IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES	Appellee	**BRIEF ON BEHALF OF APPELLANT**
v.		Docket No. ARMY 20220231
Private 2nd Class (E-2) **TREVON K. COLEY,** United States Army,	Appellant	Tried at Kaiserslautern, Germany, on 6 January, and 2 May through 6 May 2022 before a general court-martial appointed by the Commander, Headquarters, 21st Theater Sustainment Command, Lt. Col. Lance R. Smith, military judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignments of Error[1]

I. WHERE APPELLANT RAISED REASONABLE SUPPORT FOR THE AFFIRMATIVE DEFENSE OF CONTRIBUTORY NEGLIGENCE, WHETHER THE MILITARY JUDGE ERRED BY NOT INSTRUCTING THE PANEL MEMBERS ON CONTRIBUTORY NEGLIGENCE?

II. WHETHER DEFENSE COUNSEL WERE INEFFECTIVE IN INVESTIGATING AND PREPARING FOR TRIAL?

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in the Appendix.

PANEL 4

III. WHERE CONTRIBUTORY NEGLIGENCE OF A THIRD-PARTY WAS UNFORSEEABLE AND NEGATED PROXIMATE CAUSE, WHETHER APPELLANT'S CONVICTIONS FOR INVOLUNTARY MANSLAUGHTER AND AGGRAVATED ASSAULT BY CULPABLE NEGLIGENCE ARE LEGALLY AND FACTUALLY SUFFICIENT?

Statement of the Case

On 6 May 2022, an officer panel sitting as a general court-martial convicted Private (PV2) Trevon K. Coley, appellant, contrary to his pleas, of one specification of involuntary manslaughter with culpable negligence in violation of Article 119, Uniform Code of Military Justice (UCMJ), and one specification of aggravated assault inflicting grievous bodily harm, in violation of Article 128, UCMJ.[2] (R. at 9; Charge Sheet). Appellant pleaded guilty to one specification of violating a general order or regulation in violation of Article 92, UCMJ, and one specification of conspiracy, in violation of Article 81, UCMJ. (R. at 81). On 6

[2] Appellant was acquitted of one specification of murder while engaging in an inherently dangerous act to another, in violation of Article 118, UCMJ, and one specification of leaving the scene of a vehicle accident as the driver, in violation of Article 111, UCMJ. (R. at 789). The military judge dismissed one specification of drunken or reckless operation of a vehicle in violation of Article 113, UCMJ. (R. at 24).

May 2022, the panel sentenced appellant to eight years confinement, reduction to the grade of E-1, and a bad-conduct discharge. (R. at 904).

On 1 June 2022, the convening authority approved the findings and adjudged sentence. (Convening Authority Action). On 21 June 2022, the military judge entered Judgment. (Modified Judgment of the Court). This court docketed appellant's case on 12 August 2022. (Referral and Designation of Counsel).

Statement of Facts

1. Appellant had the right-of-way as he was traveling down Mannheimer Strasse.

On 5 March 2021, appellant had dinner with friends. (R. at 305). After they left the restaurant to return to their barracks in Kaiserslautern, Germany, appellant and his two friends drove their cars separately. (R. at 305, 307). All were junior enlisted soldiers between the ages of twenty and twenty-one. (R. at 273, 303). None had been drinking. (R. at 272-340).

Appellant drove a 2015 Dodge Charger. (R. at 305). Between approximately 2115 and 2130, he pulled ahead of his friends on Mannheimer Strasse. (R. at 209, 258, 275-276). Around the same time, Specialist (SPC) [redacted] was driving her 2016 Ford Fusion on Daenner Strasse. (R. at 366). She was going dancing at a nightclub with her friend, Private First Class (PFC) [redacted], who was in the passenger seat. (R. at 260, 366).

In Kaiserslautern, and elsewhere in Germany, roads marked with a diamond sign are known as "priority roads" and the automobiles on these roads have the right-of-way. (R. at 287). Mannheimer Strasse, which has multiple lanes, was a priority road. (R. at 217, 287, 430). Daenner Strasse was not.

In Kaiserslautern, roads like Daenner Strasse without the diamond sign must yield to traffic on priority roads. (R. at 561). Consequently, as SPC [redacted] made a left-hand turn onto Mannheimer Strasse from Daenner Strasse, she violated German traffic law as she did not have the right-of-way. (R. at 217).

The intersection of Daenner Strasse and Mannheimer Strasse was dangerous. (R. at 357, 589). There are traffic control signals on all corners of the intersection, but on the night of 5 March 2021, the city turned the traffic control lights off at 2100. (R. 429-430). In addition to the traffic signals, there were stop signs at each corner of the intersection. (R. at 436).

At this intersection, drivers must adhere to each stop sign to safely enter and exit the intersection. (R. 436). The first stop line for Daenner Strasse was set back approximately forty-one feet from the intersection. (R. at 436). The second stop sign was directly across from the first stop sign on the west side of Daenner Strasse. (R. at 438). Visual obstructions and busy traffic required those crossing this intersection to exercise greater caution. (R. at 589).

As SPC [redacted] began to make a left turn on Mannheimer Strasse in her Ford Fusion she was required to stop at the stop sign, then yield to oncoming traffic. (R. at 563). Instead, she failed to stop at either stop sign, disregarding the priority traffic rule. (R. at 591).

2. Kaiserslautern police investigators determined that SPC [redacted] failed to stop at two different stop signs and was "at-fault" for the ensuing accident.

Instead of stopping, SPC [redacted] "coasted" or "rolled" through the stop signs. (R. at 511-512). Expert testimony indicated a period of "indecision" where she neither braked nor accelerated as the Ford "rolled" through the intersection. (R. at 512).

The Ford straddled the intersection immediately before the vehicles collided. (R. at 232; (App. Ex. 18, p. 26). In the time leading up to the accident, appellant exceeded the speed limit. (R. at 203). According to an accident reconstruction expert, at or around 1.8 seconds prior to impact, appellant was traveling at approximately 68 mph. (R. at 500). Mannheimer Strasse is a big, multilane road where the speed limit fluctuates, but the speed limit at that section of that road was 31 miles per hour. (R. at 203).

The following figure shows SPC [redacted] "rolling" through a stop sign on Daenner Strasse while making a left turn, as appellant is traveling with priority on Mannheimer Strasse before colliding with her vehicle.

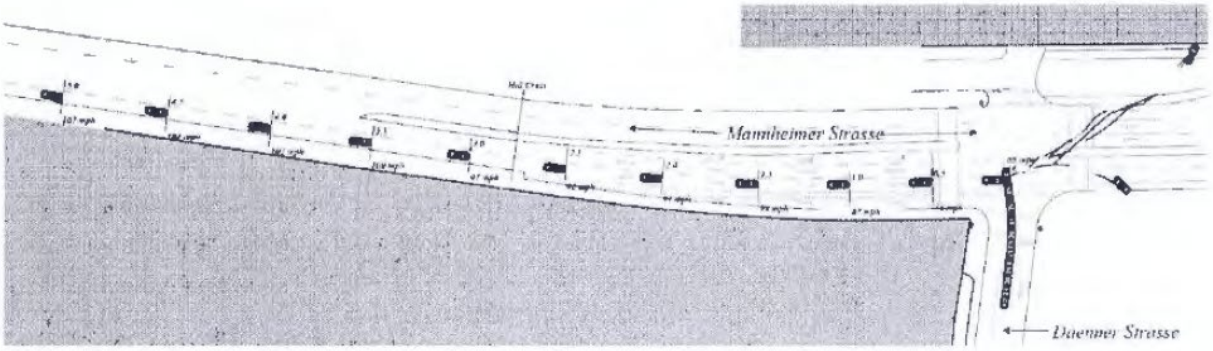

Figure 3 – Diagramed positions of each vehicle upon approach to the intersection based on the EDR data and momentum analysis.

The accident was catastrophic. (R. at 256).

Appellant knew both the driver and the passenger in the Ford. In fact, appellant and PFC [redacted] were best friends. (R. at 319, 359). Appellant was distraught and in utter shock when he realized that the accident caused serious injuries to his friends in the other vehicle. (R. at 319-321).[3]

[3] Appellant's friend, PV2 [redacted], who was traveling in a separate vehicle behind appellant, pulled over when she realized there had been an accident. (R. at 308). She testified that appellant, emotionally distraught and afraid, approached her and told her that he "can't be the driver" because his European license had been revoked. (R. at 309). She said "I gotchu" offering to help him and together they informed authorities that she was the driver of the vehicle at the time of the accident, and he was the passenger. (R. at 309). They were both scared. (R. at 310).

Private First Class [redacted] was transported to the hospital and survived the accident. (R. at 351). Specialist [redacted] was also transported to the hospital where she died. (R. at 615).

Local law enforcement agents who investigated the accident determined that SPC [redacted], not appellant, was at fault. (R. at 591).

3. Specialist [redacted] had a bottle of alcohol in her vehicle and had been drinking before the accident.

Military police found an open bottle of alcohol, with its contents empty, on the passenger side of the Ford. (R. at 249). Specialist [redacted] blood alcohol content was somewhere between 0.005 and 0.05. (R. at 669, 676). Appellant was not driving under the influence of alcohol or any other illicit substance.

I. WHERE APPELLANT RAISED REASONABLE SUPPORT FOR THE AFFIRMATIVE DEFENSE OF CONTRIBUTORY NEGLIGENCE, THE MILITARY JUDGE ERRED BY NOT INSTRUCTING THE PANEL MEMBERS ON CONTRIBUTORY NEGLIGENCE.

Facts Relevant to Assignment of Error

Specialist [redacted] failed to use reasonable care in her operation of the Ford on the night of the accident. Appellant presented significant evidence of that fact throughout the trial. (R. at 232, 249, 429-43, 438, 511-512, 563, 589, 591).

On 5 May 2022, the military judge provided the panel with prefatory instructions on findings. The military judge provided the standard proximate cause instruction for involuntary manslaughter. (R. at 723; App. Ex. XXVI at 3-4).

Instead of providing the affirmative defense instruction for contributory negligence, the military judge provided the affirmative defense instruction for an accident. (R. at 728-729; App. Ex. XXVI at 7-8). Defense counsel did not request an instruction for contributory negligence.

Though the evidence at trial raised the defense of contributory negligence, the panel was never given that instruction (Instruction 5-19). If they had, they would have heard:

> If the negligence of the deceased looms so large in comparison with the culpable negligence by the accused that the accused's conduct should not be regarded as a substantial factor in the final result, then conduct of the deceased is an independent, intervening cause and the accused is not guilty.
>
> Finding the accused's conduct to be the proximate cause also requires you to find beyond a reasonable doubt that the act of the alleged victim was not the only cause that played any material role, meaning an important role, in bringing about death.

(Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para 5-19, note 7, (29 Feb. 2020)) [Benchbook].

Standard of Review

Whether the members were instructed properly is a question of law that appellate courts review de novo. *United States v. Payne*, 73 M.J. 19, 22 (C.A.A.F. 2014) (internal citations omitted). Where there is no objection to an instruction at trial, courts review for plain error. *Id*. (citing to *United States v. Tunstall*, 72 M.J. 191, 193 (C.A.A.F. 2013); *see also* Rule for Courts-Martial [R.C.M.] 920(f). For plain error: (1) there must be error; (2) the error must be plain (clear and obvious); and (3) the error must affect the substantial rights of the appellant. *United States v. Grier*, 53 M.J. 30, 34 (C.A.A.F. 2000) (internal citations omitted).

Law

When evidence "reasonably raises" an affirmative defense or a lesser-included offense, the judge must instruct the panel accordingly. *See United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000). A military judge must instruct members on any affirmative defense "in issue." *United States v. Schumacher*, 70 M.J. 387, 389 (C.A.A.F. 2011) (citing R.C.M. 920(e)(3)). An affirmative defense is "in issue" when 'some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they chose.'" *Id*. (citing *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007) (additional citations omitted).

A military judge's decision to give a specific instruction, as well as the instruction's substance, is subject to review to determine whether the military judge "sufficiently cover the issues in the case and focus on the facts presented by the evidence." *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996) (internal quotations and citations omitted).

All panels look to the military judge for basic instruction in the law applicable to a particular case. The military judge bears the primary responsibility for assuring that the panel is properly instructed on the elements of the offenses raised by the evidence as well as potential defenses and other questions of law. *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008) (internal quotations and citations omitted).

When, as in this case, the instruction on a punitive article does not include such definitions, the military judge must tailor the instructions as appropriate to include definitions and instructions raised by the evidence. *See* Benchbook, para 5-19, note 7. The Benchbook is not a source of law, but it is a guide to existing law. *See United States v. Rush*, 51 M.J. 605, 609 (Army. Ct. Crim. App. 1999); *see also United States v. Riley*, 72 M.J. 115, 122 (C.A.A.F. 2013) (the Benchbook is not a source of law, but represents a snapshot of the prevailing understanding of

the law, among the trial judiciary, as it relates to trial procedure . . . military judges are usually well-advised to follow the standard instructions in the Benchbook.")

"If there is 'some evidence' of a possible defense . . . the military judge is duty bound to give an instruction even if the instruction was not requested by the parties;" however, the instruction may be waived "by affirmative action of the accused's counsel." *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002).

Argument

Specialist [redacted] death was a tragedy, but that does not negate the fact that she played a part in causing it. Because the evidence raised the defense of contributory negligence, the military judge had a sua sponte duty to offer the defense the option of instructing the panel members on the meaning of contributory negligence. Barring an affirmative waiver, the judge then had a duty to properly advise the panel. The absence of this critical instruction prejudiced appellant.

1. The evidence raised the defense of contributory negligence.

As *McDonald* made clear, a military judge *must* instruct members on any affirmative defense that is "in issue." 57 M.J. at 20 (emphasis added).

Defense cross-examined the government expert in accident reconstruction with reports that found SPC [redacted] at fault. The expert testified that the driver of the

Ford drove through the stop sign illegally. (R. at 557). The expert also judged that if the driver (SPC [redacted]) had stopped as she was legally required to, she "probably" would not have been hit by appellant's car. (R. at 559).

The affirmative defense of contributory negligence was fairly raised. This triggered the military judge's duty to provide the complete instruction of contributory negligence found in Benchbook Instruction 5-19.

2. The military judge had a sua sponte duty to instruct, but he failed to provide the panel with the appropriate instruction on contributory negligence.

A proper instruction on the affirmative defense of contributory negligence would have directed the panel to compare the conduct of the accused to the decedent's and consider whether it "looms so large in comparison" that the accused's conduct should not be regarded as a substantial factor in the accident, in which case, SPC [redacted] failure to stop was a "independent, intervening cause" and the accused is not guilty. The military judge did not use this language in his instructions.

The phrase "looms so large" is a legal term intended to assist the factfinder in weighing the decedent's conduct against the accused. This language comes from a line of cases addressing contributory negligence. *See United States v.*

Taylor, 44 M.J. 254, 257 (C.A.A.F. 1996); *United States v. Cooke*, 18 M.J. 152, 155 (C.M.A. 1984); *United States v. Lingenfelter*, 30 M.J. 302 (C.A.A.F. 1990).

Such an instruction would have accurately guided the members on the government's burden to prove that appellant's misconduct significantly exceeded that of SPC [redacted]. Instead, the panel was only instructed about the government's burden in the context of proximate cause and intervening causation. The Benchbook is clear: when weighing the defense of contributory negligence, the government must prove beyond a reasonable doubt the decedent's conduct was not material in bringing about her death.

3. The instructional error was prejudicial.

Properly instructing the members on affirmative defenses is as vital as advising them on the elements of the offenses, and in some ways, even more important. Giving only half of the instruction on proximate cause and failing to provide the instructions on contributory negligence deprived the accused of a properly instructed panel, and therefore, a fair trial. The legal and factual insufficiency of the evidence discussed in the AE III compounded this error. This court cannot guess what the members would have found if they had been properly instructed. As such, appellant respectfully requests this court reverse the findings as to the Specifications of Charge II and Charge III.

II. WHETHER DEFENSE COUNSEL WERE INEFFECTIVE IN INVESTIGATING AND PREPARING FOR TRIAL?

Facts Relevant to Assignment of Error

Shortly after the accident, Mr. [redacted], an accident reconstruction expert, arrived at the scene. (Def. App. Ex. A at 3). Throughout the night and the following morning, Mr. [redacted] took photographs, evaluated the air bag control units, collected trace evidence, secured the electronic data recorders (recorders) of both vehicles, conducted the digital extraction of both recorders, and otherwise secured the scene of the accident. (Def. App. Ex. A).

On 10 March 2021, Mr. [redacted] conducted the initial analysis of the Dodge Charger recorder. (Def. App. Ex. A at 9). He noted that appellant was speeding more than the posted speed limit, initiating a braking procedure 1.8 seconds before the collision.

Mr. [redacted] report also found that SPC[redacted] hesitated in the intersection for approximately 3.5 seconds. (Def. App. Ex. A at 13). Approximately one second prior to the collision, SPC [redacted] "floored" the acceleration pedal of the Ford. (Def. App. Ex. A at 13).

In addition to rolling through the stop sign, SPC [redacted] attempted to pull out in front of appellant. "From the recording," wrote Mr. [redacted], "it follows that the

female operator of the Ford entered Mannheimer Strasse coming from Danner Strasse without stopping." (Def. App. Ex. A at 13).

After investigating the accident, Mr. [redacted] prepared a report. In his summary of results, he noted, "the female operator entered primary road Mannheimer Strasse with her Ford without stopping while coming from secondary road Danner Strasse." (Def. App. Ex. A at 3). Moreover, Mr. [redacted] wrote "according to current findings, there are no indications of traffic-juridical wrongdoing by 02." (Def. App. Ex. A at 3). "02" was the number assigned to appellant and "01" was the number assigned to SPC [redacted].

There is no record of defense counsel ever interviewing Mr. [redacted] in preparation for appellant's trial.

Law

1. Ineffective Assistance Generally.

"To prevail on an ineffective assistance claim, the appellant bears the burden of proving that the performance of defense counsel was deficient and that the appellant was prejudiced by the error." *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) (citing *Strickland v. Washington*, 466 U.S. 668, (1984)). In evaluating performance, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. at

689. This presumption can be rebutted by "showing specific errors [made by defense counsel] that were unreasonable under prevailing professional norms." *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001).

Prejudice is established by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. Appellant must show "a reasonable probability that, but for counsel's [deficient performance] the result of the proceedings would have been different." *Captain*, 75 M.J. at 103 (quoting *Strickland*, 466 U.S. at 694) (internal quotation marks omitted).

2. Ineffective assistance in investigation.

In preparing a defense, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691; *see also United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002). Failure to investigate a case includes the failure to obtain necessary expert assistance. *See United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997). A counsel's failure to conduct a sufficient investigation may violate the appellant's Sixth Amendment rights. *United States v. Scott*, 24 M.J. 186, 192-93 (C.M.A. 1987) (failure to investigate alibi defense and prepare for trial was ineffective); *Holsomback v. White*, 133 F.3d 1382, 1387-89 (11th Cir. 1998)

(holding that failure to conduct adequate investigation into medical evidence of sexual abuse was ineffective).

Unlike cases involving split-second tactical decisions made at trial, courts apply closer scrutiny when claims of ineffective assistance are based on a counsel's failure to investigate during the quiet weeks and months leading up to trial. *United States v. Clark*, 55 M.J. 555, 560 (Army Ct. Crim. App. 2001). "'[I]nvestigation is an essential component of the adversarial process,' . . . that testing process generally will not function properly unless defense counsel has done some investigation." *Scott,* 24 M.J. 188 (quoting *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986)).

Argument

Defense counsel attacked the government's ability to prove causation in two ways. First, defense argued negligent medical care contributed to SPC [redacted] death by improper administration of ketamine. (R. at 646, 647, 680, 681, 757). Second, defense counsel argued SPC [redacted] failed to exercise reasonable care in executing her left-hand turn onto Mannheimer Strasse. (R. at 557, 559, 563, 756, 760).

Both lines of attack require evidence and pretrial investigation is where lawyers find it. Throughout the course of the defense preparation, it appears that counsel for the defense never sought to interview any of the medical professionals

who treated SPC [redacted] and PFC [redacted] after the accident. Nor did the defense present Mr. [redacted] expert conclusion, that SPC [redacted] and not appellant was at fault for the accident, at trial.

In *Scott*, the United States Court of Military Appeals reversed a conviction for attempted murder because counsel failed in their duty to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case. 24 M.J. at 192. *See also United States v. Saintaude*, 56 M.J. 888 (Army Ct. Crim. App. 2002), *United States v. Kreutzer*, 59 M.J. 773, 784 (Army Ct. Crim. App. 2004), *aff'd*, 70 M.J. 444 (C.A.A.F. 2012), *United States v. Boone*, 44 M.J. 742, 743 (Army Ct. Crim. App. 1996), rev'd on other grounds, 49 M.J. 187 (C.A.A.F. 1998).

Like *Scott*, where the defense counsel failed to investigate an alibi provided by an investigator, here, Mr. [redacted] report and his observations of the scene of the accident were invaluable. Additionally, counsel for appellant completely failed to follow up on this evidence by interviewing Mr. [redacted] and, if suitable, presenting this evidence at trial.

One strains to think of a valid strategic or tactical reason not to present Mr. [redacted] expert opinion to the factfinder, but more so, it strains credulity to posit any reason why counsel would not even interview him before trial. Most

novices with no legal training encountering a car accident death would begin their preparation for trial with the accident report and the expert who created it. Such a basic and fundamental breach of duty undermines confidence in the outcome of the trial. Appellant's convictions for involuntary manslaughter and aggravated assault should be reversed.

III. WHERE CONTRIBUTORY NEGLIGENCE OF A THIRD-PARTY WAS UNFORSEEABLE AND NEGATED PROXIMATE CAUSE, WHETHER APPELLANT'S CONVICTIONS FOR INVOLUNTARY MANSLAUGHTER AND AGGRAVATED ASSAULT BY CULPABLE NEGLIGENCE ARE LEGALLY AND FACTUALLY SUFFICIENT?

Standard of Review

Questions of legal and factual sufficiency are reviewed de novo. *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003).

Law

1. Factual Sufficiency and Legal Sufficiency

The test for legal sufficiency is "whether, considering the evidence in a light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003) (internal citations omitted); *United States v. Pabon*, 42

M.J. 404, 405 (C.A.A.F. 1995) (*quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

When the affirmative defense of lack of causation is properly raised, the burden is on the government to prove beyond a reasonable doubt that any other intervening, independent event was not the only cause that played a material role in bringing about the injury or death to the victim. (Benchbook, para 5-19, note 7, 29 Feb. 2020). *See United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995) (*quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

The test for factual sufficiency is, "whether after weighing the evidence in the record of trial, and making allowances for not having personally observed the witnesses, [this Court is] convinced of [appellant's] guilt beyond a reasonable doubt." *Walters*, 58 M.J. at 395. "In sum, to sustain appellant's conviction, [this Court] must find that the government has proven all essential elements and, taken together as a whole, the parcels of proof credibly and coherently demonstrate that appellant is guilty beyond a reasonable doubt." *United States v. Gilchrist*, 61 M.J. 785, 793 (Army Ct. Crim. App. 2005) (*citing United States v. Roukis*, 60 M.J. 925, 930 (Army Ct. Crim. App. 2005).

2. Elements of Involuntary Manslaughter

The elements of Involuntary Manslaughter are:

(1) That a certain person is dead;

(2) That this death resulted from the act or failure to act of the accused;

(3) That the killing by the accused was unlawful; and

(4) That this act amounted to culpable negligence;

3. Elements of Aggravated Assault

The elements of aggravated assault with the infliction of grievous bodily harm are as follows:

(1) That the accused assaulted a certain person, and

(2) That grievous bodily harm was thereby inflicted upon that certain person.

Argument

1. Specialist [redacted], who had been drinking, ignored two stop signs and proceeded to make a left-hand turn into a dangerous intersection without the right-of-way, and then hesitated in the middle of the intersection.

Some offenses require a causal nexus between the accused's conduct and the harm that is the subject of the specification. (Benchbook, para 5-19, note 7, 29 Feb. 2020). To prove appellant committed involuntary manslaughter and aggravated assault by culpable negligence, the government was required to prove appellant's culpable negligence directly resulted in the unlawful killing of the

decedent and grievous bodily injury to the passenger. (Benchbook, para 5-19, 29 Feb. 2020). Accordingly, the death must have been the "natural and probable result" of the accused's act or failure to act. *Id*.

The accused is not relieved of criminal responsibility simply because there exists a second proximate or direct cause of the death. *Id*. "The accused will, however, be relieved of criminal responsibility for the death of the victim if the death was the result of some unforeseeable, independent, intervening cause which did not involve the accused. If the victim died only because of the independent, intervening cause, the [act or failure to act] of the accused was not the proximate cause of the death, and the accused cannot be found guilty of negligent homicide." *Id*.

Where a second act of negligence looms so large in comparison with the first, that first act is not to be regarded as a substantial factor in the final result. *See United States v. Taylor*, 44 MJ 254, 257, (C.A.A.F. 1996). Specialist [redacted] drank before driving, and there is some evidence she may have been drinking while driving. She failed to stop at either stop sign approaching the intersection, and then she hesitated in the middle of it. Had SPC [redacted] exercised reasonable care and adhered to German traffic laws, this accident would not have occurred. (R. at 444, 559).

2. The government failed to prove that appellant's conduct was culpably negligent.

At the time of the accident, appellant was speeding but he was not driving erratically and other than his speed, he did nothing to contribute to the accident. Appellant's conduct on the night of the accident amounts to simple negligence under the law. Simple negligence is the absence of due care, that is, an act or omission of a person under a duty to use the degree of care which a reasonably careful person would have exercised under the same or similar circumstances. *See United States v. Riley*, 58 M.J. 305, 311 (C.A.A.F. 2003).

By contrast, culpable negligence is defined as a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. *See* Explanation, Art. 119(c)(2)(a)(i) UCMJ.

In most jurisdictions, something more than excessive speeding is ordinarily required to render one guilty of involuntary manslaughter by culpable negligence. *See, e.g., People v. Harris*, 81 N.Y.2d 850, 597 N.Y.S.2d 620, 613 N.E.2d 526 (1993) (speeding combined with circumstances such as driving at night without lights); *Goodman v. Commonwealth*, 37 Va. App. 374, 558 S.E.2d 555 (2002) and *State v. Carter*, 451 S.W.2d 340 (Mo. 1970) (speeding while on the wrong side of

the road); *State v. Brehmer*, 281 Minn. 156, 160 N.W.2d 669 (1968) and *Davis v. State*, 684 P.2d 147 (Alaska Ct. App. 1984) (speeding while drinking).

Compare appellant's conduct with the culpable negligence established in *People v. Ricardo B.*, 130 A.D.2d 213, 518 N.Y.S.2d 843 (App. Div. 2nd Dept. 1987), where the defendant was convicted for negligent homicide in the heat of a race with another vehicle and both vehicles were side-by-side at 70 to 90 miles an hour before striking the victim's car. *See also People v. Soto*, 44 N.Y.2d 683, 405 N.Y.S.2d 434, 376 N.E.2d 907 (1978) (where both defendants were actively engaged in racing at the time of the accident.).

This can be distinguished by the conduct of appellant. In *Ricardo* and *Soto*, the accidents were caused by the culpably negligent act of racing on the street. Here, witnesses established that while the young friends were driving fast alongside appellant, they had not planned, discussed, or orchestrated a "race." (R. at 334).

Appellant's conduct was simple negligence. Appellant was not weaving in and out of traffic at the time of the accident. The conditions were not wet. Appellant was not crossing the center line, he was not driving on the shoulder, he was not chasing other cars, he was not being chased by anyone, and he was not actively engaged in a race with any other vehicles on the road. For these reasons,

appellant's conviction for involuntary manslaughter and aggravated assault inflicting grievous injury is insufficiently supported by the law and by the evidence.

Conclusion

Appellant respectfully requests that this court reverse the finding of guilty as to The Specifications of Charge II and Charge III.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on February 24, 2023.

[redacted]

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