts with which the defendant has been charged, such relevancy to be established by satisfying the liberal standard pursuant to which evidence previously had been admitted under the common scheme or plan exception. Id., 473. Second, "evidence of uncharged misconduct is admissible only if its probative value outweighs the prejudicial effect that invariably flows from its admission." (Internal quotation marks omitted.) Id.

Applying the *DeJesus* rubric, we conclude that the facts alleged in the case involving M were too dissimilar from the other two cases and that the prejudicial effect of that evidence was too overwhelming to support cross admissibility in the cases involving D and J. Because we conclude that the evidence regarding M was not cross admissible and because that conclusion was the underlying predicate for the trial court's consolidation of the cases, we affirm the judgment of the Appellate Court in so far as it determined that the defendant is entitled to new trials.

Turning to the relevancy determination, we first consider the dissimilarity of the conduct at issue in the three cases.[8] Although the defendant improperly touched the breasts of D and J during a purportedly legitimate examination, his conduct toward M was markedly different, far more egregious and could in no way be mistaken for a proper medical examination. In addition to feeling her breasts with his fingertips and grabbing both of her breasts with his hands—the only conduct common to all three victims—the defendant kissed M on her cheeks, remarked that her breasts were soft and beautiful and pinched her nipples. *State* v. *Gupta*, supra, 105 Conn. App. 244–45. While he examined M's stomach, he remarked that it was flat, exposed the top of her " 'private area,' " tapped her pelvic bone and commented that she was shaved and that she was " 'so hot.' " Id., 245. Even after M told the defendant that the examination was over, he again firmly massaged M's breasts with both of his hands, asked if he could kiss her breasts, and although M replied " 'no,' " proceeded to put his mouth on each breast and to suck briefly on them. Id. When M jumped up from the table, pulled down her shirt and said, " 'No, we are done. That is enough,' " the defendant persisted by putting his hands underneath her shirt, grabbing her breasts, and asking to feel her while she was sitting up. Id. The Appellate Court's accurate summary of this evidence; id., 245–48; demonstrates, in short, that the case involving M

reflected significant qualitative differences from those involving D and J that were not merely a matter of degree.[9]

Similarly, we agree with the Appellate Court's comparison of the facts in the present case to those of *State* v. *Ellis*, supra, 270 Conn. 337, wherein this court concluded that the trial court had abused its discretion in consolidating the cases of the three victims "because the defendant's abuse of [the third victim] was substantially more egregious than his abuse of the other two [victims]." Id., 378. "In *Ellis*, the defendant was convicted of sixteen counts of sexual misconduct involving three victims. One victim claimed that the defendant had grabbed her breast through her clothing. Another victim claimed that the defendant had grabbed her breast through her clothing on two different occasions. Id., 345–46. The third victim claimed that the defendant had done several things to her, including, having sexual conversations with her, engaging her in 'phone sex'; id., 359; while telling her he was masturbating, grabbing her breast through her clothing on multiple occasions, touching her between her legs on multiple occasions, exposing himself to her, attempting to make her perform oral sex on him and forcibly kissing her. Id., 346–48." *State* v. *Gupta*, supra, 105 Conn. 247–48.

Although under the liberal standard, the similarities shared by the charged and the uncharged crimes need not be "so unusual and distinctive as to be like a signature"; (internal quotation marks omitted) *State* v. *Merriam*, 264 Conn. 617, 666, 835 A.2d 895 (2003); they still must be sufficiently similar. *State* v. *McKenzie-Adams*, supra, 281 Conn. 525 (trial court properly admitted uncharged misconduct evidence to prove common scheme or plan because victims similarly were situated and "defendant's sexual misconduct with [the victims] was sufficiently similar"). On the basis of the aforementioned facts of the present cases, the similarities did not meet that standard. We agree with the Appellate Court that the defendant's conduct toward D and J resembled that directed against two of the victims in *Ellis* and his conduct toward M resembled the conduct toward the third *Ellis* victim, whose case was deemed not sufficiently similar and thus not relevant for *DeJesus* purposes.[10]

Another factor that we must consider in the relevancy determination is the similarity of the alleged victims. Undoubtedly, all three of the victims share some features. They are all female and each was the defendant's patient when the alleged assaults occurred. M, however, also had a four year employment relationship with the defendant's medical group preceding the date of the alleged assault, whereas J and D had no relationship with him other than a physician-patient relationship. Cf. *State* v. *Ellis*, supra, 270 Conn. 361 (concluding that one victim was dissimilar from other young female

victims because, unlike others, she was not member of defendant's softball team, did not have frequent contact with defendant and "[e]ven more significantly, she did not feel compelled, as did the other [victims], to cultivate or continue a relationship with the defendant following the abuse because of his ability to assist her in obtaining a college softball scholarship"). M's status did not end when the defendant began his examination. Indeed, based on this difference in relationship, the defendant asserted a markedly different defense in the case involving M than he asserted in the cases involving J and D.[11]

Having concluded that the facts alleged in the case involving M were dissimilar from the facts alleged in the other two cases, we next address whether the probative value of the cross admissibility of evidence in these cases would nonetheless outweigh "the prejudicial effect that invariably flows from its admission." (Internal quotation marks omitted.) *State* v. *DeJesus*, supra, 288 Conn. 473; see *State* v. *Smith*, 275 Conn. 205, 218, 881 A.2d 160 (2005) ("[t]he test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jury" [internal quotation marks omitted]). In this case, the inevitable dangers of joinder derive from the likelihood that the jury improperly considered evidence of the defendant's conduct toward M to convict the defendant of the charges stemming from his conduct toward J[12] even though that evidence would have been inadmissible at a separate trial. "Joinder gave the state the opportunity to present the jury with the intimate details of each of these offenses, an opportunity that would have been unavailable if the cases had been tried separately." *State* v. *Boscarino*, 204 Conn. 714, 723, 529 A.2d 1260 (1987). Indeed, the obvious and blatant misconduct involving M severely undermined the defendant's ability to assert credibly the defense that the examinations of both D and J were medically legitimate, a point that the concurrence makes as well.

Nevertheless, despite our determination that the prejudicial effect of the evidence regarding M was too overwhelming to support the cross admissibility in the cases involving D and J, we still must consider whether the trial court abused its discretion in joining the cases.[13] In other words, we have stated that "[s]ubstantial prejudice does not necessarily result from a denial of severance even [if the] evidence of one offense would not have been admissible at a separate trial involving the second offense." (Internal quotation marks omitted.) *State* v. *Randolph*, 284 Conn. 328, 337, 933 A.2d 1158 (2007). We still examine a variety of factors in deciding whether severance was necessary to avoid undue prejudice resulting from consolidation of multiple charges for trial. Id., 337–38; see also *State* v. *Boscarino*, supra, 204 Conn. 724. In examining the issue, we in effect

weigh the risk that the jury will improperly use evidence that is introduced for proper purposes, despite the instructions of the court regarding the proper use of that evidence. This indeed is similar to the process that our courts employ in determining the admissibility of evidence regarding prior convictions and other misconduct of the defendant. See *State* v. *Rivera*, 221 Conn. 58, 72–73, 602 A.2d 571 (1992).

Accordingly, we turn again to the Appellate Court's recitation of the general inherent risks associated with improper joinder as well as the specific dangers evident in the present appeal. "Throughout the trial and numerous times in the charge to the jury, the court told the jury to consider the three cases separately. Nevertheless, there was some prejudice to the defendant that even proper instructions from the court could not cure. . . . '[A]n improper joinder may expose a defendant to potential prejudice for three reasons. First, when several charges have been made against the defendant, the jury may consider that a person charged with doing so many things is a bad [person] who must have done something, and may cumulate evidence against him . . . . Second, the jury may have used the evidence of one case to convict the defendant in another case even though that evidence would have been inadmissible at a separate trial. . . . [Third] joinder of cases that are factually similar but legally unconnected . . . present[s] the . . . danger that a defendant will be subjected to the omnipresent risk . . . that although so much [of the evidence] as would be admissible upon any one of the charges might not [persuade the jury] of the accused's guilt, the sum of it will convince them as to all.' . . .

"In the present case, some of these risks are present. For instance, there were several charges made against the defendant, and this litany of charges may have convinced the jury that he had to have committed at least one of the crimes with which he was charged. Second, the jury may have cumulated the evidence from all of the cases to find the defendant guilty in J's and M's cases. The insufficiency of the court's repeated admonitions against cumulating the cases became obvious during the foreperson's reading of the verdict. When asked if the jury found the defendant guilty in the first case, the foreperson replied, 'guilty.' Next, the court clerk asked whether the jury had found the defendant guilty in the second case, and the foreperson replied, 'I am not sure I understand that. Are we separating the three girls?' " (Citation omitted.) *State* v. *Gupta*, supra, 105 Conn. App. 249–50.

In summary, because the defendant's behavior with respect to M was far more egregious than his behavior with respect to J and D, and the evidence of that behavior was far more prejudicial than probative, we conclude that the defendant was deprived of his right to a

fair trial by the improper joinder of the cases. Accordingly, we affirm the judgment of the Appellate Court insofar as it determined that the trial court improperly consolidated the cases.[14]

II

Although our conclusion in part I requires that the cases be remanded to the trial court for new trials, we also address the evidentiary issues raised in this certified appeal because those issues are likely to arise again on remand. See *State* v. *Cote*, 286 Conn. 603, 627, 945 A.2d 412 (2008); *State* v. *Kirby*, 280 Conn. 361, 387–88, 908 A.2d 506 (2006). We therefore turn to the state's claim that the Appellate Court improperly concluded that the trial court had abused its discretion in excluding from evidence two videotapes explaining the proper technique for performing a physical examination and several excerpts from medical treatises. We conclude that the Appellate Court properly concluded that the trial court had abused its discretion in excluding the videotapes, but improperly concluded that the trial court had abused its discretion in excluding the treatises.

The following additional facts and procedural history are relevant to our resolution of this issue. Before trial, the state filed a motion in limine to preclude the defendant from using two instructional videotapes demonstrating how to perform a physical examination of a patient. One of the videotapes was labeled, "A Visual Guide to Physical Examination–Barbara Bates, M.D.–Thorax and Lungs–1995 J.B. Lippincott Company" (Bates videotape), and the other was labeled "In Performing the Physical Examination–Presented by J.L. Sherman, M.D.–Thorax and Lungs–Produced by Medical Media Production Service–VA Hospital, Northport, NY" (Sherman videotape). In the Bates videotape, the narrator stated that the middle lobe of the right lung underlies a woman's right breast and that it might be necessary to displace the breast to examine the lung. Thereafter, the person performing the examination demonstrated the proper technique for examining the anterior thorax. She removed the patient's hospital gown from his torso, directed the patient to lie on his back and palpated his chest, including his breasts, with her fingers. The examiner palpated one breast at a time using the fingers of one hand. She then demonstrated the technique for palpating for tactile fremitus.[15] She placed her right hand alternately on each side of the patient's chest, including his breasts, and applied pressure. The narrator stated that, because fremitus may be difficult to feel through a woman's breast tissue, the examiner may need to displace the breast. The person performing the examination then demonstrated the technique for auscultation[16] of the lungs. She held her stethoscope in one hand and placed it alternately on each side of the patient's chest, including on his breasts.

The narrator stated that gentle displacement of a woman's breasts might be necessary for proper auscultation.

On the Sherman videotape, the narrator stated that a person performing a routine chest examination should never perform a less thorough examination than was demonstrated in the videotape. He also stated that a breast examination routinely should be done on males, as well as females. The person demonstrating the breast examination in the videotape used the fingers of both hands to palpate each of the patient's breasts alternately. She then pressed the palms of both hands simultaneously on both sides of the patient's chest at several locations between his collarbone and his lower ribs, including his breasts. She also percussed alternate sides of the patient's chest at various locations from his collarbone to his lower ribs, including his breasts, and placed her stethoscope on several locations between and on the patient's breasts.

The state objected to the admission of the videotapes on multiple grounds, namely, that (1) it was unclear who the persons in the videotapes were and whether they were qualified to give opinions on proper examination technique; (2) it was unclear where the videotapes had come from; (3) the videotapes were hearsay; and (4) the videotapes were irrelevant because they appeared to depict general physical examinations rather than pulmonary examinations. The defendant argued that the videotapes were admissible because his expert witness was prepared to testify that they demonstrated the proper technique for performing a pulmonary examination, including touching and feeling the patient's breasts. He further argued that experts are allowed to rely on hearsay evidence to support their opinions.[17] The trial court granted the state's motion in limine with respect to the videotapes on the ground that they were irrelevant and potentially misleading.

Thereafter, during Roux' testimony at trial, counsel for the defendant showed Roux excerpts from twelve textbooks and treatises on physical examination and Roux testified that they corroborated her testimony regarding the proper technique for performing a pulmonary examination. Counsel for the defendant then offered the excerpts as exhibits and the prosecutor objected on the ground that the copies were not complete, that they were not written by experts in pulmonology and that treatises are not admissible. The defendant argued that treatises relied on by an expert are admissible under § 8-3 (8) of the Connecticut Code of Evidence,[18] and that the excerpts were relevant because they corroborated Roux' testimony. The trial court concluded that the excerpts were irrelevant because "the issues that the jury must decide [in] this case have to do with a sexual assault and not the details of the examinations . . . . The [c]ourt also believes [that the excerpts are] cumulative of the evidence that's coming

in through this witness and [through Thomas] Godar," a physician specializing in pulmonary medicine who testified as an expert witness for the state. Although the court sustained the state's objection to the admission of the excerpts as evidence, it allowed counsel for the defendant to ask Roux questions about the excerpts.

Counsel for the defendant then questioned Roux about each of the twelve excerpts.[19] Although the trial court did not allow counsel for the defendant to show the photographs contained in the excerpts to the jury, he allowed Roux to demonstrate the techniques shown in the photographs on herself. She demonstrated the technique for feeling for fremitus and for displacing the breast for percussion of the chest. In addition, the trial court allowed counsel for the defendant to question Godar about several of the excerpts and to show some of the photographs in the excerpts to the jury during cross-examination of Godar.

Our standard of review for evidentiary claims is well settled. "We review the trial court's decision to admit evidence, if premised on a correct view of the law . . . for an abuse of discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did." (Citations omitted; internal quotation marks omitted.) *State* v. *Orr*, 291 Conn. 642, 666–67, 969 A.2d 750 (2009).

"Evidence is relevant if it has any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. Conn. Code Evid. § 4-1. Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact even to a slight degree, [as] long as it is not prejudicial or merely cumulative." (Internal quotation marks omitted.) *State* v. *Bonner*, 290 Conn. 468, 496–97, 964 A.2d 73 (2009); see also Conn. Code Evid. § 4-3 ("[r]elevant evidence may be excluded if its probative value is outweighed . . . by considerations of . . . needless presentation of cumulative evidence").

"Under Connecticut law, if a medical treatise is recognized as authoritative by an expert witness and if it influenced or tended to confirm his opinion, then relevant portions thereof may be admitted into evidence in the exercise of the trial court's discretion. . . . This approach differs from that of most other jurisdictions,

including the federal rule, in that we allow the material to be taken into the jury room as a full exhibit. . . . Most other jurisdictions bar such material from the jury room, limiting their use to an oral reading in connection with an expert witness' testimony. . . . This limitation seeks to avoid the danger of misunderstanding or misapplication by the jury and ensures that the jurors will not be unduly impressed by the text or use it as a starting point for reaching conclusions untested by expert testimony. . . . The Connecticut rule, on the other hand, has the advantage of allowing the jurors to examine more fully the text of what frequently is a technical and complicated discussion that may be unfathomable to a nonexpert juror who merely heard a single oral recitation. Although the concerns which underlie the federal rule cannot be completely obviated when the materials are allowed in the jury room, the dangers can be minimized by the judicious exercise of discretion by the trial court in deciding which items ought to be admitted as full exhibits." (Citations omitted.) *Cross* v. *Huttenlocher*, 185 Conn. 390, 395–97, 440 A.2d 952 (1981); see also Conn. Code Evid. § 8-3 (8).

Turning first to the treatise, we recognize that the excerpts corroborated Roux' testimony that a proper pulmonary examination involves touching and palpating the patient's breasts. Therefore, the excerpts ordinarily would be probative and not merely cumulative of her testimony. Because defense counsel was allowed to question Roux about each of the excerpts, however, and Roux was allowed to demonstrate to the jury the techniques shown in the photographs contained in the excerpts and to testify that the excerpts corroborated her testimony; see *State* v. *Gupta*, supra, 105 Conn. App. 253; the trial court reasonably concluded that the admission of the excerpts as full exhibits was unnecessary and could possibly unduly confuse the jury. We conclude, therefore, that, under these particular circumstances, the trial court did not abuse its broad discretion when it ruled that the excerpts could not be admitted as full exhibits and brought into the jury room.

With respect to the two videotapes, we agree with the Appellate Court that portions of them corroborated Roux' testimony that the defendant's examination of the complainants was medically proper and, therefore, the videotapes were both probative and not needlessly cumulative. See id., 254. We also agree that the videotapes would not have been unduly misleading because the parties could have submitted the videotapes to their experts and questioned the experts about them. See id., 254–55. Accordingly, we conclude that the Appellate Court properly determined that the trial court had abused its discretion in excluding the videotapes.

The judgment of the Appellate Court is reversed in part and the case is remanded with direction to order a new trial in each of the two cases involving J and M.

In this opinion ZARELLA, McLACHLAN and ROBINSON, Js., concurred.

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

[1] General Statutes § 53a-73a (a) provides in relevant part: "A person is guilty of sexual assault in the fourth degree when . . . (5) such person subjects another person to sexual contact and accomplishes the sexual contact by means of false representation that the sexual contact is for a bona fide medical purpose by a health care professional . . . ."

Although § 53a-73a (a) has been amended since the time of the offenses in the three underlying cases, the relevant provisions under which the defendant was charged were not affected. Accordingly, for purposes of convenience, we refer to the current revision of the statute.

General Statutes § 53a-65 (3) defines " '[s]exual contact' " as "any contact with the intimate parts of a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person or any contact of the intimate parts of the actor with a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person."

[2] In accordance with our policy of protecting the privacy interests of the victims of sexual abuse, we decline to identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e.

[3] General Statutes § 53a-73a (a) provides in relevant part: "A person is guilty of sexual assault in the fourth degree when . . . (2) such person subjects another person to sexual contact without such other person's consent . . . ."

See footnote 1 of this opinion for a discussion of the relevant statutory revision.

[4] In his brief to this court, the defendant makes no claim that the exclusion of the evidence had constitutional ramifications. Accordingly, we deem any such claim abandoned. See *State* v. *Clark*, 255 Conn. 268, 281 n.30, 764 A.2d 1251 (2001).

[5] General Statutes § 54-57 provides: "Whenever two or more cases are pending at the same time against the same party in the same court for offenses of the same character, counts for such offenses may be joined in one information unless the court orders otherwise."

[6] Practice Book § 41-19 provides: "The judicial authority may, upon its own motion or the motion of any party, order that two or more informations, whether against the same defendant or different defendants, be tried together."

[7] The decisions of both the trial court and the Appellate Court in the present case preceded our decision in *DeJesus*, in which we finally conceded that our liberal admission of prior sexual misconduct under the common plan or scheme exception to the bar against the use of propensity evidence was in fact a rule permitting such evidence to be used for propensity purposes. *State* v. *DeJesus*, supra, 288 Conn. 473–74. Therefore, the underlying decisions in the present case rested on the cross admissibility of the evidence under the liberal common plan or scheme exception, not the propensity exception. As *DeJesus* makes clear, however, although we changed the label of the exception, we did not change the parameters that such evidence must satisfy to be admissible. See id., 473 (citing court's earlier sexual misconduct cases admitting evidence under common scheme exception as setting forth limits under which propensity evidence could be admitted); see also id., 467 (citing *State* v. *Ellis*, supra, 270 Conn. 358–59, as case in which evidence did not meet liberal common plan or scheme exception for similar prior sexual misconduct). Therefore, *DeJesus* in no way undermines the vitality of the reasoning in *Ellis*.

[8] Because we conclude that the defendant's conduct toward M was not remote in time from his conduct toward D and J, we confine our analysis to the other considerations.

[9] The dissent concludes that the evidence involving M was sufficiently similar to the evidence involving D and J so as to be cross admissible, and that, in concluding to the contrary by relying on the defendant's clearly more egregious conduct toward M, the majority has conflated the questions of relevance (similarity) and prejudice. The dissent, however, glosses over both substantial differences in the defendant's conduct toward M, as well as the significance of those differences in the context of the elements of the crime charged. The dissent concludes that the evidence would be cross

admissible because "a reasonable juror could conclude that a person who engaged in the misconduct toward M had a propensity to touch the breasts of young, female patients for sexual gratification." It is evident, however, that this narrow area of similarity is far outweighed by the differences in conduct. If we were to represent the cases as a Venn diagram of intersecting circles, the circles representing D and J largely would share the same area, whereas the common area of those circles with the one representing M would be minimal. There is no precedent under our case law for critically dissecting the facts of the case to find a narrow area of commonality to allow cross admissibility. Instead, we view the conduct as a whole, in the context of the case. See, e.g., *State* v. *Boscarino*, 204 Conn. 714, 723, 529 A.2d 1260 (1987) (concluding that trial court improperly had consolidated four sexual assault cases because, although there were factual similarities, those similarities were insufficient to make evidence in each case cross admissible and joinder impaired defendant's right to jury's fair and independent consideration of evidence in each case). Moreover, with respect to D and J, the defendant's misconduct was that he palpated their breasts in a manner intended to convey that such conduct was for "a bona fide medical purpose . . . ." General Statutes § 53a-73a (a) (5). With respect to M, although the defendant's conduct during the first few moments of the examination was similar to his conduct with D and J, the more extensive and egregious conduct that followed, crediting M's testimony, reasonably could not be viewed as intending to represent that the defendant was engaged in such a bona fide medical purpose. Thus, the present case differs from the usual sexual assault case, because it is not merely the assaultive conduct at issue but also the creation of a pretext for engaging in the conduct. Under M's version of events, the defendant quickly abandoned any such pretext by his substantially more egregious acts. Thus, the dissimilarities are significant to the issues of both relevance and prejudice. See also footnote 11 of this opinion.

[10] Although the dissent attempts to distinguish *Ellis* from the facts of the present case, the dissent's reasoning essentially disavows the holding of the case, which still is good precedent.

[11] The defendant contended that M had lied and that her allegations were intended to advance her financial interests, which the defendant claimed was evidenced by the facts that, after the alleged assault, M both retained counsel who negotiated a package whereby she received $10,000 from the defendant's medical group and accepted three months severance pay, health insurance and an agreement from the medical group not to contest unemployment compensation. The defendant did not claim that D and J had lied, but, rather, that they had misinterpreted the defendant's legitimate examination. The concurrence, in concluding that the only significant basis upon which to distinguish the case involving M from those involving J and D is the difference between the defenses asserted by the defendant in those cases, overlooks the fact that this difference results from *both* the nature of the relationship between each victim and the defendant and the nature and severity of the alleged conduct directed at each victim.

[12] Although the jury found the defendant not guilty in the case pertaining to D, we do not consider that outcome to be dispositive evidence that it was able to consider each of the cases separately. Once again, as the Appellate Court majority noted: "The state made this same argument in [*State* v. *Boscarino*, 204 Conn. 714, 724, 529 A.2d 1260 (1987)], in which our Supreme Court was unpersuaded and stated, '[w]e can only speculate as to why the jury rendered varying conclusions as to the defendant's guilt in the four cases. It is beyond our power to probe the minds of the jurors in order to determine what considerations influenced their divergent verdicts.' " *State* v. *Gupta*, supra, 105 Conn. App. 250.

[13] Although the presumption in favor of joinder is based on the rationale that it fosters judicial economy; see *State* v. *Ellis*, supra, 270 Conn. 375; there is legitimate debate about whether the interests favoring joinder should be weighed differently when both the offenses are not legally related and the evidence is not cross admissible. As one treatise has observed: "The argument for joinder is most persuasive when the offenses are based upon the same act or criminal transaction, since it seems unduly inefficient to require the state to resolve the same issues at numerous trials. Commentators have been generally critical, however, of the joinder of offenses which are unrelated, since the need to prove each offense with separate evidence and witnesses eliminates any real savings in time or efficiency which might otherwise be provided by a single trial." A. Spinella, Connecticut Criminal Procedure (1985) p. 416. As the Fourth Circuit Court of Appeals has noted

as a general matter: "[A]lthough it is true that the [f]ederal [r]ules of [c]riminal [p]rocedure [were] designed to promote economy and efficiency and to avoid a multiplicity of trials . . . we are of the strong opinion that the consideration of one's constitutional right to a fair trial cannot be reduced to a cost/benefit analysis. Thus, while we are concerned with judicial economy and efficiency, our overriding concern in an instance such as this is that [the] jury consider only relevant and competent evidence bearing on the issue of guilt or innocence for each individually charged crime separately and distinctly from the other." (Citation omitted; internal quotation marks omitted.) *United States* v. *Isom*, 138 Fed. Appx. 574, 581 (4th Cir. 2005), cert. denied, 546 U.S. 1124, 126 S. Ct. 1103, 163 L. Ed. 2d 915 (2006). Because we conclude on the basis of our jurisprudence that joinder was improper, we need not weigh in on this debate.

[14] The dissent suggests that, even if we properly have concluded that the evidence of the defendant's behavior with respect to M was more prejudicial than probative, we nevertheless should not grant the defendant a new trial in the case involving J. We disagree. The improper joinder of the cases gave the state the opportunity to present the jury with the intimate details of each of these offenses, an opportunity that otherwise would have been unavailable had the cases been tried separately. Accordingly, we do not provide relief in only the least inflammatory case. See, e.g., *State* v. *Boscarino*, supra, 204 Conn. 725.

[15] Tactile fremitus is the vibration felt by a hand placed on the chest of an individual who is speaking. See The American Heritage Stedman's Medical Dictionary (1995).

[16] "[A]uscultation" is defined as "[t]he act of listening for sounds made by internal organs, such as the heart and lungs, to aid in the diagnosis of certain disorders." The American Heritage Stedman's Medical Dictionary (1995).

[17] "Hearsay is inadmissible except as provided in the Connecticut Code of Evidence, the General Statutes or our rules of practice. Conn. Code Evid. § 8-2. An expert witness may rely on the facts otherwise not admissible in evidence if they are customarily relied on by experts in the particular field in forming opinions on the subject." *Johnson* v. *Johnson*, 111 Conn. App. 413, 418, 959 A.2d 637 (2008).

[18] Section 8-3 (8) of the Connecticut Code of Evidence provides: "To the extent called to the attention of an expert witness on cross-examination or relied on by the expert witness in direct examination, [the hearsay rule does not require exclusion of] a statement contained in a published treatise, periodical or pamphlet on a subject of history, medicine, or other science or art, recognized as a standard authority in the field by the witness, other expert witness or judicial notice."

[19] Specifically, counsel for the defendant asked Roux about an excerpt that stated that the examining physician " 'should arrange the patient's gown so that [the physician] can see the chest fully.' " Roux agreed with that statement. She also agreed with several excerpts stating that the patient should be undressed to the waist and with excerpts stating that the breasts of male and female patients should be palpated in the same way, that palpation should be done with the patient in a supine position, that the examination should be done in a systematic way so that the physician does not miss problems that the patient has not complained of, and that the physician should meticulously palpate all areas of the chest for tenderness, bulges or abnormal movements.