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DUPONT, J., concurring in part. I write separately because I respectfully disagree with the majority's decision, in part V of its opinion, to decline review of the claim by the defendant, Zachary Jay Elson, that the trial court considered improper factors when sentencing him, thereby depriving him of his constitutional due process rights.

The majority has declined review on the ground that the claim was unpreserved at trial and that the defendant has failed affirmatively to request review pursuant to *State v. Golding*, 213 Conn. 233, 567 A.2d 823 (1989),¹ because he did not mention *Golding* in his brief. This court recently held in *State v. Wright*, 114 Conn. App. 448, 969 A.2d 827 (2009), that it was not mandatory for a defendant to cite or to mention *Golding* by name to obtain review of an unpreserved claim of a constitutional deprivation at trial. *Id.*, 463. We stated that if a defendant provides a record adequate for review and sufficiently demonstrates, by discussion of relevant authority, that his claim is of constitutional magnitude, he has satisfied the first two prongs of *Golding* and is, therefore, entitled to review. *Id.*, 463–64.

The defendant in the present case has supplied a record adequate for review and has demonstrated that his claim is of constitutional magnitude, as the majority acknowledges. Accordingly, I believe that his claim is reviewable and should be examined under the third and fourth prongs of *Golding* to determine whether there is sufficient merit to the defendant's claim, such that the defendant should prevail.²

The third prong of *Golding* asks whether “the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial” *State v. Golding*, *supra*, 213 Conn. 240. In his brief, the defendant claims that the court improperly sentenced him on the basis of his decision to exercise his constitutional right to a trial instead of accepting a plea bargain. As evidence for this claim, the defendant points to the following remark made by the court during the defendant's sentencing hearing: “We’ve all heard the defendant's apology. I don’t know how sincere it is, but it is certainly unfortunate that it comes so late in the process. If the defendant had been truly apologetic, he wouldn’t have put the victim through the trial. To a large extent it seems to me that the defendant's apology represents thinking of himself rather than the victim.” The defendant argues that “[t]he trial court's consideration of ‘put[ting] the victim through the trial’ infringed on the defendant's state and federal constitutional [due process] rights, and warrants a remand from this court for resentencing.”

“As a general matter, a trial court possesses, within statutorily prescribed limits, broad discretion in sentencing matters. On appeal, we will disturb a trial court’s sentencing decision only if that discretion clearly has been abused. . . . In spite of that discretion, however, the [a]ugmentation of sentence based on a defendant’s decision to stand on [his or her] right to put the [g]overnment to its proof rather than plead guilty is clearly improper. *United States v. Araujo*, 539 F.2d 287, 291-92 (2d Cir.), [cert. denied sub nom. *Rivera v. United States*], 429 U.S. 983, 97 S. Ct. 498, 50 L. Ed. 2d 593 (1976).” (Citation omitted; internal quotation marks omitted.) *State v. Kelly*, 256 Conn. 23, 80–81, 770 A.2d 908 (2001). Review of such claims “should be based on the totality of the circumstances [and] the burden of proof in such cases rests with the defendant.” *Id.*, 82. Therefore, the remark in question must be viewed in the context of the entire sentencing hearing.

The defendant’s sentencing hearing commenced with the prosecutor delivering his argument in support of the state’s recommendation.³ This was followed by an impact statement from the victim. The defendant’s attorney then made his argument for leniency, which was followed by testimony from a friend of the defendant’s family and the defendant’s father. Next, the defendant exercised his right of allocution. In apologizing to the victim, the defendant stated: “I’ve hurt you, I’ve terrified you and I’ve destructed your sense of security, viciously. What I did was horrible, and from the bottom of my heart I’m so sorry for what I did to you and your family. I know I probably can’t make it okay right now, but I’m going to do my best. And, again, I’m just so sorry.” Following the apology, the court declared that it would like to make some introductory remarks before proceeding to formal sentencing. The court stated that it would first like to address some of the factors the defendant brought out. Very shortly thereafter, the court made the aforementioned remark that is at issue.

The court then discussed the victim’s testimony, asserting that it “found the victim’s testimony at trial entirely credible.” The court stated: “A person intends the natural consequences of his acts. . . . [The] defendant came about six inches away from killing this young woman or completely ruining her life As the state correctly points out, the victim was totally blameless. This is not a case in which the victim knew the defendant, provoked the defendant, enticed the defendant or did anything to threaten the defendant. The victim bears no part of the blame for this incident. Despite that, the defendant threatened to rob [the victim] of the prime of her life. He threatened to rob the victim of being a wife, a mother, an adult daughter, a college educated artist or a person with some other promising career. Thus, it is fully appropriate that I

take away the defendant's liberty during the prime of his life."

The court proceeded to discuss the defendant's defense of intoxication. The court stated: "Even if the defendant had drunk to an excess, there must be some deep-seated anger within the defendant that explains this act of rage and violence, which the state aptly points out appears to be part of a pattern. This, in my view, makes the defendant a dangerous person. One from whom the victim, [Western Connecticut State University] and society should be protected. . . . Furthermore, intoxication simply does not explain his statement to the police and his testimony in court that this was an accident. . . . [T]his was no accident. I do not believe the defendant's testimony that he just happened to get poked in the leg with his knife; that he just happened to pull the knife out at that time and that [the victim] just happened to turn around at that time. I believe the defendant gave a false explanation to the police, that he testified falsely in court and that he essentially obstructed justice in doing so. And this is an aggravating factor."

Next, the court stated: "The probation report recommends lengthy incarceration. Perhaps lengthy is somewhat of an unclear term, but I think I know what that means, and I agree for all the reasons I've stated. The defendant committed these crimes while he was out on bail on other felony charges. . . . A judge in Norwalk trusted the defendant and released him. The defendant abused that trust in the worst way. No judge has a crystal ball. We cannot tell for certain when we make bail decisions who will commit crimes while on bail and who will not. We make mistakes. But if we do not punish those who do commit crimes while given a privilege of release we will not be doing all we can to deter others from abusing that privilege. By committing these crimes while out on bail, the defendant not only committed a crime against the victim but also committed a crime against the court. The defendant broke his word to the court and showed disrespect for the law. The only mitigating factor I can find in this situation is that the defendant at least admitted the bail status violations." The court subsequently issued the defendant's sentence.

I believe that in this case, the totality of the circumstances surrounding the defendant's sentencing gives no indication that the court improperly augmented the defendant's sentence on the basis of the defendant's decision to stand trial. The context of the court's remark that "[i]f the defendant had been truly apologetic, he wouldn't have put the victim through the trial," makes it clear that the court was merely expressing its doubt as to the sincerity of the defendant's apology to the victim. There is no evidence that the court considered the fact that the defendant caused the victim to endure

the trial when it determined the length of his sentence. Therefore, the defendant cannot prevail on his claim because he has failed to demonstrate that the alleged constitutional violation clearly exists and clearly deprived him of a fair trial, in satisfaction of the third prong of *Golding*.⁴ Because the defendant has not satisfied the third prong of *Golding*, there is no need to perform a harmless error analysis in conformance with the fourth prong of *Golding*. I agree with the majority's conclusion that resentencing the defendant is not warranted and that the judgment of the trial court should be affirmed.

¹ In *State v. Golding*, supra, 213 Conn. 233, our Supreme Court held that "a defendant can prevail on a claim of constitutional error not preserved at trial if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original.) *Id.*, 239–40.

² Case law is clear that "[t]he first two [prongs of *Golding*] involve a determination of whether the claim is reviewable; the second two . . . involve a determination of whether the defendant may prevail." (Internal quotation marks omitted.) *State v. Whitford*, 260 Conn. 610, 621, 799 A.2d 1034 (2002).

³ The state recommended a sentence of twenty years incarceration, five years mandatory minimum, for assault in the first degree; five years incarceration, consecutive, for unlawful restraint; and ten years incarceration, suspended, but consecutive to the other two counts, with five years probation, for committing an offense while out on bond.

⁴ I also conclude that the defendant cannot prevail on his argument that the trial court erroneously relied during sentencing on the fact that the carving knife was the knife used to assault the victim because I agree with the majority's conclusion in part II of its opinion that the knife was admitted properly as relevant evidence.