IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES	Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.		Docket No. ARMY 20200391
Staff Sergeant (E-6) **LADONIES P. STRONG,** United States Army	Appellant	Tried at Fort Stewart, Georgia, on 16 December 2019, 14–18 July 2020, and 20 July 2020, before a general court-martial convened by the Commander, Fort Stewart, Georgia, Colonel G. Bret Batdorff, military judge, presiding.

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

Assignment of Error[1]

WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY SUFFICIENT TO SUSTAIN APPELLANT'S CONVICTIONS FOR NEGLIGENT HOMICIDE AND PREVENTION OF AN AUTHORIZED SEIZURE OF PROPERTY.

[1] The government reviewed the matters submitted by appellant pursuant *to United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. Should this court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

Panel No 3

Statement of the Case

On 18 July 2020, a general court-martial composed of officer and enlisted members convicted appellant, contrary to her pleas, of one specification of negligent homicide and one specification of prevention of an authorized seizure of property, in violation of Articles 134 and 131e, Uniform Code of Military Justice, 10 U.S.C. §§ 934, 931e (2019) [UCMJ]. (R. at 1251). The court-martial sentenced appellant to reduction to the grade of E-1, confinement for three years, and a bad-conduct discharge. (R. at 1410). The convening authority approved the findings[2] and sentence. (Action). On 9 September 2020, the military judge entered judgment. (Judgment).

Statement of Facts

A. Appellant unlawfully killed Cadet [redacted] through negligence.

Appellant is an 88M, motor transport operator, who served as a troop transportation section sergeant in her unit. (Pros. Ex. 28; R. at 895). In the summer of 2019, appellant's unit went to West Point, New York, to support Cadet Leadership Development Training. (R. at 896). As part of that support, appellant regularly conducted transportation missions, driving cadets to various training sites

[2] The convening authority lacked the authority to approve the findings under Article 60a, UCMJ, and Rule for Courts-Martial 1109(b). (Action).

on West Point. (R. at 549). Many of these missions required driving on Firebreak 20, a mountainous dirt road with cliffs and no guard rails that leads to a land navigation training site. (R. at 551, 852, 865). Appellant often drove an M1085 medium tactical vehicle and—according to her commander and first sergeant at the time—was one of the best drivers in her company. (R. at 848, 896).

On the morning of 6 June 2019, Cadet (CDT) [redacted] and nineteen of his United States Military Academy classmates loaded into the back of the M1085 driven by appellant to go conduct land navigation training. (Pros. Ex. 34; R. at 690, 707–709, 833). Appellant's truck was the last in a convoy of eight vehicles. (R. at 432, 538).

Once on Firebreak 20, appellant drove her M1085 in a manner that made at least one cadet uncomfortable. (R. at 334). In fact, multiple cadets who watched from the vehicle immediately in front of appellant's vehicle in the convoy made comments about her driving. (R. at 334). At one point, appellant struck a tree with the side of her vehicle, jostling the vehicle and the passengers in the back. (R. at 333). The vehicle made "a correction [] back onto . . . the road." (R. at 334).

Minutes later, appellant started driving very close to the cliff-side edge of the road. (R. at 335, 436). When Private First Class (PFC) [redacted] the truck commander riding in the cab with appellant, noticed how close the vehicle was to the edge of the road, he looked over at appellant. (R. at 437). Appellant was

driving with her left forearm resting on the steering wheel, and she was using her right hand to manipulate the Apple Watch on her left wrist. (R. at 437–39). At trial, when PFC [redacted] was asked where appellant's focus was at this time, he responded, "The watch. The watch. The focus was on the watch." (R. at 439).

Appellant drove the M1085 off the road and onto the steep embankment on the side. (Pros. Ex. 5, pp. 20, 22; R. at 390–91). Appellant attempted to correct course and turn the steering wheel back toward the road, but it was too late. (R. at 335–36, 441; Pros. Ex. 5, p. 20). The M1085 rolled over to the right and down the hillside. (R. at 336, 441). The vehicle rolled ninety degrees before pausing and then ultimately rolling another ninety degrees until it was completely upside down. (R. at 681–82).

When the vehicle came to rest, CDT [redacted] was pinned between the floor of the M1085 and a large boulder that had protruded through the cloth roof of the truck. (R. at 619). CDT [redacted] died at the scene from traumatic asphyxia—a condition where an object on somebody's chest and abdomen prevents that person from breathing and getting oxygen-rich blood to the brain. (R. at 619, 729–30).

The rollover occurred at approximately 0641 on 6 June 2019. (Pros. Ex. 34). Verizon phone records indicated multiple data sessions originating from appellant's phone in the minutes leading up to the rollover. (R. at 585; Pros. Ex. 11, at 1).

B. Appellant prevented the authorized seizure of the digital content of her cellphone by remotely wiping the data on the phone.

Following the rollover, PFC [redacted] was interviewed by Criminal Investigation Command (CID) agents as part of their investigation. (R. at 511). During the interview, he told them what he had seen—namely that appellant was manipulating her watch while driving. (R. at 511–12). As a result, CID sought and obtained authorization to seize and search appellant's Apple iPhone and Apple Watch. (R. at 985). Then-Special Agent (SA) [redacted] went to appellant's living quarters, identified herself, and told her that she was going to seize her phone and watch. (R. at 986). Special Agent [redacted] seized appellant's iPhone and Apple Watch at 2307 EDT on 6 June 2019. (Pros. Ex. 24, p. 1). Once SA [redacted] had possession of the phone and watch, appellant tried three times to physically take them back from her. (R. at 987).

After CID seized appellant's iPhone, agents attempted to place it in airplane mode but were unsuccessful. (R. at 1011). The agents also placed appellant's phone and watch into an evidence collection bag that the manufacturer incorrectly labeled as a Faraday bag.[3] (R. at 1011–12). As a result, the phone was able to send and receive cellular signals and was thus at risk of being remotely wiped or

[3] A "Faraday bag" is a bag that prevents signals from going to or emanating from an electronic device contained in the bag. (R. at 1003). The bag that CID agents placed appellant's phone in was only an "electrostatic bag." (App. Ex. XIV, p. 4).

erased—that is, remotely resetting the phone to its factory settings and deleting the data contained on the phone. (R. at 1011–12, 1023–26).

At 0020 on 7 June 2019—after appellant's phone and watch had been seized by SA [redacted] but prior to them arriving at the digital forensics lab for examination—appellant used an Apple MacBook to log into her iCloud account and remotely wipe her iPhone. (R. at 1059, 1068). As a result, the CID digital forensic examiner was not able to pull any data off of the phone that was on there when CID took possession of it. (R. at 1023–25).

When the evidence of appellant's efforts to remotely wipe her phone came to light, CID sought and obtained an additional search authorization for appellant's Apple iPad, Apple MacBook Pro, and a new Apple iPhone XR that appellant purchased to replace the other phone CID seized. (R. at 1046, 1054, 1072). Much of the evidence presented at trial came from the new iPhone XR. (R. at 1054; Pros. Ex. 24).

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Standard of Review

Military courts review questions of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Craion*, 64 M.J. 531, 534 (Army Ct. Crim. App. 2006).

Law

A. Legal and factual sufficiency

The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). "[I]n resolving questions of legal sufficiency, [the courts of appeals] are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). During

a legal sufficiency review, courts consider all available facts within the record and are "not limited to [the] appellant's narrow view of the record." *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996).

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, the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt." *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (internal quotations omitted); *Turner*, 25 M.J. at 324. Regarding the quality of witness testimony, this court has stated:

> [M]uch is lost when the testimony of live witnesses is converted into the plain text of a trial transcript. While court-reporter notes may sometimes reflect a witness's gesture, laugh, or tearful response, they do not attempt to reflect the pauses, intonation, defensiveness, surprise, calm reflection, or deception that is often apparent to those present at the court-martial.

United States v. Crews, ARMY 20130766, 2016 CCA LEXIS 127, at *11–12 (Army Ct. Crim. App. 29 Feb. 2016) (mem. op.). Further, "[t]o say that an appellate court is at a relative disadvantage in determining questions of fact as compared to a trial court is to state the obvious." *Crews*, 2016 CCA LEXIS 127, at *12. An appellate court's "assessment of evidence must be sifted through a filter that recognizes [its] inferior fact-finding viewpoint." *United States v. Feliciano*,

ARMY 20140766, 2016 CCA LEXIS 512, at *8 (Army Ct. Crim. App. 22 Aug. 2016) (mem. op.).

B. Negligent homicide.

The elements of negligent homicide are: (1) That a certain person is dead; (2) That the death resulted from an act or failure to act of the accused; (3) That the killing by the accused was unlawful; (4) That the act or failure to act of the accused that caused the death amounted to simple negligence; and (5) That, under the circumstances, the conduct of the accused was prejudicial to good order and discipline, service-discrediting, or both. *MCM*, pt. IV, ¶ 103.b. A killing is "unlawful" when it is done "without legal justification or excuse." Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 3A-70-1(d) (29 Feb. 2020) [Benchbook]. No intent to kill or injure is required. *Id.* "Simple negligence is the absence of due care . . . . Simple negligence is a lesser degree of carelessness than culpable negligence." *MCM*, pt. IV, ¶ 103.c.(2). The act of the accused must not only be negligent, but it also must be a proximate cause of the death of the victim. Benchbook, para. 3A-70-1(d). That is, the death of the victim "must have been the natural and probable result" of the negligent act. *Id.*

C. Prevention of authorized seizure of property.

The elements of prevention of authorized seizure of property are: (1) That one or more persons authorized to make searches and seizures were seizing, about

to seize, or endeavoring to seize certain property; (2) That the accused destroyed, removed, or otherwise disposed of that property with intent to prevent its seizure; and (3) That the accused then knew that persons authorized to make searches were seizing, about to seize, or endeavoring to seize the property. Article 131e, UCMJ; *MCM*, pt. IV, ¶ 86.b. Among those authorized to seize property are criminal investigators in the execution of police duties and individuals designated by proper authority to perform police duties. Military Rule of Evidence [Mil. R. Evid.] 316(d). As used in the statute, "dispose of" means "an unauthorized transfer, relinquishment, getting rid of, or abandonment of the property." Benchbook, para. 3A-55E-1(d).

Argument

As discussed below, appellant's convictions are supported by sufficient evidence: (1) that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt; and (2) that the court members themselves are convinced of appellant's guilt beyond a reasonable doubt. Appellant's arguments to the contrary are simply not supported by the evidentiary record or the law.

A. Appellant's conviction for negligent homicide is legally and factually sufficient.

As an initial matter, there is no dispute that CDT [redacted] died as a result of the rollover. (Appellant's Br. 8). Appellant, as the driver of a vehicle with twenty-one passengers—PFC [redacted] in the cab and the twenty cadets in the back—had a duty to use due care in her operation of the vehicle. *See, e.g., United States v. Lloyd*, NMCM No. 89 1584, 1991 CMR LEXIS 650 (N.M. Ct. Crim. App. 29 Apr. 1991) (per curiam) (affirming negligent homicide conviction for death of a passenger in the vehicle driven by the appellant). She violated that duty—and thus acted negligently—when she shifted her focus off of the road and began manipulating her Apple Watch. (R. at 439). That negligent act caused her to drive the M1085 off of the road, caused the truck to roll, and caused the death of CDT [redacted] (R. at 441, 728–29). Thus, CDT [redacted] death was the "natural and probable result" of appellant's negligence. *See, e.g., United States v. Cox*, ACM 38885, 2017 CCA LEXIS 169, at *9 (A.F. Ct. Crim. App. 22 Feb. 2017) ("The evidence of [appellant's] excessive speed alone might well have been sufficient to establish the [foreseeability] of a fatal crash . . . ."); *People v. Delhaye*, 2021 IL (2d) 190271 (Ill. App. Ct. 2021) (holding it was reasonable to find that appellant's use of a cellphone while driving was the proximate cause of a fatal car wreck). Finally, appellant's conduct was prejudicial to good order and discipline and service-discrediting. As a result of the rollover, PFC [redacted] was never again mentally able to

fulfill duties as a truck commander or even ride in a tactical vehicle, and the service-discrediting nature of appellant's conduct can readily be inferred from the evidence adduced at trial. (R. at 913); *see United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011) ("[Article 134], which requires proof of the 'nature' of the conduct, does not require the government to introduce testimony regarding views of 'the public' or any segment thereof. The responsibility for evaluation of the nature of the conduct rests with the trier of fact.").

1. Appellant was negligent.

Appellant argues that the government failed at trial to prove that she was negligent.[4] (Appellant's Br. 17). However, there is overwhelming evidence that appellant was manipulating her Apple Watch immediately prior to the rollover.

[4] Appellant cites to the fact that the panel returned a verdict of not guilty for dereliction of duty as evidence that "the panel clearly rejected" the government's theory that appellant was using her Apple Watch while driving. (Appellant's Br. 17, n.12). However, courts have long rejected the notion that we can speculate about the meaning of inconsistent verdicts. *See United States v. Emmons*, 31 M.J. 108, 112 (C.M.A. 1990) (citing *United States v. Powell*, 469 U.S. 57, 66 (1984)) (noting it is "imprudent and unworkable" to allow an accused "to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them"), *overruled in part on other grounds by United States v. Miergrimado*, 66 M.J. 34 (C.A.A.F. 2008). Because there is no allegation or evidence of improper extraneous information obtained by the panel, outside influence on any panel member, or unlawful command influence, this court simply should not speculate on the panel's deliberative process in reaching its verdict. *See United States v. Dugan*, 58 M.J. 253, 257 (C.A.A.F. 2003) (describing the "three circumstances that justify piercing the otherwise inviolate deliberative process" of a panel).

First, there is PFC [redacted] eyewitness account of appellant resting her forearm on the steering wheel, shifting her focus away from the road, and manipulating her Apple Watch with her right index finger. (R. at 437–39). Private First Class [redacted] indicated immediately after the rollover and consistently afterward that appellant's distracted driving caused the rollover. (R. at 444, 448).

Even though he initially said appellant was on her "phone" rather than using the term "watch," (R. at 444), there are many reasonable explanations for this that do not detract from PFC [redacted] credibility: PFC [redacted] hysterical state following the rollover, (R. at 445, 450); his lack of desire to talk to anybody or elaborate about the traumatic event he experienced, (R. at 448); that an Apple Watch performs many of the same functions as an iPhone and is functionally equivalent, (R. at 438); and his feeling that once he said "phone" the first time, he didn't want to appear that he was changing his story. (R. at 511–12). What is telling, though, is that once PFC [redacted] sat down to describe to law enforcement officials what had happened, he consistently said that appellant was using her watch while she was driving—the same facts to which he testified at trial. (R. at 437–39, 511).

Additionally, PFC [redacted] account of the rollover is corroborated by the eyewitness testimony of Second Lieutenant [redacted], (R. at 335–36), and the physical evidence described by Investigator [redacted] (R. at 1112). Further, the Verizon records

showing data usage sessions in the minutes leading up to the rollover support SPC [redacted] testimony that appellant was using her watch. (Pros. Ex. 11, p. 1).

Finally, appellant's own actions following the rollover add credence to PFC [redacted] testimony. Appellant attempted to physically prevent SA [redacted] from seizing her phone, (R. at 987), and when that failed, she ensured that there would be no evidence on the phone by logging into her iCloud account and remotely wiping it, less than an hour after it was seized. (R. at 1068). This court can and should infer that appellant did these things because she knew that she was distracted by her Apple Watch and feared that the data on her phone and watch would prove that to law enforcement. *United States v. Moran*, 65 M.J. 178, 188 (C.A.A.F. 2007) ("That an inference of consciousness of guilt can be drawn from the destruction of evidence is well-recognized in the law" (internal quotations omitted)). Taken together, the evidence leaves no fair and rational hypothesis except that appellant was distracted and manipulating her Apple Watch while she was driving.

Having established that appellant was manipulating her watch, the question becomes whether that action was negligent. It clearly was. Looking away from the road while driving to manipulate an Apple Watch is, in and of itself, a failure to exercise due care. It follows, then, that doing so while driving an M1085 medium tactical vehicle that weighs upwards of fourteen tons is also negligent. (R. at 401). Accordingly, *a fortiori*, manipulating an Apple Watch while driving an M1085 on

a mountainous road with drop-offs and no guardrails must be negligent. (R. at 852).

Appellant knew the level of skill and concentration required to drive an M1085—she drove them on numerous occasions and was one of the best drivers in her unit. (R. at 896). Additionally, like other members of her unit and other members of the convoy on the morning of 6 June 2019, she knew that Firebreak 20 was a potentially dangerous road. (R. at 903, 909). She had been on the route before, and her transportation section had conducted over forty missions on the route. (R. at 909). At a minimum, hitting a tree on the route that morning should have been a reminder that navigating Firebreak 20 required her full attention. (R. at 333). However, despite the objective hazards, she took her eyes off the road and she shifted her focus to her Apple Watch. (R. at 439) ("The watch. The watch. The focus was on the watch.").

Simply put, the evidence contained in the record leads to the inescapable conclusion that, under the same or similar circumstances, a reasonably careful person would have exercised a greater degree of care of the safety of others than appellant did. Accordingly, appellant acted with simple negligence. *MCM*, pt. IV, ¶ 103.c(2).

2. Appellant's negligence was a proximate cause of CDT [redacted] death.

Appellant argues that any negligence on her part was not a proximate cause of CDT [redacted] death. (Appellant's Br. 18–24). Instead, she argues that "[t]he unstable condition and eventual collapse of the dirt shoulder . . . was an unforeseeable and intervening cause which did not involve appellant." (Appellant's Br. 18). Appellant's argument fails for many reasons.

First, this court should not take the "narrow view of the record" that appellant does, *Cauley*, 45 M.J. at 356, especially her description that she "slightly departed the narrow 'traveled portion' of Firebreak #20." (Appellant's Br. 23). In the area of the crash, the *narrowest* portion of the road that vehicles traveled on—what Investigator [redacted] calls the "traveled portion"—was approximately 14.7 feet wide. (Pros. Ex. 37; R. at 384–85, 1105–06). The road itself was wider, but the wider portion was undisturbed because vehicles ordinarily didn't drive there. (R. at 385, 398–99; Pros. Ex. 5, p. 2). The evidence adduced at trial shows that appellant drove her vehicle outside of the 14.7 feet that other vehicles—including the seven in her convoy that morning—safely traveled before. (R. at 384–85). She then drove over a foot-and-a-half off the road itself and down the steep embankment before she even attempted to turn the wheels back. (R. at 336, 391, 398, 441; Pros. Ex. 5, p. 22). This was more than a "slight" departure.

Similarly, appellant's suggestion that the "collapse of the dirt shoulder . . . did not involve" appellant simply does not accord with the overwhelming evidence to the contrary. (Appellant's Br. 18). To be clear, what appellant refers to as a "shoulder" was an embankment down the side of a mountain that was steeper than fifty degrees. (R. at 410–11; Pros. Ex. 5, p. 22). It was not meant to be driven on. The road had no defects in the area of the rollover, and appellant admits that there is no evidence that the road itself gave way. (R. at 1107; Appellant's Br. 13). The only ground that collapsed or gave way was on the steep embankment, and it only gave way under the weight of the truck after appellant drove off the road. (R. at 410) ("She veered off the road where the cliff shoulder steep incline gave way making the vehicle unrecoverable."). Accordingly, it is clear that appellant was involved with—and caused—the "collapse of the dirt shoulder."

Further, despite appellant's arguments otherwise, the embankment giving way under the weight of appellant's vehicle was not an independent, intervening cause. (Appellant's Br. 18–20). In fact, "[i]t [was] not a cause at all; it [was] the effect in a cause-and-effect chain of events." *United States v. Bailey*, 75 M.J. 527, 533 (C.A.A.F. 2015).[5] Had appellant not been distracted by her watch and driven

[5] In addition to her other arguments, appellant argues that appellant driving off the road "was merely a contributing factor that could not have caused CDT [redacted] death *but for* the unstable condition of the shoulder." (Appellant's Br. 19) (emphasis added). To the extent appellant is suggesting that a "but-for cause" is necessarily an "intervening cause," this is not an accurate statement of the law. In

off the road, there is no evidence the embankment would have given way. In fact, the evidence in the record suggests just the opposite. Appellant's unit had conducted forty missions on Firebreak 20, the seven vehicles ahead of appellant traveled the same route that morning, and another company of cadets had conducted similar convoys on the same route, all without any issues. (R. at 432, 750, 804, 909).

Even assuming arguendo that the embankment giving way was a "cause" of CDT [redacted] death, it does not carry the day for appellant—appellant's negligence was still a proximate cause. *See United States v. Lonegran*, ARMY 9700615, 2000 CCA LEXIS 422, at *10 (Army Ct. Crim. App. 15 Feb. 2000) (mem. op.) ("[T]o be a proximate cause of a victim's death, the . . . negligence must be *a cause*, but need not be *the sole cause*[.]") (emphasis in original) (citing *United States v. Cooke*, 18 M.J. 152, 153–54 (C.M.A. 1984)); *see also United States v. Romero*, 1 M.J. 227, 230 (C.M.A. 1975) ("To be proximate, an act need not be the sole cause of the death, nor must it be the immediate cause—the latest in time and space preceding the death."). Likewise, to the extent the "terrain and wet soil" were

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Bailey, the appellant was driving, crossed into oncoming traffic, careened off of an oncoming Dodge Durango, and hit and killed the victim. 75 M.J. at 530. It may be said that but for the Durango driver not applying the brakes, the victim would not have died. *See id.* Regardless, appellant was still criminally liable for the death of the victim because the Durango driver's actions were not "independently sufficient" to cause the victim's death. *Id.* at 533.

causes, (Appellant's Br. 19), they only became causes as a direct result of appellant becoming distracted by manipulating her Apple Watch and driving the vehicle off the road. In short, neither the embankment giving way nor the soil condition were "independently sufficient cause[s]" of CDT [redacted] death. *Bailey*, 75 M.J. at 533.[6]

Finally, CDT [redacted] death was a foreseeable result of appellant's negligence. "The essence of proximate cause is foreseeability . . . . It is sufficient that the ultimate harm is one which a reasonable man would foresee as being reasonably related to the acts of the defendant." *United States v. Rogers*, ARMY 20021167, 2005 CCA LEXIS 430, at *14 (Army Ct. Crim. App. 28 Oct. 2005) (mem. op.) (internal quotations omitted) (quoting *United States v. Perez*, 15 M.J. 585, 587 (A.C.M.R. 1983)). In the case at bar, it was certainly foreseeable that appellant taking her eyes off the road, placing her forearm on the steering wheel, and shifting her focus to manipulating her Apple Watch would cause her to drive off the side of the road. Likewise, it was foreseeable that driving a vehicle that weighs over

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[6] Appellant appears to argue that the "West Point administration" was negligent in failing to maintain the road in a safe condition, and this negligence was an intervening cause, relieving appellant of liability. (Appellant's Br. 24). Appellant's reliance on the subsequent remedial measures taken after the rollover to suggest negligence is unpersuasive. Even assuming there was some negligence on the part of the "West Point administration"—which appellee certainly does not concede—it is clear from the evidentiary record that it did not "loom[] so large" in comparison with appellant's negligence that appellant's negligence would no longer "be regarded as a substantial factor" in CDT [redacted] death. *United States v. Taylor*. 44 M.J. 254, 257 (C.A.A.F. 1996) (internal quotations and emphasis omitted) (quoting *United States v. Cooke*, 18 M.J. 152, 154 (C.M.A. 1984)).

fifteen tons off the road onto a steep embankment would cause the ground underneath to give way. Finally, the fact that the vehicle would roll and that such a rollover would cause the death of a passenger in the back of the vehicle with nothing but a cloth roof overhead was foreseeable.

Put simply, a reasonable person could foresee that the "ultimate harm"—CDT [redacted] death—was "reasonably related" to appellant's actions—taking her attention off the road to manipulate her Apple Watch. *See Rogers*, 2005 CCA LEXIS 430, at *14. Accordingly, appellant's negligence was, indeed, a proximate cause of CDT [redacted] death. *Rogers*, 2005 CCA LEXIS 430, at *14.

B. Appellant's conviction for prevention of authorized seizure of property is legally and factually sufficient.

The record shows that SA [redacted] SA [redacted], and the other CID agents—all of whom were authorized to make searches and seizures—were endeavoring to seize the digital content of appellant's Apple iPhone on 6–7 June 2019. (R. at 985, 1021–26; Pros. Ex. 24, p. 1); Mil. R. Evid 316(d). In the early morning hours of 7 June 2019, appellant disposed of her phone's digital content by logging in to her iCloud account and remotely wiping the data. (R. at 1059, 1068). The evidence proving that it was appellant who did this is overwhelming and not contested by appellant on appeal.[7] (Pros. Ex. 24, pp. 1–2; Appellant's Br. 24).

[7] Appellant does not concede this point; however, she only argues that it was legally and factually impossible to violate Article 131e, UCMJ based on the timing

Further, that appellant remotely wiped her phone with the intent to prevent the seizure of the digital content thereon can be readily inferred from the circumstances surrounding her actions. *See United States v. Webb*, 38 M.J. 62, 69 (C.M.A. 1993) ("[Specific intent] 'may be inferred from the totality of the circumstances' including 'the nature, time, or place of' appellant's 'acts before and during' the crime alleged." (quoting *Goldman v. Anderson*, 625 F.2d 135, 137 (6th Cir. 1980))). Appellant attempted to physically prevent SA [redacted] from seizing her phone, (R. at 987); her browsing history shows that she was researching how to use Find My iPhone in the minutes surrounding the time she logged into her iCloud account and initiated the remote wipe, (Pros. Ex. 24, pp. 1–2); and all of this occurred close in time to the rollover and within an hour of when her iPhone was seized by SA [redacted] (Pros. Ex. 24, p. 1). It is clear from the record that appellant feared that her phone's digital content contained incriminating evidence and wanted to dispose of that property.

Finally, appellant knew that SA [redacted] was endeavoring to seize the digital content of her phone because SA [redacted] identified herself and told appellant that she was going to "seize her phone and watch." (R. at 986). Consequently, appellant's

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of her actions. (Appellant's Br. 24) ("Assuming *arguendo* that appellant actually erased the data on her phone, she only did so after CID agents seized her phone and the data within it. Therefore, appellant could not have prevented the seizure of the data on her phone because it had already been seized." (emphasis in original))

actions met all the elements of prevention of unauthorized seizure of property. Article 131e, UCMJ; *MCM*, pt. IV, ¶ 86.b.

Appellant argues that her conviction should be set aside because her actions occurred after CID "seized her phone and the data within it." (Appellant's Br. 24). Appellee concedes that appellant remotely wiped her phone after CID seized her *phone*. However—and importantly—appellant did so while CID was still endeavoring to seize the *digital content* thereon. (R. at 1068). Appellant was charged with disposing "of the *digital content* of her cellphone, property [appellant] then knew a person authorized to make searches and seizures was endeavoring to seize." (Charge Sheet) (emphasis added). It is clear, then, that the theory of liability that the government presented at trial—and that of which appellant was duly on notice—was that she violated Article 131e, UCMJ, at the moment she remotely wiped the "digital content" of her phone. Thus, the relevant inquiry is whether appellant destroyed the digital content prior to when agents seized it. On its face, the answer to that question is "yes."

In short, Article 131e, UCMJ, criminalizes destroying, removing, or otherwise disposing of property that the accused knows other persons authorized to make searches and seizures "are seizing, are about to seize, or are endeavoring to seize." "Endeavoring to" and "seize" are not defined in the statute. *Id.* Accordingly, those terms should be given their ordinary meaning. *Asgrow Seed*

Co. v. Winterboer, 513 U.S. 179, 187 (1995) (citing *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)). If somebody is "endeavoring to seize" something, the ordinary meaning of that phrase means that the person is exerting effort in an attempt to take possession of the thing. *See Black's Law Dictionary* (9th ed. 2009).[8]

Here, it is clear from the evidence in the record that CID agents were still exerting effort in an attempt to take possession of the digital content of appellant's cellphone at the time that appellant remotely wiped it. Although the phone had been seized, the seizure of the digital content itself would not have taken place unless and until CID agents at the digital forensics lab downloaded that content from the phone. (R. at 1021) ("If it is digital data, obviously, it's ready to be analyzed. *If it is a device*, there's [sic] several protocols we may go through to *remove the information from the device* . . . .") (emphasis added). However, as SA [redacted] testified, he was unable to take possession and analyze that digital content because appellant remotely wiped it prior to the phone arriving at the lab. (R. at 1023–25). In other words, while CID was endeavoring to seize the digital content, appellant disposed of it—exactly the type of conduct that is prohibited by Article 131e, UCMJ.

[8] *Black's Law Dictionary* (9th ed. 2009) defines "endeavor" as "[t]o exert physical or intellectual strength toward the attainment of an object or goal" and "seize" as, *inter alia*, "[t]o forcibly take possession (of a person or property)" and "[t]o be in possession (of property)."

Appellant's argument on appeal, and especially her reliance on *United States v. Hoffmann*, 75 M.J. 120 (C.A.A.F. 2016), *Springer v. Albin*, 398 F. App'x 427 (10th Cir. 2010), and *United States v. Eugene*, ARMY 20160438, 2018 CCA LEXIS 106 (Army Ct. Crim. App. 28 Feb. 2018) (mem. op.), is misguided. (Appellant's Br. 25–28). All of these cases cited by appellant examine seizures in the context of whether they violated the Fourth Amendment. *Hoffmann*, 75 M.J. at 2 (review of military judge's denial of motion to suppress); *Springer*, 398 F. App'x at 428–29 (*Bivens* action for alleged Fourth Amendment violations); *Eugene*, 2018 CCA LEXIS 106, at *1–2 (review of military judge's denial of motion to suppress). The present case, however, is not a Fourth Amendment case. Appellant did not raise at trial, nor does she raise on appeal, any alleged violation of her constitutional rights, and the mere fact that Article 131e uses the word "seize," alone, does not implicate the Fourth Amendment. The analysis on the questions of the legal and factual sufficiency of appellant's conviction would be the same whether Congress had substituted the word "get" or "obtain" for "seize" when drafting the statute.

Put differently, this court need not decide whether downloading the digital content off a person's phone is a "seizure" for purposes of the Fourth Amendment because that question is not before the court. The only questions before this court is whether there is sufficient evidence in the record to find that appellant "disposed

of the digital content of her cellphone, property [appellant] then knew a person authorized to make searches and seizures was endeavoring to seize" and whether such conduct constitutes a violation of Article 131e, UCMJ. A plain reading of the statute and the significant evidence in the record shows that both questions should be answered in the affirmative.

In light of the above and the evidentiary record supporting such a finding, this court should find that appellant's conviction for prevention of authorized seizure of property is legally and factually sufficient. (*See Turner*, 25 M.J. at 324–325).

Conclusion

WHEREFORE, the government respectfully requests this honorable court affirm the findings and sentence.

TIMOTHY R. EMMONS
CPT, JA
Appellate Attorney, Government Appellate Division

MARK T. ROBINSON
MAJ, JA
Branch Chief, Government Appellate Division

CRAIG J. SCHAPIRA
LTC, JA
Deputy Chief, Government Appellate Division

CHRISTOPHER B. BURGESS
COL, JA
Chief, Government Appellate Division

APPENDIX

United States v. Cox

United States Air Force Court of Criminal Appeals

February 22, 2017, Decided

No. ACM 38885

Reporter
2017 CCA LEXIS 169 *

UNITED STATES, Appellee v. Donald W. COX Senior Airman (E-4), U.S. Air Force, Appellant

Notice: THIS OPINION IS ISSUED AS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER RULE OF PRACTICE AND PROCEDURE 18.4.
NOT FOR PUBLICATION

Subsequent History: Motion granted by *United States v. Cox, 76 M.J. 266, 2017 CAAF LEXIS 324 (C.A.A.F., Apr. 18, 2017)*

Motion granted by *United States v. Cox, 76 M.J. 344, 2017 CAAF LEXIS 425 (C.A.A.F., May 8, 2017)*

Review denied by *United States v. Cox, 2017 CAAF LEXIS 697 (C.A.A.F., July 11, 2017)*

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Matthew P. Stoffel (sitting alone). Approved sentence: Confinement for one year and reduction to E-1. Sentence adjudged 25 June 2015 by GCM convened at Vandenberg Air Force Base, California.

Core Terms

culpable negligence, driving, speed, foreseeable, crash, miles per hour, passenger, act or omission, speed limit, factual sufficiency, reasonable doubt, recklessness, culpable, involuntary manslaughter, simple negligence, modifications, specification

Counsel: For Appellant: Major Lauren A. Shure, USAF (argued) and Colonel Jef-frey G. Palomino, USAF.

For Appellee: Major G. Matt Osborn, USAF (argued); Colonel Katherine E. Oler, USAF; and Gerald R. Bruce, Esquire.

Judges: Before DREW, MAYBERRY, and J. BROWN, Appellate Military Judges. Chief Judge DREW delivered the opinion of the Court, in which Senior Judge MAYBERRY and Senior Judge J. BROWN joined.

Opinion by: DREW

Opinion

DREW, Chief Judge:

A general court-martial composed of a military judge sitting alone convicted Appellant, contrary to his plea, of one specification of involuntary man-slaughter by culpable negligence, in violation of *Article 119, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 919*.[1] The

[1] The military judge also convicted Appellant of one

adjudged and approved sentence was confinement for one year and a reduction to E-1.

Appellant raises one assignment of error: whether his conviction for involuntary manslaughter is legally and factually sufficient.[2] We find that it is and thus affirm the findings and sentence. [*2]

I. Background

Appellant and another Airman drove their cars from the dorms on Vandenberg Air Force Base, California, in the direction of an off-base grocery store. Both had two passengers each. At the time, Appellant was 21 years old and had very little experience driving a standard transmission car, like the one he had recently purchased and was driving that day. After leaving the base, Appellant and the other Airman drove at excessive speeds on a divided four-lane road while passing other cars on the left and on the right. The cars entered a curvy, downhill stretch of road when Appellant lost control of his car. His car skidded diagonally across the road, hit a small curb, flew into and tumbled in the air, collided with a tree, and rolled over on the ground several times before finally coming to a rest in a cloud of dust and debris. The car sustained catastrophic damage. Appellant and his rear-seat passenger were injured but survived; his front-seat passenger died.

II. Discussion — Legal and Factual Sufficiency

Appellant challenges the legal and factual sufficiency of the evidence. Specifically, he alleges that it does not prove that he acted with culpable negligence. As Appellant [*3] concedes that his driving that day constituted simple negligence, this case presents a question as to what is necessary to constitute the higher standard of culpable negligence.

We review issues of legal and factual sufficiency de novo. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*. The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002)* (quoting *United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987)*). In applying this test, "we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001)*; *see also United States v. McGinty, 38 M.J. 131, 132 (C.M.A. 1993)*.

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, [we are] convinced of [Appellant]'s guilt beyond a reasonable doubt." *Turner, 25 M.J. at 325*. In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent de-termination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington, 57 M.J. at 399*. Proof beyond reasonable doubt does not [*4] mean that the evidence must be free from conflict. *United States v. Lips, 22 M.J. 679, 684 (A.F.C.M.R. 1986)*. Our assessment of legal and factual

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specification of reckless driving, in violation of *Article 111, UCMJ, 10 U.S.C. § 911*, but immediately dismissed this finding as an unreasonable multiplication of charges. The military judge acquitted Appellant of one specification of willfully engaging in a vehicle speed contest, in violation of *Article 134, UCMJ, 10 U.S.C. § 934*.

[2] We heard oral argument in this case on 12 January 2017 at The Ohio State University Moritz College of Law as part of this court's Project Outreach.

sufficiency is limited to the evidence produced at trial. *United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)*.

The elements of involuntary manslaughter by culpable negligence are:

(1) a death,

(2) the death resulted from Appellant's act or omission,

(3) the killing was unlawful, and

(4) Appellant's act or omission constituted culpable negligence.

Manual for Courts-Martial, United States (*MCM*) (2012 ed.), pt. IV ¶ 44.b.(2); *United States v. Oxendine, 55 M.J. 323, 325 (C.A.A.F. 2001)*; *United States v. McDuffie, 65 M.J. 631, 634 (A.F. Ct. Crim. App. 2007)*.

As an initial matter, Appellant argues that the Government, in attempting to prove his actions amounted to culpable negligence, is—based on how they elected to charge the offense—limited only to proof that Appellant "exceeded the speed limit." We disagree. In addition to exceeding the speed limit, the specification specifically alleged the act of causing his car to veer off the road and crash.

Moreover, the specification alleges—and the Government must prove—that these specified acts constituted culpable negligence. To prove the culpably negligent nature of Appellant's acts, the Government may, and often must, rely on the additional surrounding circumstances and the manner in which he com-mitted them. It is not necessary that all [*5] of the details that together establish that an act or omission rose to the level of culpable negligence be specifically alleged in a specification. *See generally, United States v. Crafter, 64 M.J. 209 (C.A.A.F. 2006)* (addressing the test for the sufficiency of a specification). Instead, the fact-finder at trial and this court on appeal may consider all of the evidence admitted during findings when determining whether Appellant's actions constituted culpable negligence.

Appellant's primary argument on appeal is that his actions amounted to nothing more than simple negligence and did not rise to the level of culpable negligence necessary to sustain a conviction of involuntary manslaughter.

"Culpable negligence is a degree of carelessness greater than simple negligence." *MCM*, pt. IV ¶ 44.c.(2)(a)(i). "Simple negligence is the absence of due care, that is an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care of the safety of others which a reasonably careful person would have exercised under the same or similar circumstances." *Id.* at ¶ 85.c.(2).

> [Culpable negligence] is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to oth-ers of [*6] that act or omission. Thus, the basis of a charge of invol-untary manslaughter may be a negligent act or omission which, when viewed in the light of human experience, might foreseeably result in the death of another, even though death would not nec-essarily be a natural and probable consequence of the act or omission.

Id. at ¶ 44.c.(2)(a)(i). "We apply an objective test in determining whether the consequences of an act are foreseeable." *McDuffie, 65 M.J. at 635* (citing *United States v. Riley, 58 M.J. 305, 311 (C.A.A.F. 2003)*; *Oxendine, 55 M.J. at 326*).

The *MCM* defines recklessness, in the context of operating a vehicle, in a similar fashion under *Article 111, UCMJ, 10 U.S.C. § 911*, as a "culpable dis-regard of foreseeable consequences to others from the act or omission involved." *MCM*, pt. IV, ¶ 35.c.(7). The *MCM* goes on to state that recklessness "cannot be

established solely by reason of the happening of an injury . . . or . . . by proof alone of excessive speed or erratic operation" of a vehicle, but these facts may be relevant to the ultimate question of whether an appellant's actions were of a "heedless nature which made it actually or imminently dangerous to the occupants." *Id.; see also* United States v. Bennitt, 72 M.J. 266, 269 (C.A.A.F. 2013) (noting that the 1917 MCM stated that "the driving of an automobile in slight excess of the speed limit . . [*7] . is not the kind of unlawful act" sufficient to sustain a conviction for involuntary manslaughter); *United States v. Lawrence*, 18 C.M.R. 855, 857 (A.F.C.M.R. 1955) ("[E]xceeding the speed limit, . . . standing alone, may show nothing more than simple negligence, which will not suffice for a conviction for reckless driving. Nor may we conclude from the mere occurrence of the accident that it was precipitated by a culpably negligent or wanton operation of the vehicle.") (citations omitted); *United States v. Gamble*, 40 C.M.R. 646, 648 (A.C.M.R. 1969) ("[S]imply exceeding the speed limit is not culpable negligence.").

Appellant, relying on the *MCM*'s guidance for reckless operation of a vehicle, argues that Appellant's speed alone cannot establish culpable negligence. Because the definitions of "recklessness" and "culpable negligence" employ the same operative language, the *MCM*'s discussion of recklessness is instructive to our analysis of culpable negligence, but we disagree that it leads to a conclusion that no amount of speed alone can ever establish culpable negligence. While exceeding the speed limit by a few miles per hour would not, by itself, establish culpable negligence, there are circumstances where sufficient excess speed alone could do so.

When reviewing for legal sufficiency, we view the evidence in the light [*8] most favorable to the Government. The posted speed limit was 65 miles per hour. The Government's expert testified that Appellant was driving over 100 miles per hour, perhaps up to 115 miles per hour, when he lost control of his car. One of Appellant's passengers died as a result of his operation of his car and it is foreseeable that his unlawful act in driving over 100 miles per hour on a curvy, downhill public road would result in a fatal crash.

When giving the evidence a fresh, impartial look, as we are required to do when assessing factual sufficiency, Appellant's exact speed at the time of the crash becomes less clear. The Defense successfully challenged the Government expert's conclusions and provided an alternative expert opinion. If the sole evidence before the military judge was the testimony of these expert witnesses, this case might be a closer call, but the evidence was much more than just a so-called "battle of the experts." The Government expert's opinion was corroborated by multiple lay witnesses, including the civilian occupants of two other cars on the road that day, by occupants of the fellow Airman's car, by the surviving passenger of Appellant's car, and even by [*9] Appellant's own admissions.

Appellant's friend, who was his rear-seat passenger at the time of the crash, testified that he had ridden with Appellant more times than he could count and this was the fastest Appellant had ever driven. He also testified that 10-30 seconds before the crash, Appellant was driving at what seemed to him as over 120 miles per hour. The two civilian drivers on the road put Appellant's speed when he passed them as well above 80 miles per hour. Appellant himself admitted that he was driving over 80 miles per hour. The evidence of his excessive speed alone might well have been sufficient to establish the foreseea-bility of a fatal crash, but the Government introduced additional evidence to prove the degree of Appellant's negligence.

The evidence established that Appellant was a relatively inexperienced driver, driving a modified manual

transmission "muscle car," and that his driving behavior on the day in question involved high-speed passing, along with rapid acceleration and deceleration. Although the driving conditions were gen-erally good, with dry well-maintained pavement and ample daylight, the crash occurred in a portion of the road with two curves and a [*10] significant downhill grade. This evidence of the manner in which Appellant was driving and of the other surrounding circumstances, taken together with his excessive speed, establishes that Appellant's actions constituted culpable negligence.

It is foreseeable that a crash will occur when an inexperienced driver engages in high-speed passing on both sides of other vehicles, on a stretch of road with curves and a notable downhill grade, all while driving at speeds at least in excess of 80 miles per hour. Moreover, death of an occupant is a foreseeable result of a crash at these speeds. After reviewing the testimony and photographs of the crash and resulting destruction, we are convinced that it is not only foreseeable, but a natural and probable result of such a high speed crash for all three occupants to be killed. Appellant's actions in driving the way he did culpably disregarded these foreseeable consequences and, thus, amounted to culpable negligence.

Appellant next argues that the pre-crash modifications to his vehicle, particularly the unexplained disconnection of the side airbags, were the actual cause of the death. He points to the testimony of the medical examiner that the [*11] deceased was partially ejected from the vehicle and died as a result of a compression fracture of his skull. Appellant argues that if the airbags had worked properly, Appellant might not have been partially ejected and would not have suffered the same type of injury to his skull.

The modifications to the vehicle did not make a fatal crash at Appellant's speed and manner of driving any less foreseeable. There is no evidence that the modifications to Appellant's vehicle would have caused a reasonable person to expect it to handle so safely at high speeds on such a road that it would be unforeseeable for an inexperienced driver to crash and cause the death of a passenger. Additionally, while it is possible that a fully functioning airbag sys-tem could have intervened to *save* the decedent's life, it was Appellant's acts or omissions—not the lack of a side airbag—that *caused* his death. Thus, none of the modifications to Appellant's vehicle made a fatal accident any less foresee-able nor do they make his disregard for these foreseeable results any less culpable. It was Appellant's driving behavior, not the modifications to his vehicle, that caused his passenger's death.

We are convinced [*12] that a reasonable factfinder could have found—as the military judge did—all the essential elements of involuntary manslaughter be-yond a reasonable doubt. In addition, after weighing the evidence in the record of trial and making allowances for not personally observing the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt.

III. Conclusion

The approved findings and the sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. *Ar-ticles 59(a)* and *66(c)*, UCMJ, *10 U.S.C. §§ 859(a)*; *866(c)*. Accordingly, the approved findings and the sentence are **AFFIRMED**.

End of Document

United States v. Crews

United States Army Court of Criminal Appeals

February 29, 2016, Decided

ARMY 20130766

Reporter

2016 CCA LEXIS 127 *

UNITED STATES, Appellee v. Sergeant JASON R. CREWS, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by *United States v. Crews, 75 M.J. 369, 2016 CAAF LEXIS 552 (C.A.A.F., June 9, 2016)*

Motion granted by *United States v. Crews, 76 M.J. 37, 2016 CAAF LEXIS 1037 (C.A.A.F., Dec. 5, 2016)*

Review granted by, in part *United States v. Crews, 76 M.J. 70, 2017 CAAF LEXIS 156 (C.A.A.F., Jan. 25, 2017)*

Affirmed by, Without opinion by *United States v. Crews, 2017 CAAF LEXIS 560 (C.A.A.F., May 4, 2017)*

Vacated by *United States v. Crews, 2017 CAAF LEXIS 398 (C.A.A.F., May 5, 2017)*

Motion denied by *United States v. Crews, 2017 CAAF LEXIS 479 (C.A.A.F., May 16, 2017)*

Affirmed by *United States v. Crews, 2017 CAAF LEXIS 485 (C.A.A.F., May 17, 2017)*

Prior History: [*1] Headquarters, 1st Infantry Division and Fort Riley. Gregory A. Gross, Military Judge, Lieutenant Colonel John A. Hamner, Staff Judge Advocate (pretrial), Colonel Craig E. Merutka, Staff Judge Advocate (post-trial).

Core Terms

video, indecent exposure, lesser-included, touched, specification, witnesses, deference, military, assault, trial court, penis, instructions, daughter, exposure, sitting, notice, sexual abuse of child, factual sufficiency, indecent act, plain error, guilt, appellate court, hearsay, playing, sexual

Case Summary

Overview

HOLDINGS: [1]-Testimony provided by two children and a child's mother during a servicemember's trial on a charge alleging that he committed rape of a child, in violation of UCMJ art. 120b, *10 U.S.C.S. § 920b*, that was based on a conversation the mother had with her six-year-old daughter after she viewed a video of the servicemember interacting with the child, was inclusive and not sufficient as a matter of law to sustain the servicemember's conviction for the lesser-included offense of sexual abuse of a child; [2]-The servicemember waived his right to appeal the military judge's decision to instruct the panel that indecent exposure was a lesser-included offense of committing an indecent act, in violation of UCMJ art. 120, *10 U.S.C.S. § 920*, when he did not object to the instruction, and the judge did not commit plain error when he instructed the panel on indecent exposure.

Outcome

The court set aside the servicemember's conviction for sexual abuse of a child and dismissed that charge, affirmed the servicemember's conviction for indecent exposure, set aside the servicemember's sentence, and authorized a rehearing to determine a sentence on the servicemember's conviction for indecent exposure.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1[] **Judicial Review, Courts of Criminal Appeals**

The United States Army Court of Criminal Appeals ("ACCA") has the independent duty to review the record to determine whether it is correct in law and fact. Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*. The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The test for factual sufficiency, on the other hand, involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c) to take into account the fact that the trial court saw and heard the witnesses. In exercising this authority, the ACCA gives no deference to the decisions of the trial court (such as a finding of guilty), but does recognize the trial court's superior ability to see and hear the witnesses. In reviewing for factual sufficiency, the ACCA is limited to the facts introduced at trial and considered by the court-martial. The ACCA may affirm a conviction only if it concludes, as a matter of factual sufficiency, that the evidence proves an appellant's guilt beyond a reasonable doubt.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > US Court of Appeals for the Armed Forces

HN2[] **Judicial Review, Courts of Criminal Appeals**

The United States Court of Appeals for the Armed Forces ("CAAF") does not share either the United States Army Court of Criminal Appeals' ("ACCA's") factual review authority or responsibility. Nonetheless, ACCA decisions are subject to review by the CAAF.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN3[] **Judicial Review, Courts of Criminal Appeals**

The deference given to a trial court's ability to see and hear the witnesses and evidence—or "recognition" as phrased in Unif. Code Mil. Justice art. 66, *10 U.S.C.S. §*

866—reflects an appreciation that much is lost when the testimony of live witnesses is converted into the plain text of a trial transcript. While court-reporter notes may sometimes reflect a witness's gesture, laugh, or tearful response, they do not attempt to reflect the pauses, intonation, defensiveness, surprise, calm reflection, or deception that is often apparent to those present at a court-martial. A panel hears not only a witness's answer, but may also observe the witness as he or she responds. To say that an appellate court is at a relative disadvantage in determining questions of fact as compared to a trial court is to state the obvious. In New York State —where the intermediate appellate court conducts a review for factual sufficiency—the intermediate appellate court gives great deference to the fact-finder's opportunity to view the witnesses, hear the testimony, and observe demeanor. However, neither the United States Army Court of Criminal Appeals nor the United States Court of Appeals for the Armed Forces has quite so clearly delineated the amount of deference due a trial court when conducting a factual sufficiency review.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN4[] **Judicial Review, Courts of Criminal Appeals**

In United States v. Johnson, the United States Army Court of Military Review distinguished between evidence whose weight depended on the factfinder's assessment of credibility, and evidence where the appellate court was at little or no disadvantage in reviewing the evidence. Similarly, in United States v. Davis, the United States Army Court of Criminal Appeals noted that the degree to which it recognizes or gives deference to a trial court's ability to see and hear the witnesses will often depend upon the degree to which the credibility of the witnesses is at issue.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN5[] **Judicial Review, Courts of Criminal Appeals**

In United States v. Johnson, the United States Army Court of Military Review (now the United States Army Court of Criminal Appeals ("ACCA")) stated that Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. § 866(c), cautioned the court to bear in mind that a trial court saw and heard the witnesses, and that in cases where witness credibility played a critical role in the outcome of the trial, it hesitated to second-guess the court's findings. This was inartfully stated as it is the ACCA's duty to "second-guess" a court-martial's findings and the ACCA does not hesitate in that duty. However, the underlying concept—that more deference is due when credibility is key to determining the weight of the evidence—remains sound. The court of military review went on to say in Johnson that when the evidence does not depend on credibility determinations, its independence as a fact-finder should only be constrained by the evidence of record and the logical inferences emanating therefrom.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN6[] **Judicial Review, Courts of Criminal Appeals**

The admonition that the United States Army Court of Criminal Appeals recognizes a court-martial panel's ability to see and hear the witnesses applies not only to credibility determinations, but also to weighing the evidence. Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Witnesses

HN7[] **Judicial Review, Standards of Review**

Children sometimes testify with shocking candor, but may also be easily manipulated on the stand. A dry transcript will contain some of these elements, but a trial court is far better positioned to determine the appropriate weight such testimony should be given.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Military & Veterans Law > ... > Courts Martial > Sentences > Maximum Limits

Military & Veterans Law > ... > Courts Martial > Sentences > Confinement

HN8[] **Military Offenses, Rape & Sexual Assault**

The maximum authorized punishment for committing an indecent act in violation of Unif. Code Mil. Justice ("UCMJ") art. 120, *10 U.S.C.S. § 920*, includes up to five years of confinement. Manual Courts-Martial ("MCM") pt. IV, para. 45.f.(6) (2008). The maximum authorized punishment for indecent exposure in violation of art. 120, *10 U.S.C.S. § 920*, includes up to one year of confinement. MCM pt. IV, para. 45.f.(7) (2008). That is, a conviction on indecent exposure reduces the possible confinement that could be adjudged for that offense by 80 percent.

Criminal Law & Procedure > Appeals > Reviewability > Waiver

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN9[] **Reviewability, Waiver**

Deviation from a legal rule is error unless the rule has been waived. Waiver is the intentional relinquishment or abandonment of a known right. Whether a particular right is waivable, whether a defendant must participate personally in the waiver, whether certain procedures are required for waiver, and whether a defendant's choice must be particularly informed or voluntary, all depend on the right at stake.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN10[] **Plain Error, Definition of Plain Error**

Under a plain error analysis, an appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the appellant.

Military & Veterans Law > Military Offenses

HN11[] **Military & Veterans Law, Military Offenses**

The element of indecent exposure, in violation of Unif. Code Mil. Justice art. 120, 10 U.S.C.S. § 920, that requires the conduct to occur somewhere other than in front of his own family or household serves as a limitation on what conduct is indecent. That is, being seen naked by your own family—while an "exposure"—is not an indecent exposure.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Burdens of Proof

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN12[] **Plain Error, Burdens of Proof**

When it comes to unpreserved error, the burden is on an appellant to establish prejudice. An appellant bears the burden of proving prejudice because he did not object at trial, and must show that under the totality of the circumstances, the Government's error resulted in material prejudice to his substantial, constitutional right to notice.

Military & Veterans Law > Military Offenses

HN13[] **Military & Veterans Law, Military Offenses**

One commits indecent exposure, in violation of Unif. Code Mil. Justice art. 120, 10 U.S.C.S. § 920, when one intentionally exposes, in an indecent manner, the genitalia. Manual Courts-Martial pt. IV, para. 45.a.(n) (2008).

Counsel: For Appellant: Captain Matthew L. Jalandoni, JA (argued); Colonel Kevin Boyle, JA; Major Yolanda McCray Jones, JA; Captain Patrick J. Scudieri, JA (on brief); Colonel Mary J. Bradley, JA; Major Christopher D. Coleman, JA; Captain Patrick J. Scudieri, JA (on brief on specified issue).

For Appellee: Captain Timothy C. Donahue, JA (argued); Major Daniel D. Derner, JA; Captain James P. Curtin, JA (on brief); Colonel Mark H. Sydenham, JA; Major Daniel D. Derner, JA; Captain Timothy C. Donahue, JA (on brief on specified issue).

Judges: Before HAIGHT, PENLAND, and WOLFE, Appellate Military Judges. Senior Judge HAIGHT and Judge PENLAND concur.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION

WOLFE, Judge:

A panel composed of officer and enlisted members sitting as a general court-martial convicted appellant, contrary to his pleas, of indecent exposure (as a lesser-included offense of indecent acts) and sexual abuse of a child (as a lesser-included offense of rape of a child), in

violation of Articles 120 and 120b, Uniform [*2] Code of Military Justice, *10 U.S.C. §§ 920* and *920b (2006 & Supp. IV; 2012)* [hereinafter UCMJ]. Appellant was arraigned on charges that included one specification of rape of a child (KG) under the age of 12 years, and one specification of indecent acts in the presence of Mrs. SG.[1] The convening authority approved the adjudged sentence of a dishonorable discharge, confinement for one year, forfeiture of all pay and allowances, and reduction to the grade of E-1.

Appellant's case is now before this court for review pursuant to *Article 66(c)*, UCMJ. Appellant assigns two errors, both of which merit discussion, and one of which merits relief. Specifically, we find the evidence supporting appellant's conviction for sexual abuse of a child to be factually insufficient.

BACKGROUND

The facts surrounding this case all took place in 2012 in a neighborhood of family housing at Fort Riley, Kansas. While not strictly neighbors, appellant, KG, and Mrs. SG all lived within a few minutes' drive of each other. KG is the five-year-old daughter of an Army specialist who served in the same company as appellant. Appellant, however, did not have any supervisory relationship or [*3] responsibilities over KG's father. Mrs. SG was the wife of an Army soldier. Mrs. SG and KG are not related and lived in separate homes in the neighborhood.

DISCUSSION

A. Factual Sufficiency of Sexual Abuse of a Child

[1] A third charge of indecent language was dismissed after arraignment.

Appellant visited KG's house often. KG's mother testified that appellant stopped by nearly every workday during his lunch break for a brief visit, and often on weekends. During these visits, KG would ask appellant for piggyback rides, and crawl over him while he was on the floor. KG's mother testified that several times appellant volunteered to babysit KG, which she and her husband declined. Appellant was also very gracious with helping around the house, to include changing the brakes and oil on the family car, fixing the dryer, and assisting with an intra-post move to a one-story house necessitated by a back injury to KG's father.

KG had an electronic toy which in addition to playing math and reading games allowed the user to take short 30-second videos. In October of 2012, KG's mother was looking at the toy when she saw a video of appellant and KG that she found disturbing. She asked KG if anyone had ever done anything inappropriate with her. KG answered yes, and indicated [*4] that appellant had touched her genitals. During a subsequent child forensic interview, KG stated that appellant had touched her genitals and penetrated her vagina.

At trial, the government attempted to prove their case that appellant raped KG through the admission of the video and the testimony of KG, KG's mother, and the boy who filmed the video, DH. We will discuss each at length.

1. Facts

a) Testimony of KG's Mother

KG's mother was the government's first witness. She provided background information and the history of interactions between appellant and KG. Most crucially, she also testified to her daughter's statement that appellant had inappropriately touched KG's genitals. Her key testimony was as follows:

Q [TC]: Has anything between your family and Sergeant Crews changed that relationship?
A: The instant [sic] that happened with our daughter.
Q: Can you tell the panel members a little bit about that?

A: It was one September evening, my friend has just gotten back from her grandmother's funeral. So we had a little barbeque and [appellant] was also over there with us, and we were just -- all the adults were outside and the kids were playing in [KG's] bedroom. And my daughter had one of [*5] those Leap Frogs that records videos and stuff. And I actually didn't notice it until October, but I was watching the video and it was actually recorded with [appellant] sitting on the edge of my daughter's bed with her completely covered underneath the jacket sitting on his lap, and that is when I discovered it. And I went and told my husband about it because he was in the bathroom -- and our daughter was in the living room when I discussed it with him; and I had walked back into the living room to ask her if anybody had done anything that she thought was wrong, and she shook her head yes; and I asked her, "Who?" I never said any name, but she said, "Sergeant Crews," and I asked her, "What did he do?" and she doesn't know the term names for her body parts because she is only six, but I asked her can -- I said, "Can you show me where he touched you?" and she proceeded to move the blanket and pointed down to her vaginal area, and that is how I discovered what had happened in her bedroom.

KG's mother further clarified that she discovered the video about a month and a half after it was taken. The defense did not object to KG's mother's testimony as hearsay or otherwise. The record provides [*6] no basis to believe that a plausible hearsay exception would have applied.[2]

b) The Video

The video, which was admitted over defense objection, is somewhat grainy.[3] Additionally, the video's camerawork reflects the fact that the video was taken by KG's friend, DH, a six-year-old neighborhood boy.

At the outset of the 30-second video, appellant is seen sitting on the edge of KG's bed. KG is sitting on appellant's lap and has a large adult jacket wrapped around her midsection and waist. Approximately halfway through the video, KG pulls the jacket over her head while appellant embraces KG by the waist with his left arm, [*7] which remains above the jacket. However, appellant then places his hand beneath the jacket, although his upper arm, elbow, and parts of his forearm remain visible. The angle of his forearm makes it possible that appellant has placed his hand near either KG's stomach or pelvic area. The video ends a few seconds later.

c) Testimony of KG

At trial KG's mother generally testified consistently with her initial statement to investigators and her testimony at the *Article 32*, UCMJ, investigation. KG, however, did not. While KG answered some initial background

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[2] We note of course that as there was no objection, the government did not attempt to lay down a foundation for a hearsay exception. Our review of the record, to include the criminal investigation, *Article 32*, UCMJ, investigation, and other allied papers attached to the record under Rule for Courts-Martial [hereinafter R.C.M.] 1103, does not reveal any indication of an applicable exception, such as an excited utterance.

[3] Testimony at trial revealed that a technician was unable to digitally copy the video. Instead the copy presented at trial was made by filming the screen of the video player.

questions, such as the name of her dog, her answer to every question of substance on direct exam was "I don't know."[4]

d) Testimony of DH

Finally, the government called DH, the boy who recorded the video. DH's direct testimony, at least when reduced to a written transcript, could generously be described as muddled. It appears that DH, who the government [*8] relied on in authenticating the video, hadn't seen the video at any time between when it was first filmed and when it was played in court. DH at times appears to testify about videos he made which were not admitted into evidence. When recounting a conversation he had with his mother (where he told his mother that KG "got touched in the private") he appears to confuse counsel's questions about where he was when he was talking to his mother, and where he was when KG was touched. DH testified he saw KG get touched, and immediately thereafter said he did not see it. In short, it is not possible to make any sense of DH's testimony one way or the other with respect to the charged misconduct he was called to testify about.

e) The Defense Case

The defense case-in-chief consisted of several witnesses. The first, a child psychologist, testified as an expert witness about child memories. The defense also called several character witnesses who had daughters the same age as KG. After laying the foundation that appellant also spent a lot of time playing with their kids, they testified that they had high opinions of appellant's "character towards children"[5] and that he was helpful.

2. Law

On appeal, appellant claims that the evidence of child sexual abuse is factually insufficient to support the conviction. In response, the government argues that KG's hearsay statement to her mother, in light of the video, is sufficient.[6]

Nonetheless, *HN1*[↑] we have the independent duty to review the record to determine whether it is correct in law *and* fact. *UCMJ art. 66(c)*. The test for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact [*10] could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560, (1979)*; *see also United States v. Phillips, 70 M.J. 161, 166 (C.A.A.F. 2011)*. The test for factual sufficiency, on the other hand, "involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in *Article 66(c)*, UCMJ, to take into account the fact that the trial court saw and heard

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[4] The record does not indicate any request for remote live testimony under R.C.M. 914A, or any other accommodation to assist a six-year-old testifying about a difficult subject. Nor was there any attempt by the trial counsel to declare KG unavailable and admit her testimony at the *Article 32* investigation. *See* Mil. R. Evid. 804(a)(3).

[5] The testimony was [*9] admitted without objection and it is not necessary for us to address whether this was testimony about the appellant's *behavior* around children, or whether it was a pertinent character trait and admissible under Mil. R. Evid. 404(a)(1).

[6] The government's brief argued only that the evidence was legally sufficient. That is, the government argued that "[w]hen viewed in a light most favorable to the government, there was sufficient evidence for a rational fact finder to find beyond a reasonable doubt that appellant sexually abused a child under the age of twelve." At oral argument, the government made clear that the position of the United States was that the evidence was both legally and factually sufficient.

the witnesses." *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*. In exercising this authority this court gives no deference to the *decisions* of the trial court (such as a finding of guilty), but does recognize the trial court's superior ability to see and hear the witnesses. *Id.* (A court of criminal appeals gives "no deference to the decision of the trial court" but is required to adhere to the admonition to take into account the fact that the trial court saw and heard the witnesses).

In reviewing for factual sufficiency we are limited to the facts introduced at trial and considered by the court-martial. *United States v. Beatty, 64 M.J. 456 (C.A.A.F. 2007)*. Thus, for example, we do not consider KG's unadmitted pretrial statements, no matter how compelling, in determining whether there was sufficient evidence to support the findings. We may affirm a conviction only if we conclude, as a matter of factual [*11] sufficiency, that the evidence proves appellant's guilt beyond a reasonable doubt. *United States v. Sills, 56 M.J. 239, 240-41 (C.A.A.F. 2002)*; *United States v. Turner, 25 M.J. 324, 324-25 (C.M.A. 1987)*.

HN2[⬆] Our superior court does not share either our factual review authority or responsibility. *Compare Article 66 with Article 67*, UCMJ. Nonetheless, our decisions are subject to review by the United States Court of Appeals for the Armed Forces (C.A.A.F.). *United States v. Nerad, 69 M.J. 138, 140 (C.A.A.F. 2010)* ("[W]hile CCAs have broad authority under *Article 66(c)*, UCMJ, to disapprove a finding, that authority is not unfettered. It must be exercised in the context of legal—not equitable—standards, subject to appellate review.").

3. Analysis

This case, somewhat uniquely, raises the degree to which we recognize the trial court's superior position in seeing and hearing the evidence. Accordingly, and as we find the evidence factually insufficient, we believe it wise to discuss how we arrive at our conclusion in light of these considerations.

HN3[⬆] The deference given to the trial court's ability to see and hear the witnesses and evidence—or "recogni[tion]" as phrased in *Article 66*, UCMJ—reflects an appreciation that much is lost when the testimony of live witnesses is converted into the plain text of a trial transcript. While court-reporter notes may sometimes reflect a witness's gesture, laugh, or tearful response, [*12] they do not attempt to reflect the pauses, intonation, defensiveness, surprise, calm reflection, or deception that is often apparent to those present at the court-martial. A panel hears not only a witness's answer, but may also *observe* the witness as he or she responds. For instance, a transcript may state "I am showing the witness prosecution exhibit 13 for identification" but will leave unstated the witness's demeanor—whether surprise, recognition, or dread, when reviewing or confronted with evidence.

To say that an appellate court is at a relative disadvantage in determining questions of fact as compared to a trial court is to state the obvious. In New York State—the only other jurisdiction we are aware of where the intermediate appellate court conducts a review for factual sufficiency—the intermediate appellate court gives "[*g*]*reat deference* . . . to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor." *People v. Romero, 7 N.Y.3d 633, 644, 859 N.E.2d 902, 826 N.Y.S.2d 163 (2006)* (emphasis added) (quoting *People v. Bleakley, 69 N.Y.2d 490, 495, 508 N.E.2d 672, 515 N.Y.S.2d 761 (1987)*). However, neither this court, nor our superior court, has quite so clearly delineated the amount of deference due the trial court when conducting a factual

sufficiency review.

HN4[] In United States v. Johnson, 30 M.J. 930, 934 (A.C.M.R. 1990), [*13] we distinguished between evidence whose weight depended on the factfinder's assessment of credibility, and evidence where the appellate court was at little or no disadvantage in reviewing the evidence.[7] Similarly, and more recently, in United States v. Davis, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015) (en banc), we noted that "the degree to which we 'recognize' or give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witnesses is at issue."

As related above, the government sought to introduce four substantive components of evidence to support the conviction involving KG: First, KG's mother testified that KG had told her that appellant had touched her sexually; second, a video, that while certainly concerning, does not explicitly depict any sexual touching; third, the government's attempt to present testimony by the alleged victim, KG; and fourth, the testimony of DH, who stated both that he saw and didn't see appellant touch KG's "privates."

With regards to the video, our ability to review the evidence and assign it proper weight is nearly identical to that of the panel members.[8] The record of trial contains the same digital copy of the video that was played for the members. It is what it is. While the video was relevant evidence that explains how the allegations came to light, as well as demonstrating opportunity, the video does not explicitly depict a sexual assault.

While we give little or no deference to the trial court's weighing of a video, the testimony of the two child witnesses falls on the other side of the spectrum. HN7[] Children sometimes testify with shocking candor, but may also be easily manipulated on the stand. A dry transcript will contain some of these elements, but the trial court is *far* better positioned to determine the appropriate weight such testimony should be given.

Nonetheless, the testimony of the two child eyewitnesses does not support the court-martial's findings. KG's testimony of "I don't know" can be interpreted in two ways: first, as some evidence that the assault did not happen; or second, that she was essentially refusing to answer any questions. Neither interpretation provides evidence of appellant's guilt. Similarly, it is hard to draw any inferences, one way or the other, from DH's internally contradictory testimony. Even applying the "great deference" standard employed by New York intermediate appellate courts, *see, e.g.* Romero, 7 N.Y.3d at 644, the testimony of the [*16] two children in this case does not weigh in favor of

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[7] HN5[] In *Johnson* we stated that Article 66(c), UCMJ, "cautions us to bear in mind that 'the trial court saw and heard the witnesses.' Thus, in cases where witness credibility plays a critical role in the outcome of the trial, we hesitate to second-guess the court's findings." 30 M.J. at 934 (citation omitted). This was inartfully stated as it is our duty to "second-guess" a court-martial's findings and we do not hesitate in this duty. However, the underlying concept—that more deference is due when credibility is key to determining the weight of evidence—remains sound. We went on to say in *Johnson*, for example, that when the evidence does not depend on credibility determinations, "our independence as a fact-finder should only [*14] be constrained by the evidence of record and the logical inferences emanating therefrom." *Id.*

[8] We say "nearly identical" for two reasons. First, the panel members had the ability to observe the witness's reaction when the video was played in court. Second, HN6[] the [*15] admonition that we recognize the panel's ability to see and hear the witnesses applies not only to credibility determinations, but also to "weigh[ing] the evidence." UCMJ art. 66(c).

appellant's guilt.[9]

Accordingly, the only evidence of weight of appellant's guilt is the testimony of KG's mother. As discussed above, KG's mother had no firsthand evidence of the offense. Rather, the inculpatory evidence consisted of repeating KG's statements that appellant had touched her inappropriately. While these unobjected-to hearsay statements were admitted for their truth—and we consider them as such—the lack of an applicable hearsay exception is concerning. Additionally, as recounted at trial, the key statement by KG was in response to a leading question from her mother. After KG indicated that appellant had done something wrong, her mother asked "can you show me where he touched you" which presupposed that an inappropriate touch was the "something wrong."

Having reviewed the entire record, we are not convinced beyond a reasonable doubt that appellant committed the offense of sexual abuse of a child. The evidence in this case did not "exclude every fair and reasonable hypothesis of the evidence except that of guilt." Dep't [*17] of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook [hereinafter Benchbook], para. 8-3 (10 Sept. 2014). Accordingly, we will set aside the finding of guilty in our decretal paragraph.

B. Indecent Exposure

During the course of appellant's friendship with KG's family, he was also introduced to Mrs. SG. Mrs. SG was an adult woman also living in family housing on Fort Riley. Appellant would stop by and talk to Mrs. SG while she was sitting outside on her porch. At trial, however, one instance stood out in her mind.

Mrs. SG stated she was sitting on her porch talking with appellant. She stated it was a perfectly normal conversation, until it suddenly wasn't. Specifically, she testified it got awkward when appellant unbuttoned his ACU pants, took out his penis, and began "messing" with himself by stroking his penis. Mrs. SG estimated this went on for twenty minutes while she tried to ignore what appellant was doing and concentrated on her laptop. She stated she discussed this event with her husband that night but decided not to report the incident as it did not happen again.

Prior to instructing the members on findings, the military judge conducted an *Article 39(a)*, UCMJ, session [*18] to discuss instructions. Specifically, the military judge addressed whether indecent exposure was a lesser-included offense of indecent acts:

> MJ: Now regarding Charge II and its Specification as I mentioned in the 802 conference this morning I saw one lesser include [sic] of indecent exposure; does either side want to be heard on that?
>
> DC: No, Your Honor.

At the end of the *Article 39(a)*, UCMJ, session, and again at several more instances during the remainder of the trial, the defense did not object to the military judge's proposed instruction on the lesser-included offense.[10] After being notified of the issue first at a R.C.M. 802 conference, and later at the *Article 39(a)*, UCMJ, session, the defense chose not to object to the

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[9] In its brief the government does not rely on either child's testimony in arguing in favor of affirmance.

[10] *HN8*[↑] The maximum authorized punishment for an indecent act includes up to five years of confinement. *See Manual for Courts-Martial, United States* (2008 ed.) [hereinafter *MCM*, 2008 ed.] pt. IV, ¶ 45.f.(6). The maximum authorized punishment for indecent exposure includes up to one year of confinement. *MCM*, 2008 ed. at ¶ 45.f.(7). That is, a conviction on indecent exposure reduced the possible confinement that could be adjudged for that offense [*19] by 80%.

instruction on the lesser-included offense.

We find that this amounted to an affirmative waiver of the matter.

> HN9[] "Deviation from a legal rule is 'error' unless the rule has been waived." United States v. Olano, 507 U.S. 725, 732-33, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). Waiver is the "intentional relinquishment or abandonment of a known right." United States v. Harcrow, 66 M.J. 154, 156 (C.A.A.F. 2008) (quoting United States v. Olano, 507 U.S. 725, 732-33, 113 S. Ct. 1770, 123 L. Ed.2d 508 (1993)). "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *Id.* (quoting Olano, 507 U.S. at 733).

United States v. Girouard, 70 M.J. 5, 10 (C.A.A.F. 2011). In *Girouard*, the court found that waiver was not present, because (unlike this case), the case law governing what constituted a lesser-included offense had changed between trial and appeal. That is, the defense counsel in *Girouard* did not intentionally relinquish a known right, as the right had not yet been clearly identified in United States v. Jones, 68 M.J. 465 (C.A.A.F. 2010). The present case was tried well after *Jones*. Here, the military judge specifically notified the defense that he intended to instruct on the lesser-included offense of indecent exposure, and the defense declined the military judge's invitation to be heard on the matter. Moreover, the defense was provided a copy of the written instructions to [*20] review, and heard the instructions given to the panel. In each instance, the elements of the two offenses in question were laid out one after the other without objection. Under the circumstances of this case, this constituted waiver.

Even assuming that an objection to the instruction on the lesser-included offense of indecent exposure was not affirmatively waived, the failure to object to the instructions forfeited the objection, absent plain error. R.C.M. 920(f); United States v. Tunstall, 72 M.J. 191, 193 (C.A.A.F. 2013); *see also* United States v. Wilkins, 71 M.J. 410, 412 (C.A.A.F. 2012) (citing United States v. Arriaga, 70 M.J. 51, 54 (C.A.A.F. 2011)); Davis, 75 M.J. 537.

> HN10[] "Under a plain error analysis, [an appellant] 'has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused.'" Tunstall, 72 M.J. at 193-94 (quoting Girouard, 70 M.J. at 11).

Applying the elements test, appellant claims that the military judge committed error as an "indecent act does not require proof of an additional element not found in the instruction for indecent exposure" and that "proof of indecent exposure requires proof that the exposure was intentional and that it was made at a place where the conduct could reasonably be expected to be viewed by people other than members of the accused's family or household."

We first note that a reasonable panel could [*21] have credited the testimony that appellant pulled out and exposed his penis on Mrs. SG's front porch, but not credited the testimony that he then stroked his penis for twenty minutes while she continued to work on her computer. That is, the panel could have credited the evidence supporting the *exposure*, while not crediting the *act* of masturbation.

We also note that HN11[] the element of indecent exposure that requires the conduct to occur somewhere other than in front of his own family or household serves as a limitation on what conduct is indecent. That is,

being seen naked by your own family—while an "exposure"—is not an indecent exposure. Appellant was charged with exposing his penis to Mrs. SG, a person he clearly knew not to be a member of his family. Moreover, as charged, the specification alleged that appellant pulled out his penis and stroked it on the front porch of Mrs. SG. That is, as charged, appellant's exposure of his penis was an intentional act, committed in public; it was not an accidental or negligent exposure or an exposure in front of his family.

HN12[] When it comes to unpreserved error, the burden is on the appellant to establish prejudice. *Wilkins, 71 M.J. at 413*; *United States v. Humphries, 71 M.J. 209, 217 n.10*. "Appellant bears the burden of [*22] proving prejudice because he did not object at trial. Appellant must show 'that under the totality of the circumstances in this case, the Government's error . . . resulted in material prejudice to [his] substantial, constitutional right to notice.'" *Wilkins, 71 M.J. at 413* (alterations in original) (quoting *Humphries, 71 M.J. at 215*) (internal citation omitted).

In *Wilkins* the United States Court of Appeals for the Armed Forces (C.A.A.F.) found that the military judge committed error by instructing the panel on abusive sexual contact as a lesser-included offense of aggravated sexual assault based on how the offense was charged. However, as the appellant had not objected at trial, the C.A.A.F. tested for plain error. The C.A.A.F. found that the appellant was "on notice of all of the elements he had to defend against." *Wilkins, 71 M.J. at 414*. Additionally, the lesser-included offense did not change the defense's strategy at trial. *Id.* Thus while finding error, and finding that it was plain and obvious, the court affirmed the findings as the appellant in *Wilkins* did not carry his burden of demonstrating a material prejudice to a substantial right. *Id. at 413* ("Appellant has not met this burden because he cannot establish prejudice to his ability to defend against [*23] the charge he was convicted of or his right to notice."). *Cf. United States v. Riggins, 75 M.J. 78, 85 (C.A.A.F. 2016)* (preserved constitutional error reviewed for harmlessness beyond a reasonable doubt).

In the present case, appellant does not even attempt to meet his burden. While appellant's brief identifies that plain error is the appropriate test, the brief addresses only the first prong of the plain error test, and does not address whether the error was plain or obvious, and if so, how the error resulted in a material prejudice to a substantial right of appellant. Accordingly, appellant has failed to meet his burden and is not entitled to relief. Even if we were to attempt to meet appellant's burden for him regarding the plain and obvious nature of the error, we find that as in *Wilkins*, the instruction on the lesser-included offense did not deprive appellant of notice regarding what he was defending against or alter his trial strategy. The defense in this case did not hinge on whether appellant's actions were an exposure or an indecent act. Rather, the defense's case claimed that the charged misconduct simply never happened, a theory that applies with equal force to both indecent acts and indecent exposure.

Finally, setting aside whether [*24] appellant waived, forfeited, or met his plain error burden in this case, we find that this issue is controlled by our superior court's decision in *United States v. Rauscher, 71 M.J. 225 (C.A.A.F. 2012)*. In that case, the appellant was charged with assault with intent to commit murder (a violation of *Article 134*), but convicted of the lesser-included offense of aggravated assault with a dangerous weapon or means likely to cause death or grievous bodily harm (a violation of *Article 128*). *Id.* In a per curiam opinion, our superior court never addressed the elements test to determine whether aggravated assault is a lesser-included offense of assault with intent to commit murder. Rather, the C.A.A.F. looked at the words of the

specification which alleged that the appellant committed "an assault . . . by stabbing [the victim] in the hand and chest with a knife." *Id. at 226*. *Id.* The court was "convinced that the specification clearly allege[d] every element of [aggravated assault]." *Id.* That is, an elements test is unnecessary if the specification itself alleges the lesser-included offense in question.

In this case, the specification alleged that appellant did "wrongfully commit indecent conduct, to wit: pulling his penis out and openly stroking it with his hand [*25] in the presence of [SG]." *HN13*[] One commits indecent exposure when one "intentionally exposes, in an indecent manner, the genitalia . . . ." *MCM*, 2008 ed. at ¶ 45.a.(n). As every element of indecent exposure was contained in the specification, appellant was on notice that he was charged with indecent exposure. *Jones, 68 M.J. at 472* ("The charge sheet itself gives content to that general language, thus providing the required notice of what an accused must defend against.").

CONCLUSION

The finding of guilt to the Specification of Charge I, sexual abuse of a child, is set aside and that charge and its specification are DISMISSED. The finding as to the Specification of Charge II, indecent exposure, is AFFIRMED. The sentence is set aside. In accordance with R.C.M. 810, a sentence rehearing is authorized. All rights, privileges, and property of which appellant has been deprived by virtue of that portion of the findings and sentence set aside by our decision, are ordered restored. *See UCMJ arts. 58b(c)* and *75(a)*.

Senior Judge HAIGHT and Judge PENLAND concur.

Positive

As of: November 22, 2021 4:50 PM Z

United States v. Eugene

United States Army Court of Criminal Appeals

February 28, 2018, Decided

ARMY 20160438

Reporter

2018 CCA LEXIS 106 *

UNITED STATES, Appellee v. Private First Class JEFFREY G. EUGENE, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by *United States v. Eugene, 77 M.J. 374, 2018 CAAF LEXIS 254 (C.A.A.F., Apr. 30, 2018)*

Review granted by *United States v. Eugene, 78 M.J. 22, 2018 CAAF LEXIS 337 (C.A.A.F., June 18, 2018)*

Affirmed by *United States v. Eugene, 78 M.J. 132, 2018 CAAF LEXIS 676 (C.A.A.F., Oct. 29, 2018)*

Prior History: [*1] Headquarters, 25th Infantry Division. Colonel Mark A. Bridges, Military Judge, Colonel Ian R. Iverson, Staff Judge Advocate.

Core Terms

cellphone, phone, military, seizure, consent to search, messenger, withdrawn, seize, withdrawal of consent, pictures, law enforcement, discovery, interview, withdraw, privacy interest, conversations, third-party, possessed, searched, underage, videos

Case Summary

Overview

HOLDINGS: [1]-The military judge (MJ) concluded the government established that Mrs. BE possessed common authority over appellant's cellphone and could therefore lawfully authorize its seizure and search. The MJ's findings were supported by law and fact; [2]-Appellant's 5 June request that his phone be returned was too late to constitute legal withdrawal of consent to seize; [3]-Even though seizure was complete, he continued to retain a privacy interest in the contents of his cellphone at the time of his 5 June request that it be returned. The typical reasonable person would understand appellant's request that his phone be returned as merely an attempt to regain control over his personal property for personal convenience; [4]-Even if appellant had withdrawn consent to search, the inevitable discovery doctrine would apply; [5]-No error was found in the denial of the motion to suppress.

Outcome

The findings of guilty and the sentence were affirmed.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military Justice > Judicial

Review > Standards of Review

HN1[] Evidence, Evidentiary Rulings

The court of criminal appeals reviews a military judge's evidentiary ruling on a motion to suppress for an abuse of discretion. It reviews findings of fact for clear error and conclusions of law de novo. Evidence is considered in the light most favorable to the prevailing party. Under the abuse of discretion standard, the challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > ... > Warrantless Searches > Consent to Search > Third Party Consent

HN2[] Search & Seizure, Scope of Protection

The ultimate touchstone of the *Fourth Amendment* is "reasonableness." A search conducted without a warrant issued upon probable cause is per se unreasonable subject only to a few specifically established and well-delineated exceptions. A search conducted with consent is one such exception. This exception extends to the consent of a third party who possesses common authority over the premises or effects to be searched. Someone has common authority where he has joint access or control for most purposes, so that it is reasonable to recognize the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the search. A search may also be upheld where a third party has apparent authority--that is, where law enforcement reasonably believes that party has actual authority.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Consent to Search

Military & Veterans Law > Military Justice > Search & Seizure

HN3[] Warrantless Searches, Consent to Search

An appellant cannot withdraw consent to seize after seizure is complete. Mil. R. Evid. 314(e)(4), Manual Courts-Martial, which governs the voluntariness of consent searches, states that consent may be withdrawn at any time. The phrase "any time" suggests no expiration, but the U.S. Court of Appeals for the Armed Forces has provided a terminus: Consent may be withdrawn at any time, provided of course that the search has not already been conducted. Mil. R. Evid. 316(d)(2), Manual Courts-Martial, states the consent requirements of Rule 314 apply to consent seizures. The same reasoning therefore applies, and consent may be withdrawn at any time, provided that the seizure has not already been completed.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure

Military & Veterans Law > Military Justice > Search & Seizure

Criminal Law & Procedure > Search & Seizure

HN4[] Fundamental Rights, Search & Seizure

A seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property. This requires law enforcement to exercise a fair degree of dominion and control over the property.

Military & Veterans Law > Military Justice > Search & Seizure

HN5[] **Military Justice, Search & Seizure**

Mil. R. Evid. 314(e)(4), Manual Courts-Martial, states that consent to search may be limited in any way by the person granting consent and may be withdrawn at any time.

Criminal Law & Procedure > ... > Warrantless Searches > Consent to Search > Third Party Consent

Military & Veterans Law > Military Justice > Search & Seizure

HN6[] **Consent to Search, Third Party Consent**

An appellant retains a privacy interest in property with evidentiary value even after it has been seized. If an appellant retains a privacy interest even after law enforcement lawfully and meaningfully interferes with an individual's possessory interest in his property, surely the same appellant retains a privacy interest when a third party meaningfully interferes with the same interest. There is tension between this conclusion and Weston. Weston may have resulted in a different outcome if appellant had voiced his objection a second time after his wife consented to the search. That said, the U.S. Army Court of Criminal Appeals does not extinguish the possibility that there may exist a situation in which a review of the totality of the circumstances may allow for withdrawal of third-party consent to search personal property. Such factors may include whether an appellant has a greater property interest than the other party, whether the greater property interest is known by law enforcement at the time consent is withdrawn, and the known evidentiary value of the item at the time it was seized.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure

Military & Veterans Law > Military Justice > Search & Seizure

HN7[] **Fundamental Rights, Search & Seizure**

Search and seizure are separate concepts that necessitate separate analyses under the *Fourth Amendment*. If searches and seizures are separate concepts, consent to one is not, without more, consent to the other; similarly, revoking consent to one does not of itself revoke consent to the other. Furthermore, individuals can retain a privacy interest in property such as bodily fluids and computer hard drives, items whose evidentiary value is unknown until it is examined by forensic experts, after that property has been seized but before forensic analysis.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Consent to Search

Military & Veterans Law > Military Justice > Search & Seizure > Seizures

HN8[] **Warrantless Searches, Consent to Search**

After receiving written consent to search property, law enforcement is entitled to clear notice that this consent has been withdrawn. The standard for withdrawal of consent is that of objective reasonableness--what would the typical reasonable person have understood by the exchange between the officer and the suspect?

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Inevitable Discovery

HN9[] **Exceptions to Exclusionary Rule, Inevitable Discovery**

The doctrine of inevitable discovery creates an exception to the exclusionary rule allowing admission of evidence that, although obtained improperly, would have been obtained by another lawful means. Under this doctrine, an unlawful search is upheld where: 1) there is overwhelming probable cause; and 2) routine police procedure made discovery of the evidence inevitable.

Counsel: For Appellant: Captain Daniel C. Kim, JA (argued); Lieutenant Colonel Christopher D. Carrier, JA; Major Julie L. Borchers, JA; Captain Daniel C. Kim, JA (on brief).

For Appellee: Captain Marc B. Sawyer, JA (argued); Colonel Tania M. Martin, JA; Major Michael E. Korte, JA; Captain Catharine M. Parnell, JA; Captain Marc B. Sawyer, JA (on brief).

Judges: Before BERGER, CAMPANELLA, and FLEMING Appellate Military Judges.

Opinion by: BERGER

Opinion

MEMORANDUM OPINION

BERGER, Chief Judge:

This case is before us for review under *Article 66*, UCMJ. A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of attempted viewing of child pornography and four specifications of attempted sexual abuse of a child in violation of *Article 80*, Uniform Code of Military Justice, *10 U.S.C. § 880 (2012 & Supp. I 2014)*. The convening authority approved the adjudged sentence of a dishonorable discharge, confinement for twenty-six months, and reduction to the grade of E-1. This court specified three issues relating to appellant's single assignment of error, arising out of the warrantless [*2] search of his cellphone.[1] Oral argument was held on these issues.[2]

First, we find appellant's wife lawfully authorized the search of appellant's cellphone. Second, we hold the military judge did not abuse his discretion in determining appellant's request that his cellphone be returned did not amount to withdrawal of consent to search based on the totality of the circumstances. Third, we find, even if consent had been withdrawn, the inevitable discovery doctrine would apply. We therefore affirm.

BACKGROUND

On 1 June 2015, appellant went to a field exercise with his unit on Schofield Barracks, Hawaii. Prior to going to the field exercise, appellant gave his cellphone to his wife, Mrs. BE. He gave her the cellphone both so she could pay bills and also because he was not allowed to take the cellphone to the field. Appellant previously allowed Mrs. BE to register her fingerprint on the phone, and he never placed any restrictions on her use of the

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[1] After due consideration, we find the matters personally raised by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, do not merit relief.

[2] Oral argument in this case was heard in Boston, Massachusetts, on 11 January 2018 at the New England Law Boston* as part of the Outreach Program of the United States Army Court of Criminal Appeals.

* Corrected

cellphone.

On 2 June, Mrs. BE accessed the cellphone in order to retrieve a code to pay rent. While on the cellphone, she accessed the Kik messenger application. The application was clearly displayed and was accessible without a password. Mrs. BE discovered [*3] communications with other females, including conversations, nude pictures, and videos. Mrs. BE engaged with some of the females through the Kik messenger. In Kik messenger conversations with appellant and with Mrs. BE, two of the females stated they were fourteen years old, and another stated she was sixteen years old. Mrs. BE contacted appellant's platoon sergeant, to whom she forwarded some of the conversations and pictures. The platoon sergeant forwarded some of the conversations to the company first sergeant, and he advised Mrs. BE to go to the Military Police (MP) Station.

The MPs directed Mrs. BE to the Schofield Barracks Criminal Investigation Command (CID) office. There, she met Special Agent (SA) GN, who had already been briefed by the MPs and was aware Mrs. BE had found nude pictures of apparent underage females on appellant's phone. After learning appellant voluntarily turned over possession of his cellphone to Mrs. BE, that she had fingerprint access to the phone, and that she had accessed the communications and images, SA GN obtained Mrs. BE's written consent to both seize and search the cellphone. Additionally, SA GN obtained Mrs. BE's sworn statement, where she corroborated [*4] the information about apparent underage girls described above.

On 2 June, SA GN conducted a logical extraction of the cellphone that did not uncover any evidence relating to the Kik messenger application. On 3 June, SA GN interviewed the platoon sergeant and the first sergeant, both of whom corroborated that they had seen sexual communications with apparent underage girls, including images and/or videos, sent by Mrs. BE from appellant's phone.

On 5 June, SA GN interviewed appellant. During the approximately three-hour interview, appellant admitted to communication with underage girls on the Kik application, including receipt of naked and masturbation pictures and videos and transmission of naked pictures of himself. After the interview, appellant requested that his cellphone be returned. SA GN denied that request.

CID subsequently conducted a forensic examination of the cellphone, without obtaining a warrant. This later, more thorough, search yielded additional evidence that formed the basis of the charged misconduct. The conversations Mrs. BE discovered were not included in the charged misconduct.

During his court-martial, appellant filed a motion to suppress the results of the forensic [*5] extraction. Appellant's primary argument on appeal is the military judge erred by concluding appellant's request that his phone be returned did not amount to a withdrawal of consent to search.

LAW AND ANALYSIS

Standard of Review

HN1[] We review a military judge's evidentiary ruling on a motion to suppress for an abuse of discretion. *United States v. Rader, 65 M.J. 30, 32 (C.A.A.F. 2007)* (citing *United States v. Khamsouk, 57 M.J. 282, 286 (C.A.A.F. 2002)*). We review findings of fact for clear error and conclusions of law de novo. *United States v. Gallagher, 66 M.J. 250, 253 (C.A.A.F. 2008)*. Evidence is considered in the light most favorable to the prevailing party. *United States v. Leedy, 65 M.J. 208, 213*

(C.A.A.F. 2007). Under the abuse of discretion standard, "[t]he challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" United States v. Baker, 70 M.J. 283, 287 (C.A.A.F. 2011) (quoting United States v. White, 69 M.J. 236, 239 (C.A.A.F. 2010)).

Consent to Seize and Search

HN2[] "The ultimate touchstone of the Fourth Amendment is 'reasonableness.'" Brigham City v. Stuart, 547 U.S. 398, 403, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006). "[A] search conducted without a warrant issued upon probable cause is per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions." Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) (internal quotations and citations omitted). A search conducted with consent is one such exception. United States v. Hoffmann, 75 M.J. 120, 124 (C.A.A.F. 2016). This exception extends to the consent of a third party who possesses common authority over the premises or effects to be searched. Rader, 65 M.J. at 32. Someone has common authority where he has "joint access or control [*6] for most purposes, so that it is reasonable to recognize . . . the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the search." Id. at 33 (quoting United States v. Matlock, 415 U.S. 164, 171, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974)). A search may also be upheld where a third party has apparent authority—that is, where law enforcement reasonably believes that party has actual authority. Gallagher, 66 M.J. at 253.

Here, the military judge found appellant previously authorized Mrs. BE to use his cellphone, permitted her to register her fingerprint to allow access to the contents, and provided her with the phone on this occasion not only because he was not permitted to take it to the field, but also so she could pay bills. The military judge further determined SA GN knew at the time Mrs. BE provided her consent that appellant had given Mrs. BE exclusive possession of the cellphone and that she had accessed the cellphone via her registered fingerprint. The military judge concluded the government established by clear and convincing evidence that Mrs. BE possessed common authority over the cellphone and could therefore lawfully authorize its seizure and search. We find the military judge's findings are supported by law and fact. [*7]

Withdrawal of Consent to Seize

HN3[] An appellant cannot withdraw consent to seize after seizure is complete. Military Rule of Evidence (Mil. R. Evid.) 314(e)(4), which governs the voluntariness of consent searches, states "[c]onsent may . . . be withdrawn at any time." The phrase "any time" suggests no expiration, but our higher court has provided a terminus: "Consent . . . may be withdrawn at any time, provided of course that the search has not already been conducted." United States v. Dease, 71 M.J. 116, 120 (C.A.A.F. 2012). Mil. R. Evid. 316(d)(2) states the consent requirements of Mil. R. Evid. 314 apply to consent seizures. The same reasoning therefore applies, and consent may be withdrawn at any time, provided that the seizure has not already been completed.

HN4[] "A seizure of property occurs when there is some *meaningful* interference with an individual's possessory interests in that property." Hoffmann, 75 M.J. at 124 (internal quotation marks and citation omitted). This requires law enforcement to exercise a fair degree of dominion and control over the property. United States v. Jacobsen, 466 U.S. 109, 120, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984). Here, meaningful interference occurred on 2 June, when appellant's wife

consented to seizure of the cellphone and provided it to CID. The seizure was therefore complete. Under the facts of this case, we find appellant's 5 June request that his [*8] phone be returned was too late to constitute legal withdrawal of consent to seize.

Withdrawal of Third-Party Consent to Search

Appellant argues that he withdrew his wife's third-party consent, which begs the question: can one individual withdraw another person's consent, at least where he has a greater property interest in the evidence being searched? This appears to be a matter of first impression in this court.

HN5[] Military Rule of Evidence 314(e)(4) states "[c]onsent [to search] may be limited in any way *by the person granting consent* . . . and may be withdrawn at any time." (emphasis added). Neither this rule nor any other specifically addresses whether one person can withdraw another person's consent. Likewise, we have found no binding precedent from our superior court.

On the one hand, cases upholding searches based on third-party consent imply an appellant cannot revoke third-party consent. For example, in *United States v. Weston*, our superior court upheld as reasonable the search of a dwelling based on a spouse's consent that was granted *after* the appellant explicitly nonconsented. 67 M.J. 390, 391 (C.A.A.F. 2009). This is one of many cases that distinguish Georgia v. Randolph, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006), confirming law enforcement can rely on the consent of one person with common authority, even [*9] over the express objection of another person, as long as that objection is not contemporaneous. Such cases imply that, except for the contemporaneous objection scenario, one person's consent is enough.

On the other hand, our superior court has held that HN6[] an appellant retains a privacy interest in property with evidentiary value even after it has been seized. *See* Dease, 71 M.J. at 120-21. If an appellant retains a privacy interest even after law enforcement lawfully and meaningfully interferes with an individual's possessory interest in his property, surely the same appellant retains a privacy interest when a third party meaningfully interferes with the same interest.

We find the second of these competing arguments is more persuasive. We recognize there is tension between this conclusion and *Weston*. As our holding suggests, Weston may have resulted in a different outcome if appellant had voiced his objection a second time after his wife consented to the search. That said, we do not extinguish the possibility that there may exist a situation in which a review of the totality of the circumstances may allow for withdrawal of third-party consent to search personal property. Such factors may include whether an appellant [*10] has a greater property interest than the other party, whether the greater property interest is known by law enforcement at the time consent is withdrawn, and the known evidentiary value of the item at the time it was seized. We need not decide whether appellant could revoke his wife's consent to search because of our holding below.

Withdrawal of Consent to Search

HN7[] Search and seizure are separate concepts that "necessitate separate analyses under the Fourth Amendment." United States v. Wallace, 66 M.J. 5, 8 (C.A.A.F. 2008). "If searches and seizures are separate concepts, consent to one is not, without more, consent to the other; similarly, revoking consent to one does not of itself revoke consent to the other." *Id.* Furthermore, individuals can retain a privacy interest in property such as bodily fluids and computer hard drives, items "whose evidentiary value is unknown until it is examined by

forensic experts," after that property has been seized but before forensic analysis. *Dease, 71 M.J. at 120-21*. Here, even though seizure was complete, appellant continued to retain a privacy interest in the contents of his cellphone at the time of his 5 June request that it be returned.

Nonetheless, *HN8*[↑] after receiving written consent to search property, law enforcement "is entitled to clear notice [*11] that this consent has been withdrawn." *United States v. Stoecker, 17 M.J. 158, 162 (C.M.A. 1984)*. The standard for withdrawal of consent "is that of objective reasonableness -- what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Wallace, 66 M.J. at 8* (internal quotation marks and citation omitted).

The military judge found appellant's request that his cellphone be returned did not amount to withdrawal of consent to search. The military judge stated instead that "it appears the accused wanted the phone back, most likely so he could continue to use it." We note appellant waived his rights and made a lengthy incriminating sworn statement as part of an approximately three-hour interview. In that statement, he acknowledged there were nude pictures of minors and masturbation videos of minors on his cellphone, which he received through the Kik messenger application. Appellant provided his phone number, Kik messenger name, Kik messenger password, and email address to the agent who interviewed him. Our review of the evidence does not indicate appellant ever asked that his cellphone not be searched.

Under the totality of the circumstances in this case, the typical reasonable person would understand appellant's request [*12] that his phone be returned as merely an attempt to regain control over his personal property for personal convenience. Under these facts, we hold that the military judge's finding was not clearly erroneous, and we therefore affirm.

Additionally, we note that appellant testified in a suppression hearing as to the reason he asked for his phone back:

> Q. Why did you ask for your phone back?
>
> A. It's my only phone and we are in the military, it is kind of hard not to have a phone. You miss a lot of appointments and stuff. It was my only phone.

The record is not clear as to whether this information was known to the CID agent at the time appellant requested his cellphone be returned. But to the extent appellant conveyed similar information to the agent, this case would be remarkably similar to *Wallace*. In that case, appellant made incriminating statements before consenting to the search and seizure of his computer, but he later objected to the computer's removal, stating:

> [The computer] has our life on it. It has our photo albums on it. It's got our banking on it. All of our financial stuff is on there. You know, I use it to do all of our bill paying and everything else. Our online business is [*13] on there. I was like "You can't take it." Then my wife even started going nuts at that time.

Appellant's statement here is like that in *Wallace*. Both suggest any request that the property be returned was out of concern for its continued use by appellant and not to withdraw consent to search.

Inevitable Discovery

We also find that even if appellant had withdrawn consent to search, the inevitable discovery doctrine would apply.

HN9[↑] "The doctrine of inevitable discovery creates an exception to the exclusionary rule allowing admission of evidence that, although obtained improperly, would

have been obtained by another lawful means." *Wallace, 66 M.J. at 10* (citing *Nix v. Williams, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984)*). Under this doctrine, an unlawful search is upheld where: 1) there is "overwhelming probable cause"; and 2) "routine police procedure made discovery of the evidence inevitable." *Id.* (citing *United States v. Owens, 51 M.J. 204, 210-11 (C.A.A.F. 1999)*). Both conditions are met here.

There is overwhelming probable cause. Not only did appellant confess to exchanging messages, pictures, and videos with underage girls on the Kik messenger application on his cellphone, but his spouse, platoon sergeant and first sergeant all provided sworn statements confirming they viewed similar evidence originating from appellant's phone. [*14]

Special Agent GN testified that he would have contacted a military magistrate to get a search authorization if he believed he did not have consent, and that this was his standard operating procedure. This testimony parallels investigators' statements in *Wallace* regarding routine procedures.

We pause to note that while the evidence does not rise to the level of inferring intentional evasion of the warrant requirement by SA GN and SA ST, it is nonetheless concerning.

The military judge found that on 5 June, appellant requested his cellphone be returned. We are left to accept the military judge's factual finding in this regard.

On 15 June, SA GN acknowledged, in his Case Activity Summary notes, that he had been directed to seek a federal search warrant. This indicates investigators gave some thought to obtaining a warrant, although, the record does not indicate why investigators were thinking along these lines if they believed they possessed consent to search the phone. Further, contradicting CID's assertion that they believed they possessed consent to search appellant's phone, SA ST annotated on 16 June in the case notes that he would obtain appellant's consent to search his cellphone. Despite [*15] the CID agents' case notes, there is no evidence before us that the agents actually sought a search authorization or appellant's consent to search his cellphone—despite the fact that CID possessed the cell phone and, accordingly, no risk of evidence tampering or loss was present.

The simple practice of obtaining a search authorization in a case such as this, where no exigency is evidenced, would have extinguished the concerns noted herein.

Despite these concerns, this case falls within the holding in *Wallace*, and we are bound by that decision. We therefore arrive at the conclusion that the inevitable discovery doctrine applies. Finding no error in the military judge's denial of appellant's motion to suppress, we affirm.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Senior Judge CAMPANELLA and Judge FLEMING concur.

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United States v. Feliciano

United States Army Court of Criminal Appeals

August 22, 2016, Decided

ARMY 20140766

Reporter
2016 CCA LEXIS 512 *

UNITED STATES, Appellee v. Private E-2 JEFFRY A. FELICIANO, JR., United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review granted by, in part *United States v. Feliciano, 76 M.J. 37, 2016 CAAF LEXIS 1042 (C.A.A.F., Dec. 5, 2016)*

Motion denied by *United States v. Feliciano, 76 M.J. 131, 2017 CAAF LEXIS 178 (C.A.A.F., Feb. 16, 2017)*

Affirmed by *United States v. Feliciano, 2017 CAAF LEXIS 482 (C.A.A.F., May 17, 2017)*

Prior History: [*1] Headquarters, I Corps. Andrew J. Glass, Military Judge (arraignment), Samuel A. Schubert, Military Judge (trial), Colonel Randall J. Bagwell, Staff Judge Advocate (pre-trial), Lieutenant Colonel Christopher A. Kennebeck, Acting Staff Judge Advocate (post-trial).

Core Terms

military, sentencing, specification, unsworn statement, instructions, witnesses, credibility, sex offender registration, attempted sexual assault, court-martial, offenses, deliberations, convicted, offender, pulled, sex

Case Summary

Overview
HOLDINGS: [1]-The court discussed three issues in this appeal. First, it addressed the servicemember's assigned errors that the evidence was legally and factually insufficient, and after reviewing the record, it affirmed the findings as factually and legally sufficient in all but one regard; [2]-Next, it determined that the servicemember's two convictions for attempted sexual assault were unreasonably multiplied when there was only a single attempt. Accordingly, it conditionally dismissed one of the specifications; [3]-Finally, the court discussed the military judge's instructions to the panel on sex offender registration. As the military judge's actions were entirely in accord with Talkington, there was no error, and the servicemember was not entitled to any relief.

Outcome
The finding of guilty of Specification 1 Charge I was conditionally dismissed. The court affirmed only so much of the finding of guilty of Specification 2 of Charge I as the court described. The remaining findings of guilty were affirmed. Reassessing the sentence, the court affirmed the sentence as approved by the convening authority.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN1[] **Judicial Review, Standards of Review**

In accordance with Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*, the court of criminal appeals reviews issues of legal and factual sufficiency de novo. The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. In resolving questions of legal sufficiency, the court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. 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, the court is itself convinced of the accused's guilt beyond a reasonable doubt.

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN2[] **Evidence, Weight & Sufficiency of Evidence**

In Davis, the court noted that the degree to which it recognizes or gives deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witness is at issue. At least as far back as 1990, the court discussed the degree of deference given to a trial court's ability to see the witnesses, inartfully stating that the court hesitates to second-guess a trial court's findings that depend on credibility determinations. Put differently, the court is required to make credibility determinations on appeal, but those determinations are made with the "admonition" that it recognizes the trial court's superior position in making those determinations. Thus, while the court gives no deference to the factual sufficiency decisions of the trial court, its assessment of the evidence must be sifted through a filter that recognizes its inferior fact-finding viewpoint.

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Registration

Military & Veterans Law > Military Justice > Courts Martial > Sentences

HN3[] **Sex Offenders, Registration**

In Talkington, the U.S. Court of Appeals for the Armed Forces decided that sex offender registration is: 1) a collateral effect of findings not sentencing; and 2) is a consequence that is separate and distinct from the court-martial process. The Talkington court then found no error in the military judge having told the panel that sex offender registration "should not be a part of your deliberations." The court in Talkington was fully aware of the dilemma this caused, stating that there is a tension between the scope of pre-sentencing unsworn statements and the military judge's obligation to provide proper instructions. However, the Court did not address the tension because it was not raised.

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Registration

Military & Veterans Law > Military Justice > Courts

Martial > Sentences

HN4[] **Sex Offenders, Registration**

In the court's view, the "tension" described in Talkington is best resolved by allowing the military judge to limit unsworn statements to the matters allowed under the rules. Such a resolution is per se not prejudicial, is in accord with the rules for court-martial, and properly reflects the military judge's role as the presiding officer. The status quo, where the military judge is prohibited from enforcing the rules for courts-martial, is at least problematic. Additionally, such an interpretation prevents the prejudice to an accused that may arise when a panel is told to give no weight to portions of an accused's unsworn statement.

Counsel: For Appellant: Lieutenant Colonel Charles D. Lozano, JA; Major Christopher D. Coleman, JA; Captain Jennifer K. Beerman, JA (on brief).

For Appellee: Colonel Mark H. Sydenham, JA; Major Daniel D. Derner, JA; Captain Steve T. Nam, JA (on brief).

Judges: Before CAMPANELLA, PENLAND, and WOLFE, Appellate Military Judges. Senior Judge CAMPANELLA and Judge PENLAND concur.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION

WOLFE, Judge:

We discuss three issues in this appeal.[1] First, we address appellant's assigned errors that the evidence is legally and factually insufficient. After reviewing the record, we find the evidence both legally and factually sufficient. Next, we determine that appellant's two convictions for attempted sexual assault were unreasonably multiplied when there was only a single attempt. Accordingly, we conditionally dismiss one of the specifications. Finally, we discuss the military judge's instructions to the panel on sex offender registration. As we [*2] find the military judge did not commit error, we order no relief.

At a general court-martial, appellant pleaded guilty to one specification of disrespect towards a non-commissioned officer, one specification of disobeying a non-commissioned officer, two specifications of wrongfully using marijuana, and one specification of being disorderly, in violation of Articles 91, 112a, and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 891*, *912a*, *934 (2012)* [hereinafter UCMJ]. Contrary to his pleas, an officer and enlisted panel convicted appellant of two specifications of attempted sexual assault in violation of Article 120, UCMJ. The court-martial sentenced appellant to be discharged from the Army with a bad-conduct discharge, to be confined for one year, to forfeit all pay and allowances, and to be reduced to the grade of E-1. The convening authority approved the sentence as adjudged.

BACKGROUND

On 22 January 2011, appellant, Specialist (SPC) Schwartz and Private (PV2) KF went out drinking. As the night out [*3] concluded, SPC Schwartz drove the trio back to the barracks. En route, they were pulled over by the police. Specialist Schwartz barely passed a

[1] Appellant also personally raised several issues pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*. Except for appellant's claim of unreasonable multiplication of charges, the matters raised by appellant warrant neither discussion nor relief.

breathalyzer test. The officer released them after determining that SPC Schwartz was the *most* sober individual. They then drove back to the barracks, stopping to buy more alcohol. When they returned to the barracks, appellant and PV2 KF continued drinking. Eventually, all three went to bed in appellant's bed. Specialist Schwartz, however, eventually left the bed to sleep in a nearby chair. Specialist Schwartz awoke a short time later to see appellant on top of PV2 KF. Appellant was holding himself up with one hand while "starting to pull his britches down" with the other. Specialist Schwartz testified that PV2 KF's "britches" were around her knees. Later he answered the question, "where were her pants?" by saying "By her knees." He also testified that she was saying "no, no, no" and that she was in "a state of unconsciousness" and was "passed out." SPC Schwartz confronted appellant and told appellant that "what he was doing was rape" and "that if he continued along they would definitely get him for rape. . . ." Appellant responded by saying [*4] "You know what? You're right" and got off of PV2 KF.

Private KF was not called by the government. She testified briefly for the defense. Appellant did not testify.

LAW AND ANALYSIS

A. Factual and Legal Sufficiency

HN1[] In accordance with *Article 66(c), UCMJ*, we review issues of legal and factual sufficiency de novo. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*. The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987)* (internal citations omitted); *see also United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002)*. In resolving questions of legal sufficiency, we are "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001)*. 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, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner, 25 M.J. at 325*.

Appellant's claim that the evidence is legally and factually insufficient boils down to questioning the credibility of SPC Schwartz. By the time of trial, SPC Schwartz had been chaptered out of the Army for using marijuana. The [*5] defense called five witnesses who said SPC Schwartz had a reputation for being untruthful. Additionally, the defense elicited from SPC Schwartz that he was a reluctant witness and that he was testifying, at least in part, in order to get the per diem accorded to travelling witnesses. The government responded that none of the reputational witnesses were aware of SPC Schwartz ever lying to them, and that he was entirely honest when directly confronted.

The following exchange between the defense counsel and SPC Schwartz demonstrates his bluntness while testifying:

> Q: And you've already testified that you're not employed at all so you're not getting any money from an employer? A: No, sir.
>
> Q: Now, you are getting per diem for participating in this trial, aren't you?
>
> A; Yes, sir.
>
> Q: So they're paying you a few hundred dollars to come out here and be present?
>
> A: I guess. I haven't been told anything really about any money.
>
> Q: And outside in this waiting room just a few minutes ago you said "I don't care about this. I'm

just doing this for the money?"

A: I don't care about this. Even when [appellant and PV2 KF] were in my life, they were menial [sic] people to me.

Q: And you're just doing this for [*6] the money?

A: I'm doing this to tell the truth. Also for the money.

Q: Get a few hundred extra dollars?

A: Oh, yeah. Everybody can use some money.

A short while later, the trial counsel attempted to rehabilitate SPC Schwartz and give him an opportunity to explain why he was testifying. The trial counsel was only partially successful:

Q: Mr. Schwartz, why are you testifying today?

A: Well, I told that girl back in 2011 that I would do whatever she decided. I mean, it took quite a while for her to decide what she was going to do. And I feel that it's right to testify for her. But at the same time, I do need the money. I am having a baby and I am unemployed. So yes, I do need the money.

Certainly, appellant's view that SPC Schwartz's testimony presents clear evidence of bias is a reasonable one. However, on the other hand, SPC Schwartz's lack of defensiveness may also be viewed as a display of unusual candor. Specialist Schwartz did not shy away from the allegation of bias.

In *United States v. Crews* we discussed the relative disadvantage of an appellate court in attempting to assess credibility from a cold transcript:

> The deference given to the trial court's ability to see and hear the witnesses [*7] and evidence—or "recogni[tion]" as phrased in Article 66, UCMJ—reflects an appreciation that much is lost when the testimony of live witnesses is converted into the plain text of a trial transcript. While court-reporter notes may sometimes reflect a witness's gesture, laugh, or tearful response, they do not attempt to reflect the pauses, intonation, defensiveness, surprise, calm reflection, or deception that is often apparent to those present at the court-martial. A panel hears not only a witness's answer, but may also *observe* the witness as he or she responds. For instance, a transcript may state "I am showing the witness prosecution exhibit 13 for identification" but will leave unstated the witness's demeanor—whether surprise, recognition, or dread, when reviewing or confronted with evidence.
>
> To say that an appellate court is at a relative disadvantage in determining questions of fact as compared to a trial court is to state the obvious.

*United States v. Crews, ARMY 20130766, 2016 CCA LEXIS 127, at *11-12 (Army. Ct. Crim. App. 29 Feb. 2016)*. Similarly, *HN2*[↑] in *United States v. Davis, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015)* (en banc), we noted that "the degree to which we 'recognize' or give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witness [*8] is at issue." At least as far back as 1990, we discussed the degree of deference given to a trial court's ability to see the witnesses. *United States v. Johnson, 30 M.J. 930, 934 (A.C.M.R. 1990)* (inartfully stating that we "hesitate to second-guess" a trial court's findings that depend on credibility determinations).

Put differently, we are required to make credibility determinations on appeal, but those determinations are made with the "admonition" that we recognize the trial court's superior position in making those determinations. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*. Thus, while we give no deference to the factual sufficiency *decisions* of the trial court, *Id.*, our assessment of the evidence must be sifted through a filter that recognizes our inferior fact-finding viewpoint.

With this recognition, we assess SPC Schwartz to be

credible. Accordingly we affirm the findings as factually and legally sufficient in all but one regard. As alleged, appellant was charged with, and found guilty of, attempted sexual assault by pulling down PV2 KF's pants *and underwear*. The record is devoid of any evidence, regardless of credibility, regarding whether appellant pulled down PV2 KF's underwear and that part of the specification is therefore legally insufficient. Accordingly, we will provide [*9] relief in our decretal paragraph.

B. Unreasonable Multiplication of Charges

Appellant was convicted of attempted sexual assault under the theory that PV2 KF was incapacitated and under the theory that appellant was attempting to commit a sexual assault by bodily harm. At trial, while appellant successfully objected to the two offenses as being unreasonably multiplied for sentencing, he never objected to the offenses as being unreasonably multiplied for findings. Additionally, while the two offenses appeared to have been charged in the alternative, (to address SPC Schwartz's perhaps conflicting testimony that PV2 was both unconscious and saying "no"), the government never explicitly stated so. Accordingly, this case falls outside our superior court's decision in *United States v. Elespuru, 73 M.J. 326, 329-30 (C.A.A.F. 2014)*(dismissing a specification where the government states it was charged in the alternative.).

Therefore, appellant has forfeited any error. Additionally, the detailed motion practice on merging the specifications for sentencing show that appellant was at the threshold—if not crossing it—of waiving the error. In short, there was no error by the military judge, plain or otherwise. Nonetheless, as an exercise of our discretionary authority [*10] under *Article 66(c)* we will notice the issue and provide relief.

We find the *Quiroz* factors weigh in favor of dismissing one specification. *United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001)*. Specifically, we give great weight to our determination that a conviction for two specifications of attempted sexual assault unreasonably exaggerated appellant's criminality.

Accordingly, we *conditionally* dismiss Specification 1 of Charge I, which alleged an attempted sexual assault while PV2 KF was substantially incapable of apprising the nature of the sexual act. *See United States v. Britton, 47 M.J. 195, 203 (C.A.A.F. 1997)*(J. Effron concurring); *United States v. Hines, 75 MJ 734 , 2016 CCA LEXIS 439, *7-8 fn4 (Army. Ct. Crim. App. 27 Jul. 2016)*; *United States v. Woods, 21 M.J. 856, 876 (A.C.M.R. 1986)*. Our dismissal is conditional on Specification 2 of Charge I surviving the "final judgment" as to the legality of the proceedings. *See Article 71(c)(1)* (defining final judgment as to the legality of the proceedings).

C. Sentencing Instructions on Sex Offender Registration

At the presentencing proceedings, appellant introduced two unsworn statements. The first unsworn statement consisted of training certificates and family photos.[2] The second unsworn statement was read by appellant's counsel and consisted entirely of the following:

> "I am Jeffrey A. Feliciano, Junior. I am a registered sex offender." This is the panel's findings [*11] on Charge I and that is a phrase that Private Feliciano will now say the[] rest of his life. He will not be permitted to pick [his child] up from school, or

[2] Government counsel did not object to the use of photos as an unsworn statement or the unsworn statements of *others* (as contained in various training certificates) being introduced as the unsworn statement *of the accused*.

attend school sporting events. He is, for the rest of his life, a sex offender.

The military judge then gave the panel sentencing instructions. Over defense objection, the instructions included the following:

> The accused's unsworn statement included the mention that the accused will have to register as a sex offender. An unsworn statement is a proper means to bring information to your attention, and you must give it appropriate consideration. Your deliberations should focus on an appropriate sentence for the accused for the offenses of which the accused stands convicted. Under DOD instructions, when convicted of certain offenses, including an offense here, the accused may have to register as a sex offender with appropriate authorities in the jurisdiction in which he resides, works, or goes to school. Such registration [*12] is required in all 50 states; though the requirements may differ between jurisdictions. Thus, specific requirements are not necessarily predictable.
>
> It is not your duty to attempt to predict sex offender registration requirements, or the consequences thereof.
>
> While the accused is permitted to address these matters in an unsworn statement, these possible collateral consequences should not be part of your deliberations in arriving at a sentence. Your duty is to adjudge an appropriate sentence for this accused based on the offenses for which he has been found guilty that you regard as fair and just when it is imposed and not one whose fairness depends upon possible requirements of sex offender registration, and the consequences thereof, at certain locations in the future.

In short, the military judge permitted the accused in his unsworn statement to raise the issue of sex offender registration, and then instructed the panel not to consider the information when deliberating on a sentence. Given the brevity of appellant's unsworn statement, the only portion of appellant's statement that the panel was instructed to consider during deliberations was "I am Jeffrey A. Feliciano, Junior." Nonetheless, [*13] this instruction was not error and was consistent with our superior court's decision in *United States v. Talkington, 73 M.J. 212, 218 (C.A.A.F. 2014)*.

HN3[] In *Talkington*, our superior court decided that sex offender registration is: 1) a collateral effect of findings not sentencing; and 2) "is a consequence . . . that is separate and distinct from the court-martial process." *Id. at 217* (internal citations and quotations omitted). The *Talkington* court then found no error in the military judge having told the panel that sex offender registration "should not be a part of your deliberations . . . ." *Id. at 214, 218*.

The court in *Talkington* was fully aware of the dilemma this caused. "[T]here is a 'tension between the scope of pre-sentencing unsworn statements and the military judge's obligation to provide proper instructions.'" *Id. at 216* (internal citations omitted). However, the court did not address the tension because it was not raised. *Id.* This case presents two concerns about the current state of the law.

First, in cases such as this one, the net effect of the military judge's instructions is to tell the panel to ignore the accused's unsworn statement. At this stage of trial a panel will often be familiar with curative instructions and how they come to pass (i.e. someone made a mistake). [*14] When the military judge tells the panel they should not consider the accused's statements about sex-offender registration it resembles a curative instruction. The danger is that a panel infers from the tailored instruction that the accused was trying to

subvert the sentencing rules. That is, by telling the panel to ignore what the accused just stated, the panel may be left with the impression that the accused's statement was impermissible.[3] Moreover, a panel at sentencing which has just rejected an accused's theory of the case may be predisposed to adopt such a viewpoint. Here, to the extent that appellant may be seen as having invited this risk, he was informed of the military judge's instructions only after he made the unsworn statement.

Second, while correct, it is unusual for a military judge to allow inadmissible information to come in front of the panel only to then tell the panel to ignore it. The alternative—prohibiting the information from coming in the first instance—would appear to be preferable.[4] As the court discussed in *Talkington*, this is the turbulence caused from the convergence of two unrelated lines of cases. *Id. at 213, 215*. ("This Court has explained that while the right of allocution includes the right to present evidence that is not relevant as extenuation, mitigation, or rebuttal, the military judge may 'put the information in proper context by effectively advising the members to ignore it.'").

As *Talkington* acknowledges, this is a problem created entirely by case law, and is contrary to Rule for Courts-Martial [hereinafter R.C.M.] 1001(c)(2)(A), which limits the accused's unsworn statement to matters in extenuation, mitigation, or in rebuttal. *See also* Military Rules of Evidence [hereinafter Mil. R. Evid.] 1101 (rules of evidence applicable to sentencing); 402 (irrelevant evidence is inadmissible). It would also appear to be tautological that there is little to be gained by allowing the introduction of inadmissible information. The military judge is the presiding officer at a court-martial. R.C.M. 103(15); *Article 26, UCMJ*. The current state of the law would appear to elevate the right of the accused to admit irrelevant information over the military judge's authority to exclude that same information under the rules. In a case where the accused is only informed of the military judge's instructions after having made the statement, this may be to the detriment of the accused.

HN4[↑] In our view, the "tension" described in *Talkington* is best resolved by allowing the military judge to limit unsworn statements to the matters allowed under the rules. Such a resolution [*17] is per se not prejudicial, is in accord with the rules for court-martial, and properly reflects the military judge's role as the presiding officer. The status quo, where the military judge is prohibited from enforcing the rules for courts-martial, is at least problematic. Additionally, such an interpretation prevents the prejudice to an accused that may arise when a panel is told to give no weight to portions of an accused's unsworn statement.

Nonetheless, the resolution of this issue here is entirely determined by our superior court's decision in *Talkington*. As the military judge's actions were entirely in accord with *Talkington*, there is no error, and

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[3] The panel was instructed that the accused's statements "were permissible." However, in the context of an entire trial, where matters are admitted based on rules of evidence, the members may find it perplexing that the accused is permitted to raise matters that the military judge then instructs them to disregard. And, even if the members can set aside this dissonance, they may still be left with the impression that the accused was using a technicality [*15] to get impermissible information before them. There is nothing in the trial experience that would explain to panel members why it is not error to present information that they are not supposed to consider.

[4] Consider the following: Were a military judge to prevent an accused from mentioning sex offender registration during an unsworn statement, such an action will almost certainly be harmless error. Since the panel may be instructed to ignore the information during deliberations, there cannot be prejudice from excluding in [*16] the first instance what the panel would be told to ignore in the second.

appellant is not entitled to any relief.

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CONCLUSION

The finding of guilty of Specification 1 Charge I is *conditionally* DISMISSED. This court AFFIRMS only so much of the finding of guilty of Specification 2 of Charge I as finds that:

> [appellant] did, at or near Joint Base Lewis-McChord, Washington, on or about 23 January 2011, attempt to commit the offense of aggravated sexual assault, to wit: penetrating Private (E-2) [KF]'s vulva with his penis, by causing bodily harm to her, to wit: pulling down the pants of the said Private [KF] with [*18] the specific intent to engage in a sexual act with Private [KF], and that the accused's actions would have resulted in the commission of the offense but for the intervention of Specialist (E-4) R.S.

The remaining findings of guilty are AFFIRMED.

Applying the factors set out by our superior court in *United States v. Winckelmann, 73 M.J. 11, 15-16 (C.A.A.F. 2013)*, we are confident that reassessment is appropriate. There is no change to the penalty landscape because the military judge had already merged the two specifications of Charge I for sentencing. Reassessing the sentence on the basis of the noted error, the remaining findings of guilty, and the entire record, we AFFIRM the sentence as approved by the convening authority. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by our decision, are ordered restored. *See UCMJ arts. 58b(c)* and *75(a)*.

Senior Judge CAMPANELLA and Judge PENLAND concur.

United States v. Lloyd

United States Navy-Marine Corps Court of Military Review

April 29, 1991, Decided

NMCM No. 89 1584

Reporter
1991 CMR LEXIS 650 *

UNITED STATES V. Brian S. LLOYD, Lance Corporal (E-3), U.S. Marine Corps

Prior History: [*1] Sentence adjudged 10 December 1988. Military Judge: A. H. Williams, III. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Expeditionary Brigade, FMF, Marine Corps Air Station, Kaneohe Bay, HI 96863-5501.

Core Terms

speed, truck, dereliction of duty, sentence, driving, government property, negligent homicide, damaging, beyond a reasonable doubt, assigned error, bad-conduct, conditions, Military, offenses, driver, riding, cargo, front, rear

Counsel: LT MARY ANNE RAZIM, JAGC, USNR, Appellate Defense Counsel.

LT KIRK A. LUDWIG, JAGC, USNR, Appellate Government Counsel.

Judges: KENT A. WILLEVER, Chief Judge, E. M. ALBERTSON, Judge, T. A. LAWRENCE, Judge.

Opinion by: PER CURIAM

Opinion

Contrary to his pleas, appellant was convicted by a general court-martial composed of officer and enlisted members of dereliction of duty, negligently damaging government property, and negligent homicide of a fellow Marine, violations of the Uniform Code of Military Justice, Articles 92, 108, and 134, respectively. Appellant was sentenced to confinement for 6 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

Appellant was the driver of a Government cargo truck that, one drizzly late afternoon, ran off the side of a road, hit a drainage culvert, became airborne, and landing on but two of its wheels, [*2] rolled over onto its top in a muddy field. A Marine Sergeant riding in the front of the truck with appellant was crushed and killed in the accident. Several other Marines riding in the truck's rear were thrown from the truck and slightly injured. The accident caused approximately $ 20,000.00 damage to the vehicle.

In his first assignment of error, [1] appellant argues that

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[1] I. THE GOVERNMENT FAILED TO PROVE THAT APPELLANT OPERATED HIS VEHICLE NEGLIGENTLY OR THAT HE WAS DRIVING AT AN EXCESSIVE SPEED WHEN

the evidence of his negligence, that is, that he drove the cargo truck at an unsafe speed, is insufficient to support the findings of guilty. We do not agree. We are convinced beyond a reasonable doubt that appellant was driving the truck at excessive speed on an unpaved, oil-compacted, rain-soaked road. The testimony of Marines who were yelling at appellant from the rear of the vehicle to reduce his speed, coupled with the testimony of an expert in traffic accident reconstruction that the length of the skid and yaw marks made by the truck as appellant first locked his brakes and then released them, while taking into account slickness of the road surface, indicates that appellant was, at a minimum, driving at a speed two times the posted speed limit in difficult driving conditions. The evidence convincingly [*3] disproves appellant's testimony and that of the driver of the vehicle directly in front of appellant on the road that traveling speed was considerably less than 30 m.p.h. In sum, we find that appellant's driving of this vehicle at that speed over those road conditions was an act which did not exhibit "that degree of care which a reasonably prudent person would have exercised under the same or similar circumstance," and was, therefore, negligent. *See* Manual for Courts-Martial, United States, 1984, paragraph 16c(3)(c). Appellant's negligent act renders him criminally culpable for the death of the Sergeant and the damage to the vehicle which resulted from it.

[*4] Regarding appellant's third assignment of error, we dismiss Charge I and its accompanying Specification alleging dereliction of duty as multiplicious for findings purposes with those Charges and Specifications alleging negligent homicide and negligently damaging Government property. Simply put, while these offenses contain different elements as a matter of law from the dereliction of duty offense, the same lack of due care, proved beyond a reasonable doubt by the evidence adduced at trial, which constituted appellant's dereliction of duty constituted as well that negligence which supports his conviction for negligent homicide and negligently damaging Government property, and is therefore fairly embraced within the factual allegations contained within those offenses. *United States v. Baker, 14 M.J. 361 (C.M.A. 1983)*. Appellant suffered no prejudice, however, as the military judge consolidated all three Charges for sentencing.

Appellant's remaining assignments of error are without merit. Under the circumstance of this case, we find an unsuspended bad-conduct discharge to be an appropriate punishment. Accordingly, the findings, as modified above, and the sentence, [*5] as approved on review below, are affirmed.

THE ACCIDENT OCCURRED. II. THE MILITARY JUDGE ERRED IN REFUSING TO GRANT APPELLANT'S CHALLENGE FOR CAUSE OF TWO COURT MEMBERS. III. THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO DISMISS CHARGE I AND THE SPECIFICATION THEREUNDER AS MULTIPLICIOUS WITH CHARGES II AND III. IV. THE ADJUDGED SENTENCE OF A BAD-CONDUCT DISCHARGE IS INAPPROPRIATELY SEVERE UNDER THE CIRCUMSTANCES OF THIS CASE.

United States v. Lonergan

United States Army Court of Criminal Appeals

February 15, 2000, Decided

ARMY 9700615

Reporter

2000 CCA LEXIS 422 *; 2000 WL 35801740

UNITED STATES, Appellee v. Sergeant THOMAS M. LONERGAN, United States Army, Appellant

Subsequent History: Motion granted by *United States v. Lonergan, 53 M.J. 422, 2000 CAAF LEXIS 459 (C.A.A.F., 2000)*

Prior History: [*1] 4th Infantry Division (Mechanized). K. H. Hodges, Military Judge.

Core Terms

proximate cause, military, driving, roadway, drunk, sentence, involuntary manslaughter, contributory negligence, culpable negligence, guilty plea, highway, beer

Case Summary

Procedural Posture

A military judge convicted appellant servicemember of involuntary manslaughter and fleeing the scene of an accident, under Unif. Code Mil. Justice arts. 119 and 134, *10 U.S.C.S. §§ 919* and *934*. A general court-martial sentenced the servicemember to a dishonorable discharge, confinement for eight years, forfeiture of all pay and allowances, and reduction in rank. The convening authority approved the adjudged sentence. The servicemember appealed.

Overview

The servicemember claimed that his guilty plea to involuntary manslaughter was improvident because the providence inquiry and the testimony of a witness and of the defense expert set forth matters substantially inconsistent with his plea. The court found that the servicemember's responses during the providence inquiry established that the victim was on the edge of the roadway when the collision occurred. The witness's testimony established that he and the victim chose to cross a five-lane highway at a diagonal and not at an intersection. Accepting this as evidence of the victim's contributory negligence, the court did not find such contributory negligence substantially in conflict with the plea. The providence inquiry established that the servicemember was drunk and speeding, and that although he observed the victim and the witness in the roadway, he took no action to avoid them. The expert's testimony corroborated the servicemember's speed and lack of evasive action. The servicemember's negligence was a proximate cause of the victim's death. The mitigating evidence raised no basis in law and fact for questioning the servicemember's plea.

Outcome

The findings of guilty and the sentence were affirmed.

LexisNexis® Headnotes

Military & Veterans Law > Military Offenses > Manslaughter

HN1[] **Military Offenses, Manslaughter**

In the context of the military offense of involuntary manslaughter, culpable negligence is defined by Manual Courts-Martial pt. IV, para. 44c(2)(a)(i) (1995), as a degree of carelessness greater than simple negligence, and a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. The Military Judges' Benchbook further defines culpable negligence as a negligent act or failure to act accompanied by a gross, reckless, wanton or deliberate disregard for the foreseeable results to others.

Military & Veterans Law > Military Offenses > Manslaughter

HN2[] **Military Offenses, Manslaughter**

In the context of the military offense of involuntary manslaughter, proximate cause means that the death must have been the natural and probable result of an accused's culpably negligent act. The proximate cause does not have to be the only cause, but it must be a contributory cause which plays an important part in bringing about the death. It is possible for the conduct of two or more persons to contribute each as a proximate cause to the death of another. If the accused's conduct was the proximate cause of the victim's death, the accused will not be relieved of criminal responsibility just because some other person's conduct was also a proximate cause of the death. Thus, to be a proximate cause of a victim's death, the culpable negligence must be a cause, but need not be the sole cause.

Military & Veterans Law > Military Offenses > Manslaughter

HN3[] **Military Offenses, Manslaughter**

In the context of the military offense of involuntary manslaughter, finding a homicide victim contributorily negligent in his own death can be fully consistent with finding an appellant guilty of manslaughter by culpable negligence in that same homicide. While there are undoubtedly situations where the victim is totally free of negligence, it is not uncommon for the victim's negligence or even his criminal conduct to be a contributing factor in his own demise.

Military & Veterans Law > ... > Trial Procedures > Pleas > General Overview

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN4[] **Trial Procedures, Pleas**

The United States Army Court of Criminal Appeals will not reject an appellant's plea unless it finds a substantial conflict between the appellant's statements during the plea inquiry and the other evidence of record.

Counsel: For Appellant: Major Leslie A. Nepper, JA; Captain Marc D. A. Cipriano, JA ((on brief); Captain Marc D. A. Cipriano, JA (on supplemental brief).

For Appellee: Colonel Russell S. Estey, JA; Lieutenant Colonel Eugene R. Milhizer, JA; Captain Mary E. Braisted, JA; Captain Joseph A. Pixley, JA (on brief); Lieutenant Colonel Eugene R. Milhizer, JA; Captain

Kelly R. Bailey, JA (on supplemental brief).

Judges: Before CAIRNS, BROWN, and VOWELL, Appellate Military Judges. Senior Judge CAIRNS and Judge BROWN concur.

Opinion by: VOWELL

Opinion

MEMORANDUM OPINION

VOWELL, Judge:

Pursuant to his pleas, the appellant was convicted of drunk driving, involuntary manslaughter, and fleeing the scene of an accident, in violation of Articles 111, 119, and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 911*, *919*, and *934* [hereinafter UCMJ]. [1] After findings, the military judge dismissed the drunk driving charge and specification as being multiplicious with the charge and specification of involuntary manslaughter. A general court-martial composed of officer and enlisted members sentenced the appellant to a dishonorable discharge, confinement for eight years, forfeiture [*2] of all pay and allowances, and reduction to Private E1. [2] The convening authority approved the adjudged sentence.

In this *Article 66, UCMJ*, appeal, the appellant claims that his guilty plea to involuntary manslaughter was improvident, that the staff judge advocate's post-trial recommendation is incomplete, and that the military judge erred, not only by excluding certain sentencing evidence, but also by entering a finding of guilty to the drunk driving specification after finding it multiplicious with the involuntary manslaughter specification. [3] Pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, the appellant personally challenges the appropriateness of his sentence, the competence of the assistant civilian defense counsel, and the sentencing argument of the trial counsel. We find the appellant's plea provident and find [*3] no errors prejudicial to the substantial rights of the appellant. However, the appellant's claim that his guilty plea to involuntary manslaughter was improvident warrants comment.

Background

At the time of trial, the appellant was a thirty-three year-old married soldier with a long history of alcohol-related problems. Prior to enlisting in the Army, he had a Florida conviction for driving while intoxicated. While stationed in Germany in 1992, he was punished [*4] pursuant to *Article 15, UCMJ*, for drunk driving. In 1994, in Killeen, Texas, he drove his truck into a concrete railroad crossing guard while drunk, occasioning yet another alcohol-related civilian conviction. He was a veteran of

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[1] The plea to involuntary manslaughter was to the lesser included offense of Charge II, murder, in violation of *Article 118, UCMJ*.

[2] The court members recommended that some portion of the adjudged forfeitures be provided to the appellant's family. Pursuant to *Article 58b, UCMJ*, the convening authority deferred forfeitures from 24 April 1997 until action.

[3] An additional assignment of error alleging that the record of trial was not substantially complete has been rendered moot by the filing of a certificate of correction. Part of what was missing from the record of trial was Prosecution Exhibit 17 for Identification, consisting of autopsy photographs of the victim. Counsel for both sides sought, at various times, to admit some or all of these photographs. While the military judge was considering the defense request to admit some of the photographs, the government counsel requested the admission of all of them. We find that the defense counsel affirmatively waived any objection by subsequently withdrawing his request for admission and characterizing his request as a "miscommunication."

five enrollments in the Army's alcohol and drug treatment program.

On the evening of 29 August 1996, the appellant and a friend, David Thornton, drank some beer at a club in Killeen, Texas. Later, they went to the home of another friend, where they drank some of their host's beer and contributed an eighteen-pack of beer they had purchased. When the appellant and Mr. Thornton departed, they left several cans of beer with their friend, taking what remained of the beer with them. They consumed the remainder at a "bring your own" club in Temple, Texas. They left Temple at around midnight.

Their next stop was at yet another bar, called "Harve's Place," in Harker Heights, Texas. The appellant continued to drink there until around 0100 hours, when he was expelled by the owner for rude conduct toward a waitress. Mr. Thornton drove the appellant to Mr. Thornton's house, where he hid the appellant's car keys in an effort to keep him from driving home that evening. The [*5] appellant became angry, and he and Mr. Thornton struggled over possession of the keys, with the appellant eventually reacquiring them. The appellant then began his drive home.

His route took him along Business Highway 190, a five-lane road (with two lanes in each direction plus a center turning lane) with a posted speed limit of 40 miles per hour. The victim, Private First Class (PFC) Joseph Guthrie, and his friend, Private (PVT) Andrew Ross, had been at a nightclub located along Business Highway 190. Deciding they wanted a soda, they left the nightclub to walk to a convenience store located on the other side of the highway. Their route took them across all five lanes of traffic in a diagonal direction. Private Ross testified that, as he was stepping off the roadway after completing the crossing, he and PFC Guthrie were about a foot apart, with PFC Guthrie on the edge of the roadway. Private Ross saw no headlights, but heard the sound of a vehicle engine. He heard a loud thud, saw his friend thrown first onto the hood of a truck, then into the air, and finally, saw him land about fifty feet away in the middle of the roadway.

Although emergency medical personnel were summoned to the scene, [*6] they were unable to save PFC Guthrie. An autopsy disclosed traces of marijuana in PFC Guthrie's urine, but found no alcohol. While Private First Class Guthrie died of brain injuries, the autopsy revealed numerous contusions and abrasions over his body.

The appellant fled the scene, and returned home. The next afternoon, he and his attorney went to the Harker Heights police station, where he confessed to being the driver of the vehicle that had struck and killed PFC Guthrie.

Providence of the Guilty Plea

The appellant's guilty pleas were entered pursuant to a pretrial agreement. There was no sentence limitation; however, in exchange for the appellant's guilty pleas, the government agreed to present no evidence on the charged offense of murder. The manslaughter plea was based on a theory of culpable negligence. [4]

During the providence inquiry, the appellant admitted that he was driving while drunk, that he was exceeding the posted speed limit [*7] at the time of the collision, and that he had observed the two pedestrians on the right hand side of the road when he was about 300 feet away from them. He admitted that he took no action to

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[4] *Article 119, UCMJ*, punishes three different types of manslaughter. The appellant pled guilty to a violation of *Article 119(b)(1)*: the unlawful killing of a human being by culpable negligence. Culpable negligence is not further defined in the statute.

evade them or to slow down. After striking PFC Guthrie, he slowed, but ultimately drove away without stopping to render assistance.

At the sentencing hearing, the defense sought to mitigate the involuntary manslaughter offense by introducing evidence tending to show that PFC Guthrie was contributorily negligent in the accident that took his life. Through the cross-examination of PVT Ross, the defense established that he and the victim took a diagonal path across a five-lane highway in a poorly lit area. Private Ross also admitted that he and PFC Guthrie heard the appellant's vehicle approaching off to their right as they neared the side of the road.

Through the testimony of a defense expert in accident reconstruction, the defense proffered the theory that PFC Guthrie, who sustained significant injuries to the left side of his body, must have been struck on the left side. Based on the appellant's direction of travel and the direction in which the two pedestrians were traveling prior to the impact, [*8] the defense postulated that PFC Guthrie had turned and walked in the opposite direction, stepping back onto the roadway in front of the appellant's oncoming vehicle. The military judge suggested an alternative explanation for the physical evidence: PFC Guthrie, hearing engine noise but seeing no headlights, turned to see what was causing the noise, and was then struck on the left side by the appellant's vehicle.

The appellant now contends that his plea was improvident because the providence inquiry and the testimony of PVT Ross and of the defense expert set forth matters substantially inconsistent with his plea. We disagree. The appellant's argument reveals a misunderstanding of the concepts of proximate cause, culpable negligence, and contributory negligence, particularly as they relate to the offense of involuntary manslaughter.

HN1[↑] Culpable negligence is defined by Part IV, paragraph 44(c)(2)(a)(i), of the Manual for Courts-Martial, United States (1995 edition), as "a degree of carelessness greater than simple negligence," and "a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission." The Military Judges' Benchbook [*9] further defines culpable negligence as "a negligent act or failure to act accompanied by a gross, reckless, wanton or deliberate disregard for the foreseeable results to others." Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 3-44-2d (30 Sep. 1996).

Note 1 to paragraph 3-44-2d of the Military Judges' Benchbook offers this explanation of proximate cause:

> *HN2*[↑] Proximate cause means that the death must have been the natural and probable result of the accused's culpably negligent [act] . . . . The proximate cause *does not have to be the only cause, but it must be a contributory cause which plays an important part in bringing about the death.* (*It is possible for the conduct of two or more persons to contribute each as a proximate cause to the death of another.* If the accused's conduct was the proximate cause of the victim's death, the accused will not be relieved of criminal responsibility just because some other person's conduct was also a proximate cause of the death.)

(Emphasis added). Thus, to be a proximate cause of a victim's death, the culpable negligence must be *a cause,* but need not be *the sole cause.*

United States v. Cooke, 18 M.J. 152, 153-54 (C.M.A. 1984), [*10] illustrates the relationship between the culpable negligence of an accused and the contributory negligence of the victim in determining the proximate cause of death. In *Cooke,* the deceased had parked his

disabled vehicle on the side of the road, and was standing between his truck and the roadway when the appellant, driving while drunk, struck and killed him. At trial, the defense sought an instruction on proximate cause, arguing that the negligence of the victim in failing to use emergency flashers and in standing between the truck and the roadway contributed to the accident. In determining if such an instruction was required, the then Court of Military Appeals applied the following test: "[D]id the deceased's negligence 'loom so large' in comparison with appellant's that appellant's negligence could not be regarded as a substantial factor in the final result?" *Cooke, 18 M.J. at 154-55*. Concluding that it did not, the court refused to find error in the military judge's failure to give an instruction on proximate cause.

HN3[⬆] Finding a homicide victim contributorily negligent in his own death can be fully consistent with finding an appellant guilty of manslaughter by culpable negligence in [*11] that same homicide. While there are undoubtedly situations where the victim is totally free of negligence, it is not uncommon for the victim's negligence or even his criminal conduct to be a contributing factor in his own demise. *See, e.g., United States v. Mazur, 13 M.J. 143 (C.M.A. 1982)* (victim asked accused to assist him in injecting heroin because he was too unsteady from earlier heroin use to do it himself), *overruled in part by United States v. Sargent, 18 M.J. 331 (C.M.A. 1984)* (overruled to the extent that the decision cited approvingly to *United States v. Moglia, 3 M.J. 216 (C.M.A. 1977)*); *United States v. Pina, ACM 31810, 1996 C.C.A. LEXIS 311 (A.F. Ct. Crim. App. Oct. 17, 1996)* (victim failed to wear a seatbelt and voluntarily rode with a drunk driver); *United States v. Hofmann, 6 C.M.R. 679 (A.F.B.R. 1952)* (victim engaged in horseplay with a loaded weapon with the accused when the weapon discharged).

HN4[⬆] We will not reject the appellant's plea unless we find a "'substantial conflict'" between the appellant's statements during the plea inquiry and the other evidence of record. *United States v. Thomas, 45 M.J. 661, 664 (Army Ct. Crim. App. 1997)*; *see also United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991)*. [*12] In the appellant's case, the expert testimony merely suggested that the victim was still in the roadway, and that the probable point of impact was on the left side of his body. The appellant's responses during the providence inquiry established that the victim was on the edge of the roadway when the collision occurred. Private Ross' testimony established that the two pedestrians chose to cross a five-lane highway at a diagonal and not at an intersection.

Accepting this as evidence of the victim's contributory negligence for purposes of analysis only, we do not find such contributory negligence substantially in conflict with the plea. The providence inquiry established that the appellant was drunk and speeding, and that although he observed the victim and his friend in the roadway, he took no action to avoid them. The expert's testimony corroborated the appellant's speed and lack of evasive action.

Viewing such culpably negligent behavior in comparison with the contributory negligence of the victim, we are satisfied that the appellant's negligence was a proximate cause of the victim's death. The mitigating evidence raised no basis in law and fact for questioning the appellant's plea; [*13] further inquiry by the military judge was, therefore, not required.

The findings of guilty and the sentence are affirmed.

Senior Judge CAIRNS and Judge BROWN concur.

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United States v. Rogers

United States Army Court of Criminal Appeals

October 28, 2005, Decided

ARMY 20021167

Reporter

2005 CCA LEXIS 430 *; 2005 WL 6524261

UNITED STATES, Appellee v. Specialist VANCE J. ROGERS, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] 1st Cavalry Division. Debra L. Boudreau, Military Judge, Lieutenant Colonel Christopher J. O'Brien, Staff Judge Advocate.

Core Terms

military, weapon, firearm, negligent homicide, fired, circumstances, guilty plea, foreseeable, willful discharge, pistol, shoot, human life, proximate, endanger, sentence, evening, loaded, guns, shot, armed forces, cocaine, criminally responsible, proximate cause, negligent act, conspiracy, intervening cause, failure to act, plea guilty, killing, stipulation of facts

Case Summary

Procedural Posture

A military judge, sitting as a general court-martial, convicted appellant servicemember of conspiracy to possess cocaine, negligent homicide, and willful discharge of a firearm under such circumstances as to endanger human life, in violation of Unif. Code Mil. Justice (UCMJ) arts. 81 and 134, *10 U.S.C.S. §§ 881* and *934*. The convening authority approved a sentence that included confinement for 48 months. The servicemember appealed.

Overview

The servicemember was charged with violating UCMJ arts 81 and 134 after he allowed two other soldiers to take guns from an apartment he rented, agreed that he would drive around the area near Fort Hood, Texas, with the other soldiers in an attempt to purchase cocaine, and one of the other soldiers shot and killed a pedestrian. The servicemember pled guilty, and he was convicted of all charges. The court of criminal appeals found that the servicemember's pleas to negligent homicide and wrongful discharge of a firearm were improvident. Although the servicemember admitted in a stipulation of fact that he aided the soldier who fired the fatal shot because he gave the other soldier the weapon, he stated during the providence inquiry that he was surprised when the other soldier shot the victim, that statement created a conflict between the stipulation and the servicemember's statement, and the military judge failed to create an adequate record to resolve that conflict. Although the other soldier had previously fired shots into a parked van, the court could not say as a matter of law that it was foreseeable the other soldier would shoot an unarmed man he had never met.

Outcome

The court of criminal appeals affirmed the servicemember's conviction for conspiracy to possess cocaine but set aside the servicemember's convictions for negligent homicide and willful discharge of a firearm. The court authorized a rehearing on the charges that were set aside.

LexisNexis® Headnotes

Military & Veterans Law > ... > Trial Procedures > Pleas > Providence Inquiries

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1[] **Pleas, Providence Inquiries**

The standard of review to determine whether a guilty plea is provident is if the record reveals a substantial basis in law or fact for questioning the plea. The military judge must make an inquiry of the accused to ensure that there is a factual basis for the plea. R.C.M. 910(e), Manual Courts-Martial. The providence inquiry must make clear the basis for a determination by the military trial judge whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty.

Military & Veterans Law > ... > Trial Procedures > Pleas > Providence Inquiries

HN2[] **Pleas, Providence Inquiries**

If an accused servicemember sets up a matter inconsistent with his guilty plea at any time during the proceeding, the military judge either must resolve the inconsistency or reject the guilty plea. A military judge's responsibility under Unif. Code Mil. Justice art. 45, *10 U.S.C.S. § 845*, includes the duty to explain to a military accused possible defenses that might be raised as a result of his guilty-plea responses. R.C.M. 910(e), Discussion, Manual Courts-Martial.

Military & Veterans Law > Military Offenses > Weapons

HN3[] **Military Offenses, Weapons**

The elements of willfully discharging a firearm under such circumstances as to endanger human life are: (1) that the accused discharged a firearm, (2) that the discharge was willful and wrongful; (3) that the discharge was under circumstances such as to endanger human life; and (4) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. Manual Courts-Martial pt. IV, para. 81b (2002).

Criminal Law & Procedure > Accessories > Aiding & Abetting

Military & Veterans Law > General Overview

Criminal Law & Procedure > Criminal Offenses > General Overview

HN4[] **Accessories, Aiding & Abetting**

Any person who actually commits an offense is a principal. Unif. Code Mil. Justice (UCMJ) art. 77, *10 U.S.C.S. § 877*. Anyone who aids or abets another in committing an offense is also a principal and equally guilty of the offense. UCMJ art. 77. An aider and abettor must assist, encourage, advise, instigate, counsel,

command, or procure another in the commission of an offense, and share the criminal purpose or design. Manual Courts-Martial pt. IV, para. 1(b)(2)(b).

Military & Veterans Law > Military Offenses > General Article > Negligent Homicide

HN5[] General Article, Negligent Homicide

The elements of negligent homicide, in violation of Unif. Code Mil. Justice art. 134, 10 U.S.C.S. § 934, 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; (4) that the act or failure to act of the accused which caused the death amounted to simple negligence; and (5) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. Manual Courts-Martial pt. IV, para. 85(b).

Military & Veterans Law > Military Offenses > General Article > Negligent Homicide

HN6[] General Article, Negligent Homicide

In order to be guilty of negligent homicide, in violation of Unif. Code Mil. Justice art. 134, 10 U.S.C.S. § 934, an accused must commit a negligent act which is the proximate cause of the death of another person. The essence of proximate cause is foreseeability. It is not essential to the existence of a causal relationship that the ultimate harm which has resulted was foreseen or intended by the actor. It is sufficient that the ultimate harm is one which a reasonable man would foresee as being reasonably related to the acts of the defendant. Furthermore, to be proximate, an act need not be the sole cause of death, nor must it be the immediate cause, i.e., the latest in time and space preceding the death. But a contributing cause is deemed proximate only if it plays a material role in the victim's demise.

Military & Veterans Law > Military Offenses > General Article > Negligent Homicide

HN7[] General Article, Negligent Homicide

When the negligence of an accused servicemember is a cause-in-fact of a death, it must not be assumed that the negligence of the deceased or of another is to be entirely disregarded. Even though an accused servicemember was criminally negligent in his conduct, it is possible for negligence of the deceased or another to intervene between his conduct and the fatal result in such a manner as to constitute a superseding cause, completely eliminating the defendant from the field of proximate causation. This is true only in situations in which the second act of negligence looms so large in comparison with the first that the first is not to be regarded as a substantial factor in the final result. Such an intervening cause, in order to relieve an accused of criminal responsibility for his acts, must be such that it intervenes between the original wrongful act or omission and the injury, turns aside the natural sequence of events, and produces a result which would not otherwise have followed and which could not have been reasonably anticipated.

Military & Veterans Law > Military Offenses > General Article > Negligent Homicide

HN8[] General Article, Negligent Homicide

When deciding whether the act of another constitutes an intervening cause that "looms so large" as to supersede the negligence of the accused, a primary issue is

whether the act is foreseeable. For example, simple negligence in medical care will not be a sufficient intervening cause to acquit an accused who intentionally inflicts a wound calculated to endanger or destroy life. This is because it can be reasonably anticipated that a victim of an assault will receive medical attention and the more complex the required treatment is, the more opportunity for error on the part of the attending physician. In contrast, gross negligence in medical care which results in death is not foreseeable and will relieve the accused of responsibility for the death where the negligence is of such a nature as to turn aside the course of probable recovery.

Military & Veterans Law > Military Offenses > General Article > Negligent Homicide

HN9[] **General Article, Negligent Homicide**

Criminal acts of another will not absolve an accused of responsibility where they are reasonably foreseeable.

Counsel: For Appellant: Captain Julie A. Caruso, JA (argued); Colonel Robert D. Teetsel, JA; Lieutenant Colonel Mark Tellitocci, JA; Major Sean S. Park, JA; Major Darrel J. Vandeveld, JA (on brief).

For Appellee: Captain Flor M. Suarez, JA (argued); Colonel Steven T. Salata, JA; Lieutenant Colonel Mark L. Johnson, JA; Lieutenant Colonel Theresa A. Gallagher, JA (on brief); Colonel Lauren B. Leeker, JA; Lieutenant Colonel Margaret B. Baines, JA.

Judges: Before MERCK, JOHNSON, and KIRBY, Appellate Military Judges. Senior Judge MERCK and Judge KIRBY concur.

Opinion by: JOHNSON

Opinion

MEMORANDUM OPINION

JOHNSON, Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of conspiracy to possess cocaine, negligent homicide, and willful discharge of a firearm under such circumstances as to endanger human life, in violation of Articles 81 and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 881* and *934* [hereinafter UCMJ]. The military judge sentenced appellant to a dishonorable discharge, confinement for nine years, forfeiture of all pay and allowances, reduction to [*2] Private E1, and a reprimand. Pursuant to a pretrial agreement, the convening authority approved only so much of the adjudged sentence as provides for a dishonorable discharge, confinement for forty-eight months, forfeiture of all pay and allowances, reduction to Private E1, and a reprimand.

The case is before the court for review under *Article 66, UCMJ*. We have considered the record of trial, appellant's assignments of error, the matters personally raised by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, and the government's reply thereto. We heard oral argument on 31 August 2005. Appellant asserts that his pleas to negligent homicide and wrongful discharge of a firearm were improvident. We agree and will grant appropriate relief in our decretal paragraph.

FACTS

During the providence inquiry, appellant testified under oath and by means of a stipulation of fact to the circumstances surrounding his plea to willful discharge of a firearm under circumstances likely to endanger

human life [1] and negligent homicide. [2] *See United States v. Care, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969)*. That portion of the stipulation of fact describing these offenses contains the [*3] following:

> On 31 March 2002, [Specialist] SPC Rogers had several firearms in his apartment, one of which belongs to him, the others belonging to other soldiers in his unit. SPC Rogers holds these weapons for other soldiers who are not allowed to have them in their barracks rooms on Fort Hood. While there, the accused and SPC Reyes each got a loaded firearm from SPC Roger's bedroom. The accused took with him a .45 Caliber pistol that he then placed under his seat in the car and SPC Reyes took a 9 mm pistol. Over the course of the night, three guns were eventually picked up from SPC Rogers' apartment, the last being a .38 caliber pistol, which [Private First Class] PFC Payton placed in the center console of SPC Rogers' vehicle.
>
> . . . .
>
> [Later in the evening], SPC Reyes pointed the loaded pistol that SPC Rogers had provided him out of the car's window and fired at least one shot, and maybe three, into a van parked on the side of the road.

---

[1] Specification 1 of Charge III read as follows:

> In that Specialist, E-4, Vance J. Rogers, U.S. Army, did, at or near Fort Hood, Texas, on or about 31 March 2002, wrongfully and willfully discharge a firearm, to wit: approximately three rounds from their moving vehicle while driving on or near Fort Hood, under circumstances such as to endanger human life.

[2] In the Specification of Charge II, appellant was originally charged with the premeditated murder of Mr. Eric [*6] Davis. He pled not guilty to this offense, but guilty to the lesser included offense of negligent homicide.

SPC Rogers aided SPC Reyes in the willful discharge of this weapon because SPC Reyes would not have been able to do so if SPC Rogers had not given him permission to take the loaded 9 mm from SPC Rogers' house. When SPC Rogers let SPC Reyes take the 9 mm [*4] and SPC Rogers took the loaded .45 caliber handgun, although SPC Rogers did not specifically intend for anyone to be shot, he knew he and SPC Reyes were likely to shoot the guns that night, and that doing so could put human life in danger. Any firing of a weapon from a moving car without any lawful justification is prejudicial to good order and discipline, especially when the shot strikes a parked vehicle, and could have stuck [sic] someone sitting in that vehicle. SPC Rogers was aware of what SPC Reyes was doing when Reyes fired the weapon out the Blazer. After Reyes fired the weapon, SPC Rogers allowed Reyes to keep the weapon. Rogers did nothing to prevent any further discharge of the weapon, such as, for example, taking the weapon or ammunition from Reyes.

. . . .

Sometime just before midnight on 31 March 2002, the three soldiers were in SPC Roger's [sic] Blazer and saw a man later identified as Mr. Eric Davis walking down the street. At this time in the evening, PFC Payton was driving, SPC Rogers was in the front passenger seat, and SPC Reyes was sitting behind SPC Rogers. All three soldiers then began to yell to Mr. Davis as PFC Payton pulled the vehicle along side of Mr. Davis.

. [*5] . . .

SPC Reyes then pointed the loaded 9 mm pistol he had been given by SPC Rogers out the window of the vehicle and fired one shot at Mr. Davis, killing him. SPC Reyes then said "I just shot that guy" SPC Rogers did not say anything, and PFC Payton

then drove them away from the crime scene. Once again, SPC Rogers took no steps to take away the 9mm he had allowed Reyes to grab earlier that evening.

Mr. Davis died as a result of this gunshot. There was no lawful justification for the shooting of Mr. Davis. At the time Mr. Davis was shot he was unarmed, and was not known to SPC Rogers, SPC Reyes or PFC Payton. Immediately prior to the shooting of Mr. Davis, he in no way threatened the lives of SPC Rogers, SPC Reyes or PFC Payton.

During the providence inquiry, the military judge provided the following explanation of the offense of willful discharge of a firearm:

Now let's look at the last offense to which you've pled guilty in this case and that's Specification 1 of Charge III. There you have pled guilty to willful discharge of a firearm under circumstances that endangered human life. Now the theory of this offense, Specialist Rogers, is not that you actually fired that weapon but that you were guilty of this offense as a principle because you aided and abetted Specialist Reyes, who actually fired the weapon. Now the elements of this offense as you've pled guilty to it are:

One, on or about 31 March 2002, at or near Fort Hood, Texas, Specialist Christopher Reyes discharged a firearm and that is a loaded 9-millimeter pistol that you had given him earlier that evening as part of the conspiracy to possess cocaine.

Two, that the discharge of the firearm was willful and wrongful.

Three, that this discharge was under circumstances such as to endanger human life.

And four, finally that under the circumstances, Specialist [*7] Reyes' conduct and yours in providing the weapon, knowing that there was a substantial likelihood that you and Specialist Reyes were likely to shoot guns that evening, was to the prejudice of good order and discipline in the Armed Forces or was or a nature to bring discredit upon the Armed Forces.

The military judge never provided any explanation of the concept of "aiding and abetting" to appellant.

In explaining the offense of negligent homicide, the military judge said:

MJ: [Y]ou've pled guilty to a lesser included offense of negligent homicide. Now the theory in this offense, Specialist Rogers, is not that you fired the shot that killed Mr. Davis but that Specialist Reyes killed Mr. Davis with a firearm provided by you as part of the conspiracy of Charge I. And that your negligent acts were direct in [sic] probable cause of Mr. Davis' death. Now the elements of the offense to which you've pled guilty in negligent homicide are:

One, that Mr. Eric Davis is dead.

Two, that his death resulted from the act of Specialist Christopher Reyes shooting him with a loaded 9 millimeter pistol on or about 31 March 2002, at or near Fort Hood, Texas.

Three, that the killing by Specialist Reyes was unlawful.

Four, [*8] that your act of giving Specialist Reyes a loaded 9 millimeter pistol that evening as part of the conspiracy of Charge I, your knowledge that Specialist Reyes had consumed alcohol that evening, and of Specialist Reyes prior firing of that pistol from your vehicle that night under circumstances that endangered human life, and your subsequent failure to take reasonable measures to stop Specialist Reyes; when you had provided him the means to continue committing foreseeable crimes of violence while all three conspirators were trying to purchase cocaine, were

> negligent acts on your part, which were a direct and probable cause of Mr. Davis' death.
>
> And five, that under the circumstances, your conduct was to the prejudice to good order and discipline in the Armed Forces or was of a nature to bring discredit upon the Armed Forces.

The military judge informed appellant that "simple negligence" is "the absence of due care; that is, it's an act or a failure to act by a person who is under a duty to use due care which demonstrates a lack of care for the safety of others which a reasonably careful person would have used under the same or similar circumstances." She further explained to appellant [*9] that:

> the act or failure to act alleged must not only amount to simple negligence but it must also be the proximate cause of the death. This means that the death of Mr. Davis must have been the natural and a probable result of your negligent act or failure to act. In this case Mr. Davis would not have died if you had not provided the firearm to Specialist Reyes. Now it is possible for the conduct of two or more persons to contribute, each as the proximate or direct cause to the death of another. If your conduct was the proximate or direct cause of the victim's death you will not be relieved of criminal responsibility just because some other person's conduct, in this case Specialist Reyes', was also a proximate or direct cause of the death.

Appellant agreed that his conduct met the elements of wrongful discharge of a firearm and negligent homicide. The military judge then questioned appellant about the offenses. Appellant said that he took a weapon from his apartment and that he allowed SPC Reyes to take a weapon. At the time, they were planning to try to buy some cocaine. The military judge asked appellant, "You didn't talk about why you were both bringing guns?" Appellant replied, "No, [*10] ma'am. When we walked down with the guns, to me, it seemed more like we were just showing off." The military judge and appellant later had the following exchange:

> MJ: Okay. Did something happen that causes you to be guilty of the willful discharge of the firearm by Specialist Reyes? Go ahead and tell me what happened there.
>
> ACC: I had allowed Reyes to possess the firearm.
>
> MJ: What did he do with it on West Fort Hood?
>
> ACC: He fired it out of the window, striking a military vehicle.
>
> MJ: Okay. And he's sitting right behind you, right?
>
> ACC: Yes, ma'am.
>
> MJ: Did you realize what he had done?
>
> ACC: Yes, ma'am.
>
> MJ: And if you hadn't given him that loaded pistol, he couldn't have done it, right? So that's why you're pleading --
>
> ACC: That is correct, ma'am.
>
> MJ: -- as a principal to that offense?
>
> ACC: Yes, ma'am.
>
> MJ: Now did that surprise you, when he did that?
>
> ACC: No.
>
> MJ: It didn't?
>
> ACC: What was the question, ma'am.
>
> MJ: Did it surprise you when he did that?
>
> ACC: It was unexpected, ma'am. I didn't --
>
> MJ: Okay.
>
> ACC: -- know that he was going to.

Appellant continued describing the group's activity that night and said that at some point they returned to his apartment and retrieved a third weapon. They continued driving [*11] around and came upon Mr. Davis walking alongside the road. They slowed down and SPC Reyes and appellant tried to talk to him to see if they could "purchase anything from him." The military judge and appellant had the following colloquy:

> MJ: Okay. So what happens next?

ACC: SPC Reyes shot one round out the window, shooting Mr. Davis.

MJ: And you were still sitting right in front of him in the front passenger's seat?

ACC: Yes, ma'am.

MJ: Now, you didn't know that Mr. -- that Specialist Reyes was going to do that, right?

ACC: No, ma'am.

MJ: This was not part of your plan?

ACC: No, ma'am.

MJ: Okay. But if you hadn't given him the weapon, would he have been able to shoot Mr. Davis?

ACC: No, he wouldn't have.

MJ: So do you understand that's why you're guilty of negligent homicide?

ACC: Yes, I do, ma'am.

The military judge subsequently accepted appellant's pleas of guilty and found appellant guilty of both wrongful discharge of a firearm and negligent homicide.

LAW

HN1[] The standard of review to determine whether a guilty plea is provident is if the record reveals a substantial basis in law or fact for questioning the plea. *United States v. Jordan, 57 M.J. 236, 238 (C.A.A.F. 2002)* (citing *United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991)*). [*12] The military judge must make an inquiry of the accused to ensure "that there is a factual basis for the plea." Rule for Courts-Martial [hereinafter R.C.M.] 910(e). The providence inquiry must "'make clear the basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty.'" *Jordan, 57 M.J. at 238* (quoting *United States v. Care, 18 U.S.C.M.A. 535, 541, 40 C.M.R. 247, 253 (1969)*).

Moreover, *HN2*[] if the accused "set[s] up a matter inconsistent with the plea at any time during the proceeding, the military judge either must resolve the inconsistency or reject the guilty plea." *United States v. Rogers, 59 M.J. 584, 585-86 (Army Ct. Crim. App. 2003)*. Our superior court has made clear that "[a military judge's responsibility under *Article 45, UCMJ*,] includes the duty to explain to a military accused possible defenses that might be raised as a result of his guilty-plea responses." *United States v. Smith, 44 M.J. 387, 392 (C.A.A.F. 1996)*. *See United States v. Jemmings, 24 C.M.A. 251, 1 M.J. 414, 418, 51 C.M.R. 630 (C.M.A. 1976)* ("Where an accused's responses during the providence inquiry suggest a possible defense to [*13] the offense charged, the trial judge is well-advised to clearly and concisely explain the elements of the defense in addition to securing a factual basis to assure that the defense is not available."); R.C.M. 910(e) discussion.

HN3[] The elements of willfully discharging a firearm under such circumstances as to endanger human life are:

(1) That the accused discharged a firearm;

(2) That the discharge was willful and wrongful;

(3) That the discharge was under circumstances such as to endanger human life; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Manual for Courts-Martial, United States, (2002 ed.) [hereinafter *MCM*], Part IV, para. 81(b).

HN4[] Any person who actually commits an offense is a principal. *UCMJ art. 77*. Anyone who aids or abets another in committing an offense is also a principal and equally guilty of the offense. *Id.* An aider and abettor must "assist, encourage, advise, instigate, counsel, command, or procure another . . . in the commission of [an] offense; . . . and share the criminal purpose or

design." *See MCM*, Part IV, para. 1(b)(2)(b); [*14] *United States v. Thompson, 50 M.J. 257, 259 (C.A.A.F. 1999)*.

HN5[] The elements of negligent homicide are:

> (1) That a certain person is dead;
>
> (2) That this death resulted from the act or failure to act of the accused;
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> (3) That the killing by the accused was unlawful;
>
> (4) That the act or failure to act of the accused which caused the death amounted to simple negligence; and
>
> (5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, Part IV, para. 85(b).

HN6[] In order to be guilty of negligent homicide, an accused must commit a negligent act which is the proximate cause of the death of another person. As we have previously stated:

> The essence of proximate cause is foreseeability. It is not essential to the existence of a causal relationship that the ultimate harm which has resulted was foreseen or intended by the actor. It is sufficient that the ultimate harm is one which a reasonable man would foresee as being reasonably related to the acts of the defendant.

United States v. Perez, 15 M.J. 585, 587 (A.C.M.R. 1983) (internal quotation and citation omitted).

Furthermore, [*15] "[t]o be proximate, an act need not be the sole cause of death, nor must it be the immediate cause - the latest in time and space preceding the death. But a contributing cause is deemed proximate only if it plays a material role in the victim's decease." *United States v. Romero, 24 C.M.A. 39, 1 M.J. 227, 230, 51 C.M.R. 133 (C.M.A. 1975)*. As our superior court has recognized, *HN7*[] when the negligence of the accused is a cause-in-fact of a death:

> [i]t must not be assumed that negligence of the deceased or of another is to be entirely disregarded. Even though the defendant was criminally negligent in his conduct it is possible for negligence of the deceased or another to intervene between his conduct and the fatal result in such a manner as to constitute a superseding cause, completely eliminating the defendant from the field of proximate causation. *This is true only in situations in which the second act of negligence looms so large in comparison with the first, that the first is not to be regarded as a substantial factor in the final result*.

United States v. Cooke, 18 M.J. 152, 154 (C.M.A. 1984) (quoting R. Perkins, CRIMINAL LAW, 703 (2d ed. 1969). Such an "intervening cause, in order to relieve an accused of criminal [*16] responsibility for his acts must be such that it intervenes between the original wrongful act or omission and the injury, turns aside the natural sequence of events, and produces a result which would not otherwise have followed and which could not have been reasonably anticipated." *United States v. Gomez, 15 M.J. 954, 961 (A.C.M.R. 1983)* (internal quotations omitted).

DISCUSSION

The key question in this case is whether, after allowing SPC Reyes to have access to a weapon, appellant was criminally responsible for everything SPC Reyes did with that weapon. However, the military judge failed to create an adequate record to resolve this issue. As a result, appellant's pleas of guilty to Charges II and III and their Specifications were improvident.

Willful Discharge of a Firearm

The military judge informed appellant that he was charged with willful discharge of a firearm under the theory that appellant "aided and abetted" SPC Reyes. Unfortunately, she never explained the legal definition of aiding and abetting to appellant. Therefore, the record does not reflect that appellant fully understood the offense to which he pled guilty.

Moreover, the record does not reflect that appellant actually [*17] was guilty of this offense. Appellant certainly "aided" in the sense that if he had not allowed SPC Reyes to have the weapon, SPC Reyes could not have fired it. However, the record does not establish that appellant "shared in the criminal purpose or design" of SPC Reyes in firing the weapon. As discussed above, the stipulation of fact states that appellant knew that they were likely to fire the weapons that evening, but that is not what he testified to during the providence inquiry. He said that the firing of the weapon was "unexpected" and that he did not know SPC Reyes was going to do it. The military judge failed to resolve this inconsistency. As a result, there is a substantial basis in law and fact to question the guilty plea to willful discharge of a firearm.

Negligent Homicide

The military judge based her acceptance of appellant's plea of guilty to negligent homicide on appellant's allowing SPC Reyes to take a weapon from his apartment when they went to purchase cocaine, knowing that SPC Reyes had been drinking and appellant's subsequent failure to take the weapon away from SPC Reyes after he fired it at a parked car. While appellant's conduct was undoubtedly a cause-in-fact of [*18] Mr. Davis' death, an issue remains as to whether SPC Reyes' homicidal act constituted a foreseeable, intervening cause that severed appellant's criminal responsibility. Therefore, the providence inquiry is insufficient to support appellant's plea of guilty to negligent homicide.

HN8[↑] When deciding whether the act of another constitutes an intervening cause that "looms so large" as to supersede the negligence of the accused, a primary issue is whether the act is foreseeable. For example, simple negligence in medical care will not be a sufficient intervening cause to acquit an accused who intentionally inflicts a wound calculated to endanger or destroy life. *Gomez, 15 M.J. at 961*. This is because "[i]t can be reasonably anticipated that a victim of an assault will receive medical attention" and "[t]he more complex the required treatment is, the more opportunity for error on the part of the attending physician." *Id*. In contrast, gross negligence in medical care which results in death is not foreseeable and will relieve the accused of responsibility for the death where the negligence is "of such a nature as to turn aside the course of probable recovery." [3] *Id*.

Similarly, *HN9*[↑] criminal acts of another will not absolve an accused of responsibility where they are reasonably foreseeable. It is foreseeable that negligently allowing an intoxicated person to borrow one's car will result in a fatal accident. Therefore, the victim's criminal act of driving while intoxicated will not negate the criminal responsibility of an accused who hands over his keys to a person whom he knows to be intoxicated. *See United States v. Martinez, 42 M.J. 327 (C.A.A.F. 1995)*. Likewise, it is foreseeable that leaving a small child with an adult who has twice previously inflicted life-threatening injuries on him will result in the child's death. As a result, a parent who knowingly makes such a decision can properly be convicted of

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[3] However, in such a situation, an [*19] accused would remain responsible for the original assault.

negligent homicide. *United States v. Perez, 15 M.J. 585 (A.C.M.R. 1983)*.

In deciding whether appellant's actions were a proximate cause of Mr. Davis' death, the key question was whether SPC Reyes' act was foreseeable to a reasonable person. This issue was not explained to or discussed with appellant on the record. There is no evidence in the record that appellant had any indication that SPC [*20] Reyes would kill a pedestrian. Even given the fact that SPC Reyes had previously fired a shot into a parked van, we cannot say as a matter of law in this guilty plea setting that it was foreseeable that he would, with no provocation and without any reason, gun down an unarmed man whom he had never met. This is especially true because the three soldiers had approached other individuals previously on the night in question in an effort to purchase cocaine with no indication in the record that any of the firearms were used or even displayed in those interactions.

The stipulation of fact indicated that appellant knew that he and SPC Reyes were likely to shoot guns that evening and that doing so could endanger human life. Even if we assume such knowledge would render the death of a bystander reasonably foreseeable, the stipulation of fact is still insufficient to support the guilty plea because appellant made contrary assertions during the providence inquiry. He said that in his mind they were taking the guns with them just to "show off." He also said that both SPC Reyes' initial discharge of the weapon and his shooting Mr. Davis were unexpected acts. The military judge never resolved this [*21] inconsistency. [4]

However, the military judge did more than fail to create a sufficient record to support the guilty plea; she affirmatively created a substantial risk that appellant misunderstood the crucial element of proximate cause. The military judge essentially told appellant that if his negligent acts or omissions were a cause-in-fact of Mr. Davis' death, he was guilty and that any other potential causes were irrelevant. The military judge provided a portion of the correct explanation found in the Military Judge's Benchbook regarding proximate cause. [5] *See* Dep't of Army, Pam. 27-9, Legal Services: Military Judge's Benchbook, para. 3-85-1, note 2 (15 Sept. 2002). [*22] Unfortunately, she failed to include the following part of the explanation, which would have helped to clarify the law regarding this offense:

> 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.

See id.

Because she did not include this piece of the explanation, the military judge essentially told appellant (1) he was guilty if his negligent act was the proximate cause of Mr. Davis' death; (2) his negligent act was the proximate cause of Mr. Davis' death if the death would not have occurred without appellant allowing SPC Reyes access to the gun; and (3) if his act was the

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[4] The military judge also never discussed with appellant his purported duty to take the weapon away from SPC Reyes after he fired it at the parked car or whether a reasonable person would have been expected to wrestle with a potentially intoxicated person over a loaded weapon in the closed confines of a car containing three people. Appellant arguably had a duty to at least attempt to retrieve the weapon by asking for it back, but this is yet another issue that the military judge did not discuss with appellant on the record.

[5] *See, supra*, page 6.

proximate cause of Mr. Davis' death, SPC Reyes' contribution to the death was irrelevant to appellant's guilt. She left no room for the possibility that SPC Reyes' act may have superseded appellant's criminal responsibility. Instead, [*23] the military judge emphasized the cause-in-fact basis of guilt during her questioning of appellant when she asked, "But if you hadn't given him the weapon, would he have been able to shoot Mr. Davis?" When appellant replied, "No, he wouldn't have," the military judge asked, "So you understand that's why you are guilty of negligent homicide?" Appellant replied, "Yes, I do, ma'am." Unfortunately, based on this inadequate record, we cannot say the same.

Sentence Reassessment

In order to properly reassess the sentence for the remaining conviction of conspiracy to possess cocaine, we must "assure that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed." *United States v. Sales, 22 M.J. 305, 308 (C.M.A. 1986)* (quoting *United States v. Suzuki, 20 M.J. 248, 249 (C.M.A. 1985))*. This means that we must determine, absent the military judge's erroneous acceptance of appellant's guilty plea to negligent homicide and willful discharge of a firearm, that appellant would have received a sentence of at least a certain severity solely for the conspiracy to possess cocaine. *See id*. Under the facts of this case, we "cannot reliably determine [*24] what sentence would have been imposed at the trial level" for the conspiracy conviction, without the additional convictions for negligent homicide and willful discharge of a firearm. *See id. at 307*.

Accordingly, the findings of guilty of Charge II and Charge III and their Specifications are set aside. The remaining findings of guilty are affirmed. The sentence is set aside. A rehearing on Charge II and Charge III and their Specifications is authorized, as is a rehearing on the sentence, or both. After the convening authority has taken his action, the record will be resubmitted to this court for review consistent with our responsibilities under *Article 66, UCMJ*.

Senior Judge MERCK and Judge KIRBY concur.

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CERTIFICATE OF SERVICE U.S. v. STRONG (20200391)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on this 22th day of November, 2021.

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