DOMINGOS GABRIEL ET AL. *v.* MOUNT VERNON FIRE INSURANCE COMPANY (AC 40174)

Sheldon, Elgo and Eveleigh, Js.

Syllabus

The named plaintiff, who had sustained severe injuries when a van in which he was a passenger went off the road and crashed into a building, and his wife brought this subrogation action seeking to recover damages under the terms of a $1 million umbrella automobile insurance policy issued by the defendant to its insured, P, the operator of the vehicle involved in the crash. At the time of the accident, P was driving the van for his employer, P Co., and the van was covered by a primary business insurance policy issued by N Co. to P Co., which had a policy limit of $300,000. Prior to commencing the present action, the plaintiffs recovered judgments in the total amount of $1.8 million from P and P Co., and N Co. paid the plaintiffs $300,000 toward their judgments. The defendant, however, refused to apply its $1 million umbrella coverage to the unpaid balance of the plaintiffs' judgments on the ground that the primary insurance policy provided bodily injury liability coverage of less than $500,000, which the defendant claimed was not sufficient to trigger excess coverage. P subsequently assigned the umbrella insurance policy to the plaintiffs, who commenced the present action. After the case was tried on a stipulation of facts, the trial court rendered judgment in favor of the plaintiffs, finding that the umbrella insurance policy declared unambiguously that the failure to maintain underlying insurance policies covering the loss that meet minimum limits would not invalidate the policy but would merely adjust the net loss to be paid by the defendant. On the defendant's appeal to this court, *held*:

1. The trial court did nor err in finding that the business insurance policy qualified as underlying insurance, thereby triggering excess coverage, as the umbrella insurance policy unambiguously provided excess coverage even when the insured's primary policy is maintained at a lower level than specified: the failure to maintain the proper amount of primary coverage generally does not invalidate the excess coverage, the umbrella insurance policy's terms did not override that general rule, as there was

no language indicating that a primary policy with a minimum coverage of $500,000 was a condition precedent to insurance coverage, and even if the policy included such language, the savings clause anticipated inadequate primary coverage and specifically provided that, in such a case, the defendant is not responsible for any gap in coverage up to the $500,000 limit; moreover, the defendant could not prevail on its claim that the savings clause, which provided that the defendant is not required to provide coverage if the insured fails to maintain his underlying insurance, was inapplicable because it only contemplated situations in which an insured has underlying insurance at the requisite level when the umbrella insurance policy becomes active and fails to keep up the underlying policy, as that claim hinged on the meaning of the term "maintain" as used in the policy, the defendant's definition of "maintain" was not the only natural and ordinary meaning of that word and was not likely to align with a layperson's reasonable reading of the word and the policy provision, and the plaintiffs' interpretation that to "maintain" insurance means to obtain insurance reflected an insured's reasonable expectations.

2. The trial court properly determined that the umbrella insurance policy's business exclusion did not apply because qualifying underlying insurance existed at the time of the accident; the policy's business exclusion, which eliminated coverage of a loss caused by the insured's business or business property unless underlying insurance provided coverage for the loss, was inapplicable because underlying insurance, namely, the business insurance policy, existed at the time of the accident, and that policy qualified as underlying insurance even though the coverage was for $300,000 instead of for $500,000 or more.

3. The defendant could not prevail on its claim that the trial court erred in its determination of damages, which was based on the defendant's assertion that the court improperly denied it a $200,000 credit to be charged against the sum that the defendant owed toward the unsatisfied portion of the plaintiffs' underlying judgments; nothing in the umbrella insurance policy provided for such a credit, the defendant already received the benefit of a $200,000 credit because it was obligated to pay only for recovery exceeding $500,000, and the cases on which the defendant relied to support its claim were distinguishable from the present case in that they concerned a theory of recovery that the plaintiffs were not pursuing.

Argued September 17—officially released November 20, 2018

Procedural History

Action to recover proceeds allegedly due under an umbrella automobile insurance policy issued by the defendant, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to

the court, *Krumeich, J.*, on a stipulation of facts; judgment for the plaintiffs as to liability; thereafter, the court denied the defendant's motion to open and vacate the judgment; subsequently, the court granted in part the plaintiffs' amended motion to assess damages and for postjudgment interest, and the defendant appealed to this court. *Affirmed.*

Dennis M. Carnelli, with whom were *Emily McDonough Souza* and, on the brief, *Joseph J. Andriola*, for the appellant (defendant).

Michael S. Burrell, with whom were *Joseph P. Krevolin* and, on the brief, *Joram Hirsch*, for the appellees (plaintiffs).

Opinion

EVELEIGH, J. The defendant, Mount Vernon Fire Insurance Company, appeals from the judgment of the trial court in favor of the plaintiffs, Domingos Gabriel and his wife, Laurinda Gabriel.[1] On appeal, the defendant argues that the trial court erred in (1) finding that the plaintiffs' primary insurance policy qualified as an underlying policy entitling the plaintiffs to excess coverage; (2) finding that the business exception of the plaintiffs' umbrella insurance policy did not apply; and (3) its determination of damages. We affirm the judgment of the trial court.

The following stipulated facts and procedural history are relevant to the resolution of this appeal. On September 6, 2011, at approximately 1 p.m., Domingos Gabriel was the passenger in a van operated by Domingos Pires, on Route 58 in Easton, Connecticut, that went off the road and crashed into a building. The accident caused severe injuries to Domingos Gabriel, including injuries

[1] We refer to Domingos Gabriel and Laurinda Gabriel, collectively, as the plaintiffs, and individually by name where appropriate.

to his spine, which rendered him permanently wheelchair bound and severely limited the use of his arms. At the time of the accident, Pires was driving the van for D.A.J., LLC, doing business as Pools Plus, Inc. (Pools Plus), a pool maintenance company. Pires was employed by Pools Plus and his wife, Ana Pires, was a principal in the company.

When the accident occurred, Pires was insured under a $1 million umbrella liability insurance policy (policy), issued by the defendant. The van was covered by a primary business insurance policy issued by National Grange Mutual Insurance Company (NGM) to Pools Plus. The NGM policy was effective from January 1, 2008 through September 7, 2011, and had a policy limit of $300,000.

Domingos Gabriel brought actions, in 2012, against Pires and, in 2013, against Pools Plus to recover damages for his injuries and losses. Laurinda Gabriel, was also a plaintiff in those actions and sought to recover damages for loss of consortium. The plaintiffs recovered judgments in the total amount of $1,800,000 from Pires and Pools Plus.[2] NGM paid the plaintiffs $300,000 toward their judgments.[3] The defendant, however, refused to apply its $1,000,000 umbrella coverage to the unpaid balance of the plaintiffs' judgments. The defendant denied coverage because "the NGM policy provided bodily injury liability coverage of less than $500,000," which, the defendant argues, was not sufficient to trigger excess coverage.

[2] Domingos Gabriel recovered judgments in the amount of $1,200,000 from Pires and Pools Plus, and Laurinda Gabriel recovered judgments in the amount of $600,000 from Pires and Pools Plus.

[3] The plaintiffs also recovered $450,000 from a settlement with Monroe Insurance Center, Inc., the insurance broker that sold Pires the policy. See *Pires* v. *Monroe Ins. Center, Inc.*, Superior Court, judicial district of Fairfield, Docket No. CV-14-6042866-S (May 31, 2016).

After the defendant denied Pires' claim, Pires assigned the policy to the plaintiffs.[4] The plaintiffs then commenced the present action to enforce the policy and to recover the excess coverage from the defendant. The trial court tried the case based on stipulated facts. On November 16, 2016, the court found in favor of the plaintiffs, stating: "[T]he policy declares unambiguously [that] the failure to maintain underlying policies covering the loss that meet minimum limits would not invalidate the policy but merely adjusts the net loss to be paid by the insurer." This appeal followed. Additional facts and procedural history will be set forth as necessary.

Before analyzing the merits of the defendant's claims on appeal, we set forth the applicable standard of review. "[C]onstruction of a contract of insurance presents a question of law for the court which this court reviews de novo." (Internal quotation marks omitted.) *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.*, 311 Conn. 29, 37, 84 A.3d 1167 (2014). Because all of the defendant's claims on appeal relate to an interpretation of the policy, our review is plenary.

I

The defendant first argues that the court erred in finding that the NGM policy qualified as "underlying insurance," thereby triggering excess coverage. Specifically, the defendant argues that applicable "underlying insurance" never existed. The plaintiffs argue that the trial court's finding was correct because failing to obtain a primary policy with a $500,000 minimum did not invalidate the policy; rather, it shifted the $200,000 gap in

[4] Because the plaintiffs stand in the shoes of Pires, the term plaintiffs will also be used when referring to Pires' actions before he assigned his rights under the umbrella policy to the plaintiffs. See *Brown* v. *Employer's Reinsurance Corp.*, 206 Conn. 668, 673, 539 A.2d 138 (1988).

coverage[5] to be borne by the insured. We agree with the plaintiffs.

The following well established legal principles regarding the interpretation of insurance contracts are relevant to this claim. "It is axiomatic that a contract of insurance must be viewed in its entirety, and the intent of the parties for entering it derived from the four corners of the policy. . . . The policy words must be accorded their natural and ordinary meaning . . . [and] any ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy." (Citation omitted; internal quotation marks omitted.) *Imperial Casualty & Indemnity Co.* v. *State*, 246 Conn. 313, 324–25, 714 A.2d 1230 (1998). Additionally, "the appropriate viewpoint from which to read the policy . . . is that of the insured . . . ." *National Grange Mutual Ins. Co.* v. *Santaniello*, 290 Conn. 81, 99, 961 A.2d 387 (2009). "When interpreting [an insurance policy], [the court] must look at the contract as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result." (Internal quotation marks omitted.) *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.*, supra, 311 Conn. 38.

The policy at issue is an umbrella insurance policy. Umbrella policies are meant to provide an insured with excess coverage when his or her primary policy or policies have been exhausted. See *Heyman Associates No. 1* v. *Ins. Co. of Pennsylvania*, 231 Conn. 756, 760 n.3, 653 A.2d 122 (1995). Policies that provide excess coverage usually "[require] the insured to maintain a lower level of insurance coverage at a stated monetary level." 15 L. Russ & T. Segalla, Couch on Insurance (3d

[5] The $200,000 gap is derived from the difference between the $300,000 underlying coverage and the $500,000 limit in the policy.

Ed. 2005) § 220:35. When the insured's primary policy is maintained below a stated monetary level, "[g]enerally, depending upon the wording of the policy, the excess insurer's obligation remains the same as though the underlying coverage was maintained at the proper level." Id. In the absence of policy terms to the contrary, "[t]he failure to maintain the proper amount of primary coverage does not invalidate the excess coverage." Id.

The defendant claims that the policy's terms override the general rule by expressly providing that the failure to obtain a primary policy with the requisite minimum coverage invalidates the policy. We disagree. Three provisions of the policy, in particular, are relevant to this argument. First, § I (R) defines underlying insurance, in relevant part, as "the policy with the greater limit of . . . [t]he limit shown for that policy in the DECLARATIONS in Item 6., Required Underlying Insurance Coverage . . . ." Second, item 6 on the policy declarations page reads as follows: "Required Underlying Insurance Coverage: You agree that the higher of the MINIMUM UNDERLYING LIMITS below . . . (1) is in force and will continue in force; and (2) insures all . . . automobiles . . . owned by, leased or regularly furnished to you." Third, § IV of the policy provides, in relevant part, as follows: "These are things you must do for us. We may not provide coverage if you do not . . . [A] . . . maintain your *underlying insurance*. You agree to maintain all insurance policies affording in total the coverage and the greater of the limits shown in the DECLARATIONS in Item 6., Required Underlying Insurance Coverages . . . . If Required Underlying Limits are not maintained, or are not maintained at the greater of the limit of liability shown in Item 6., Required Underlying Insurance Coverages . . . you will be responsible for paying the amount of loss or loss adjustment expense that would have been paid by that policy had its full limit of liability been available. . . . Your failure

to comply with the foregoing paragraphs *will not invalidate this policy*, but in the event of such failure, we shall be liable under this policy for indemnity and/or defense expense only to the extent that we would have been liable had you complied with these obligations." (Emphasis altered.)

Looking at the four corners of the policy from the viewpoint of the insured, there is no language indicating that a primary policy with minimum coverage of $500,000 is a condition precedent to insurance coverage. Furthermore, an insured would not understand item 6 of the declaration page, which reads, "[y]ou agree that the higher of the MINIMUM UNDERLYING LIMITS below . . . is in force and will continue in force," combined with the schedule below the item, to mean that he or she has to obtain primary insurance at $500,000 to make his or her excess policy effective.

Even if we assume, arguendo, that the policy clearly indicated that existing primary insurance with a limit of $500,000 is a prerequisite to excess coverage, the defendant's argument is undercut by the savings clause in § IV (A).[6] As stated in the preceding paragraph, § IV (A) provides in relevant part: "Your failure to comply with the foregoing paragraphs will not invalidate this policy, but in the event of such failure, we shall be liable under this policy for indemnity and/or defense expense only to the extent that we would have been liable had you complied with these obligations." Although the defendant argues that the failure to obtain primary coverage at the requisite level bars excess coverage, the savings clause anticipates inadequate primary coverage and specifically provides for such an event. If the policy was conditioned on obtaining

[6] Indeed, if said language did exist, it would create an ambiguity in the policy. Instead, we agree with the plaintiffs that the policy language is clear and unambiguous.

"underlying insurance" at a specified level, such a clause would be unnecessary. To adopt the defendant's interpretation of the savings clause would be to read it out of the contract almost entirely, which undermines the principle that a court is to read a contract so as to give effect to all provisions therein. See *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.*, supra, 311 Conn. 38. It is clear, therefore, that the clause listed in § IV (A) means that the defendant is not responsible for any gap in coverage up to the $500,000 limit.

The defendant argues that the savings clause in § IV (A) is inapplicable because it only contemplates situations in which an insured has "underlying insurance" at the requisite level when the umbrella policy becomes active and fails to keep up the underlying policy. This argument hinges on the meaning of the word "maintain." The defendant argues that "maintain" means only to keep up something that is already in existence. The plaintiffs counter that this definition is overly narrow and that there is nothing in the policy to preclude an insured from reasonably understanding "maintain" insurance to mean obtain insurance.

Because the word "maintain" is not defined in the policy, the term should be accorded its natural and ordinary meaning. See *New London County Mutual Ins. Co.* v. *Zachem*, 145 Conn. App. 160, 166, 74 A.3d 525 (2013). Additionally, "[i]t is a basic principle of insurance law that policy language will be construed as laymen would understand it and not according to the interpretation of sophisticated underwriters . . . . [T]he policyholder's expectations should be protected as long as they are objectively reasonable from the layman's point of view." (Internal quotation marks omitted.) *R.T. Vanderbilt Co.* v. *Continental Casualty Co.*, 273 Conn. 448, 462–63, 870 A.2d 1048 (2005). While the defendant's definition of "maintain" is one possible meaning of the term, it is not likely to align with a

layperson's reasonable reading of the word and the policy provision. Under the defendant's interpretation of "maintain," an insured would be barred from claiming excess coverage if the insured obtained a primary policy with the requisite limit just one day after procuring umbrella coverage, but before an accident for which the insured seeks coverage. We conclude, therefore, that the plaintiffs' understanding of "maintain" reflects an insured's reasonable expectations, and that the defendant's definition is not the only natural and ordinary meaning of the word.

In *Israel* v. *State Farm Mutual Automobile Ins. Co.*, 259 Conn. 503, 509, 789 A.2d 974 (2002), our Supreme Court interpreted a similar savings clause in an umbrella insurance policy. The court in *Israel* held that the umbrella policy at issue was ambiguous because it contained two inconsistent clauses. Id., 512. One provision of the policy in *Israel* "indicate[d] that in the event of an insured's failure to maintain underlying coverage, the insured will be responsible for any loss up to the amount of the required underlying coverage before the umbrella takes effect." Id., 509. Another provision of the policy provided that "the insured forfeits umbrella coverage completely if he or she does not maintain the requisite underlying coverage." Id. Because "it [was] not possible to give effect to both of these provisions in a manner that resolves the ambiguity created by the policy language"; id., 510; the court in *Israel* construed the umbrella policy against the insurance company that drafted the policy and "in a manner that affords coverage to the insured." Id., 512. In so doing, the court determined that the umbrella policy provided excess coverage to the insured. Id.

Unlike the insurance policy in *Israel*, the policy in the present case does not contain contradictory provisions and, therefore, is not ambiguous. The provisions in the policy indicate that a gap in coverage will not invalidate

the policy. Moreover, unlike the policy in *Israel*, the policy in the present case does not provide that the failure to maintain underlying insurance forfeits the entire umbrella policy. We conclude, therefore, that unlike the policy in *Israel*, the policy in the present case unambiguously provides excess coverage, even when the insured's primary policy is maintained at a lower level than specified.

II

The defendant's second claim on appeal is that, even if the policy provided excess coverage, the trial court erred in finding that the policy's business exclusion did not apply. Specifically, the defendant argues that the business exclusion applies because the NGM policy that covered the van at the time of the accident does not qualify as "underlying insurance." The plaintiffs argue that the trial court properly determined that the policy's business exclusion does not apply because qualifying "underlying insurance" existed at the time of the accident. We agree with the plaintiffs.

"In an insurance policy, an exclusion is a provision which eliminates coverage where, were it not for the exclusion, coverage would have existed." (Internal quotation marks omitted.) *Hammer* v. *Lumberman's Mutual Casualty Co.*, 214 Conn. 573, 588, 573 A.2d 699 (1990). Section III (G) of the policy eliminates coverage of a loss "[c]aused by [the insured's] *business* or *business property* unless *underlying insurance* provides coverage for the *loss*." (Emphasis in original.)

Section I (D) of the policy defines business as "any employment, trade, profession, occupation or any other enterprise in which the *insured* has a financial interest . . . ." (Emphasis in original.) It is uncontested that the van was being used for business purposes, within the policy's definition of the term, at the time of the accident.

The second clause of § III (G)—"unless *underlying insurance* provides coverage for the *loss*"—however, makes the exclusion inapplicable in the present case. (Emphasis in original.) It is uncontested that Pires had insurance through NGM that provided business automobile coverage for the van when the accident occurred. The defendant argues that the NGM policy did not qualify as "underlying insurance," as required by the second clause of the exclusion. The defendant relies on the same reasoning as in its first claim to support its assertion that the second clause of the business exception does not apply, since the coverage did not contain the $500,000 limit. Specifically, the defendant argues that "[t]he exception to the business exclusion is not at issue because 'underlying insurance' never existed." As discussed in part I of this opinion, however, the NGM policy qualified as "underlying insurance," even though the coverage was $300,000 instead of $500,000 or more. Because there was "underlying insurance" that covered the loss caused by the accident, the trial court correctly determined that the business exclusion does not apply.

III

The defendant's final claim is that, even if excess coverage existed and the business exception did not apply, the trial court erred in the determination of damages. Specifically, the defendant argues that the trial court improperly denied it a $200,000 credit to be charged against the sum the defendant owes toward the unsatisfied portion of the plaintiffs' judgments. The plaintiffs argue that nothing in the policy provides for such a credit and that the defendant is already receiving the benefit of a $200,000 credit because it is only obligated to pay for recovery exceeding $500,000. We agree with the plaintiffs.

Section II (A) of the policy states: "If you are legally liable to pay damages for a loss to which this insurance

applies, we will pay your net loss in excess of the retained limit." (Emphasis omitted.) Section I (J) defines net loss, in relevant part, as "[t]he amount you are legally obligated to pay as *damages for personal injury*, *bodily injury or property damage* including prejudgment interest. . . . All reasonable expenses you incur in the investigation, settlement and defense of any claim or suit at our request. This does not include expenses covered by another policy or expenses we incur under the Defense and Settlement section of this policy and salaries of your employees . . . ." (Emphasis in original.) There is nothing in the terms of the policy, however, to support the defendant's argument that it is entitled to a credit.

The defendant's argument relies on the proposition that "an excess carrier is entitled to a credit, not from the primary carrier's settlement, but from the amount allocable to the primary under its policies. In other words, the excess carrier is entitled to a credit for the full amount of the primary carrier's coverage before it is required to pay any cleanup expense." *UMC/Stamford, Inc.* v. *Allianz Underwriters Ins. Co.*, 276 N.J. Super. 52, 69, 647 A.2d 182 (1994); accord *Chemical Leaman Tank Lines, Inc.* v. *Aetna Casualty & Surety Co.*, 177 F.3d 210, 227 (3d Cir. 1999). As the plaintiffs correctly point out, however, these cases are distinguishable from the present case in that they deal with drop-down coverage, a theory of recovery that the plaintiffs are not pursuing in this case. The defendant received the benefit of the $200,000 gap in coverage by not being required to pay any money until after the requisite $500,000 limit. On the basis of the foregoing, we conclude that the trial court properly determined that the defendant was not entitled to a $200,000 credit under the policy.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* TRAJUAN A. WASHINGTON (AC 40031)

Lavine, Sheldon and Bright, Js.

Syllabus

Convicted of the crimes of conspiracy to commit home invasion, attempt to commit home invasion, attempt to commit robbery in the first degree, conspiracy to commit robbery in the first degree and attempt to commit assault in the first degree, the defendant appealed to this court. The defendant's conviction stemmed from an incident in which the defendant and two coconspirators, including D, allegedly planned to break into an apartment to steal a large sum of money from a person who lived there. After arriving at the location, the defendant entered the apartment building with his coconspirators, knocked on an interior door of a first floor apartment, and identified himself to an occupant of the apartment by the name of a person with whom he believed the occupant was familiar. After the occupant of the apartment began to open the door, she quickly closed it when she saw three men in hoodies. The defendant attempted to catch the door before the occupant closed it shut but was unsuccessful. The defendant and his coconspirators then exited the apartment building, but while walking away down the street, were followed by a man who had exited the apartment building after them. Believing that the man was armed, the defendant and D fired shots from their handguns in the direction of the building before fleeing the location. Several weeks later, the police identified D as one of the shooters, who in turn identified the defendant as the other shooter. D, who had agreed to cooperate with the state, testified at the defendant's trial. *Held*:

1. The defendant's claim that the evidence was insufficient to support his conviction of conspiracy to commit home invasion was unavailing; the jury reasonably could have found that the defendant had agreed with his coconspirators to engage in conduct constituting home invasion in light of D's testimony that they had intended to break into the apartment to steal a large sum of money from the occupant, that they had travelled to the apartment together for that purpose, and that the defendant and D were armed with loaded handguns that they had purchased together, and the jury was entitled to credit and rely on D's testimony as a basis for conviction, even if it was the only evidence offered to establish one or more essential elements of the charged offense, and even though D had been offered and accepted a favorable plea bargain in exchange for his incriminating testimony.
2. The evidence was sufficient to support the defendant's conviction of attempt to commit home invasion, as the jury reasonably could have found that the defendant intentionally took a substantial step in a course

of conduct planned to culminate in the crime of home invasion; the evidence presented at trial, including D's testimony, concerning the defendant's conduct in going to the apartment, armed with a loaded handgun, with the intent to break into the apartment and steal a large sum of money strongly corroborated his criminal purpose, especially given that he had misidentified himself to the occupant of the apartment in an attempt to cause the occupant of the apartment to open the door, and attempted to force his way into the apartment when the door began to open, which strongly corroborated his intent to enter an occupied dwelling, without the permission of its owner or occupant, with the intent to commit a crime therein, while he was armed with a deadly weapon.

3. The defendant could not prevail on his unpreserved claim that the trial court improperly instructed the jury on the common essential element of conspiracy to commit home invasion and attempt to commit home invasion by substituting the term "dwelling" with the word "building" in its final oral jury instructions, as it was not reasonably possible that the instructions, when viewed as a whole, misled the jury and the defendant, thus, failed to demonstrate the existence of a constitutional violation that deprived him of a fair trial pursuant to the third prong of the test set forth in *State* v. *Golding* (231 Conn. 233): although the trial court erred by misspeaking during its oral instructions and substituting the word "building" for the term "dwelling" on eight of twenty occasions, the jury had before it the written instructions which clearly, and in a manner sufficiently correct in law, communicated that the defendant must have conspired to unlawfully enter, or intentionally taken a substantial step in a course of conduct planned to culminate in the unlawful entry of, a dwelling, and not merely a building, under circumstances constituting home invasion, to be guilty of conspiracy or attempt to commit home invasion, and neither defense counsel nor the prosecutor objected to or recognized the discrepancy between the written and oral instructions, which suggested that the misstatements were not noticeable to the court, counsel or the jury; moreover, it was not reasonably possible, in the context of this case, that the jury could have been misled to believe that to convict the defendant of conspiracy to commit home invasion and attempt to commit home invasion, it needed only to find that he had agreed to enter and attempted to enter the common spaces of the apartment building in which the intended victims dwelled, and the defendant was not entitled to a reversal of the judgment pursuant to the plain error doctrine, as his claim of instructional error was not so extraordinary that it necessitated reversal of the judgment.

Argued September 7—officially released November 20, 2018

Procedural History

Substitute information charging the defendant with the crimes of attempt to commit home invasion, conspiracy to commit home invasion, attempt to commit

robbery in the first degree, conspiracy to commit robbery in the first degree, attempt to commit assault in the first degree and criminal possession of a firearm, brought to the Superior Court in the judicial district of Hartford, where the defendant elected a trial to the court on the charge of criminal possession of a firearm; thereafter, the remaining charges were tried to the jury before *Dewey*, *J.*; verdict of guilty; subsequently, the court dismissed the charge of conspiracy to commit robbery in the first degree; judgment of guilty of attempt to commit home invasion, conspiracy to commit home invasion, attempt to commit robbery in the first degree and attempt to commit assault in the first degree; thereafter, the state entered a nolle prosequi as to the charge of criminal possession of a firearm, and the defendant appealed to this court. *Affirmed.*

Joseph A. Jaumann, assigned counsel, for the appellant (defendant).

Brett R. Aiello, special deputy assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Anthony Bochicchio*, senior assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. The defendant, Trajuan A. Washington, appeals from the judgment of conviction that was rendered against him, upon the verdict of a jury in the Hartford Superior Court, on charges of conspiracy to commit home invasion in violation of General Statutes §§ 53a-48 and 53a-100aa (a) (2) and attempt to commit home invasion in violation of General Statutes §§ 53a-49 (a) (2) and 53a-100aa (a) (2).[1] The defendant was

[1] The defendant also was convicted of attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-134 (a) (2), conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (2), and attempt to commit assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and § 53a-59 (a) (5). No claim of error has been made on appeal with respect to his conviction of those charges.

tried under an amended information dated May 2, 2016, in which the state alleged, in relevant part, that on February 19, 2014 (1) he conspired to commit home invasion by agreeing with one or more persons to enter a dwelling at 33 Seyms Street in Hartford with the intent to commit a crime therein, while he was armed with a deadly weapon and another person not participating in the crime was actually present inside the dwelling, and (2) he attempted to commit home invasion by intentionally taking a substantial step in a course of conduct planned to culminate in the commission of home invasion, while acting with the mental state required for the commission of that offense.[2] On appeal, the defendant claims that (1) the evidence was insufficient to support his conviction of conspiracy to commit home invasion and attempt to commit home invasion, and (2) the trial court erred in instructing the jury on a common essential element of conspiracy to commit home invasion and attempt to commit home invasion by repeatedly substituting the word building for the term dwelling in its final instructions describing those offenses. We affirm the judgment of the trial court.

The jury was presented with the following evidence upon which to base its verdict. On February 19, 2014, at approximately 8:33 a.m., officers of the Hartford Police Department were dispatched to 33 Seyms Street in Hartford to investigate a report of shots fired at that location. Officer Dwayne Tine, a patrolman, was the first officer to arrive at the scene. Upon his arrival, Tine secured the area and performed a preliminary investigation, during which he spoke with Tiffany and Julianna Moore, two sisters who lived on the first floor of the three story apartment building at that address.

[2] The amended information also charged the defendant with criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). The defendant elected to try this final count to the court. The state entered a nolle prosequi on this charge on July 21, 2016.

Sergeant Jason Lee, a detective with the crime scene division of the Hartford Police Department, arrived at the scene shortly thereafter. Upon his arrival, he searched the area and made two sets of findings of possible relevance to the shooting. First, he found two spent cartridge casings on the sidewalk in front of 39 Seyms Street, the building immediately to the west of 33 Seyms Street. Second, upon inspecting the front of the building at 33 Seyms Street, he found a bullet hole in the center of the front door, a "defect" that could have been caused by a bullet to the left of the number placard immediately to the right of the front door, and jacketing from a bullet in a hole between the brick wall and the wooden frame of the first floor apartment window to the left of the front door.

Detective Mark Rostkowski of the Hartford Police Shooting Task Force also responded to the report of shots fired at 33 Seyms Street on the morning of February 19. While in the area, he recovered a surveillance video of the shooting that had been recorded by a camera installed on the adjacent building at 39 Seyms Street. A portion of the video, bearing a time stamp of 8:26 a.m., showed three men wearing hoodies walking down the sidewalk toward 39 Seyms Street from the direction of 33 Seyms Street when two of the men, apparently reacting to something off camera behind them, suddenly turned in that direction, raised handguns they had been carrying, and fired shots before running away further to the west. At the conclusion of their investigation on February 19, the police had no leads as to possible suspects in connection with the shooting.

Police investigators got their first lead as to who might have perpetrated the shooting when, several weeks later, they received a tip from Jhllah Govan, who claimed to have witnessed the shooting through the window of the first floor apartment at 33 Seyms Street, where he was then living with his girlfriend, Julianna

Moore, and her sister, Tiffany Moore. Govan reported that he had gone to the window that morning after hearing the apartment's front door slam and Tiffany cry out for help. When he did so, he reportedly saw three men walking away from the apartment building to his left when two of the men suddenly turned back toward the building and fired handguns in his direction. Govan identified one of the shooters as a man he had come to know as "Awack," with whom he had been incarcerated at the Hartford Correctional Center sometime after the shooting following his arrest on unrelated charges. Detective Rostkowski subsequently determined that Awack was an alias used by Shannon Davis of Hartford. Accordingly, police investigators showed Govan a photographic array that included Davis' photo, from which Govan identified Davis as one of the men who had fired shots toward 33 Seyms Street on the morning of February 19.

When Rostkowski located Davis, he agreed to speak to detectives about the incident. In his meeting with detectives, Davis confessed to his involvement in the incident and identified the defendant as the other man who had fired shots toward the apartment building at 33 Seyms Street during the course of that incident. Davis was later arrested in connection with the incident and agreed to cooperate with the state.[3]

At the defendant's trial, Davis testified that he, the defendant and a third man he identified only as "Dough" went together to the apartment building at 33 Seyms Street on the morning of February 19, with the intent to break into the apartment of a man named "300" and steal a large sum of money from him. The defendant and Davis were both armed with handguns, which they

[3] Davis pleaded guilty to his involvement in the incident in exchange for a suspended sentence and probation. As part of the terms of his probation, Davis agreed to continue to cooperate with the Hartford Police Department and the state on this case and others.

had purchased together approximately one week before the incident. After driving together to 33 Seyms Street in Davis' car, the three men entered the front door of the building and walked to the door of a first floor apartment through an interior hallway. The defendant knocked on the apartment door, which had no peep hole in it, and identified himself to the apartment's occupants by the name of a person with whom he believed they were familiar. A female resident of the apartment answered the door and started to open it. When, however, she saw the three men standing before her wearing hoodies, she quickly closed the door. Although the defendant tried to catch the door before the woman could close it, she was able to slam it shut. The three men then left the apartment building and began to walk away to their left, in a westerly direction down Seyms Street, when two women in the first floor apartment began to taunt them from the apartment's front window. Shortly thereafter, an unidentified man came out the front door of the apartment building. Believing that the unidentified man was carrying a weapon, Davis and the defendant turned toward him and fired shots at him with their handguns. No one was injured by the shots. Davis identified himself and the defendant in the video recording of the shooting that Detective Rostkowski had obtained from 39 Seyms Street as the two men who fired handguns in the direction of 33 Seyms Street before running away.

After concluding its deliberations, the jury returned a guilty verdict on all charges, including conspiracy to commit home invasion, attempt to commit home invasion, conspiracy to commit robbery in the first degree, attempt to commit robbery in the first degree, and attempt to commit assault in the first degree.[4] The

[4] The court dismissed count four of the amended information, conspiracy to commit robbery in the first degree, in accordance with our constitutional protections against double jeopardy. "The double jeopardy clause of the fifth amendment to the United States constitution provides that no person shall be subject for the same offense to be twice put in jeopardy of life or

defendant was later sentenced on those charges to a total effective term of forty years of incarceration, execution suspended after thirty years, and five years of probation. This appeal followed. Additional facts will be set forth as necessary.

I

CLAIMS OF EVIDENTIARY INSUFFICIENCY

The defendant first claims that the evidence was insufficient to support his conviction of conspiracy to commit home invasion and attempt to commit home invasion. Specifically, he contends that evidence that he and his companions drove together to 33 Seyms Street while armed with loaded handguns with the intent to break in and steal money, that they attempted to gain entry to the apartment by tricking the residents to believe they were persons known to them, and that he tried to catch the door when the resident attempted to shut it, did not establish that he ever agreed with his companions to commit home invasion or that he intentionally took a substantial step in a course of conduct planned to culminate in the commission of that offense. For the following reasons, we disagree.

"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."

limb. This clause prohibits not only multiple trials for the same offense but also multiple punishment for the same offense." (Internal quotation marks omitted.) *State* v. *Brown*, 132 Conn. App. 251, 255, 31 A.3d 434 (2011), cert. denied, 303 Conn. 922, 34 A.3d 396 (2012).

(Internal quotation marks omitted.) *State* v. *Allan*, 311 Conn. 1, 25, 83 A.3d 326 (2014). In applying that test, "we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Stephen J. R.*, 309 Conn. 586, 594, 72 A.3d 379 (2013).

A

Conspiracy to Commit Home Invasion

"A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy." General Statutes § 53a-48 (a). "In proving the requisite element of agreement, [i]t is not necessary to establish that the defendant and his coconspirators signed papers, shook hands or uttered the words we have an agreement . . . . Indeed, [b]ecause of the secret nature of conspiracies, a conviction is usually based on circumstantial evidence. . . . [A] conspiracy can be inferred from the conduct of the accused." (Internal quotation marks omitted.) *State* v. *Rosado*, 134 Conn. App. 505, 511, 39 A.3d 1156, cert. denied, 305 Conn. 905, 44 A.3d 181 (2012). "[P]roof of a conspiracy to commit a specific offense requires proof that the conspirators intended to bring about the elements of the conspired offense." (Internal quotation marks omitted.) *State* v. *Padua*, 273 Conn. 138, 167, 869 A.2d 192 (2005).

General Statutes § 53a-100aa provides, in relevant part: "(a) A person is guilty of home invasion when such person enters . . . unlawfully in a dwelling, while a person other than a participant in the crime is actually present in such dwelling, with intent to commit a crime

therein, and, in the course of committing the offense . . . (2) such person is armed with . . . a deadly weapon . . . .'' As used in that statute, the term '' 'dwelling' means a building which is usually occupied by a person lodging therein at night, whether or not a person is actually present . . . .'' General Statutes § 53a-100 (a) (2). The term '' '[d]eadly weapon' means any weapon, whether loaded or unloaded, from which a shot may be discharged . . . .'' General Statutes § 53a-3 (6). The term ''enters [a dwelling] . . . unlawfully'' means enters a dwelling ''not open to the public and when the actor is not otherwise licensed or privilege to do so.'' General Statutes § 53a-100 (b).

Reading the conspiracy and home invasion statutes together, in light of the foregoing definitions, the essential elements of conspiracy to commit home invasion are as follows: (1) the defendant agreed with one or more other persons to commit home invasion, to wit, to enter a dwelling without license or privilege to do so, with the intent to commit a crime therein, while he was armed with a weapon from which a shot could be discharged, and a person other than one of his coconspirators actually was present in the dwelling; (2) the defendant specifically intended to engage in conduct constituting the crime of home invasion, as previously defined; and (3) at least one of the coconspirators committed an overt act in pursuance of that conspiratorial agreement.

The defendant first argues that the state's evidence was insufficient to convict him of conspiracy to commit home invasion because such evidence came principally from Shannon Davis, one of his alleged coconspirators, who had been offered a favorable plea bargain in exchange for his incriminating testimony. It is well established, however, that ''[t]his court does not retry the case or evaluate the credibility of the witnesses.

. . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Citation omitted; internal quotation marks omitted.) *State* v. *McClam*, 44 Conn. App. 198, 208, 689 A.2d 475, cert. denied, 240 Conn. 912, 690 A.2d 400 (1997). Accordingly, the jury was entitled to credit Davis' testimony and to rely on it as a basis for conviction even if it was the only evidence offered to establish one or more essential elements of the charged offense. Therefore, we reject the defendant's initial challenge to the sufficiency of the evidence to support his conspiracy conviction.

The defendant next claims that the state presented insufficient evidence to establish that he and his companions entered into an agreement to commit *any* crime, much less the specific crime of home invasion, as required to convict him of conspiracy to commit that offense. On the basis of the testimony of Davis concerning how he, the defendant and Dough planned their visit to 33 Seyms Street on the morning of February 19, however, and their joint efforts thereafter to carry out that very plan, we disagree.

According to Davis, the men's shared purpose in going to 33 Seyms Street that morning was to break into 300's apartment and take a large sum of money from him. All three men travelled together to 33 Seyms Street that morning for that purpose, supporting the inference that they did so intentionally, pursuant to a joint agreement among them. They did so, moreover, while two of the men, the defendant and Davis, were armed with loaded, operable handguns that they had purchased together approximately one week earlier. This evidence, if believed, certainly was sufficient to establish not only that the three men agreed to engage in a joint criminal enterprise on the morning of February 19, but that they did so with the shared intent to enter

an occupied dwelling at that address, without the owner's or occupant's permission, with the intent to commit a larceny within that dwelling, at gunpoint if necessary, while the defendant was armed with a deadly weapon from which a shot could be discharged. The jury reasonably could have relied upon such evidence, viewed in the light most favorable to the state, to find that the specific crime that the defendant and his companions agreed to commit that morning was home invasion in violation of § 53a-100aa. Accordingly, we also reject the defendant's remaining challenges to the sufficiency of the evidence to support his conspiracy to commit home invasion conviction.

B

Attempt to Commit Home Invasion

The defendant next challenges the sufficiency of the state's evidence to support his conviction of attempt to commit home invasion. The defendant claims, more particularly, that because "no entry was ever made" into the first floor apartment at 33 Seyms Street, the state failed to establish that he intended to commit home invasion, or intentionally took a substantial step in a course of conduct planned to culminate in the commission of that offense, as opposed to some other crime. We disagree.

General Statutes § 53a-49 (a) (2) provides in relevant part: "A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he . . . intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." "To constitute a substantial step, the conduct must be strongly corroborative of the actor's criminal purpose. . . . This standard focuses on what the actor has already

done and not what remains to be done. . . . The substantial step must be at least the start of a line of conduct which will lead naturally to the commission of a crime." (Internal quotation marks omitted.) *State* v. *Andrews*, 114 Conn. App. 738, 747, 971 A.2d 63, cert. denied, 293 Conn. 901, 975 A.2d 1277 (2009).

General Statutes § 53a-49 (b) provides in relevant part: "Without negating the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law . . . (4) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed . . . [and] (5) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances . . . ." In *State* v. *Serrano*, 91 Conn. App. 227, 242–43, 880 A.2d 183, cert. denied, 276 Conn. 908, 884 A.2d 1029 (2005), this court held that the evidence was sufficient to support a conviction of attempt to commit burglary where the victim "was in her apartment at the relevant time when she saw a fork being inserted past the door lock striker and saw the doorknob turn. When the door opened, she saw the defendant holding a fork near the locking mechanism. The defendant stated that he was at the wrong apartment, covered his face and ran down the stairs. It was reasonable for the jury to infer that the defendant was attempting to break into the apartment."

Reading the attempt and home invasion statutes together, the essential elements of attempt to commit home invasion are that (1) the defendant intentionally took a substantial step in a course of conduct planned to culminate in his commission of the crime of home invasion, to wit, entering a dwelling without license or privilege to do so, with the intent to commit a crime therein, while he was armed with a weapon from which

a shot could be discharged, and another person not participating in the crime was actually present in the dwelling; and (2) at the time he took that substantial step, the defendant was acting with the mental state required for commission of the crime of home invasion, to wit, intent to commit a crime inside of the unlawfully entered dwelling. The evidence presented at trial concerning the defendant's conduct on the morning of February 19, was strongly corroborative of his alleged criminal purpose of committing the crime of home invasion. On the basis of Davis' testimony, which the jury reasonably could have credited and relied upon, the defendant went to 33 Seyms Street on that morning, while he and Davis were armed with loaded weapons from which shots could be discharged, with the intent to break into an apartment at that address and steal a large sum of money from a person who lived there. When he and his companions arrived at that address, moreover, he used a ruse to cause the person who responded to his knock on the apartment door to open that door, then tried to force his way inside when the door began to open. Such evidence reasonably could have been found to strongly corroborate the defendant's intent to enter an occupied dwelling, without the permission of its owner or occupant, with the intent to commit a crime therein, while he was armed with a deadly weapon. It thus was sufficient to establish that he intentionally took a substantial step in a course of conduct planned to culminate in the commission of a home invasion. Therefore, his claims of evidentiary insufficiency as to his conviction of attempt to commit home invasion must likewise be rejected.

II

CLAIMS OF INSTRUCTIONAL ERROR

The defendant next claims that the trial court erred by instructing the jury improperly on a common essential

element of conspiracy to commit home invasion and attempt to commit home invasion. Specifically, he contends that the jury could have been misled by the trial court's repeated substitution of the word building for the term dwelling in its final oral jury instructions on the elements of those offenses, thereby diluting the state's burden of proof as to those offenses. The defendant concedes that this claim is unpreserved, and thus he seeks review of the claim under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). In the alternative, he asks that we reverse his conviction under the plain error doctrine. Although we conclude that the claim is reviewable under the first two prongs of *Golding*, we further conclude that the claim fails under *Golding*'s third prong, as modified by *In re Yasiel R.*, which requires that he demonstrate that "the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial . . . ." *Golding*, supra, 240. The following additional facts are necessary to our review of this claim.

On May 11, 2016, the day before the jury charge was to be given, the court held a brief charging conference on the record, during which it clarified the language it would use in its instructions on the underlying offense of home invasion, which the defendant was charged, in separate counts, with conspiring and attempting to commit. The court's focus in that conference was on whether it should describe that underlying offense, as the defendant allegedly conspired and attempted to commit it, as "entering or remaining" in the subject premises under circumstances constituting home invasion or merely "entering" those premises under such aggravating circumstances. After the close of testimony later that day, the court distributed to counsel copies of what it called the "close-to-final version" of its jury instructions so that they could take them home and

review them. The following day, when counsel were asked to state for the record if they wished to make any changes or corrections to the written instructions, they both answered in the negative.

During the state's closing argument concerning the charge of attempted home invasion, it focused on the alleged conduct of the defendant and his companions just outside the interior door of the Moore sisters' first floor apartment, contending that "the attempt [was] knocking on the door [of the apartment] and trying to get in . . . ." Notably, defense counsel's closing argument focused solely on the issue of identity, challenging the credibility of the defendant's alleged coconspirator, Davis, who was the only person to implicate the defendant as a participant in the charged offenses. Before giving its oral charge, the court distributed written copies of its final instructions to the jury so that the jurors could read along as the court read the instructions aloud, and so they could have the instructions with them in writing when they conducted their deliberations.

In its written instructions on the charge of home invasion, the court substituted the word building for the term dwelling on two of the twenty occasions when it should have used the term dwelling to describe the elements of the charged offenses. The first such occasion was when the court, in discussing the first element of home invasion, namely, that the defendant unlawfully entered a dwelling, stated: "The inference may be drawn if the circumstances are such that a reasonable person of honest intention, in the situation of the defendant, would have concluded that he knowingly and unlawfully remained in the *building*." (Emphasis added.) The second such occasion occurred when the court, in discussing the fourth element of home invasion, namely, that the defendant was armed with a deadly weapon, stated: "This means that the defendant at some point of entering the *building* had actual physical possession

of a deadly weapon." (Emphasis added.) There were no other substitutions of the word building for the term dwelling in the court's written instructions.

When reading its written instructions to the jury, however, the court misspoke on eight of the twenty occasions when it should have used the word dwelling to define the elements of home invasion by using the word building in its stead. The first time the court misspoke in its oral instructions was when it gave the general definition of the term knowingly, stating: "In this case, the inference may be drawn if the circumstances are such that a reasonable person of honest intention, in the situation of the defendant, would have concluded that he unlawfully entered a *building*." (Emphasis added.) The court next substituted the word building for the term dwelling in its recitation of the text of General Statutes § 53a-100aa (a) (2), when it stated: "A person is guilty of home invasion when such person unlawfully enters or remains in a *building* . . . ." (Emphasis added.) The court thereafter used the word building instead of the term dwelling on three more occasions in quick succession, stating: "Element one—it says remained in the *building*. It should be entered a *building*. The first element is that the defendant knowingly and unlawfully entered a *building*." (Emphasis added.) The court again used the word building instead of the term dwelling when it further explained the first element of home invasion, stating: "The inference may be drawn if the circumstances are such that a reasonable person of honest intention, in the situation of the defendant, would have concluded that he knowingly and unlawfully—it says remained but it should be entered in the *building*." (Emphasis added.) This instance was one of the two substitutions of the word building for the term dwelling that also appeared in the court's written instructions.

The next use of the word building by the court was when it appeared as part of the definition of the term dwelling. The court thereafter continued to use the term dwelling as required by the statute until it reached the fourth and final element of home invasion, as to which it said: "This means that the defendant at some point of entering the *building* had actual physical possession of a deadly weapon." (Emphasis added). This use of the word building for the term dwelling repeated the second such substitution as it appeared in the court's written instructions.

At the conclusion of its oral charge, the court asked counsel if they had any comments or questions about the charge, but neither defense counsel nor the prosecutor took exception to the charge. Thereafter, during the jury's deliberations, it asked no questions about any of the court's written or oral jury instructions.

As an initial matter, the defendant concedes that this claim is unpreserved, and thus seeks review pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40. "[A] defendant can prevail on a claim of constitutional error not preserved at trial only 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 . . . exists and . . . 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. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40, as modified by *In re Yasiel R.*, supra, 317 Conn. 781.

This unpreserved claim is reviewable under the first two prongs of *Golding* because the oral jury charge

and the written instructions are set forth in their entirety in the record and the claim is of constitutional magnitude. See *State* v. *Aponte*, 259 Conn. 512, 518, 790 A.2d 457 (2002) (failure to instruct jury on essential element of crime deprives defendant of constitutional right to have jury told crimes charged and essential elements of those crimes). Therefore, we turn to the third prong of *Golding* to determine whether "the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial." *State* v. *Golding*, supra, 213 Conn. 240.

Our analysis under the third prong of *Golding* begins with the "well established standard of review governing claims of instructional impropriety. [I]ndividual jury instructions should not be judged in artificial isolation, but must be viewed in the context of the overall charge. . . . The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Thus, [t]he whole charge must be considered from the standpoint of its effect on the [jurors] in guiding them to the proper verdict . . . and not critically dissected in a microscopic search for possible error. . . . Accordingly, [i]n reviewing a constitutional challenge to the trial court's instruction, we must consider the jury charge as a whole to determine whether it is reasonably possible that the instruction misled the jury. . . . In other words, we must consider whether the instructions [in totality] are sufficiently correct in law, adapted to the issues and ample for the guidance of the jury." (Internal quotation marks omitted.) *State* v. *Hampton*, 293 Conn. 435, 452–53, 988 A.2d 167 (2009). In resolving this claim, we note that "[r]eviewing courts are especially hesitant in reversing a conviction on the basis of an inaccuracy in a trial court's oral instruction if the jury was provided with accurate written instructions." *State* v. *Holley*, 174

Conn. App. 488, 497, 167 A.3d 1000 (2017), cert. denied, 327 Conn. 907, 170 A.3d 3 (2017), cert. denied, U.S. , 138 S. Ct. 1012, 200 L. Ed. 2d 275 (2018).

In the present case, it is conceded by the state that the court erred in substituting the word building for the term dwelling in its instructions describing the crime of home invasion as the alleged object of the defendant's alleged conspiracy and attempt. We conclude, however, that it is not reasonably possible that the jury was misled by such erroneous instructions under the circumstances of this case or that the defendant was thereby deprived of a fair trial. The jury was given copies of the court's written instructions, which properly defined the term dwelling and correctly listed it as an element of home invasion on eighteen of the twenty times when that term should have been used in such written instructions. Such written instructions were available to the jury both during the delivery of the court's oral instructions and throughout its deliberations. Thus, although there were two instances in the written charge where the trial court erroneously used the word building instead of the term dwelling, when considering the whole charge, the other eighteen uses of the term dwelling clearly communicated to the jury that the defendant must have conspired to enter a dwelling, not merely a building, under circumstances constituting home invasion to be guilty of conspiracy to commit home invasion, and similarly must have intentionally taken a substantial step in a course of conduct planned to culminate in the unlawful entry of a dwelling under such circumstances to be guilty of attempt to commit home invasion. Moreover, neither counsel seemed to recognize that the court had misspoken at the time of trial since neither took exception to the charge. This suggests that, although the challenged misstatements were incorrect, they were not noticeable to the court, counsel, or the jury.

The defendant claims that the jury could have been misled to believe that to convict him of conspiracy to commit home invasion and attempt to commit home invasion, it needed only to find that he had agreed to enter and attempted to enter the common spaces of the apartment building instead of the individual apartment within that building in which the intended victims dwelled. This is not reasonably possible in the context of this case. It was uncontested that the three men entered the front door of the apartment building and approached the door of a first floor apartment within it through a common hallway. It was uncontested throughout the trial that the first floor apartment was indeed a dwelling. It was clear from the testimony presented during trial and the arguments of counsel that the criminal activity at issue was that which occurred at the inner door to the first floor apartment. There was never any suggestion that the perpetrators' unopposed entry to the common area of the apartment building through its front door was the basis of the prosecution in this case. Therefore, although we conclude that the court erred by misspeaking during its oral charge, the overall charge, as delivered orally and in writing, was sufficiently correct in law and adapted to the issues to provide ample guidance to the jury, and, thus, the defendant was not deprived of a fair trial. Accordingly, his claim fails under *Golding*'s third prong

Furthermore, we also conclude that the defendant is not entitled to reversal for plain error pursuant to Practice Book § 60-5. "[P]lain error review is reserved for only the most egregious errors. When an error of such a magnitude exists, it necessitates reversal." *State* v. *McClain*, 324 Conn. 802, 814, 155 A.3d 209 (2017). "[T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or

never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy." (Internal quotation marks omitted.) *State* v. *Gaffney*, 148 Conn. App. 537, 542, 84 A.3d 1261, cert. denied, 312 Conn. 902, 91 A.3d 907 (2014). For the foregoing reasons, we cannot conclude that the defendant's claim is so extraordinary that it necessitates reversal of the judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* CHRISTOPHER M. SPRING
(AC 39628)

Prescott, Bright and Flynn, Js.

Syllabus

Convicted of the crimes of strangulation in the second degree and assault in the third degree, the defendant appealed to this court. On appeal, he claimed that the trial court erred in granting the state's motion to admit into evidence a written statement he had given to the police during an unrecorded custodial interrogation at the police station, which he claimed violated the statute (§ 54-1o) that creates a presumption of inadmissibility of statements from persons under investigation for certain crimes made as a result of custodial interrogation at a place of detention unless an electronic recording is made of the custodial interrogation. The defendant also claimed that this court should invoke its supervisory authority to order a new trial and to require the judges of the Superior Court to instruct juries in a particular manner when faced with statements or confessions obtained during unrecorded custodial interrogations in violation of statute § 54-1o. *Held:*

1. The trial court properly admitted the defendant's written statement into evidence:

   a. The defendant's claim that the admission of his written statement had constitutional implications under the federal and state constitutions was unavailing; the defendant having cited no authority for his novel suggestion that the legislature created a new constitutional right by enacting § 54-1o, and having made no claim that his statement was taken in violation of *Miranda* v. *Arizona* (384 U.S. 436), the claim was evidentiary in nature.

b. The trial court properly determined that although the defendant's statement was not recorded electronically and was, therefore, presumed inadmissible pursuant to § 54-1o (d), the statement was nonetheless admissible pursuant to the exception in subsection (h) of § 54-1o because the statement was voluntary and reliable under the totality of the circumstances: that court's finding concerning the voluntary nature of the statement was proper in light of the evidence indicating that the defendant was advised of his *Miranda* rights twice before the statement was taken and signed a notice of rights form, that he did not request an attorney or request to remain silent, that there was no evidence of trickery, threats or coercion by the police, that the defendant was thirty-eight years old and had no issues in terms of being intoxicated or otherwise incapacitated, either mentally or physically, that the interrogation took place over an approximate one hour period in an office cubicle and was witnessed for the most part by a detective sergeant, and that the defendant read, made changes to, and signed the statement on each of its three pages, which specifically provided that it was voluntarily given and that the defendant was read, knew and understood his rights; moreover, although the parties disagreed as to what the court could properly consider in assessing the reliability of the defendant's statement and whether independent corroborating evidence was necessary, it was unnecessary for this court to determine whether there is a requirement under § 54-1o (h) that there be corroborating evidence of the contents of a confession for it to be considered reliable under the totality of the circumstances, as there was evidence to support the court's decision that the statement was reliable under either test advanced by the parties in that the evidence concerning the voluntariness of the statement also could have been used to determine its reliability, and there was independent evidence to corroborate many of the facts set forth in the defendant's statement.

2. The defendant's claim that the trial court abused its discretion in overruling his objection to an alleged misstatement of the prosecutor during closing rebuttal argument was not reviewable, the defendant having failed to brief the claim adequately.

3. This court declined to exercise its supervisory authority over the administration of justice to order a new trial in the interests of justice or to create a rule requiring the Superior Court to give a cautionary instruction to the jury when it has admitted into evidence a defendant's statement that does not adhere to the recording requirements of § 54-1o (b); the defendant provided little analysis as to the necessity of such a rule, and the legislature chose not to include a requirement that the trial court give a cautionary instruction upon the state successfully overcoming the presumption of inadmissibility under one of the factors established by the legislature.

Argued September 6—officially released November 20, 2018

Procedural History

Substitute information charging the defendant with the crimes of burglary in the first degree, kidnapping in the second degree, strangulation in the second degree, and assault in the third degree, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Bentivegna*, *J.*; verdict and judgment of guilty of strangulation in the second degree and assault in the third degree, from which the defendant appealed to this court. *Affirmed.*

Timothy H. Everett, with whom were *Michael Edelson*, certified legal intern, and, on the brief, *Andrew Ammirati*, certified legal intern, and *Shaun D. Loughlin*, certified legal intern, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Richard J. Rubino*, senior assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, J. The primary issue in this appeal involves the admissibility at trial of the defendant's written statement, which was made during an unrecorded custodial interrogation at the Enfield police station. The defendant, Christopher M. Spring, appeals from the judgment of conviction, rendered after a jury trial, of strangulation in the second degree in violation of General Statutes § 53a-64bb (a) and assault in the third degree in violation of General Statutes § 53a-61 (a) (1).[1] On appeal, the defendant claims that (1) the court erred when it granted the state's motion to admit his statement, which

[1] The jury found the defendant not guilty of the additional charges of burglary in the first degree in violation of General Statutes § 53a-101 (a) (2) and kidnapping in the second degree in violation of General Statutes § 53a-94 (a).

was taken in violation of General Statutes § 54-1o,[2] during an unrecorded custodial interrogation, because the state failed to prove that the statement was both voluntarily given and reliable under the totality of the circumstances, as required by § 54-1o (h), (2) the court abused

[2] General Statutes § 54-1o provides in relevant part: "(a) For the purposes of this section:

"(1) 'Custody' means the circumstance when (A) a person has been placed under formal arrest . . .

"(2) 'Interrogation' means questioning initiated by a law enforcement official . . .

"(3) 'Custodial interrogation' means any interrogation of a person while such person is in custody;

"(4) 'Place of detention' means a police station or barracks . . . and

"(5) 'Electronic recording' means an audiovisual recording made by use of an electronic or digital audiovisual device.

"(b) An oral, written or sign language statement of a person under investigation for or accused of a capital felony or a class A or B felony made as a result of a custodial interrogation at a place of detention shall be presumed to be inadmissible as evidence against the person in any criminal proceeding unless: (1) An electronic recording is made of the custodial interrogation, and (2) such recording is substantially accurate and not intentionally altered. . . .

"(d) If the court finds by a preponderance of the evidence that the person was subjected to a custodial interrogation in violation of this section, then any statements made by the person during or following that nonrecorded custodial interrogation, even if otherwise in compliance with this section, are presumed to be inadmissible in any criminal proceeding against the person except for the purposes of impeachment.

"(e) Nothing in this section precludes the admission of . . .

"(2) A statement made during a custodial interrogation that was not recorded as required by this section because electronic recording was not feasible;

"(3) A voluntary statement, whether or not the result of a custodial interrogation, that has a bearing on the credibility of the person as a witness . . .

"(6) A statement made during a custodial interrogation by a person who requests, prior to making the statement, to respond to the interrogator's questions only if an electronic recording is not made of the statement, provided an electronic recording is made of the statement by the person agreeing to respond to the interrogator's question only if a recording is not made of the statement . . . and

"(8) Any other statement that may be admissible under law.

"(f) The state shall have the burden of proving, by a preponderance of the evidence, that one of the exceptions specified in subsection (e) of this section is applicable.

"(g) Nothing in this section precludes the admission of a statement, otherwise inadmissible under this section, that is used only for impeachment and not as substantive evidence.

"(h) The presumption of inadmissibility of a statement made by a person at a custodial interrogation at a place of detention may be overcome by a

its discretion when it overruled an objection made by the defendant regarding an inaccurate argument made by the state about the defendant's statement, and (3) this court should exercise its supervisory authority over the administration of justice by ordering a new trial in this case and by requiring the judges of our Superior Court to instruct juries in a particular manner when faced with statements or confessions obtained during unrecorded custodial interrogations that violate § 54-1o. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts, which are necessary to our review of the defendant's claims. The Enfield police arrested the defendant on May 3, 2015, at approximately 5:30 a.m., on multiple charges, including class A or B felonies, following a physical altercation between the defendant and the victim. Enfield Police Officer Mark Critz read the defendant his *Miranda*[3] rights at the time he was arrested and, again, when he was brought to the police station, where he signed a notice of rights form at approximately 7:23 a.m. He then was taken to lock up. Several hours later, at approximately 1:10 p.m., the defendant was interrogated by Detective Martin Merritt of the Enfield Police Department. The interrogation took place at Merritt's desk, which is in a large room with cubicles that had walls about five feet tall, and was not video recorded. Merritt did not readvise the defendant of his *Miranda* rights because Critz had informed him that the defendant had been provided such warnings twice already. In addition, the defendant confirmed to Merritt that he had been advised of his rights. Merritt asked the defendant to explain what had happened the night before and took notes as the defendant recounted the events leading up to his arrest.

preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances. . . ."

[3] *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

After the defendant finished giving his oral statement, Merritt prepared a written statement on an Enfield Police Department form. The defendant then reviewed, edited, initialed and signed the statement three times below an acknowledgement that reads: "I HAVE READ THE ABOVE STATEMENT AND IT IS TRUE TO THE BEST OF MY KNOWLEDGE. I FULLY UNDERSTAND THAT IF I MAKE A FALSE STATEMENT THAT IS UNTRUE AND WHICH IS INTENDED TO MISLEAD A LAW ENFORCEMENT OFFICER IN THE PERFORMANCE OF HIS OFFICIAL FUNCTIONS I WILL BE IN VIOLATION OF [GENERAL STATUTES] SECTION 53A-157, CONNECTICUT GENERAL STATUTES. A FALSE STATEMENT IS A CLASS A MISDEMEANOR, WHICH IS PUNISHABLE UP TO 1 YEAR IN JAIL AND/OR A $1000 FINE AND NOT MORE THAN 3 YEARS PROBATION."

In the statement, the defendant acknowledged, by initialing specific sentences, that he had been advised of his rights, understood those rights, was making the statement of his own free will, without any threats or promises having been made, and that he was giving the statement voluntarily. Also in the written statement, the defendant acknowledged, in relevant part, the following events: The defendant and others were watching "the fight" on television, during a party. Later, wanting to talk to the victim, the defendant went to her residence.[4] After the defendant knocked on a window to the apartment, the victim opened the door. Shortly thereafter, the defendant took the victim for a ride in his vehicle, where they immediately started to argue. The defendant pulled over the vehicle, choked the victim with his hands, punched her, and slapped her repeatedly. The victim tore off the defendant's necklace, and she punched him in the face, causing his gums to bleed.

[4] In accordance with General Statutes § 54-86e, we decline to identify the victim or others through whom the victim's identity may be ascertained.

After the fight, both the victim and the defendant had a lot of blood on them. The defendant drove to someone's apartment, where both he and victim cleaned up. Someone then telephoned the police. Soon thereafter, the defendant went for a walk. The police then arrested him. After making whatever changes to the written statement that he thought were necessary, the defendant initialed each change, and he signed each page of the statement.

On April 27, 2016, shortly before the defendant's trial began, the state, pursuant to § 54-1o, filed a motion seeking permission to introduce the defendant's signed statement into evidence during its case-in-chief.[5] In its motion, the state requested an evidentiary hearing wherein it could establish an exception to the custodial interrogation recording requirement under subsections (e) and (h) of § 54-1o. See footnote 2 of this opinion. The court held the hearing on May 2, 2016.

During the hearing, Critz testified that he read the defendant his *Miranda* rights when he arrested him in an outdoor area at approximately 5:30 a.m. on May 3, 2015, as he had been directed to do by his detective sergeant, who, at that time, was talking to the victim. Critz observed that the defendant was bleeding from his mouth at that time. Critz also acknowledged that the defendant told him that he had been at a party, watching the "Pacquiano" fight. Critz further stated that he again read the defendant his rights after he was transported to the police station, and the defendant signed a notice of rights form at approximately 7:23 a.m.

The state also called Merritt, the lead detective in the defendant's case, as a witness at the hearing. Merritt testified that, at approximately 1:10 p.m., he spoke with the defendant at the police station in an interview that

[5] The trial court's list of motions form shows the date of the filing of this motion as April 20, 2016. The court's date stamp on the motion, however, shows a date of filing of April 27, 2016, which is also the date typewritten on the motion.

lasted approximately one hour, and that the defendant told him what had happened. Thereafter, Merritt handwrote the defendant's statement, which the defendant then reviewed, and, after making several changes to the statement, the defendant initialed the changes, and signed each of the three pages of the document. Merritt denied that the defendant smelled of alcohol or had slurred speech, stating that "[h]e seemed fine to me . . . ." When asked why he did not record electronically his interview of the defendant, Merritt explained that they had been having difficulties with their recording system, and he believed that it had not been working properly at that time, but he was not positive. He also stated that it could have been possible that the defendant requested that the interview not be recorded, but he had no specific recollection and did not write down any reason for not recording the interview. Defense counsel asked Merritt whether he had a cell phone with recording capabilities and whether there was recording equipment in the holding cells. Merritt responded affirmatively to both questions. The state also called Detective Sergeant Daniel Casale to testify. Casale stated that he oversaw the process of the defendant's interrogation, standing by to ensure that no issues developed. He explained that his office was a mere twenty feet away from Merritt's cubicle, which he could see from his office, and that he "was bouncing back and forth between . . . Merritt's desk and [his] office doing paperwork . . . ." Casale admitted to knowing that the police had an "obligation" to make a video recording of the defendant's interview and statement, and he acknowledged that he had no explanation as to why this interview was not recorded.

Following the close of testimony, the defendant argued that the state had failed to establish an exception to § 54-1o, under either subsection (e) or (h), and that the court, therefore, should deny the state's motion to

admit the defendant's statement, which was taken in violation of the statute. The court, ruling from the bench, stated in relevant part: "[T]he defendant was . . . under formal arrest. There was a postbooking statement. The defendant was subjected to police interrogation. This was a custodial interrogation at a police station. No electronic recording was made. The written statement [was taken from a] person under investigation or accused of a . . . class A or B felony . . . . [T]he court finds by the preponderance of the evidence that there was no compliance with the electronic recording requirement, and . . . based on that, the statement is presumed to be inadmissible as evidence . . . ."

The court then considered the claimed exceptions to the statute that had been argued by the state, particularly subsections (e) (2) and (h) of the statute. The court found that subsection (e), and, in particular, subsection (e) (2), did not apply because, although there was testimony regarding a possible problem with the electronic recording equipment in the area where the defendant had been interrogated, there were other recording alternatives available. The court then analyzed the exception in subsection (h), which it referred to as a "catchall exception," examining multiple factors in its consideration of the totality of the circumstances. Thereafter, the court found, on the basis of its assessment of the totality of the circumstances, "that the [defendant's] statement was pursuant to a knowing, intelligent, and voluntary waiver of the defendant's *Miranda* rights, and that the statement was voluntarily given, and that the statement was reliable." The court further found that there was no evidence of any coercion. On the basis of these findings, along with the "fact that the defendant was able to read the statement and he made corrections to the statement, and he signed

the statement," the court granted the state's motion to introduce the statement during its case-in-chief.

The defendant proceeded to trial on the amended charges of burglary in the first degree, kidnapping in the second degree, strangulation in the second degree, and assault in the third degree. During the state's case-in-chief, it offered the defendant's statement into evidence through Merritt's testimony. The defendant raised no objections to the offer "other than those previously noted." The court admitted the statement into evidence.

The defendant's statement was addressed by both defense counsel and the prosecutor during closing arguments. Defense counsel argued forcefully that the jury should disregard the statement in its entirety given the circumstances under which it was made and "most importantly of all" because it was not videotaped as required by law. In rebuttal, the prosecutor argued that the jury should reject defense counsel's suggestion that they ignore the statement because "it came in without objection, and . . . is a full exhibit." Defense counsel immediately responded by interjecting, "[t]hat's not true, judge." The court responded by overruling the defendant's objection. Thereafter, the jury found the defendant guilty of strangulation in the second degree and assault in the third degree. It found him not guilty on the remaining two charges. This appeal followed.

While this appeal was pending, the defendant filed a motion for articulation and a motion for further articulation, requesting in each that the trial court further explain its decision to grant the state's motion to admit into evidence the defendant's statement. The trial court granted the defendant's motions, further explained its decision, and answered the specific requests for articulation raised by the defendant. Specifically, the court

articulated: (1) Merritt's failure to record his interrogation of the defendant was not done in bad faith, intentionally, recklessly, or negligently; (2) Merritt's testimony was credible, and his testimony regarding the malfunctioning of the recording system around the time that the defendant was arrested was not implausible; (3) there was no evidence that the defendant actually waived his *Miranda* rights prior to his interview with Merritt, only that he was advised of those rights; (4) Merritt did not advise the defendant of his rights for a third time because the defendant already had been advised twice of those rights, and the defendant willingly spoke to Merritt, waiving his *Miranda* rights at that time; and (5) the defendant's statement was voluntary and reliable as evidenced by the defendant's review of the statement and the multiple changes that he made to the statement, initialing each change, and then signing each page of the statement. Additional facts will be set forth as necessary.

I

The defendant claims that the court erred in granting the state's motion to admit his statement into evidence because it was taken in violation of § 54-1o (b) and the state failed to prove that the statement was both voluntarily given and reliable under the totality of the circumstances, as required by the exception found in subsection (h) of the statute. He contends that the court conflated the requirements of voluntariness and reliability under § 54-1o (h), thereafter finding that the state had met its burden. The defendant also alleges, although he has made no claim that his statement was taken in violation of *Miranda*,[6] that the trial court's decision to admit the statement has both federal and state constitutional implications. The state argues that this is a purely evidentiary matter involving a state statute and that the

[6] This fact was clarified during oral argument before this court.

court properly concluded that the statement was both voluntarily given and reliable in accordance with § 54-1o (h). We agree with the state.

Before setting forth our standard of review, we first consider whether the defendant's claim is one of constitutional magnitude. Our law is quite clear. Neither federal nor state constitutional law, nor the supervisory authority of our Supreme Court, *requires* the recording of custodial interrogations and the statements made as a result thereof. *State* v. *Edwards*, 299 Conn. 419, 444, 11 A.3d 116 (2011); *State* v. *Lockhart*, 298 Conn. 537, 542–77, 4 A.3d 1176 (2010); see also *State* v. *James*, 237 Conn. 390, 429, 678 A.2d 1338 (1996) ("article first, § 8 [of Connecticut constitution] does not require electronic recording in order for a confession to be admissible at trial"). Instead, our Supreme Court in *Edwards* specifically deferred "to the legislature and its determination whether to establish such a recording requirement." *State* v. *Edwards*, supra, 444. The legislature did just that when it enacted § 54-1o.

Here, the defendant raises no claim that his statement was taken in violation of *Miranda*. Rather, he claims that there are constitutional implications to the failure to record his statement in violation of § 54-1o. Essentially, he argues that the legislature, by enacting § 54-1o, has created a new constitutional right. The defendant has cited no authority for his novel suggestion that the legislature can create constitutional rights and we are aware of none. Consequently, we disagree with this proposition and conclude, on the basis of our Supreme Court precedent, that the defendant's claim is purely evidentiary in nature.

"The standard that we apply in reviewing a trial court's evidentiary ruling depends on the context in which the ruling was made. . . . When a trial court's

determination of admissibility is founded on an accurate understanding of the law, it must stand unless there is a showing of an abuse of discretion. . . . When the admissibility of the challenged testimony turns on the interpretation of an evidentiary rule, however, we are presented with a legal question and our review is plenary." (Citations omitted; footnote omitted.) *State* v. *Burney*, 288 Conn. 548, 555, 954 A.2d 793 (2008). Here, because the defendant challenges in part the court's interpretation of the exception found in § 54-1o (h), as well as the court's findings that the defendant's statement was both voluntarily given and reliable, we employ a mixed standard of review. We first consider the relevant portions of the statute.

Section 54-1o (b) provides: "An oral, written or sign language statement of a person under investigation for or accused of a capital felony or a class A or B felony made as a result of a custodial interrogation at a place of detention shall be presumed to be inadmissible as evidence against the person in any criminal proceeding unless: (1) An electronic recording is made of the custodial interrogation, and (2) such recording is substantially accurate and not intentionally altered."

Section 54-1o (d) provides: "If the court finds by a preponderance of the evidence that the person was subjected to a custodial interrogation in violation of this section, then any statements made by the person during or following that nonrecorded custodial interrogation, even if otherwise in compliance with this section, are presumed to be inadmissible in any criminal proceeding against the person except for the purposes of impeachment."

There is no dispute in this case that the defendant was undergoing a custodial interrogation while under investigation or accused of a class A or B felony when he gave a statement to police, which was recorded in

writing by Merritt and signed by the defendant on each page, after the defendant made and initialed several changes. Because the interrogation was not recorded electronically, pursuant to the plain language of § 54-1o (b), the defendant's written statement is presumed inadmissible as evidence against the defendant in his criminal trial, except for impeachment purposes, as set forth in subsection (d).

The statute, however, contains several exceptions that, if met, would overcome the presumption of inadmissibility. Relevant to this appeal is the exception set forth in § 54-1o (h), which provides: "The presumption of inadmissibility of a statement made by a person at a custodial interrogation at a place of detention may be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances." In this matter, the trial court found, by a preponderance of the evidence and on the basis of the totality of the circumstances, that the defendant's statement was both voluntarily given and reliable. The defendant claims that this was error because the state failed to prove that the statement was both voluntarily given and reliable. We disagree.

As to the voluntariness of the defendant's statement, the defendant argues that the court "assumed that proof of compliance with the dictates of *Miranda* . . . would satisfy the requirement . . . that the defendant's statement was voluntarily given." (Citation omitted; internal quotation marks omitted.) He further argues that the court overlooked "the distinction in constitutional law between the *Miranda* doctrine and the voluntariness doctrine." We are not persuaded.

In the due process context, our Supreme Court has set forth several factors that may be considered when determining whether a statement has been voluntarily

given. "The determination of whether a confession is voluntary must be based on a consideration of the totality of circumstances surrounding it . . . including both the characteristics of the accused and the details of the interrogation. . . . Factors that may be taken into account, upon a proper factual showing, include: the youth of the accused; his lack of education; his intelligence; the lack of any advice as to his constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment, such as the deprivation of food and sleep. . . . The state is required to prove the voluntariness of a confession by a preponderance of the evidence." (Internal quotation marks omitted.) *State* v. *Ramos*, 317 Conn. 19, 32, 114 A.3d 1202 (2015); see also *State* v. *Lawrence*, 282 Conn. 141, 153–54, 920 A.2d 236 (2007). Because the legislature has not provided a different test for determining voluntariness under the statute, we conclude that the same factors that traditionally are used under a due process analysis are relevant in determining voluntariness under § 54-1o (h).

Here, the trial court, citing *State* v. *Azukas*, 278 Conn. 267, 289–90, 897 A.2d 554 (2006), specifically recognized that its voluntary analysis needed to go beyond *Miranda* and examine the totality of the circumstances to determine whether "the conduct of law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely determined . . . ." (Internal quotation marks omitted.) Id., 290. Thus, contrary to the defendant's suggestion, the court applied the proper legal test when determining whether the defendant voluntarily gave his statement. Applying the correct test, the court found the following: The defendant was thirty-eight years old and there were "no issues in terms of the defendant being intoxicated or otherwise incapacitated, either mentally or physically." Critz twice read the defendant his *Miranda* rights, and

the defendant signed a notice of rights form at the police station. Although the defendant was bleeding from his mouth, he was not in any pain or suffering from any serious physical injury. The defendant did not request an attorney and did not request to remain silent. The defendant was questioned primarily by one officer, Merritt. When the defendant was interrogated by Merritt, he was seated in an open cubicle. Merritt asked the defendant whether he was willing to speak with him about the incident and the defendant thereafter spoke with him, while Merritt took notes. The interview lasted only about one hour. Casale went in and out of the interview area and witnessed the interrogation. The defendant signed a written statement, which provided in relevant part that it was truthful and that it was the product of the defendant's "own free will." There was no evidence of trickery, threats, promises or coercive or deceptive measures by the police. On the basis of these findings, which are supported by the record, we conclude that the defendant has failed to establish that the trial court improperly concluded that the defendant's statement was given voluntarily.

We next turn to the reliability factor. The defendant argues: "To prove that a statement is sufficiently reliable to be admitted into evidence requires evidence that . . . confirms the truth of its content, i.e., that corroborates it. . . . Our courts have consistently understood that corroboration of a statement requires more than a showing that it is internally coherent. To corroborate a confession requires *independent* evidence." (Emphasis in original; internal quotation marks omitted.) The defendant also argues: "The fact that a suspect can read and write and is given an opportunity to edit a statement has some bearing on the fairness of the process . . . but it is not extrinsic corroborative evidence of the statement's reliability. Here, the state

. . . failed to adduce any independent (extrinsic) evidence bearing on the statement's reliability—its truth, accuracy and trustworthiness."

In response, the state contends that all of the circumstances surrounding the giving of a statement are relevant to its reliability, but there is no requirement under our law that there be independent corroborating evidence of the contents of the statement. It argues: First, "our case law is clear that the manner in which police took the defendant's statement—and, particularly, whether they engaged in coercive or deceptive measures—is relevant to the *reliability* of the statement. . . . Second, the defendant's claim that the state failed to adduce any evidence during the motion hearing that corroborated the truthfulness of the content of the statement simply is not supported by the record." (Citations omitted; emphasis in original.) Despite the state's position that there was corroborating evidence, it firmly "disputes the defendant's assertion that [it] must present evidence that corroborates aspects of an unrecorded statement in order to satisfy the reliability component to § 54-1o (h)." (Emphasis omitted.) It argues: "The defendant's position finds no support in the statutory text or in Connecticut jurisprudence. See *State* v. *Flores*, 319 Conn. 218, 226–27, [125 A.3d 157] (2015) (finding informant's tip 'reliable' even though it lacked independent corroboration, [cert. denied, U.S. , 136 S. Ct. 1529, 194 L. Ed. 2d 615 (2016)])."

In addition, the state also argues that the record contains considerable "findings and evidence that support the trial court's determination that the state had proven, by a preponderance of the evidence, that the defendant's statement was reliable. . . . [T]he defendant never disputed the accuracy of the contents of the statements, or the fact that he read, understood, initialed, and signed it. . . . Also undisputed were the facts that the statement described events that occurred less than

twelve hours earlier . . . and that the statement contained statements against penal interest, including admissions of guilt to two of the four crimes for which the police were investigating the defendant. . . . Lastly, the trial court found that the defendant was not suffering from any mental or physical impairment that would have affected his capacity to give an accurate statement." (Citations omitted; footnotes omitted.)

After fully considering the well thought out and thorough arguments of the parties, as raised in their briefs and at oral argument before this court, along with the many cases cited by them, we conclude that it is unnecessary for us to decide in this particular case whether there is a requirement under § 54-1o (h) that there be corroborating evidence of the contents of a confession for it to be considered "reliable, under the totality of the circumstances." In this case, there is evidence to support the trial court's decision under both tests, namely, (1) a consideration of the circumstances surrounding the defendant's statement to police and (2) whether there was corroborative evidence of the contents of that statement presented at the hearing.

The evidence credited by the trial court demonstrates that the defendant had been advised of his *Miranda* rights on two occasions earlier in the morning. He was sober and did not appear to be under the influence of drugs or alcohol, and there was no issue regarding his mental or physical well-being, despite the presence of blood on his clothes and the fact that he had been bleeding from his mouth. The defendant was approximately thirty-eight years old. At approximately 1 p.m., he was interrogated by Merritt and agreed to tell Merritt what had happened. This interrogation took place in an office cubicle, over an approximate one hour period, and, for the most part, was witnessed by Casale. The defendant then read the written statement prepared by Merritt, which set forth the facts as told to him by the

defendant. While reading that statement, which specifically provided that it was voluntarily given and that the defendant had been read, knew, and understood his rights, the defendant made several corrections and initialed those corrections.[7] He then signed each page of the three page statement.

The defendant argues that these types of facts, as found and relied on by the trial court, address only the voluntariness of a statement and not the reliability of a statement. Although we agree that these facts certainly shed light on the voluntariness of a statement, we see no reason why they cannot be used to determine whether the defendant's statement also is reliable. In fact, both our Supreme Court and this court repeatedly have relied on evidence as to the coerciveness of police procedures and the circumstances surrounding defendants' interrogations and statements to assess the reliability of such statements. See *State* v. *Carrion*, 313 Conn. 823, 838, 100 A.3d 361 (2014) (statement made under circumstances so unduly coercive as to grievously undermine reliability may be deemed untrustworthy); *State* v. *Pierre*, 277 Conn. 42, 61–62, 890 A.2d 474 (fact that witness indicated he was giving statement freely and that he reviewed statement with attorney, and signed it in eight places demonstrated lack of coercion, providing sufficient indicia of reliability for admission of statement under *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 [1986], cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006); *State* v. *Collins*, 147 Conn. App. 584, 594–95, 82 A.3d 1208 (involuntariness of defendant's statements to police may undermine

[7] Specifically, the defendant's statement provided in relevant part: "I, Christopher Spring . . . give the following truthful statement to the Enfield Police Dep[artment] of my own free will, with no threats or promises made to me. When I was arrested earlier this date, I was advised of my rights. I understand those rights and give this statement voluntarily."

statements' reliability), cert. denied, 311 Conn. 929, 86 A.3d 1057 (2014).

Additionally, although the trial court did not state specifically that it relied on corroborating evidence in its consideration of the reliability factor, the record of the hearing certainly demonstrates that there was independent evidence to corroborate many of the facts set forth in the defendant's statement.

In his statement, the defendant stated that he had been outside walking when he was arrested, that both he and the victim had gotten bloody during their altercation, and that he was bleeding from his mouth. This information was corroborated by Critz, who testified that the defendant was outside and walking toward him, when Critz went to speak with him and subsequently arrest him. Critz also testified that the defendant had blood on his shirt and cell phone, and that he was bleeding from his mouth. Additionally, in his statement, the defendant also stated that that he and others had been at a party watching "the fight" on television before he went to see the victim. At the hearing, Critz corroborated this statement when he acknowledged that the defendant had told him that he had been at a party watching the "Pacquiano" fight before he went to see the victim. Finally, Critz testified that he was told by his detective sergeant, who, at the time, was talking to the victim, to read the defendant his rights and to detain him for questioning. This evidence corroborated that there had been an altercation between the defendant and the victim, which the defendant described in his statement.

In consideration of the foregoing, using both the test of the surrounding circumstances as advanced by the state and the test of independent corroborating evidence as advanced by the defendant, we conclude that the defendant has failed to establish that the trial court

improperly determined that the defendant's statement was reliable. Accordingly, the defendant having failed to meet his burden, we conclude that the court properly ruled that the statement was admissible as evidence at the defendant's criminal trial.

II

The defendant next claims that the court abused its discretion when it overruled his objection to the prosecutor's statement, made during closing rebuttal argument, that the defendant's statement had been admitted into evidence without objection. The defendant claims that the court's ruling was in error because the defendant clearly had objected, albeit outside the presence of the jury, to the admission of his statement. Although his primary appellate brief sets forth the defendant's argument as to why the court erred, it fails to address how the court's ruling was harmful. During oral argument before this court, we asked the defendant about his failure to conduct a harmful error analysis in his primary appellate brief. The defendant, thereafter, conceded that this claim was deficiently briefed. Accordingly, we decline to review it. See *State* v. *Njoku*, 163 Conn. App. 134, 145 and n.9, 133 A.3d 906 (declining to review merits of claim because defendant concededly failed to conduct harmful error analysis), cert. denied, 321 Conn. 912, 136 A.3d 644 (2016).

III

The defendant's final claim, set forth on the last two pages of his appellate brief, is that this court should exercise its supervisory authority over the administration of justice to order our Superior Court to instruct juries "to evaluate with particular caution statements obtained by custodial interrogation that [are] out of compliance with the recording mandate in . . . § 54-10o (b)," and to order that the defendant be given a new trial because the trial court in this case did not

give such an instruction.[8] We decline the defendant's invitation.

In support of his request, the defendant relies on the brief discussion of a New Jersey rule of court and *Commonwealth* v. *DiGiambattista*, 442 Mass. 423, 813 N.E. 2d 516 (2004), by our Supreme Court in a footnote in *State* v. *Lockhart*, 298 Conn. 537, supra, 564 n.11. Specifically, that footnote provides: "The rule established by the New Jersey Supreme Court also provides that the trial court should consider the unexcused failure to record a custodial interrogation when determining whether the state may introduce testimony describing the interrogation. N.J. Court Rules 3:17 (d). Additionally, the court is required to give the jury a cautionary instruction in such cases; N.J. Court Rules 3:17; and a report issued by the New Jersey Supreme Court Special Committee on Recordation of Custodial Interrogations in 2005 recommended an instruction that the jury has 'not been provided with a complete picture of all of the facts surrounding the defendant's alleged statement and the precise details of that statement.'

"Similarly, the Supreme Judicial Court of Massachusetts, after declining to make the electronic recording of the defendant's interrogation a prerequisite to the admissibility of his statement, concluded that defendants are entitled to a cautionary instruction regarding

[8] The defendant neither requested that the trial court give such an instruction in this case, nor offered any objection to the instructions that were given by the court, a copy of which he had been given well in advance of the jury's final charge. If this claim were of constitutional dimension, it likely would be deemed waived under *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011). Our Supreme Court, however, has declined to apply the waiver rule to requests that we exercise our supervisory authority to adopt a new rule regarding a special jury instruction. See *State* v. *Diaz*, 302 Conn. 93, 100 n.5, 25 A.3d 594 (2011) (although state argued that defendant waived claim by failing to request special credibility instruction, claim was not waived because defendant was requesting adoption of new rule requiring trial courts to give special instruction; therefore, any such claim to trial court would have been futile).

the use of an interrogation when the interrogation was not reliably preserved by a complete electronic recording. *Commonwealth* v. *DiGiambattista*, [supra 442 Mass. 447–49]." Id. This quote, essentially, is the entirety of the defendant's discussion and analysis of his request that we exercise our supervisory authority, an extraordinary measure reserved for matters of utmost seriousness.

"The exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Lockhart*, supra, 298 Conn. 576. "Although [a]ppellate courts possess an inherent supervisory authority over the administration of justice . . . [that] authority . . . is not a form of free-floating justice, untethered to legal principle. . . . Constitutional, statutory and procedural limitations are generally adequate to protect the rights of the defendant and the integrity of the judicial system. Our supervisory powers are invoked only in the rare circumstance [in which] these traditional protections are inadequate to ensure the fair and just administration of the courts. . . . Overall, the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of our supervisory powers. . . . Thus, we are more likely to invoke our supervisory powers when there is a pervasive and significant problem . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Edwards*, 314 Conn. 465, 498–99, 102 A.3d 52 (2014).

In this case, the defendant has provided us little analysis as to the necessity of a rule requiring our Superior Court to give a cautionary instruction to the jury when

it has admitted into evidence a defendant's statement that was given to an interrogating law enforcement official who had not adhered to recording requirements under § 54-1o (b). In adopting § 54-1o, our legislature has set forth that such statements are presumed inadmissible unless the state can establish, by a preponderance of the evidence, specific criterion that overcome such a presumption. The legislature also chose not to include a requirement that the trial court give a cautionary instruction upon the state successfully overcoming the presumption of inadmissibility under one of the factors established by the legislature. Under these circumstances, we decline the invitation made by the defendant to create such a requirement through the exercise of our supervisory authority.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* CHAD LAMAR FARRAR (AC 40879)

Lavine, Prescott and Elgo, Js.

Syllabus

The defendant, who had been convicted, on a guilty plea, of the crimes of possession of a controlled substance with intent to sell and criminal possession of a firearm, and had been sentenced to a total effective term of seven years incarceration followed by eight years of special parole, appealed to this court from the judgment of the trial court denying his motion to correct an illegal sentence. In his motion to correct an illegal sentence, he claimed that his sentence, which included a term of imprisonment and a period of special parole, was not authorized by statute and, thus, violated his constitutional right against double jeopardy. Specifically, he claimed that his sentence of incarceration followed by a period of special parole was prohibited by the statute (§ 53a-35a) that requires that a defendant be sentenced to a definite term of imprisonment, because special parole is not a definite term of imprisonment. *Held* that the trial court properly denied the defendant's motion to

correct an illegal sentence; the defendant's sentence was explicitly authorized by statute and did not constitute an illegal sentence, as the applicable statutes (§§ 53a-28 [b] [9] and 54-128 [c]) explicitly authorize a defendant to be sentenced to a term of imprisonment followed by a period of special parole, provided that the combined term of the period of imprisonment and special parole do not exceed the statutory maximum for the crime for which the defendant was convicted, and the defendant's sentence of seven years incarceration followed by eight years of special parole did not exceed the maximum sentence of incarceration for his conviction of possession of a controlled substance with intent to sell, which is punishable for up to fifteen years of incarceration for a first offense.

Argued October 19—officially released November 20, 2018

Procedural History

Substitute information charging the defendant with the crimes of possession of a controlled substance with intent to sell and criminal possession of a firearm, brought to the Superior Court in the judicial district of Waterbury, where the defendant was presented to the court, *Fasano*, *J.*, on a plea of guilty; judgment of guilty in accordance with the plea; thereafter, the court denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed*.

Chad Farrar, self-represented, the appellant (defendant).

Sarah Hanna, assistant state's attorney, with whom, on the brief, was *Maureen Platt*, state's attorney, for the appellee (state).

Opinion

PER CURIAM. The self-represented defendant, Chad Lamar Farrar, appeals from the judgment of the trial court denying his motion to correct an illegal sentence. On appeal, the defendant claims that the court improperly concluded that the sentence imposed on him for a term of incarceration followed by a period of special parole was authorized by statute and, therefore, was not illegal. We affirm the judgment of the trial court.

The following facts and procedural history underlie the defendant's appeal. On October 9, 2014, the defendant pleaded guilty to possession of a controlled substance with intent to sell in violation of General Statutes § 21a-277 (a) and criminal possession of a firearm in violation of General Statutes § 53a-217. The trial court sentenced the defendant to a total effective term of seven years of incarceration followed by eight years of special parole.

On February 27, 2017, the defendant filed a motion to correct an illegal sentence, claiming that his sentence, which included a term of imprisonment followed by a period of special parole, was not authorized by statute and, thus, violated his constitutional right against double jeopardy. The court held a hearing on the defendant's motion on May 31, 2017. In a memorandum of decision issued on June 7, 2017, the court denied the defendant's motion, concluding that "there is no authority for the proposition that special parole constitutes a separate sentence as opposed to a parole status and, therefore, a double jeopardy violation . . . ." The defendant appealed.

On appeal, the defendant claims that the court improperly denied his motion to correct an illegal sentence, asserting that his sentence of seven years of incarceration followed by eight years of special parole is prohibited by statute because special parole is not a definite term of imprisonment and that General Statutes § 53a-35a[1] requires that a defendant be sentenced to a definite term of imprisonment. He contends, therefore, that the court illegally sentenced him to both a definite

[1] General Statutes § 53a-35a titled, "Imprisonment for felony committed on or after July 1, 1981. Definite sentence. Authorized term," provides in relevant part: "For any felony committed on or after July 1, 1981, the sentence of imprisonment shall be a definite sentence and, unless the section of the general statutes that defines or provides the penalty for the crime specifically provides otherwise, the term shall be fixed by the court . . . ."

term of imprisonment and a period of special parole in violation of § 53a-35a.

The issue raised by the defendant is the same one he raised in his motion to correct an illegal sentence. We have examined the record on appeal and the briefs and arguments of the parties and conclude that special parole is a status duly authorized by General Statutes § 53a-28 (b).[2] We decline to adopt the defendant's construction of § 53a-35a, as that construction would conflict with § 53a-28 (b) (9) and General Statutes § 54-128 (c). Sections 53a-28 (b) (9) and 54-128 (c) explicitly authorize a defendant to be sentenced to a term of imprisonment followed by a period of special parole, provided that the combined term of the period of imprisonment and special parole do not exceed the statutory maximum for the crime for which the defendant was convicted.

"It . . . is well established that, [i]n cases in which more than one [statutory provision] is involved, we presume that the legislature intended [those provisions] to be read together to create a harmonious body of law . . . and we construe the [provisions], if possible, to avoid conflict between them." (Internal quotation marks omitted.) *State* v. *Victor O.*, 320 Conn. 239, 248–49, 128 A.3d 940 (2016).

Here, the defendant received a definite period of incarceration of seven years followed by a period of eight years of special parole, and the combined terms

[2] General Statutes § 53a-28 (b) provides in relevant part: "Except as provided in section 53a-46a, when a person is convicted of an offense, the court shall impose one of the following sentences . . . (9) a term of imprisonment *and* period of special parole as provided in section 53-125e." (Emphasis added.)

Pursuant to General Statutes § 54-128 (c), "[t]he total length of the term of incarceration and term of special parole combined shall not exceed the maximum sentence of incarceration authorized for the offense for which the person was convicted." See also General Statutes § 54-125e.

of imprisonment and special parole did not exceed the maximum sentence of incarceration for his conviction of possession of a controlled substance with intent to sell pursuant to § 21a-277 (a), which is punishable for up to fifteen years of incarceration for a first offense. The defendant's sentence, therefore, was explicitly authorized by statute and does not constitute an illegal sentence. Therefore, the trial court properly denied the defendant's motion to correct an illegal sentence.

The judgment is affirmed.