

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

**BREIF ON BEHALF OF
APPELLEE**

v.

Docket No. ARMY 20210286

Private First Class (E-3)
LOUIS A. MORALES-SANCHEZ
United States Army,
Appellant

Tried at Fort Bliss, Texas, on 5 June,
3 August, 22 September 2020, 14,
25–26 January, 19 February, and 3–8,
10, 17 May 2021, before a general
court-martial convened by
Commander, Fort Bliss, Colonel
Michael S. Devine and Colonel
Robert L. Shuck, Military Judges,
presiding.

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

Assignment of Error I¹

**THE EVIDENCE SUPPORTING THE MURDER
CONVICTIONS WAS NOT FACTUALLY
SUFFICIENT.**

Assignment of Error II

**THE MILITARY JUDGE VIOLATED
APPELLANT’S RIGHTS UNDER *BRADY* v.
MARYLAND AND RULE FOR COURTS-MARTIAL
701.**

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 they lack merit. Should this court consider any *Grostefon* matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

Assignment of Error III

**ASSAULT WITH AN UNLOADED FIREARM IS
NOT A LESSER-INCLUDED OFFENSE OF
AGGRAVATED ASSAULT WITH A LOADED
FIREARM.**

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Statement of the Case

On 8 May 2021, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of murder² and one specification of assault, in violation of Articles 118 and 128, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 918 and 928. (Statement of Trial Results³ [STR], R. at 1375–77). On the same day, consistent with his pleas, appellant was found guilty of six specifications of assault, one specification of wrongful use of cocaine, two specifications of willfully disobeying a superior commissioned officer, one specification of false official statement, and one specification of extramarital sexual conduct, in violation of Articles 128, 112a, 90, 107, and 134, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 928, 912a, 890, 907, and 934. (STR, R. at 1375–77).

On 10 May 2021, in the aggregate, the military judge sentenced appellant to 40 years and 10 months of confinement and a dishonorable discharge. (R. at

² The military judge conditionally dismissed Specification 2 of Charge I upon final appellate review. (R. at 1458).

³ There are several clerical errors within the STR. A service court of criminal appeals may modify errors in the judgment, “in the performance of its duties and responsibilities.” Rule For Courts-Martial [R.C.M.] 1111(c)(2). Appellee recommends the following changes to ensure the STR accurately reflects the findings of his court-martial: (1) Charge III, Specification 1, guilty finding should read “on or about 1 October 2018” not “31 October 2018[.]” (*See* R. at 1376); and (2) Additional Charge VI, Specification 1, PLEA should read “Not Guilty” not “Guilty[.]” (*See* App. Ex. XLIII, p. 2).

1452–56). The military judge credited appellant with 451 days of confinement credit. (R. at 1455–56). On 25 June 2021 the convening authority took no action on the sentence and the military judge entered judgment on 7 July 2021. (Action and Judgment).

Statement of the Facts

A. Appellant’s five separate accounts of how Miss [REDACTED] his girlfriend’s 10-month-old daughter, died in his care.

Miss [REDACTED] the 10-month-old decedent, and her four-year-old sister, [REDACTED], were left in the care of appellant after their mother, [REDACTED]⁴ left for work at approximately 0300 on 19 January 2019. (R. at 768–69). Appellant gave five separate accounts of what happened on the day Miss [REDACTED] died. (R. at 744–50, 768–73, 807, 813–19, 890–91).

The first account was given to the responding paramedic. (R. at 744). Appellant relayed to the paramedics he put Miss [REDACTED] down for a nap and when he went to wake her up, she was unresponsive and not breathing. (R. at 746). When confronted about Miss [REDACTED] bruised head, appellant stated it occurred after she jumped off a bed and fell on to the tile floor two days prior. (R. at 744, 750).

The second account was given to a detective with the El Paso Police Department. (R. at 768). Appellant explained he was in sole care of the two girls

⁴ Appellant and [REDACTED] were both married to other people but in a romantic relationship with each other. (R. at 261).

after [REDACTED] left for work at 0300 that morning. (R. at 768–69). During this interview, appellant confided that Miss [REDACTED] appeared to not feel well when she woke up around 0900 or 0930. (R. at 769). Appellant related Miss [REDACTED] did not eat or drink much and threw up clear liquid at one point. (R. at 769). After this, appellant bathed Miss [REDACTED] and took her to play with her older sister in the family room. (R. at 769). According to appellant, the girls played together for an hour or so during which time [REDACTED] called Appellant on FaceTime⁵ and saw the girls. (R. at 770). Around 1224 [REDACTED] called again on FaceTime to see the girls. (R. at 770, 773). It was approximately 25–30 minutes after the second FaceTime call, appellant recalled to the detective, that Miss [REDACTED] started to cry while he was in a separate bedroom playing Fortnite⁶ on PlayStation. (R. at 770, 773). Appellant went into the family room and brought her in to the room where he was playing video games. (R. at 770). There she started coughing and throwing up clear liquid again. (R. at 770). According to appellant, he decided to give Miss [REDACTED] a second

⁵ FaceTime is a mobile app that allows users to communicate through a video chat.

⁶ An expert in “Epic Games account data analysis” retrieved records for the username “CANO87” pursuant to a subpoena in appellant’s case. (R. at 850–51). This account was registered to a “Luis Morales.” (R. at 852). These records showed that appellant was playing a game called “Fortnite” from 1101 until 1249 on 19 January 2019. (R. at 877; Pros. Ex. 15). Further, this information was corroborated by Mr. BS who played online gaming with appellant. (R. at 844). Mr. BS confirmed “CANO87” was appellant’s gamertag (ID created by the user) and that he was logged in under that handle and playing Fortnite during an event that occurred on 19 January 2019. (R. at 846).

bath and then sat her down next to him in the room he was and resumed playing video games. While he played, appellant later recalled, he could see Miss [REDACTED] was cold and shivering. (R. at 771). Appellant stated that Miss [REDACTED] stayed next to him for some time, while he continued playing PlayStation, until she again started coughing and then she declined. (R. at 771, 773).

The appellant gave his third account to the emergency department physician. (R. at 807). In this recitation, Appellant reported to Miss [REDACTED] treating physician that she suddenly began coughing, vomited, and then became unresponsive. (R. at 807).

He gave his fourth account to a patrol officer at the hospital after Miss [REDACTED] was pronounced dead. (R. at 813). Appellant then restated that in the afternoon, while he was playing video games, Miss [REDACTED] began coughing, threw up, then her eyes rolled in the back of her head, and she fainted. (R. at 814, 819).

Appellant gave a final account to the Child Protective Services (CPS) investigator. (R. at 890). Appellant then recalled that on the day of her death Miss [REDACTED] was fussy and not eating. (R. 891). He explained that he was playing video games and she became unresponsive around 1250. (R. at 891).

B. Expert medical testimony established that Miss [REDACTED] died from multiple blunt force injuries to her head.

Dr. JD, a qualified expert in forensic pathology, testified that Miss [REDACTED] “died as a result of multiple blunt force injuries [to her head].” (R. at 906, 907–08). Dr.

JD determined the manner of death was homicide as “there [was] no accident described that would account for the extensive injuries to her head.” (R. at 909). “These [injuries] are severe and devastating, that eventually ended with a devastating neurological injury,” Dr. JD testified, and are not a result of “trivial injuries” associated with accidental falls. (R. at 909). Dr. JD found twenty-three discrete blows to Miss [REDACTED] head. (R. at 944). Of note, Dr. JD found evidence of blows “down at the base of the skull.” (R. at 945). Dr. JD explained this is a “very hard area to hit” from a fall, “[b]ecause when you fall, you hit the back of your head[—]you don’t hit the recess.” (R. at 945). Moreover, Dr. JD stated that a “10-month old” child cannot “generate enough force to cause [the] type[s] of injur[ies] on [her] own.” (R. at 946). Dr. JD also found “an isolated impact to the top of [Miss [REDACTED] head]” to be very significant “[b]ecause you can’t really fall and hit the top of your head.” (R. at 950). In addition to the multiple head injuries, Miss [REDACTED] had “an oblique fracture to the right humerus⁷” which is a “big red flag for abuse[.]” (R. at 929). This injury occurred close to Miss [REDACTED] death because there were no signs of healing.⁸ (R. at 930).

⁷ The humerus is the “upper arm bone.” (R. at 929).

⁸ Compare Dr. JD’s conclusions with respect to Miss [REDACTED] fractured humerus with appellant’s expert, Dr. LD. Dr. LD states that he “cannot make a conclusion [about the right humerus fracture] [b]ut [he has] belief and concern that this is [] probably, in [his] opinion, a postmortem artifact, because body handling can sometimes be fairly physical after death.” (R. at 1177).

Dr. JD testified in detail about the significance of finding retinal (eye) injuries. (R. at 961–66). “Children with head injuries, they often times get what are called retinal petechiae hemorrhages,” Dr. JD explained. (R. at 962). Miss ■■■ had both gross and microscopic retinal petechiae. (R. at 962). Miss ■■■ also had “full thickness” retinal hemorrhaging through the entire retina. (R. at 964). This is significant because it evidences a great “acceleration/deceleration” force to the subject’s head that “tugs at the retina” causing the eyeballs to “pop[] out of the socket.” (R. at 966).

Dr. JD was able to conclude the blows to Miss ■■■ occurred right before she died, due to the lack of swelling or edema in Miss ■■■ brain. (R. at 954). “[This] tells [us] that [Miss ■■■ sustained] trauma. And died right away. She didn’t survive to be allowed to swell into her brain” he testified. (R. at 954). “Swelling happens from hypoxia or low oxygen. Here, [Miss ■■■ died before her body got hypoxic to the point of swelling in the brain, which tells us, again, this is the trauma that caused her death[.]” (R. at 955). Further, Dr. JD explained that Miss ■■■ must have endured significant force to her head because there was “bl[eeding] in the dural sheath [in the eye],” but “no inflammation [which] you might expect from something that happened two days earlier.” (R. at 964).

Dr. SN, a qualified expert in pediatric neurology, testified that Miss ■■■ was “repeatedly struck in the head” and died “of blunt force trauma with

acceleration/deceleration injuries resulting in grave global brain injury.” (R. at 1060, 1061). Dr. SN explained that “the reason we know that [Miss ██████] passed away immediately [after] the accumulation of hits occurred is that we don’t see evidence of brain swelling.” (R. at 1064). Dr. SN also testified about a reported fall Miss ██████ suffered a few days⁹ before her death. (R. at 1071). He explained that if Miss ██████ had suffered a fall that was devastating enough to cause her death several days later than “she would have become immediately symptomatic.” (R. at 1068). “She would have been unresponsive[, s]he would have been comatose [and t]here would have been no ability to wake her up.” (R. at 1068). Miss ██████ could not have eaten or played after such an injury and “she would have passed away in a matter of minutes, as she did in this case.” (R. at 1068). Furthermore, beyond the fact that Miss ██████ would have been comatose from the injury, if she had survived

⁹ The medical experts were asked about the effect of Miss ██████ falling and hitting her head either two days or four-five days prior to her death. (R. at 920, 1067–68, 1124). Dr. JD, the forensic pathologist, was asked to consider Miss ██████ injuries in light of a fall from a bed two days prior to her death. (R. at 920). Dr. JD testified that the injuries he saw were too fresh to have occurred two days prior. (R. at 920, 964, 971). Dr. SN, the pediatric neurologist, was also asked about the effects of a fall two days prior to Miss ██████ death. (R. at 1067). He testified that the fall described by appellant could not have caused her the “grave neurological injury” because she would have “become immediately symptomatic. Meaning she would have become unresponsive.” (R. at 1068). Dr. SM, the child abuse pediatrician, was asked about a fall four to five days prior onto tile floor. (R. at 1124). Dr. SM explained that if Miss ██████ sustained a significant enough injury four or five days prior to her death she would have progressively exhibited symptoms. (R. at 1124).

a fall that was the cause of her ultimate death several days earlier, there would have been evidence of brain swelling (edema) in Miss [REDACTED] autopsy. (R. at 1072). There was not. (R. at 954, 1072).

Colonel [Col.] SM (Air Force medical doctor), a qualified expert in pediatrics and child abuse pediatrics, concluded that Miss [REDACTED] died from non-accidental trauma. (R. at 1127). Colonel SM's testimony mostly opined on the possibilities of other manners of death other than homicide, all of which were not supported by the injuries. (R. at 1111–16). First, Col. SM noted that Miss [REDACTED] “had way more than average routine accidental injuries to her face[.]” (R. at 1112). Colonel SM explained how Miss [REDACTED] sister, [REDACTED], who was in the home her when she died, “is not big enough and not strong enough to generate the forces to cause the head injuries [Miss [REDACTED] had[.]” (R. at 1111). Further, Col. SM stated that after sustaining the head trauma evident in the autopsy, Miss [REDACTED] would not have “normal mental status, and she would not be sitting up and playing.” (R. at 1119–20). Thus, the fall from the bed several days before her death could not have been the fatal massive head injury she died from.¹⁰ (R. at 1120, 1124–25).

¹⁰ Specifically, Col. SM stated, “But, if you fall and hit the back of your head, you can get subdural and you can get retinal hemorrhages. She would not have been acting well and normal and still walking around for four or five days with the type of head injury that killed her. Plus, the fact that she doesn't have features suggested of delayed deterioration.” (R. at 1124). “And I've seen those cases where children have a trauma and the brain swelling is progressive. They're not well, they're still having symptoms, but they get worse and worse. So, even if she

Additionally, Col. SM discussed Miss [REDACTED] broken humerus, stating “it actually takes significant force to break infant bones[—]pediatric bone is very elastic, [t]here’s still more cartilage in them [and therefore t]hey have more elasticity.” (R. at 1114). This break “broke the cortex edges of the bone” and Col. SM explained, Miss [REDACTED] would have been symptomatic after the fracture and would not have been able to play or use her arm. (R. at 1114).

Dr. LD was called by the appellant and was qualified as an expert in forensic pathology, autopsy, and neuropathology. (R. at 1153–54). Dr. LD found, at most, six impacts to Miss [REDACTED] head, two of which were to the top of her head. (R. at 1183). From those discernable injuries, Dr. LD testified that accidental falls could explain Miss [REDACTED] catastrophic injuries. (R. at 1183). Dr. LD also opined that Miss [REDACTED] brain “must have been swollen at some period of time when the injury occurred” and “there was enough time for the cerebral edema to subside [before Miss [REDACTED] death], because it wasn’t lethal edema.” (R. at 1233, 1235). Even Dr. LD conceded that there was no swelling on Miss [REDACTED] brain at the time of her autopsy. (R. at 1197). Dr. LD opined an accidental fall could explain Miss [REDACTED] catastrophic injuries in this case, making her more susceptible to complications. (R. at 1183–84). Dr. LD found evidence of pneumonia in Miss [REDACTED] lungs and

did fall back and hit the occiput of her head, and she could have gotten one subdural from that, not twenty plus impacts from that, she wouldn’t have been fine and then just dropped dead four days later.” (R. at 1125).

concluded that she died from impaired brain “function [] complicated by pneumonia.” (R. at 1226).

Additional facts incorporated below.

Assignment of Error I

**THE EVIDENCE SUPPORTING THE MURDER
CONVICTIONS WAS NOT FACTUALLY
SUFFICIENT.**

Standard of Review

Questions of factual sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)

Law

A. Factual sufficiency.

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 [this] court are themselves convinced of appellant’s guilt beyond reasonable doubt.” *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)). In its factual sufficiency review, this court “in considering the record . . . may weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.” Article 66(d)(1), UCMJ.

Further, this court has stated: “we are required to make credibility determinations on appeal, but those determinations . . . recognize the trial court’s superior position in making those determinations. Our assessment of evidence must be sifted through a filter that recognizes our 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.) (citing *Washington*, 57 M.J. at 399).

Factfinders “are expected to use their common sense in assessing the credibility of testimony as well as other evidence presented at trial.” *United States v. Frey*, 73 M.J. 245, 250 (C.A.A.F. 2014). There is “no reason why the principles that members may use their common sense and ways of the world to assess the credibility of the evidence should not apply in equal measure in a military judge alone case.” *Id.* at 251. “In weighing and evaluating the evidence, [the factfinder is] expected to use [his] own common sense and [his] knowledge of human nature and the ways of the world. In light of all the circumstances in the case, [the fact finder] should consider the inherent probability or improbability of the evidence.” Dep’t of Army, Pam. 27-9, Legal Services: Military Judges’ Benchbook, para. 2-5-12 (29 February 2020) [Benchbook].

B. Article 118—Murder.

Unpremeditated murder¹¹ has four elements: (1) a death; (2) that the accused caused the death by an act or omission; (3) the killing was unlawful; and (4) at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon a person. Art. 118(2), UCMJ; Manual for Courts-Martial [*MCM*], Part IV, ¶ 56b(2)(a)-(d). “It may be inferred that a person intends the natural and probable consequences of an act purposely done. Hence, if a person does an intentional act likely to result in death or great bodily injury, it may be inferred that death or great bodily injury was intended.” *United States v. Valdez*, 35 M.J. 555, 560 (A.C.M.R. 1992), *aff’d*, 40 M.J. 491 (C.M.A. 1994). Murder under Article 118(2) “requires a specific intent to kill *or inflict great bodily harm*.” *Id.* at 559 (emphasis added); *see also*, *United States v. Roa*, 12 M.J. 210, 212 (C.M.A. 1982) (“... whereunder intent to inflict [great] bodily harm will allow [a] conviction for murder [under the provisions of Article 118(2)]”).

Wanton Murder¹² has five elements: (1) a death; (2) that the death resulted from the intentional act of the accused; (3) that the act was inherently dangerous to

¹¹ This brief will refer only to Article 118(2) as unpremeditated murder. All other subsections of Article 118 will be specifically and separately annotated.

¹² Appellant refers to Article 118(3), UCMJ as “wanton murder” consistent with case law, whereas the MCM refers to this manner of murder as an “act inherently dangerous to another.” Appellee will refer to Article 118(3) murder as “wanton murder.”

another and showed a wanton disregard for human life; (4) that the accused knew that death or great bodily harm was the probable consequence of the act; and (5) the killing was unlawful. Art. 118(3), UCMJ; *MCM*, Part IV, ¶ 56b(3)(a)-(e). Article 118(3) involves general intent, thus “[actual] knowledge of the probable consequences” is the requisite *mens rea* for wanton murder. *United States v. Looney*, 48 M.J. 681, 686 (C.M.A. 1998). The accused’s “knowledge of the probable consequences” of his actions “may be proved by circumstantial evidence.” *Id.* (internal citations omitted).

Argument

Appellant avers that his murder convictions should be overturned because the evidence did not establish the cause and manner of death (Appellant’s Br. 35), and because the circumstantial evidence regarding intent supporting the conviction under Article 118(2), UCMJ is incongruent with a conviction for Article 118(3), UCMJ. (Appellant’s Br. 30–35).¹³ For the reasons set forth below, both of appellant’s arguments fail.

¹³ “Although Subsections 2 and 3 of Article 118 are ‘parallel,’ Subsection 3 may be construed as a lesser offense because its threshold of culpability is lower, and in many cases facts that satisfy Subsection 2 would satisfy Subsection 3, but the reverse is not true.” (Appellant’s Br. 33–34).

A. The medical evidence proves that appellant murdered Miss [REDACTED] a ten-month old infant, by repetitively causing blows to her head.

Miss [REDACTED] cause of death was “multiple blunt forces injuries” to her head and her manner of death was homicide. (R. at 984). Three medical experts who reviewed Miss [REDACTED] autopsy and appellant’s case file, including accounts of pervious falls, all concluded that she died from multiple blunt force injuries.¹⁴ The sole outlying medical expert, Dr. LD, testified the cause of death was “cranial cerebral trauma and complication[—]pneumonia” despite visualizing six separate impacts to Miss [REDACTED] head and finding no signs of edema from the autopsy. (R. at 1183, 1189, 1197, 1223).

Appellant’s versions of what happened prior to Miss [REDACTED] death are implausible based on the scientific evidence presented at his court-martial. As detailed *supra* pp. 2–4, appellant discloses no falls or accidents on 19 January 2019—the date of Miss [REDACTED] death. Appellant only told the responding paramedic about a fall a few days prior where Miss [REDACTED] was jumping on the bed and fell off on to the tile floor, after asked how she got a bruise on her forehead.¹⁵

¹⁴ Dr. JD testified cause of death was “multiple blunt force injures” (R. at 907–08); Dr. NS testified cause of death was “blunt force trauma with acceleration/deceleration injuries resulting in grave global brain injury” (R. at 1061); and Col. SM testified that cause of death was a result of non-accidental trauma. (R. at 1126–27).

¹⁵ This fall was also described to the fact finder by defense counsel during cross examination where Dr. JD was asked about [REDACTED] (Miss [REDACTED] mother) testimony at an Article 32, UCMJ hearing. (R. at 1019). Defense counsel states “in [REDACTED]

(R. at 744). Appellant disclosed no other falls or accidents to any other medical providers or law enforcement.

However, this purported fall cannot account for the extensive injuries to Miss [REDACTED] head which ultimately resulted in her death. (R. at 909). The pediatric neurologist, Dr. SN, testified,

It's clear from the autopsy that [] this child didn't die from bumping her head on the bed 2 days before. . . this child had [] twenty plus separate incidents of abusive head trauma on top of a broken arm, on top of retinal hemorrhages, on top of bruising on other locations. So, clearly, this child was abused multiple times in a row over a short period of time. (R. at 1099).

Dr. LD, on the other hand, concluded that the "fall backwards" described to have occurred two days before Miss [REDACTED] death could have brought about a "contusion of the cortex" which in turn would have caused her brain to be "less functional" resulting in her being more vulnerable to complications such as pneumonia. (R. at 1184). In fact, "less than [one] per [two] million children per year [die] from a short fall." (R. at 1121).

sworn testimony, she describes the fall where the child launched herself off the bed, she grabbed her arm, and she fell and hit her head both on the bedpost and the ground, right?" (R. at 1019). Dr. JD responded: "That's correct." (R. at 1019). On re-direct, Dr. JD stated, "[Miss [REDACTED] did reportedly hit her forehead on the side rails of, how I read it, of the bed. As mom caught her to pull her back, she still banged into the side rail, which I guess is where the box spring and the mattress would sit is how I see it. She could get a bruise from that. She could have gotten a skull fracture from that. She did not, in my opinion, get a massive injury from that[.]" (R. at 1122). There was no direct testimony of this fall at trial, as [REDACTED] did not testify on the merits.

Dr. LD's conclusions have several scientific inaccuracies, as addressed in the government's cross-examination of him. (R. at 1191–1246). To begin, if the fall Appellant described occurring two days prior to Miss [REDACTED] death was sufficiently devastating to make her "vulnerable to complications," she must have also sustained brain swelling and apparent neurological symptoms. (R. at 1071). It is not medically possible that Miss [REDACTED] brain swelling (edema) would have decreased at time of her autopsy from any fall she sustained two days prior to her death. (R. at 1071). This is true for two reasons.

First, according to Dr. SN, if Miss [REDACTED] fall two days earlier was linked to her death several things would have happened to her that would have been obvious in the autopsy. (R. at 1071–72). There would have been evidence that her brain shifted, either (a) from blood coming into the cavities of her skull, or (b) evidence of her being comatose. (R. at 1071–72). Regarding the former, there would be evidence that the "brain shift[ed] to try and get out of the way of the blood, and that's actually what ends up causing you to die [is] your brain shifting." (R. at 1071–72). With the latter, the brain would have swelled resulting in cerebral edema, which "will cause you to become unconscious" and comatose. (R. at 1072).

The second reason it is not possible that Miss [REDACTED] prior fall caused her death is because any cerebral edema she suffered would have gotten worse,

peaking somewhere between 48 to 72 hours after the injury before the swelling decreased. (R. at 1072). If true, it would have been visible at the autopsy. (R. at 1072). No swelling of Miss [REDACTED] brain was found in her autopsy, a fact that even Dr. LD agreed with. (R. at 1072, 1223, 1233, 1235).

Moreover, according to Col. SM, if Miss [REDACTED] had sustained a two-day old devastating injury proximately causing death, there would have also been neurological symptoms. (R. at 1119–20). Dr. LD’s testimony cannot account for her physical activity prior to her death. Miss [REDACTED] would not have been “sitting up alert and playing.” (R. at 1119–20). Despite opining a contradictory cause of death, Dr. LD conceded there were no symptoms reported in the 72 hours prior. (R. at 1193).

This court can contrast the testimony of the medical experts and “consider the inherent probability or improbability of the evidence.” Benchbook, para. 2-5-1. Moreover, this court must give deference to the factfinder by “making allowances for not having personally observed the witnesses” and must “recognize the trial court’s superior position in making those determinations.” *Rosario*, 76 M.J. at 117 and *Feliciano*, 2016 CCA LEXIS at *8.

B. The evidence presented at trial supported both the specific intent theory of unpremeditated murder and the wanton act theory of murder.

Appellant's submission that the distinguishing characteristic between Article 118(2) and 118(3) "is the distinction between having in one's mind the intent to cause the consequence of the act versus having in one's mind the knowledge of what the consequences would likely be" is not supported by the law. (Appellant's Br. 31). The *mens rea* for Article 118(2) is a "[specific focused] intent to kill or inflict great bodily harm." *Looney*, 48 M.J. at 686 (internal quotations and citations omitted). "Wanton disregard for human life is defined as conduct reflecting heedlessness, indifference, recklessness, a depraved or 'so what' attitude about the probable fatal consequences of an act, or some combination thereof." *Id.* (cleaned up).

1. Appellant's intent can be inferred from the crime.

Appellant's intent can be inferred from the circumstantial evidence establishing Miss [REDACTED] cause and time of death. *See United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (citing *United States v. Kearns*, 73 M.J. 177, 182 (C.A.A.F. 2014) and *United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007)); *see also United States v. Curry*, 31 M.J. 359, 371 (C.M.A. 1990) ("although there may have been no *direct* evidence of [] intent (such evidence could only exist in the case of an admission or confession of guilt), there was substantial

circumstantial evidence from which these elements could be inferred”) (emphasis in original).

Here, the government presented a robust case and the factfinder relied on circumstantial evidence establishing Miss [REDACTED] time of death occurred when she was left in the sole care of the appellant. The Court of Appeals for the Armed Forces (CAAF) has recognized the “ability to rely on circumstantial evidence is especially important in cases . . . where the offense is . . . committed in private.” *King*, 78 M.J. at 221. The government established that appellant was the only caretaker at home with Miss [REDACTED] and her sister on 19 January 2019. (R. at 768–69). The evidence at trial also established that Miss [REDACTED] was still alive at least as late as 1224 because this is when [REDACTED] FaceTimed appellant and saw the children. (R. at 770). The next known condition of Miss [REDACTED] was at 1314, when the paramedics arrived and she was motionless, not breathing, with no pulse, and lying on tile floor. (R. at 730, 743). It was also readily established, as discussed *supra* pp. 14–17, that Miss [REDACTED] was killed by blunt force trauma to her head, when only individuals in the home with her were appellant and her four-year-old sister—who would not have been strong enough to inflict the devastating injuries in this case. (R. at 768, 1111).

2. Appellant had the intent to commit unpremeditated murder.

The circumstantial evidence proved that appellant had the “intent to kill or inflict great bodily harm” upon Miss [REDACTED] when he struck her more than twenty times in the head. Art. 118(2), UCMJ; (R. at 944). “[I]f a person does an intentional act likely to result in death or great bodily injury, it may be inferred that death or great bodily injury was intended.” *Valdez*, 35 M.J. at 560, *aff’d*, 40 M.J. 491; *cf.*, *United States v. Buber*, ARMY 20000777, 2005 CCA LEXIS 458 (Army Ct. Crim. App. 12 Jan 2005) (mem. op.) (appellant’s conviction for Article 118(2), UCMJ was factually insufficient where the “government’s expert failed to exclude the reasonable possibility that [the decedent] accidentally suffered a previous head injury . . . which was exacerbated by a second injury[.]”). Death or great bodily harm is the only probable consequence of repeatedly hitting a ten-month-old infant in the head. Circumstantial evidence of appellant’s intent can be inferred from the extraordinarily excessive blows Miss [REDACTED] endured and the substantial damage caused to her brain. *See Curry*, 31 M.J. at 372 (“there was abundant evidence for which the factfinder could have otherwise inferred [intent] . . . including the extraordinarily violent nature of the [assault]”).

3. Appellant acted with a wanton disregard for Miss [REDACTED] life when he repeatedly beat her.

As an alternative theory of guilt (R. at 1449–50), the government proved that appellant engaged in the “intentional act” of striking Miss [REDACTED] that this “act was inherently dangerous to [Miss [REDACTED] striking a ten-month-old baby in the head twenty-three times, showed a “wanton disregard for human life”; and that he knew the “probable consequence” of viciously beating a ten-month-old defenseless infant was “death or great bodily harm.” Art. 118(3), UCMJ, *MCM*, Part IV, ¶ 56b(3)(b)-(d). Wanton disregard murder is a general intent crime and “knowledge of the probable consequences [of the intentional act] may be proved by circumstantial evidence.” *Looney*, 48 M.J. at 686. Notwithstanding the fact that wanton murder under Article 118(3), UCMJ is not a lesser included offense of unpremeditated murder under Article 118(2), UCMJ,¹⁶ the factfinder was permitted to draw the same inferences for the specific intent of “death or great bodily harm” for unpremeditated murder, as he did in finding general intent under wanton disregard murder. *See Looney*, 48 M.J. at 687 (“[W]e note that the evidence presented at trial supported both the wanton act theory and the specific intent theory of unpremeditated murder.”).

¹⁶ The military judge noted that the wanton disregard murder “is a lesser offense, it’s not a lesser included offense to [unpremeditated murder].” (R. at 1457).

Therefore, “the members of [this] court [can be] convinced of appellant’s guilt for both unpremeditated and wanton murder beyond reasonable doubt,” as the number of blows alone evince the requisite *mens rea* for both convictions.¹⁷ *Rosario*, 76 M.J. at 117 (internal quotations and citations omitted).

Assignment of Error II

THE MILITARY JUDGE VIOLATED APPELLANT’S RIGHTS UNDER *BRADY* v. *MARYLAND* AND RULE FOR COURTS-MARTIAL 701.

Additional Facts

A. Appellant motioned for dismissal.

On the second day of appellant’s court-martial, 4 May 2021, defense counsel made a motion to dismiss appellant’s case due to a discovery violation citing *United States v. Stellato*. (R. at 576). The basis for this motion was that Miss [REDACTED] autopsy was sent to the Armed Forces Medical Examiner Service [AFMES] without notification to the defense¹⁸ and on 3 May 2021, the first day of trial, a report was generated. (R. at 576, App. Ex. LXIII).

¹⁷ Since appellate review is not yet complete appellee asks this court to affirm both specifications of Charge I, as the military judge “conditionally dismissed [Specification 2 of Charge I, wanton disregard murder], pending Specification 1 of Charge I[, unpremeditated murder,] surviving appellate review.” (R. at 1158); *United States v. Britton*, 47 M.J. 195, 203 (C.A.A.F. 1997) (J. Effron concurring); Art. 57(c), UCMJ.

¹⁸ The Special Agent [SA] assigned to appellant’s case, SA DB, requested a review of the autopsy by AFMES prior to informing trial counsel. (R. at 611–12).

Special Agent [SA] DB was assigned as the lead agent in appellant's case sometime in late December of 2020 and had not participated in the investigation at all prior to being assigned the case. (R. at 608). As lead agent SA DB sought to re-organize appellant's Criminal Investigation Command [CID] file and found "some investigatory activity" was still needed—namely, inconsistencies with respect to Miss [REDACTED] manner of death and the fact that no other pathologist had reviewed the autopsy other than the original civilian medical examiner. (R. at 609–10). Therefore, SA DB contacted the AFMES on or about 24 March 2021 and requested a review of Miss [REDACTED] autopsy. (R. at 611; App. Ex. LXV). Special Agent DB informed trial counsel after he had submitted his request to the AFMES and trial counsel asked SA DB to rescind the request for a review of the autopsy as the review was unnecessary to proceed to trial. (R. at 611–12; App. Ex. LXVI). This, however, was not possible because AFMES indicated that they cannot cancel the request for review until both the defense and the government agree to withdraw it. (R. at 613). Special Agent DB testified that he told trial counsel the defense would need to give their consent to stop the review and he assumed trial counsel would reach out to defense counsel if they wanted to stop the review.¹⁹ (R. at 614–15). Defense counsel was not notified of the requested

¹⁹ The military judge also questioned SA DB about whether contact was ever made with defense counsel based his Agent Investigation Report (App. Ex. LXV). (R. at 630). Special Agent DB explained that his note indicating that consultation

review of the autopsy nor asked to join the government's withdrawal request. (R. at 614, 576).

The report was created and sent to government counsel, via SA DB, on 4 May 2021²⁰ and forwarded to defense the same morning. (R. at 576). The report from the AFMES states, in part, “[t]he materials reviewed in this case show findings that are highly concerning for non-accidental trauma. The injuries described [in our findings] are not consistent with the falls that the infant reportedly experienced several days prior to death.” (App. Ex. LXIII).

B. The military judge denied appellant's motion for dismissal but barred the government from using the AFMES report.

The military judge made the following findings of fact: (1) “on day two of the government's case in chief, the defense made a motion to dismiss for non-disclosure of discovery in accordance with Rule For Courts-Martial [R.C.M.] 701”; (2) “government counsel beforehand had emailed [the AFMES report] to the defense team indicating that the [AFMES office] had rendered an undetermined cause and manner of [Miss ██████ death]”; (3) CID determined, prior to trial, that “the investigative file needed to be cleaned up to meet CID's paperwork

with TDS was done was his “speculation based on a lack of response [f]rom [trial counsel].” (R. at 630–31).

²⁰ The report was forwarded to trial counsel at 0907 on 4 May 2021. (R. at 577, App. Ex. XLIV p. 15). Trial counsel forwarded the email and report to the defense as soon as he received it which was during a recess at 1025. (R. at 577).

requirements” and therefore sent the autopsy out to AFMES “to complete their own records”; (4) trial counsel was aware of the AFMES office’s efforts to review Miss [REDACTED] autopsy and “negligently failed to [inform the defense]”; and (5) the failure to disclose was due to a failure in communications, “trial counsel negligence, inexperience, and competing interests in the case from both CID and the prosecution.” (R. at 714–16).

In analyzing the applicable law, the military judge found a discovery violation for government knowing that an additional review of Miss [REDACTED] autopsy was being conducted and failing disclose that to the defense. (R. at 715).

However, he concluded “the defense is not disadvantaged” despite the government’s violation. (R. at 717). The military judge did not find a *Brady* violation because the report produced was not favorable to appellant. (R. at 717). At best, the military judge explained, the medical examiner did not have sufficient information to generate an opinion despite saying the original autopsy was “highly concerning and required that the body be exhumed and re-examined for further investigation”. (R. at 717, *citing* App. Ex. LXIII).

Consistent with the remedies outlined in R.C.M. 701(g)(3)(C), the military judge held “[t]he government may not refer to [the AFMES review], and certainly will not be allowed to admit it.” (R. at 717).

Standard of Review

A military judge's discovery rulings and remedies are reviewed for an abuse of discretion. *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015) (cleaned up). "The abuse of discretion standard calls for more than a mere difference of opinion." *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014). An abuse of discretion occurs "when [the military judge's] findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *Stellato*, 74 M.J. at 480.

Law

The government has as continual obligation to disclose information "favorable to the defense and material to the [accused's] guilt or punishment." *Smith v. Cain*, 565 U.S. 73, 73 (2012) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)); R.C.M. 701(d). "Evidence is favorable if it is exculpatory, substantive evidence, or evidence capable of impeaching the government's case." *United States v. Behenna*, 71 M.J. 228, 238 (C.A.A.F. 2012) (cleaned up). Evidence is material when "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Smith*, 565 U.S. at 73 (cleaned up). "A reasonable probability does not mean that the accused 'would more likely than not have received a different verdict with the evidence,'

only that the likelihood of a different result is great enough to ‘undermine[] confidence in the outcome of the trial.’ *Id.* (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

Trial counsel has a duty to “disclose to the defense the existence of evidence known to trial counsel, [as soon as practicable], which reasonably tends to [n]egate the guilt of the accused[.]” R.C.M. 701(a)(6)(A). Article 46, UCMJ, obligates the government to remove “obstacles to defense access to information” and provide “such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence.” *Stellato*, 74 M.J. at 481 (quoting *United States v. Williams*, 50 M.J. 436, 442 (C.A.A.F. 1999)).

A military judge may employ one or more of the following actions in response to discovery violations: (a) order the party to permit discovery; (b) grant a continuance; (c) prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and (d) enter such other order as is just under the circumstances. R.C.M. 701(g)(3); *See also United States v. Vargas*, 2023 CAAF LEXIS 146, *7–8, __ M.J. __ (C.A.A.F. 2023) (outlining remedies for discovery violations).

Argument

A. Failure to disclose this information does not equate to a *Brady* violation.

There was no *Brady* violation because the AFMES report was not favorable to appellant nor material to his guilt or punishment. *Brady* 373, U.S. at 87 (R. at 717; App. Ex. LXIII). The opinion of the medical examiner from AFMES stated “[t]he materials reviewed in this case show findings that are highly concerning for non-accidental trauma . . .” and “we cannot rule out homicide as manner of death.” (App. Ex. LXIII). These conclusions are directly aligned with the theory of the government’s case: that the original medical examiner determined wrongly that cause of death was accidental and there were numerous shortcomings with the autopsy. (R. at 577–578, 929). Thus, this evidence was not exculpatory and would have bolstered the government’s case, not impeached it. (R. at 717); *See Behenna*, 71 M.J. at 238 (“[e]ven if we assume the evidence was favorable and not properly disclosed, the evidence was ultimately immaterial both as substantive and impeachment evidence”).

Contrary to appellant’s assertions that material evidence “includes that which would assist the defense in formulating strategy, tactics, or lines of investigation” (Appellant’s Br. 48; R. at 700), evidence is material when “there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” *Smith*, 565 U.S. at 73. The result of

appellant's court-martial, in relevant part, was guilty findings for both specifications of murder. (R. at 1375). If the report from the AFMES had been known to the defense prior to the start of his court-martial²¹ and both parties were free to rely on the report, then the result of the proceeding would *not* have been different. *Smith*, 565 U.S. at 73. Since *Brady* is rooted in the due process rights of the accused, there can still be a discovery violation despite finding no *Brady* violations. *United States v. Adens*, 56 M.J 724, 732 (Army Ct. Crim. App. 2002).

B. The discovery violation and remedy.

In the present case the military judge found a discovery violation. (R. at 715). The military judge concluded the “government should have informed the defense of [the ongoing review of Miss ██████ autopsy by the AFMES], and negligently failed to do so.” (R. at 715). Appellant's argument that this report was material evidence because it “would assist the defense in formulating strategy, tactics, or lines of investigation” (Appellant's Br. 48, R. at 700) more accurately falls into an R.C.M. 701 discovery violation as opposed to a *Brady* violation. *See* R.C.M. 701(a)(2)(A)–(B) (“... the Government shall permit the defense to inspect any ... papers, documents, ... the results or reports of physical examinations. ... or [results] of any scientific tests ... which are in the possession, custody, or control

²¹ Despite the fact that the report did not exist prior to the start of appellant's court-martial, its imminent production required the government to inform defense of the AFMES review of Miss ██████ autopsy.

of military authorities, the existence of which is known or by the exercise of due diligence may become known to trial counsel if . . . the item is relevant to defense preparation[.]”).

The military judge’s remedy for this discovery violation was proper. *Vargas*, 2023 CAAF LEXIS at *7–8. Relevant to the military judge’s chosen remedy is the fact that the undisclosed evidence is not exculpatory. *See Stellato*, 74 M.J. at 489–90 (reasoning the military judge did not abuse his discretion in ordering dismissal with prejudice, in part, because of the exculpatory nature of the evidence that was not disclosed); *but see United States v. Trigueros*, 69 M.J. 604, 610 (Army Ct. Crim. App. 2010) (“Although not a common occurrence, our court has previously recognized that an Article 46 [discovery], UCMJ violation may occur without a coexistent violation of constitutional due process.”).

This is not a scenario where government counsel withheld information that “reasonably tend[ed] to either negate or reduce the guilt of an accused, or reduce[d] the accused’s punishment.” R.C.M. 701(a)(6). Here, the military judge found “the defense [was] not disadvantaged.” (R. at 717). Instead, the evidence was incriminating and disclosed immediately upon receiving it. (R. at 577). The military judge summarized the AFMES report, stating that the medical examiner’s findings were “highly concerning [for a finding of non-accidental trauma (App. Ex. LXIII)] and required that the body be examined and re-examined for further

investigation.” (R. at 717). Open disclosure—regardless of the incriminating versus exculpatory nature of the evidence—is the standard in military criminal practice. *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004). Here, the discovery violation found was for not informing the defense of the ongoing efforts of the AFMES—once the report was created, however, the government immediately provided it to the defense. (R. at 577).

In this case, where the evidence was not exculpatory, the failure to keep the defense apprised of an independent office’s efforts in continuing the investigation against appellant was merely negligent—as the Military Judge found— and not willful, and the report was immediately turned over to defense, the military judge’s ruling to prohibit the use of it against appellant was well within the “range of choices reasonably arising from the applicable facts and the law.” *Stellato*, 74 M.J. at 480.

Assignment of Error III

ASSAULT WITH AN UNLOADED FIREARM IS NOT A LESSER-INCLUDED OFFENSE OF AGGRAVATED ASSAULT WITH A LOADED FIREARM

Additional Facts

A. Appellant was charged with committing an aggravated assault upon First Lieutenant [1LT] [REDACTED] with a deadly weapon in violation of Article 128, UCMJ.

Appellant was charged that “at or near El Paso, Texas, on or about 13 July 2019, with intent to inflict bodily harm, [he did] commit an assault upon 1LT [REDACTED] by shooting at her with a dangerous weapon to wit: a loaded firearm.” (Charge Sheet, Additional Charge VI, Specification 1). The maximum punishment for this offense is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 8 years. *MCM*, Part IV, ¶ 77.d.(3)(a)(i).

B. Appellant was found guilty of committing a simple assault upon 1LT [REDACTED] in violation of Article 128, UCMJ.

The military judge found appellant guilty of Specification 1 of Additional Charge VI by exceptions and substitutions. (R. at 1377). The guilty charge reads as follows: “[Appellant] did, at or near El Paso, Texas, on or about 13 July 2019, commit an assault upon 1LT [REDACTED] by pointing at her with an unloaded firearm.” (R. at 1377). Appellant was found guilty of a simple assault. The maximum punishment for a simple assault committed with an unloaded firearm is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3

years. *MCM*, Part IV, ¶ 77.d.(1)(b). Appellant received 30 months confinement for this specification. (R. at 1453).

Standard of Review

Whether an offense is a lesser included of another offense is a question of law reviewed *de novo*. *United States v. Gonzales*, 78 M.J. 480, 483 (C.A.A.F. 2019). When an appellant fails to object to a finding of guilty to a lesser included offense, and raises it for the first time on appeal, this court reviews the issue only for plain error. *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018).

Under plain error review, appellant must demonstrate that: “(1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the accused.” *United States v. Jones*, 78 M.J. 37, 44 (C.A.A.F. 2018) (cleaned up). “[A]ll three prongs must be satisfied” in order for the appellant to prevail. *United States v. Gomez*, 76 M.J. 76, 79 (C.A.A.F. 2017).

Law

An accused may be found guilty of a lesser included offense of the offense charged. Art. 79(a), UCMJ. An offense is a lesser included offense when it is “necessarily included in the offense charged.” Art. 79(b)(1), UCMJ. This elements test has been applied in two ways: (1) “if each of its elements is necessarily also an element of the charged offense,” or (2) “if the specification of

the charged offense is drafted in such a manner that it alleges facts that necessarily satisfy all the elements of each offense.” *Armstrong*, 77 M.J. at 469–70.

The elements of aggravated assault with a loaded firearm are as follows:

- (1) That the accused *offered* to do bodily harm to a certain person;
- (2) That the *offer* was made with the intent to do bodily harm;
- (3) That the accused did so with a dangerous weapon; and
- (4) That the dangerous weapon was a loaded firearm.

MCM, Part IV, ¶77.b.(4)(a)(i)-(iii) (emphasis added).²²

The elements of simple assault with an unloaded firearm are as follows:

- (1) That the accused attempted to do *or* offered to do bodily harm to a certain person;
- (2) That the attempt *or* offer was done unlawfully; and
- (3) That the attempt *or* offer was done with force or violence; and
- (4) That the accused did so with an unloaded firearm.

MCM, Part IV, ¶77.b.(2)(a)-(c) & ¶77.d.(1)(b) (emphasis added).²³

²² See also Benchbook, para. 3a-52-8c:

- (1) That, (state the time and place alleged), the accused assaulted (state the name of the alleged victim) by offering to do bodily harm to him/her;
- (2) That the accused did so by (state the manner alleged) with a certain weapon, to wit: (state the weapon alleged).
- (3) That the accused intended to do bodily harm;
- (4) That the weapon was a dangerous weapon; and
- (5) That the weapon was a loaded firearm.

²³ See also Benchbook, para. 3a-52-1c:

- (1) That (state the time and place alleged), the accused (attempted) (offered) to do bodily harm to (state the name of the alleged victim) by (state the manner alleged);
- (2) That the (attempt) (offer) was done unlawfully; (and)
- (3) That the (attempt) (offer) was done with force or violence; [and]
- (4) That the (attempt) (offer) was done with an unloaded firearm.

Argument

This court should affirm the military judge’s findings regarding Specification 1 of Additional Charge VI because it is a lesser included offense of the specification charged. *See United States v. Bousman*, 2023 CCA LEXIS 66, *16 (A.F. Ct. Crim. App. 8 Feb. 2023).

A. Aggravated assault with a loaded firearm is an offer-type assault.

Appellant’s argument is conditioned upon his assertion that aggravated assault is an attempt-type assault. (Appellant’s Br. 54). Appellant states that “[Specification 1 of Additional Charge VI, as charged,] is patently an attempt-type assault with a specific intent and over act [sic].” (Appellant’s Br. 54). This conclusory statement, however, is not supported by the record. The 2019 edition of the MCM intentionally aligns an aggravated assault as an offer type assault only, whereas, in previous additions of the MCM, aggravated assault could be an attempt *or* offer-type assault. *Cf. MCM*, Part IV, ¶77.b.(4)(a)(i)-(ii) (2019 edition) (“[t]hat the accused *offered* to do bodily harm to a certain person” and “[t]hat the *offer* was made with the intent to do bodily harm”) *with MCM*, Part IV, ¶54.b.(4)(a)(i)&(iii) (2016 edition) (“[t]hat the accused *attempted* to do, *offered* to do, or did bodily harm to a certain person” and “[t]hat the *attempt, offer, or* bodily harm was done with unlawful force or violence”) (emphasis added to both); *see also Bousman*, 2023 CCA LEXIS at *16 (“there is no provision for an attempt-type

aggravated assault with a dangerous weapon [in the 2019 edition of the MCM]”).

Simple assault can be either an attempt *or* offer-type assault under either version of the MCM.²⁴

Appellant was convicted of an offer-type simple assault, in that he placed 1LT ■■■ in fear, which she reasonably apprehended, when he pointed a firearm at her. (R. at 463, 1377). Appellant acknowledges as much. (Appellant’s Br. 54).

B. Simple assault with an unloaded firearm is a lesser included offense of aggravated assault with a loaded firearm.

Despite the military judge finding appellant guilty by exceptions and substitutions this court can conclude that “the charged offense [was] drafted in such a manner that it alleges facts that necessarily satisfy all the elements of each offense” as a lesser included offense.²⁵ *Armstrong*, 77 M.J. at 470.

The first element of the greater offense,²⁶ “[t]hat the accused offered to do bodily harm to a certain person,” is mirrored in the lesser offense.²⁷ *Cf. MCM*, Part IV, ¶77.b.(4)(a)(i) *with MCM*, Part IV, ¶77.b.(2)(a).

²⁴ *Cf. MCM*, Part IV, ¶77.b.(1)(a)-(c) (2019 edition) *with MCM*, Part IV, ¶54.b.(1)(a)-(b) (2016 edition).

²⁵ A strict statutory definition elements test is not appropriate for these two types of assault since simple assault can be either an attempt or offer-type assault, whereas aggravated assault can only be an offer-type assault. *United States v. Gaskins*, 72 M.J. 225, 235 (C.A.A.F. 2013).

²⁶ Herein after “greater offense” will refer to aggravated assault with a dangerous weapon.

²⁷ Herein after “lesser offense” will refer to simple assault with an unloaded firearm.

The next element of the greater offense is “[t]hat the offer was made with the intent to do bodily harm[.]” *MCM*, Part IV, ¶77.b.(4)(a)(ii). The lesser offense requires that the offer was done unlawfully and with force or violence. *MCM*, Part IV, ¶77.b.(2)(b)-(c). As charged, appellant was on notice of “the intent to do bodily harm” by “shooting at” the victim. (Charge Sheet, Additional Charge VI, Specification 1). Therefore, appellant was aware that the government was seeking to prove that the victim apprehended fear from him pointing a firearm at her and pulling the trigger. (See R. at 464, where defense counsel objects to victim “impact testimony” during merits but not the substance of the victim’s apprehension of fear). Since pointing a firearm at someone without legal justification or excuse, as it was charged here, is unlawful and is a gesture of violence, the next two elements of the lesser offense are necessarily covered by the larger offense as charged.

Finally, there is no question that final elements of the greater offense—that the offer was done with a loaded firearm—covers the simple assault with an unloaded firearm specification appellant was found guilty of.

Thus, contrary to appellant’s assertions, the military judge properly found appellant guilty of the lesser included offense of the greater specification of aggravated assault with a deadly weapon. See *Bousman*, 2023 CCA LEXIS at *16.

Finally, appellant's argument asserting the simple assault is not a lesser included offense cannot survive a plain error review. Appellant did not object to the military judge's finding at trial. When an appellant fails to object to a lesser included offense at trial, appellate courts can only review the issue for plain error. *Armstrong*, 77 M.J. at 469 (C.A.A.F. 2018).

As detailed *supra* pp. 36–38, there was no error. However, assuming *arguendo* there was, the finding is neither plain nor obvious. Defense counsel made no objection to the finding at trial nor was this claimed error addressed at a post-trial Article 39(a), UCMJ session that was called for the unique purpose of clarifying the military judge's findings. (R. at 1457). Moreover, appellant failed in his brief to even assert how the purported error “materially prejudiced [his] substantial right[s.]” *Jones*, 78 M.J. at 44.

Therefore, finding no error, nor any prejudice to an unspecified material right, this court should affirm the military judge's finding of guilt for a simple assault with an unloaded firearm.²⁸

²⁸ Should this court hold that the simple assault with an unloaded firearm appellant was convicted of is not a lesser included offense of aggravated assault with a loaded firearm he was charged with, this court can affirm appellant's conviction under a variance analysis. “A variance that is material is one that, for instance, substantially changes the nature of the offense, increases the seriousness of the offense, or increases the punishment of the offense.” *United States v. Marshall*, 67 M.J. 418, 420 (C.A.A.F. 2009). “A variance can prejudice an appellant by (1) putting ‘him at risk of another prosecution for the same conduct,’ (2) misleading him ‘to the extent that he has been unable adequately to prepare for trial,’ or (3)

Conclusion

WHEREFORE, the government respectfully requests this honorable Court affirm the findings and sentence as approved by the convening authority.



CPT, JA
Appellate Attorney, Government
Appellate Division



MAJ, JA
Branch Chief, Government
Appellate Division



COL, JA
Chief, Government Appellate
Division

denying him ‘the opportunity to defend against the charge.’” *Id.* (quoting *United States v. Teffeau*, 58 M.J. 62, 67 (C.A.A.F. 2003)). Since all factors weigh in favor of the government, appellant was on notice of the conduct he needed to defense against, and the conviction is appropriate.

Certificate of Filing and Service

I certify that a copy of the foregoing was sent via electronic submission to
the Defense Appellate Division at [REDACTED]
[REDACTED] on the 27 day of April, 2023.

[REDACTED]
Paralegal Specialist
Government Appellate Division

APPENDIX

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).

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

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.

trio back to the barracks. En route, they were pulled over by the police. Specialist Schwartz barely passed a 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

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, 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 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).

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

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*.

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.

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 appellant is not entitled to any relief.

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.

³The 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.

⁴Consider 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.

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.

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United States v. Buber

United States Army Court of Criminal Appeals

January 12, 2005, Decided

ARMY 20000777

Reporter

2005 CCA LEXIS 458 *; 2005 WL 6520474

UNITED STATES, Appellee v. Sergeant SCOTT A. BUBER, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Stay denied by United States v. Buber, 61 M.J. 48, 2005 CAAF LEXIS 245 (C.A.A.F., 2005)

Prior History: [*1] United States Army Alaska. Stephen V. Saynisch (arraignment) and Robert F. Holland (trial), Military Judges, Lieutenant Colonel Richard O. Hatch, Staff Judge Advocate.

Counsel: For Appellant: Captain Eric D. Noble, JA (argued); Colonel Robert D. Teetsel, JA; Major Imogene M. Jamison, JA; Captain Gregory M. Kelch, JA (on brief); Major Allyson G. Lambert, JA.

For Appellee: Captain Michael D. Wallace, JA (argued); Colonel Lauren B. Leeker, JA; Lieutenant Colonel Margaret B. Baines, JA (on brief).

Judges: Before CHAPMAN, CLEVENGER, and STOCKEL, Appellate Military Judges. Senior Judge CHAPMAN and Judge CLEVENGER concur.

Opinion by: STOCKEL

Opinion

MEMORANDUM OPINION

STOCKEL, Judge:

A general court-martial composed of officer and enlisted members convicted appellant, contrary to his pleas, of making a false official statement, unpremeditated murder, and assault of a child under the age of sixteen, in violation of Articles 107, 118, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 918, and 928 [hereinafter UCMJ]. The convening authority approved the adjudged sentence to a dishonorable discharge and

confinement for thirty-three years.

In this Article 66, UCMJ, appeal, appellant asserts that: (1) the evidence is factually [*2] and legally insufficient to sustain a finding of guilty to unpremeditated murder; (2) the military judge erred in admitting appellant's oral and written statements to agents from the Criminal Investigation Command (CID); (3) the record of trial is nonverbatim; and (4) the trial counsel's closing argument at the merits phase of the trial was prejudicially inflammatory when it included an emotional reading to the panel of what the government believed the child-victim would have said had he been alive to testify. In addition to these assigned errors, we asked counsel to argue whether the evidence is factually and legally sufficient to sustain a finding of guilty of the assault of a child under the age of sixteen.

Based upon the record of trial before us, we find that the evidence adduced at trial was factually insufficient to support appellant's conviction of unpremeditated murder and assault of a child under the age of sixteen. Although the government theorized that appellant was a child abuser who assaulted his stepson, Ja'lon Johnson, on 16 November 1999, and subsequently inflicted a mortal injury upon Ja'lon on 29 November 1999, the evidence fails to prove these theories beyond a reasonable [*3] doubt. The greater weight of the evidence supports the defense theory that Ja'lon fell down stairs on 16 November 1999, injuring himself, received superficial treatment following the fall, and demonstrated lingering symptoms of a head injury, which were fatally exacerbated by being accidentally hurt while playing roughly a football game with appellant on 29 November 1999. Based upon all of the circumstances and medical opinion evidence, the combination of these accidental injuries as the cause of death cannot be precluded beyond a reasonable doubt. We will grant appropriate relief in our decretal paragraph.

Facts

We find the following as a matter of fact. On 16

November 1999, appellant brought his four-year-old stepson, Ja'lon Johnson, to Bassett Army Community Hospital, Fort Wainwright, Alaska [hereinafter referred to as Bassett]. Ja'lon had facial swelling across the bridge of his nose extending to under his right eye, a rug burn to his forehead, bruise on his left ear lobe, and a superficial laceration to his lower lip. Appellant told Captain (CPT) (Dr.) John Collingham, Ja'lon's treating physician, that Ja'lon had fallen down some carpeted stairs. Doctor Collingham treated Ja'lon [*4] by suturing his lower lip. Also, during the examination, Dr. Collingham performed tests to Ja'lon's facial nerves and noted Ja'lon had "bad reflexes, which showed that certain nerves were not functioning." Doctor Collingham scheduled a follow-up appointment for 17 November 1999, and prescribed Tylenol with codeine.¹ He did not order an X-ray or Computed Tomography (CT) scan,² an imaging study of the brain, to determine if there was any brain injury.

Appellant took Ja'lon to the follow-up appointment the next day and told the new treating physician, CPT (Dr.) Corrinne Coyner that Ja'lon's nose had been bleeding. Doctor Coyner referred Ja'lon to Major (Dr.) Mark Voss, an ear, nose and throat specialist, to treat the nosebleed. Although the injuries were considered on the "high scale" for injuries as a result of an accidental fall down stairs, appellant was appropriately concerned about Ja'lon's injuries and Ja'lon responded appropriately to appellant.³ None of the doctors who treated Ja'lon reported to the authorities any suspicions concerning child [*5] abuse.⁴

¹ Also known as Tylenol 3. Tylenol 3 was discontinued on or about 20 November 1999.

² Also known as "CAT scan" (Computed Axial Tomography).

³ In his progress notes, Dr. Voss reported that the bruising to Ja'lon's face was mild. He further annotated that his "exam suggest[ed] decreased sensation over the right cheek." Impairment of the reflexes may have been indicative of a head injury.

⁴ Doctor Coyner testified that she had suspicions, given the extent of the facial swelling and bruising, that Ja'lon's injuries were inconsistent with slipping on a book and falling down carpeted stairs. She further testified that she gave appellant the benefit of the doubt as appellant was appropriately concerned about Ja'lon's injuries and Ja'lon told her himself that he had slipped on a book and fell down some stairs. We find her testimony regarding her suspicions as not credible. Additionally, we find Dr. Voss' testimony regarding appellant's response to the procedure is not credible. Medical records prepared contemporaneous with the examinations

Ja'lon stayed home from Tuesday, 16 November 1999, to Friday, 19 November 1999. He was sleepy, complained of headaches, and vomited. Appellant and his wife called the advice [*6] nurse sometime before Thanksgiving, and were told that they could wait and see if Ja'lon got better, or call the emergency room and talk to someone there. They decided to wait and see.

Ja'lon returned to the child development center (CDC) on Monday, 22 November 1999. While at the CDC, Ja'lon was sleepy, complained of headaches, and was not his normal self. Ja'lon told his CDC provider, Mrs. Shanna Baker, that he fell down stairs. Appellant was not present when Ja'lon told Mrs. Baker about his fall. At approximately 1000 on 22 November 1999, appellant picked up Ja'lon and took him to have his sutures removed. Ja'lon did not return to the CDC that day. Ja'lon came to the CDC the next day, 23 November 1999, again complained of headaches and threw up at lunch. On 24 November 1999, Ja'lon was again at the CDC, still not his normal self, but more active than he was for the past two days. The next day was Thanksgiving and Friday was a training holiday. On 29 November 1999, appellant took Ja'lon to Bassett because his lip was bleeding. Later that day, back at the CDC, Mrs. Baker took Ja'lon's temperature and he had a low grade fever. As she was taking Ja'lon's temperature, Ja'lon would not [*7] sit, arched his back, and said his "booty" hurt. Ja'lon continued to be tired, withdrawn, and complained of headaches.

Later that evening on the 29th, appellant took his wife, Tameka Buber, to work around 2130-2145. Mrs. Buber was a certified nurse's aid, working at an assisted living facility for the elderly located approximately 5.4 miles from the Buber's quarters. Ja'lon and his half-brother, Alexander,⁵ went with appellant to drop off Mrs. Buber. Appellant placed a tape in the recorder to tape the end of World Wrestling Federation Monday Night Raw prior to taking Mrs. Buber to work. Appellant testified that when he and the boys returned at about 2210, appellant and Ja'lon watched the wrestling tape. After watching the tape, appellant told Ja'lon to get his Nerf football. Appellant, who weighed between 210-250 pounds, played football with Ja'lon, who weighed approximately thirty-one pounds. At one point, appellant stated that Ja'lon fell backwards and hit his head. Later, appellant and Ja'lon butted heads as appellant was trying to teach

demonstrate no such suspicions and Dr. Voss' progress notes describe "a cooperative young man" and a concerned parent.

⁵ Alexander is appellant's biological son and was approximately eight-months old at the time of Ja'lon's death.

Ja'lon spin moves to avoid being tackled. Appellant said that his left temple butted the left side of Ja'lon's head, above his temple, causing [*8] Ja'lon to hit the floor hard. Appellant asked Ja'lon if he was okay. Ja'lon replied he was okay, but became non-responsive after two minutes. According to appellant, Ja'lon's eyes were big, his breath was raspy, and his hands were up with his fingers extended, like a praying mantis. In an attempt to get a response from Ja'lon, appellant pinched Ja'lon's fingernail, ran his thumb nail under Ja'lon's feet, and pinched and bit Ja'lon on his inner thigh. When he received no response, appellant placed Ja'lon on a loveseat while he ran upstairs to change into clothes and get clothes for Ja'lon and Alexander. He laid Ja'lon on the floor to change him. At that point, appellant noticed that Ja'lon had urinated. He took off Ja'lon's underwear and put one of Alexander's diapers on Ja'lon. He then telephoned his wife and told her Ja'lon would not wake up. Mrs. Buber told appellant to bring Ja'lon to her work site. He did but, when Mrs. Buber saw Ja'lon, she told appellant to take him to the hospital.

Sometime after 0015 and before 0136 on 30 November 1999, appellant brought Ja'lon to Bassett. [*9] Ja'lon was unconscious, posturing,⁶ and his breath was rattled.⁷ Appellant told emergency room staff that he and Ja'lon fell asleep watching a video of wrestling and that upon awakening, appellant was unable to wake Ja'lon to put him to bed properly. Appellant later admitted this was a lie. Appellant also told the doctors about Ja'lon's fall down the stairs on 16 November 1999.

A CT scan was performed on Ja'lon shortly after his arrival at Bassett. Major (Dr.) Michael Citrone, the radiologist, concluded that there was: (1) a small to moderate sized left frontal parietal subdural hematoma,⁸ comprised mostly of acute blood, with some evidence of chronic blood,⁹ and (2) cerebral edema.¹⁰ Mrs.

Buber arrived at Bassett approximately twenty to forty-five minutes after appellant and Ja'lon arrived. At approximately [*10] 0500, Ja'lon and his mother were transported by air to Providence Alaska Medical Center, Anchorage, Alaska [hereinafter referred to as Providence], for neurosurgery. At Providence, his attending physician, Dr. Calle Gonzales,¹¹ annotated that Ja'lon had a slight abrasion on his left forehead area and a bruise on his right inner thigh, which was later determined to be consistent with a bite mark. Doctors Gonzales and Louis Kralick¹² performed an examination of Ja'lon's body, including rolling Ja'lon on his stomach, to determine whether there were any broken bones. No fractures, recent or old, were ever found.¹³ There were no lesions or bruises noted on Ja'lon's back, neck, or the back of his head at this time. An intercranial pressure monitor was placed in the frontal region of Ja'lon's cranium to measure pressure and swelling. According to medical records, Ja'lon suffered left hemispheric infarct and right frontal infarct.¹⁴ He was pronounced dead on 9 December 1999.

Doctor Franc Fallico,¹⁵ the Deputy Medical Examiner for Alaska, conducted Ja'lon's autopsy. He opined that Ja'lon died from multiple cranial cerebral (i.e., head) injuries. He based this opinion on several factors. First, he considered two bruises that he found on the back of Ja'lon's head. One bruise was in the middle of the back of the head, while a second bruise was in the wrinkles of the neck. Neither bruise was noted at the time Ja'lon was admitted at Providence nor [*12] were they noticed until the autopsy. Doctor Fallico opined that both were evidence of blunt force injuries, occurring during the same time frame as the internal brain injuries. He was unable to determine, however, what caused the impacts

Chronic blood refers to a period of fourteen to seventeen days after injury and is typically viewed as a dark density on a CT Scan. The period in between is referred to as subacute. Other medical experts testified, however, that only acute blood was present in the subdural hematoma.

⁶ Posturing is a term used by medical personnel to describe rigidity, flexion of the arms, clenched fists and extended legs. The arms are bent inward toward the body with wrists and fingers bent and held on the chest similar to a praying mantis. Presence of posturing implies severe damage to the brain, requiring immediate need for medical attention.

⁷ Like there was liquid in his throat.

⁸ A collection of blood on the surface of the brain.

⁹ Acute blood refers to an accumulation of blood resulting from an injury that occurred within the first twenty-four hours, and is typically viewed as a bright density [*11] on a CT Scan.

¹⁰ Brain swelling.

¹¹ Qualified as an expert in pediatric critical care.

¹² Qualified as an expert in neurosurgery.

¹³ A bone scan was performed, which supported this examination.

¹⁴ The brain is divided lengthwise into two halves called the cerebral hemispheres and is comprised of the frontal, parietal, temporal, and occipital lobes. Infarct is localized changes due to death of cells, resulting from obstruction of the blood supply.

¹⁵ Qualified as an expert in forensic pathology.

because there were no patterns to the bruising. We find that the bruise in the wrinkles of the neck was not evidence of blunt force trauma.¹⁶

Doctor Fallico further based his opinion on the presence of petechial hemorrhaging¹⁷ in Ja'lon's brain, which, in his opinion, were consistent with diffuse axonal injury (DAI).¹⁸ Diffuse axonal injury normally requires diagnosis through microscopic examination of brain tissue [*13] and it is difficult to diagnose in children. Doctor Fallico directed a microscopic examination be done, which he did not personally view, but the results of which he considered before reaching his conclusions. Doctor Fallico opined that the subdural hematoma was primarily composed of subacute bleeding and found no evidence of chronic bleeding. Additionally, his examination failed to disclose any retinal hemorrhages, which would be an indication of shaking.

The government requested that the Armed Forces Institute of Pathology conduct a microscopic examination of Ja'lon's brain tissue sections to determine whether DAI was present. Colonel (Dr.) Glenn Sandberg¹⁹ received four brain sections from the Alaska Medical Examiner's Office.²⁰ He saw axonal balloons, which, in his opinion, indicated the presence of DAI in the white matter of the brain. He was unable to tell which section contained DAI; thus, he was unable to tell where DAI was present in Ja'lon's brain. He admitted that DAI is typically [*14] found around areas of violent impact.

Prior to 16 November 1999, Ja'lon was a normal,

¹⁶ The evidence clearly supports the testimony of Dr. Jan Leetsma, who was qualified as an expert in neuropathology and forensic neuropathology, that this bruise was more of a blister or superficial pressure sore, which developed only while Ja'lon was hospitalized at Providence for more than one week. Moreover, while the bruise in the middle of the back of Ja'lon's head also appeared as bruise in the soft tissue of the scalp, the lesion in the neck wrinkles did not appear in the soft tissue.

¹⁷ Pinpoint hemorrhages that occur in minute points beneath the skin.

¹⁸ Diffuse axonal injury is a shearing of axons or nerve fibers due to accelerating and decelerating forces or rotational forces.

¹⁹ Qualified as an expert in neuropathology.

²⁰ Two of the sections were unlabelled. Two sections were labeled: one was labeled "A," and one was labeled "B." Doctor Sandberg believed that Section A was from the left hemisphere and Section B was from the right hemisphere.

healthy four-year old, who had good interaction with appellant. Additionally, prior to 16 November, only minor injuries were noted. These injuries consisted of one incident of scratches or a minor bruise on Ja'lon's back sometime between January and June 1999; a pinpoint wound on his scalp on 11 September 1999; and a black eye on 20 September 1999.²¹

Discussion

The evidence is factually insufficient to sustain both the assault and unpremeditated murder convictions

In his first assigned error, appellant asserts that the evidence is factually insufficient to sustain his conviction for unpremeditated murder. The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances [*15] for not having personally observed the witnesses," this court is "convinced of the accused's guilt beyond a reasonable doubt." *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). The standard of review for questions of factual sufficiency is de novo. *Ryder v. United States*, 515 U.S. 177, 187, 115 S. Ct. 2031, 132 L. Ed. 2d 136 (1995).

To sustain a conviction of the unpremeditated murder of Ja'lon by means of striking and shaking him, the court must be convinced beyond a reasonable doubt that the child is dead, the death resulted from an act or omission of the appellant, the killing was unlawful, and that at the time of Ja'lon's death, appellant had the intent to kill or inflict great bodily harm. The government has the burden to prove beyond a reasonable doubt that Ja'lon's death was the result of appellant striking and shaking²² Ja'lon with the intent to kill or inflict great bodily harm.

The government's evidence was entirely circumstantial, relying upon the testimony of [*16] medical experts and, to a lesser degree, upon the improbability that the victim could have been injured in the manner appellant

²¹ On 24 September 1999, however, Ja'lon had a physical conducted by Dr. Coyner, who noted no bruising during her examination.

²² So unsure of the government's case, the trial counsel, in his closing argument, argued that the panel members could except out language concerning shaking in reaching its findings.

ultimately described.²³ To prove intent to kill or inflict great bodily harm, the government relied on three medical experts who testified regarding the presence of DAI and the significant force necessary to produce this condition, such as major motor vehicle crashes, falls from second story windows, or inflicted severe blunt force injuries. The government theorized that since the force necessary to cause DAI was significant, the infliction of the injury or injuries had to be with the intent to kill or to inflict great bodily harm. In addition to the amount of force necessary to cause DAI, the government's experts also testified that, in their opinion, a fall down the stairs or, alternatively, head butting in a game of football could not produce a force sufficient to cause the injuries suffered by Ja'lon. Not one government expert witness could exactly, or precisely, quantify or define the amount of force necessary to cause this injury in this child or a source to the force that in fact caused Ja'lon's injuries. One government expert testified, however, that **[*17]** a child running into a wall could cause DAI.

Appellant's defense was that Ja'lon suffered a head injury on 16 November 1999, as evidenced by his headaches, sleepiness, and vomiting, which was subsequently exacerbated by a fall backwards and head butting while playing football with appellant on 29 November 1999. Expert medical testimony was also the centerpiece of the defense. In addition to a defense medical expert who conducted a microscopic examination of the brain sections challenging the finding of DAI, both the government's and defense's medical experts testified that there were a number of mechanisms, in addition to severe inflicted trauma, which could induce DAI. These other mechanisms include significant trauma due to rotational force, stroke or infarct, or bleeding in the brain. Moreover, the fact that Ja'lon was on a respirator for several days before the autopsy was conducted could also have caused the pinpoint spots of hemorrhaging, leading to the diagnosis of DAI. The **[*18]** absence of severe external trauma, which is usually associated with DAI, is also rare. Additionally, Dr. Fallico was unable to ascertain what caused the bruises on the back of Ja'lon's head and testified that "I don't mean to state that I know that striking, that is, hitting a person by another person, occurred in this particular case." Accordingly, testimony by the government's expert witnesses failed to exclude

the reasonable possibility that Ja'lon might have accidentally suffered a previous head injury during a fall down stairs, which was exacerbated by a second injury, caused while playing football.²⁴

The evidence is also factually insufficient to support appellant's conviction of assault on a child under the age of sixteen on 16 November 1999. The only inference of an assault as the source of those injuries came from Dr. Jenny, whose testimony was amply contradicted by the other evidence in this case. For example, not one doctor who examined Ja'lon at or near the time of the fall reported the incident as suspicious.

[*19] Furthermore, all of the doctors who saw Ja'lon and the appellant on 16 and 17 November 1999 testified that appellant was appropriately concerned for Ja'lon, to include bringing Ja'lon to Bassett the next day for a follow-up appointment. They further testified that Ja'lon's behavior was appropriate towards appellant. Moreover, after Ja'lon was admitted to Providence on 30 November 1999, a CID agent interviewed appellant in his quarters. Appellant showed the agent blood stains from the 16 November 1999 accident, in the shape of small droplets on the stairwell wall. The CID agent testified that the droplets were consistent with appellant's explanation of Ja'lon's fall.

The evidence is factually insufficient to sustain appellant's conviction of false official statement as alleged

Based upon our findings, the evidence is also factually insufficient to sustain appellant's conviction for making a false official statement, as alleged. Appellant was convicted of the following:

In that [appellant] . . . on or about 29 November 1999, with intent to deceive, utter a statement to Special Agent [SA] Nicolas Seibert and to Lieutenant Colonel [LTC] [Dr.] Tom Lyngholm to wit: Ja'lon Johnson fell down **[*20]** the stairs on 16 November 1999, Ja'lon Johnson became unresponsive after falling asleep on 29 November 1999 and sustained no injuries on 29 November 1999, or words to that effect, which statement was totally false in that Ja'lon Johnson became unresponsive after sustaining injuries on 29 November 1999 when he was awake, and was then

²³ The government's experts testified that a fall down the stairs or, alternatively, head butting in a game of football could not have produced a force sufficient to cause the injuries observed at Providence.

²⁴ With the exception of Dr. Fallico, all of the medical experts and treating physicians conceded that a prior brain injury could exacerbate a second injury to the brain.

known by . . . [appellant] to be so false.

In addition to our factual findings with regard to both the 16 and 29 November 1999 incidents, this offense as alleged is duplicitous, in that the statements to SA Siebert and Dr. Lyngholm were given at different times and places. We will take corrective action in our decretal paragraph. See Rules for Courts Martial 307(c)(2) discussion and 906(b)(5).

Reassessment Analysis

If we conclude that we can "reliably determine what sentence would have been imposed at the trial level if the error had not occurred," we need not order a rehearing on the sentence in this case. *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986). "[T]he standard for reassessment is not what sentence would be imposed at a rehearing, but rather, would the sentence have been 'at least of a certain magnitude.'" *United States v. Taylor*, 51 M.J. 390, 391 (1999) [*21] (quoting *United States v. Taylor*, 47 M.J. 322, 324 (1997)). In curing the error through reassessment, we must "assure that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed." *Sales*, 22 M.J. at 308 (quoting *United States Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985)). Appellant's duty performance was described as being in the top five percent of noncommissioned officers. He was dependable and demonstrated initiative, tenacity, and creativity. Given the serious circumstances of appellant's lie, our collective experience, and the principles of *Sales*, we conclude that we can reliably determine what sentence would have been imposed if these errors had not occurred.

We have reviewed appellant's second and third assignments of error and matters personally raised by him under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit. We need not decide appellant's fourth assignment of error given our disposition of this case on other grounds.

Decision

Accordingly, the court affirms only so much of the finding of guilty of The Specification of Charge I as finds appellant, did at near Fort Wainwright, Alaska, [*22] on or about 29 November 1999 with intent to deceive, utter a statement to Special Agent Nicolas Seibert to wit: Ja'lon Johnson became unresponsive after falling asleep on 29 November 1999 and sustained no injuries

on 29 November or words to that effect, which statement was totally false in that Ja'lon Johnson became unresponsive after sustaining injuries on 29 November when he was awake, and was then known by appellant to be so false.

The findings of guilty of The Specification of Charge II and Charge II and The Specification of Charge III and Charge III are set aside and dismissed. Reassessing the sentence based upon the errors noted, the entire record, and the principles of *United States v. Sales*, the court affirms only so much of the sentence as provides for a bad-conduct discharge and confinement for two years. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of his sentence set aside by this decision, are ordered restored. See UCMJ arts. 58b(c) and 75(a).

Senior Judge CHAPMAN and Judge CLEVENGER concur.

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United States v. Bousman

United States Air Force Court of Criminal Appeals

February 8, 2023, Decided

No. ACM 40174

Reporter

2023 CCA LEXIS 66 *; 2023 WL 1816930

UNITED STATES, Appellee v. Kaleb A. BOUSMAN,
Airman (E-2), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Andrew R. Norton; Christina M. Jimenez (entry of judgment). Sentence: Sentence adjudged on 6 May 2021 by GCM convened at Cannon Air Force Base, New Mexico. Sentence entered by military judge on 27 July 2021: Bad-conduct discharge, confinement for 15 months, reduction to E-1, and a reprimand.

Counsel: For Appellant: Major Alexandra K. Fleszar, USAF.

For Appellee: Lieutenant Colonel Matthew J. Neil, USAF; Major Morgan R. Christie, USAF; Major John P. Patera, USAF; Mary Ellen Payne, Esquire.

Judges: Before JOHNSON, POSCH, and RICHARDSON, Appellate Military Judges. Chief Judge JOHNSON delivered the opinion of the court, in which Senior Judge POSCH and Judge RICHARDSON joined.

Opinion by: _

Opinion

JOHNSON, Chief Judge:

A general court-martial composed of a military judge alone convicted Appellant, contrary to his pleas, of one specification of resisting apprehension, one specification of failure to obey a lawful order, one specification of controlling a motor vehicle while drunk, one specification of wrongfully using provoking language, one specification of assault with a dangerous weapon, and three specifications of simple assault, in violation of Articles 87a, 92, [*2] 113, 117, and 128, Uniform Code

of Military Justice (UCMJ), 10 U.S.C. §§ 887a, 892, 913, 917, and 928.¹ The military judge sentenced Appellant to a bad-conduct discharge, confinement for 15 months, reduction to the grade of E-1, and a reprimand. The convening authority took no action on the findings or sentence, but waived automatic forfeiture of pay and allowances for the benefit of Appellant's dependent child for a period of six months.

Appellant raises six issues for our consideration on appeal, which we have consolidated and reordered for purposes of our analysis: (1) whether Appellant's convictions for Specification 2 (simple assault), Specification 3 (assault with a dangerous weapon), and Specification 4 (simple assault) of Charge I are legally and factually sufficient and may be affirmed on appeal; (2) whether trial counsel's findings argument was improper; (3) whether the military judge erred by denying Appellant credit for the Government's violations of Article 13, UCMJ, 10 U.S.C. § 813; and (4) whether the doctrine of cumulative error warrants relief.² In addition, although not raised by Appellant, we address an additional issue: the convening authority's failure to state his reasons for denying Appellant's request to defer his punishments. We have carefully considered issues (3) and [*3] (4) and find they do not require discussion or warrant relief.³ We further find Appellant's conviction for assault with a dangerous weapon is not factually sufficient and set it aside, but affirm the lesser

¹The military judge found Appellant not guilty of one specification of insubordinate conduct toward a noncommissioned officer, one specification of failure to obey a lawful order, and three specifications of aggravated assault in violation of Articles 91, 92, and 128 UCMJ, 10 U.S.C. §§ 891, 892, 928. The military judge found two of the specifications of simple assault of which he found Appellant guilty were lesser included offenses of aggravated assaults of which he found Appellant not guilty.

²Appellant personally raises issue (3) pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

³Issue (3) was thoroughly litigated before trial and addressed in a written ruling by the military judge.

included offense of simple assault with a firearm in violation of Article 128, UCMJ, affirm the remaining findings, and reassess Appellant's sentence.

I. BACKGROUND

Appellant was stationed at Cannon Air Force Base (AFB), New Mexico, in June 2020 at the time of the offenses for which he was convicted. Appellant was married at the time and had one child, but his spouse and child had moved to another state without him. Appellant lived in an area of base housing known as Chavez Housing, which was across a street and adjacent to the main part of Cannon AFB.

Technical Sergeant (TSgt) DC was Appellant's next-door neighbor in Chavez Housing, where TSgt DC lived with his wife and children. TSgt DC planned a barbecue at his house on the evening of Saturday, 6 June 2020, to which he invited Appellant and others. TSgt DC knew Appellant worked parttime at the base's auto hobby shop on Saturdays. As TSgt DC was outside his house preparing for the barbecue, he saw Appellant return home around the middle of that day [*4] to care for his dogs. TSgt DC and Appellant conversed briefly, and TSgt DC had the impression Appellant "was having a rough day at work" and was "a little bit annoyed." However, Appellant was "talking coherently" and "holding a normal conversation," and TSgt DC thought little of their conversation when Appellant returned to his work.

TSgt DC next heard from Appellant at approximately 1900 that evening, when he received a text from Appellant asking if TSgt DC knew "how to do stitches." After they exchanged some texts, Appellant indicated he intended to "take care of it himself" but he would be late to the barbecue. Appellant came to TSgt DC's house at approximately 2100, with an apparent cut on his torso. At trial, TSgt DC described Appellant's appearance:

He looked worse for wear. He was wearing a tank top that had been cut opened, he was bleeding pretty bad. The hole in his tank top was big enough that I could see where he had bandaged himself. He just didn't look good.

When TSgt DC questioned Appellant about what had happened, Appellant apologized for being late but claimed he had gone "to collect some money that somebody owed him" when he had been "jumped" by "some guys," one of whom [*5] stabbed him before Appellant "beat the guy up." However, Appellant persistently refused suggestions from TSgt DC and

others that he seek medical attention and insisted he was "fine." According to TSgt DC, Appellant was not stumbling or slurring his words, and he was speaking coherently. Appellant ate a plate of food as he conversed with TSgt DC in the driveway of the house. TSgt DC recalled Appellant had a bottle of tequila in his hand at some point, but did not remember whether he saw Appellant drink from it or not.

In the meantime, elsewhere on Cannon AFB, Senior Airman (SrA) KC, who worked with Appellant at the auto hobby shop and considered him a friend, had a conversation about Appellant with KR, the auto hobby shop manager. SrA KC had seen and conversed with Appellant that day at work and had not noted anything out of the ordinary. However, that night KR sent SrA KC a text message asking SrA KC to call. When they spoke, KR explained Appellant had sent KR a photo that apparently depicted Appellant in a bloody shirt. KR asked SrA KC to go check on Appellant at his residence. As a result, SrA KC and a friend who was with him at the time drove in separate cars to Appellant's house [*6] while Appellant was at the barbecue at TSgt DC's house.

TSgt DC testified these two cars arrived unexpectedly at his driveway at a high rate of speed. TSgt DC, SrA KC, and another friend of Appellant who was attending the barbecue, CC,⁴ described the ensuing encounter in somewhat different ways, but generally agreed on certain elements. When SrA KC arrived and exited his car, Appellant took out a pocketknife, opened it, and confronted SrA KC in the driveway with the knife in his hand. SrA KC said he had come to check on Appellant, but Appellant wanted SrA KC to leave. SrA KC and CC later testified Appellant held the knife to SrA KC's stomach during the confrontation. After failing to persuade Appellant to accept assistance, SrA KC and his friend returned to their cars and drove away.⁵

Appellant then returned to his seat in the driveway. However, TSgt DC perceived Appellant was angry and agitated after SrA KC left. After a "couple of minutes," Appellant went into his house. CC followed Appellant into the house. According to CC, after he again told Appellant to go to a hospital or get treated, Appellant held up a knife toward CC's throat, approximately five or

⁴ CC was an active duty Air Force member in June 2020 and at the time of Appellant's trial.

⁵ The military judge found Appellant not guilty of a charged assault on SrA KC with a dangerous weapon.

six inches away from CC's neck. [*7] In response, CC raised his hands between the knife and his neck. CC subsequently testified Appellant told CC that Appellant was leaving and they were "not going to see him again." While still holding a knife near CC's throat, Appellant then pulled out a handgun, warned CC "don't call the cops or else," and put the gun against CC's torso. CC described the gun as "tan" in color; however, he did not have an opportunity to inspect it and did not know if it was loaded. CC responded that Appellant could leave if he wanted to.

Appellant then told CC they were going outside and to "put [his] hands down," and they departed the house with CC walking in front of Appellant. CC later testified he did not know what Appellant was holding in his hands when CC exited the house, or if Appellant had "put [the gun] away or stopped or anything," because Appellant was behind him. TSgt DC saw them come outside; he observed Appellant was holding an "extremely long" Bowie-type knife and had a handgun tucked into his waistband at his lower back. Appellant got in his truck and drove away. CC, who looked "afraid" and "shaken up" to TSgt DC, said Appellant had "pulled a gun on him."

In the meantime, while Appellant [*8] was inside his house with CC, TSgt DC's wife had called security forces. SSgt AG and SrA AA⁶ from security forces were dispatched from the main base to Chavez Housing to respond to what was described as "a possibly intoxicated, injured, suicidal, panicked, combative individual that was also armed," driving an old blue pickup truck. SSgt AG and SrA AA arrived at the gate to Chavez Housing and used their vehicle to block the outbound lane. Almost immediately, they saw Appellant's truck driving toward the gate. Appellant's vehicle made a turn, and SSgt AG and SrA AA followed him. They found Appellant attempting to pull his truck into the open garage of a house; however, Appellant appeared to have gotten his truck wedged between a vehicle inside the garage and the wall of the garage. SSgt AG and SrA AA exited their vehicle and SSgt AG began giving Appellant instructions to place his arms in the air, turn the truck off, and exit the truck. Appellant did not initially comply, and he shouted back that SSgt AG should drag him out of the truck while appearing to reach behind his seat. Appellant eventually did exit the

truck after two additional security forces members, GM⁷ and SrA TW, arrived. [*9]

Appellant then began walking toward the security forces members, shouting expletives and insults at them, and telling them to shoot him because that was "all [] cops are good for." GM and SrA AA observed the handle of a pocketknife protruding from Appellant's front pants pocket. SSgt AG, GM, and SrA AA attempted to calm Appellant by talking to him, but SSgt AG observed Appellant was becoming more "hostile" and "aggressive." None of the security forces members drew a weapon at any point during the encounter.

Eventually, after Appellant took a step toward SSgt AG, GM grabbed Appellant's arms from behind and the two of them fell to the ground. SSgt AG and SrA AA moved to help GM control Appellant, who resisted vigorously. SrA AA saw that Appellant had managed to grab his pocketknife and open the blade, and Appellant was making stabbing motions towards GM's leg with it. However, SrA AA did not see the knife contact GM's body. SrA AA grabbed Appellant's wrist and took the knife from him. GM heard SrA AA call out "knife" during the struggle, but he never saw the knife in Appellant's hand, he was not aware that Appellant was attempting to stab him, and he did not feel the knife make contact [*10] with him.

With difficulty, the security forces members were able to subdue and handcuff Appellant.⁸ They noted Appellant smelled like alcohol. Later that night, approximately three hours after they apprehended Appellant, security forces took Appellant to the base medical facility to have his blood drawn. Appellant physically resisted the initial attempt to draw his blood; during the struggle, he licked the exposed arm of one of the security forces members who was attempting to restrain him. Appellant eventually submitted to the blood test. According to Dr. ES, the forensic toxicologist who testified at trial, subsequent analysis found Appellant's blood alcohol content at that time was 0.098 "gram percent."⁹ By extrapolation, Dr. ES estimated that Appellant's peak blood alcohol

⁷ GM was an active duty Air Force member in June 2020 and at the time of Appellant's trial.

⁸ Because of Appellant's resistance, the security forces members had to chain two pairs of handcuffs together because they could not get his wrists close enough together for one pair.

⁹ We understand "gram percent" to be a reference to the measurement of grams of alcohol per 100 milliliters of blood.

⁶ SrA AA subsequently separated from the Air Force and was a civilian at the time of Appellant's trial.

concentration earlier on the night of 6 June 2020 might have been approximately 0.143 gram percent.

After Appellant's apprehension, security forces recovered a loaded, black .40 caliber handgun from Appellant's vehicle.

The following afternoon, Appellant texted an apology to TSgt DC stating that "he understood if [they] didn't want him to come around." TSgt DC responded to the effect that he just wanted to make sure [*11] Appellant was "okay." Appellant came to TSgt DC's house and sat with him in the driveway that afternoon. Appellant told TSgt DC, *inter alia*, that Appellant put up a big fight when security forces attempted to arrest him and "it took a lot of cops to end up getting his hands." Appellant did not mention a knife or gun. That same day Appellant also sent a non-specific apology to CC by text message.

Appellant subsequently agreed to speak to agents of the Air Force Office of Special Investigations (AFOSI) with his defense counsel present; the Government introduced a videorecording of this interview at trial. Appellant professed not to remember many of the events of the night of 6 June 2020. However, Appellant admitted to the agents he had made the cut on his torso himself and lied to TSgt DC about being attacked. Appellant said he made up the story because he did not want others to know he cut himself. In addition, he described leaving TSgt DC's barbecue to go into his house, where he "grabbed" his "normal carry" gun, which he put behind the seat of his truck. Appellant told the agents that when he was not carrying it, he normally left that particular gun, a black .40 caliber pistol, unloaded [*12] on a table in his house. Appellant told the agents that after he entered his house, he turned around and discovered CC behind him. According to Appellant, CC tried to "stop" Appellant, and Appellant told CC to get out of his way, or words to that effect. Appellant said he could not remember if he was already holding the pistol when he saw CC, and he did not say anything about holding either a knife or a gun toward CC.

II. DISCUSSION

A. Legal and Factual Sufficiency

1. Law

We review issues of legal and factual sufficiency de

novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). "Our assessment of legal and factual sufficiency is limited to the evidence produced at trial." *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citation omitted), *rev. denied*, 82 M.J. 312 (C.A.A.F. 2022).

"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." *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (citation omitted). "[T]he term 'reasonable doubt' does not mean that the evidence must be free from any conflict" *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (citation omitted). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." [*13] *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). Thus, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *King*, 78 M.J. at 221 (alteration in original) (citation omitted).

"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 the [appellant]'s guilt beyond a reasonable doubt.'" *Rodela*, 82 M.J. at 525 (second alteration in original) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). "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 determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (alteration in original) (quoting *Washington*, 57 M.J. at 399), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018).

The elements of the offense of assault with a dangerous weapon under Article 128, UCMJ, include: that the accused *offered to do bodily harm* to a certain person; that the offer was made with the intent to do bodily harm; and that the accused did so with a dangerous weapon. 10 U.S.C. § 928(b)(1); see *Manual for Courts-Martial, United States* (2019 ed.) (MCM), pt. IV, ¶ 77.b.(4)(a).

The elements of simple assault under Article 128, UCMJ, include: [*14] that the accused *attempted to do*

or offered to do bodily harm to a certain person; that the attempt or offer was done unlawfully; and that the attempt or offer was done with force or violence. 10 U.S.C. § 928(a)(1) and (2); see *MCM*, pt. IV, ¶ 77.b.(1).

The Manual explains the difference between "attempt-type" assault and "offer-type" assault:

An attempt-type assault requires a specific intent to inflict bodily harm, and an overt act—that is, an act that amounts to more than mere preparation and apparently tends to effect the intended bodily harm. An attempt-type assault may be committed even though the victim had no knowledge of the incident at the time.

[] An offer-type assault is an unlawful demonstration of violence, either by an intentional or by a culpably negligent act or omission, which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm. Specific intent to inflict bodily harm is not required.

MCM, pt. IV, ¶ 77.c.(2)(b)(i) and (ii).

An accused may be found guilty of a lesser included offense of the offense charged. Article 79(a), UCMJ, 10 U.S.C. § 879(a). "Whether one offense is a lesser included offense of another offense is a question of law." *United States v. Gonzales*, 78 M.J. 480, 483 (C.A.A.F. 2019) (citation omitted). An offense is a lesser included offense [*15] when it is "necessarily included in the offense charged." Article 79(b)(1), UCMJ, 10 U.S.C. § 879(b)(1). The United States Court of Appeals for the Armed Forces has explained:

The "elements test" determines whether an offense is "necessarily included in the offense charged" under Article 79, UCMJ. We have applied the elements test in two ways. The first way is by comparing the statutory definitions of the two offenses. An offense is a lesser included offense of the charged offense if each of its elements is necessarily also an element of the charged offense. The second way is by examining the specification of the charged offense. An offense can also be a lesser included offense of the charged offense if the specification of the charged offense is drafted in such a manner that it alleges facts that necessarily satisfy all the elements of each offense.

United States v. Armstrong, 77 M.J. 465, 469-70 (C.A.A.F. 2018) (citations omitted).

2. Analysis

Appellant challenges the legal and factual sufficiency of his convictions for Specifications 2, 3, and 4 under Charge I. We address each specification in turn, beginning with the first Appellant addresses, Specification 4.

a. Charge I, Specification 4 (Simple Assault Lesser Included Offense)

Specification 4 of Charge I alleged Appellant: "did, at or near Cannon [AFB], [*16] New Mexico, on or about 6 June 2020, with the intent to inflict bodily harm, commit an assault upon [GM] . . . by attempting to stab him with a dangerous weapon to wit: a knife."

The military judge announced the following finding as to Specification 4 of Charge I: "Not Guilty of the charged offense of assault with a dangerous weapon, but Guilty of the lesser included offense of simple assault."

Appellant contends the simple assault of which the military judge convicted him was not a proper lesser included offense of the charged aggravated assault under Article 128, UCMJ, and the conviction must be set aside. We disagree.

Simple assault in violation of Article 128, UCMJ, may be charged under the theory that the accused either "attempted" to do bodily harm to the victim or "offered" to do bodily harm to the victim. *MCM*, pt. IV, ¶ 77.b.(1). As Appellant notes, in contrast, the elements of the current version of Article 128, UCMJ, as articulated in the Manual provide that an aggravated assault with a dangerous weapon not actually inflicting bodily harm requires an "offer" to do bodily harm with the weapon; there is no provision for an attempt-type aggravated assault with a dangerous weapon. *MCM*, pt. IV, ¶ 77.b.(4)(a).¹⁰

As the Manual explains, attempt-type assaults and offer-type assaults are not mutually exclusive. For example, if a perpetrator swings at the victim attempting to strike him, and the victim sees the swing and is thereby put in apprehension of being struck, the perpetrator may be guilty of both an attempt-type simple assault and an offer-type simple assault. See *MCM*, pt. IV, ¶ 77.c.(2)(b)(iii)(C). Appellant's alleged attempt to stab

¹⁰ As Appellant notes, prior versions of the Manual provided for both attempt-type and offer-type aggravated assault with a dangerous weapon. See, e.g., *Manual for [*17] Courts-Martial*, *United States* (2016 ed.), pt. IV, ¶ 54.b.(4).

GM could be both an attempt and an offer to do bodily harm, provided the attempt created in GM "a reasonable apprehension of receiving immediate bodily harm." *MCM*, pt. IV, ¶ 77.c.(2)(b)(ii).

Nevertheless, Appellant contends Specification 4 cannot serve as a basis for his conviction for a lesser included offense of simple assault under an offer-type theory. We agree with him on this point. The evidence indicates GM was not aware of Appellant's attempt to stab him with the knife at the time it occurred. Although he heard SrA AA call out "knife," GM did not see the knife or Appellant's attempt to stab him, was unaware of the attempt at the time, and therefore was not put in reasonable apprehension of immediate bodily harm by the [*18] attempt. Although GM may have learned of Appellant's attempt later, he would not have been put in reasonable apprehension of immediate bodily harm of being stabbed at that point because Appellant had been disarmed and GM was no longer in danger. Moreover, although Appellant's action may have caused SrA AA apprehension, SrA AA was not the named victim, nor was he put in apprehension that Appellant's attempt to stab GM would cause SrA AA bodily harm.

However, we conclude the military judge *could* properly find Appellant guilty of simple assault on an attempt-type theory. Appellant is correct that the elements of aggravated assault with a dangerous weapon under Article 128, UCMJ, includes only offer-type assault. However, "[a]n offense can also be a lesser included offense of the charged offense if the specification of the charged offense is drafted in such a manner that it alleges facts that necessarily satisfy all the elements of each offense." *Armstrong*, 77 M.J. at 470 (citations omitted); see also *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011) (holding that although the elements of housebreaking are not necessarily included in the elements of burglary, as charged the specification included all the elements of housebreaking and burglary). Moreover, "[a] specification is [*19] sufficient if it alleges every element of the charged offense expressly or by necessary implication." Rule for Courts-Martial (R.C.M.) 307(c)(3). In this case, Specification 4 alleged Appellant "commit[ted] an assault" on GM by "attempting to stab" him with a knife "with the intent to inflict bodily harm." This specification thus alleged expressly or by necessary implication every element of an attempt-type simple assault: that Appellant attempted to do bodily harm to GM; that the attempt was done unlawfully; and that the attempt was done with force or violence.

Because Specification 4 of Charge I thus incorporated both aggravated assault with a dangerous weapon and simple attempt-type assault, Appellant was on notice to defend against both the greater and lesser offenses. He knew the Government intended to prove he attempted to stab GM with a knife with the intent to inflict bodily harm. Moreover, the military judge found Appellant guilty of a lesser-included offense without modification of the specification as charged. Accordingly, we are not persuaded by Appellant's arguments that he lacked adequate due process notice that he might be convicted of such a lesser included offense. See *United States v. Riley*, 50 M.J. 410, 415 (C.A.A.F. 1999) ("An appellate court may not affirm an [*20] included offense on 'a theory not presented to the' trier of fact." (citation omitted)).

Relying on *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003), Appellant further contends that our Article 66, UCMJ, 10 U.S.C. § 866, review is precluded because it is "impossible for this Court to determine on which theory of simple assault Appellant was found guilty and which he was acquitted." However, this situation does not raise the fatal ambiguity at issue in *Walters*, which specifically addressed the situation in which a finder of fact excepts "on divers occasions" language from a specification without identifying the single occasion of which they found the accused guilty. *Id.* at 396-97. The military judge made no such exception from Specification 4 of Charge I, nor did the specification even allege "on divers occasions." Moreover, in general, "[a] factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence supports at least one of the means beyond a reasonable doubt." *United States v. Brown*, 65 M.J. 356, 359 (C.A.A.F. 2007) (citations omitted). In Appellant's case the Defense made no request for special findings, and the evidence supports Appellant's conviction for simple assault against GM beyond a reasonable doubt.

Having given full consideration to Appellant's arguments, [*21] and drawing every reasonable inference from the evidence in favor of the Government, we conclude the evidence was legally sufficient to support Appellant's conviction for simple assault as a lesser included offense under Specification 4 of Charge I. Additionally, having weighed the evidence in the record of trial, and having made allowances for the fact that the trial judge personally observed the witnesses and we did not, we also find the evidence factually sufficient.

b. Charge I, Specification 2 (Simple Assault Lesser Included Offense)

Specification 2 of Charge I alleged Appellant: "did, at or near Cannon [AFB], New Mexico, on or about 6 June 2020, with the intent to inflict bodily harm, commit an assault upon [CC] . . . by pointing at him with a dangerous weapon to wit: a knife."

Appellant contends the military judge's finding of guilty of a lesser included offense of simple assault based on Specification 2 of Charge I is legally and factually insufficient. He contends an attempt-type simple assault was unavailable as a lesser included offense for reasons similar to his argument with respect to Specification 4 of Charge I, addressed above—that is, the elements of the charged aggravated [*22] assault with a dangerous weapon under Article 128, UCMJ, only permit an offer-type theory. With respect to a lesser included offer-type simple assault, Appellant contends the evidence does not support a finding that CC felt reasonable apprehension of bodily harm when Appellant held a knife toward him. We find the evidence is sufficient to support Appellant's conviction on an offer-type theory of simple assault.¹¹

On direct examination, CC testified that after he followed Appellant into his house, Appellant held a knife "up to [his] throat, maybe just a little distance away." On cross-examination, CC estimated the blade was approximately five or six inches from his neck. CC further testified on direct examination, "At that point [CC] threw [his] hands up between [Appellant] with the blade and [CC's] throat, trying to give [himself] more of a cushion." CC testified that "while [Appellant] was standing there with the knife to [CC's] throat," Appellant told him that he was leaving, they would not see him again, and "don't call the cops or else," at which point he held the handgun to CC's "stomach." Appellant testified that at that point he felt "a little fear" and "suddenly betrayed."

Appellant cites the [*23] following cross-examination from CC's testimony:

Q. Now, when he had that knife out, based on all the factors you observed, everything you knew about him before and what you knew about him

from that night, you didn't think he was actually going to use that against you?

A. No, Sir.

Q. I'm sorry?

A. No, Sir.

Q. You were not concerned that he was going to inflict bodily harm on you?

A. I didn't believe he would.

Q. And he was at a distance where you had ample time and leverage to react without getting injured, or at least that was your perception at that time?

A. Yes, Sir.

Q. And that contributed to you not being afraid?

A. Yes, Sir.

Q. And actually believing he wasn't going to do anything?

A. Yes, Sir.

On redirect examination, CC testified that although he was not "afraid" as Appellant was holding the knife near his throat, that changed when Appellant brought out the gun.

Despite CC's testimony that he did not believe Appellant would use the knife to inflict bodily harm on him, we find a rational factfinder could conclude beyond a reasonable doubt CC did feel reasonable apprehension. In general, brandishing a knife—even at a distance of several meters, much less six inches—may be sufficient to support [*24] a conviction for an offer-type assault. See *United States v. Smith*, 4 C.M.A. 41, 15 C.M.R. 41, 43-45 (C.M.A. 1954); see also *United States v. Salazar*, No. 202000134, 2021 CCA LEXIS 495, *5 (N.M. Ct. Crim. App. 27 Sep. 2021) (per curiam) (unpub. op.) (explaining the "brazen act" of "holding a knife to another's throat" is a "clear way[] of creating reasonable apprehension of immediate bodily harm"). In this case, CC's immediate reaction to Appellant holding the knife toward his neck—throwing his hands up between the blade and his neck—demonstrates he felt some degree of apprehension. Under the circumstances, including the fact that CC had previously seen Appellant brandish a knife at the unarmed SrA KC, and Appellant's generally erratic behavior at the barbecue—such apprehension was reasonable. CC's testimony on cross-examination that he did not believe Appellant would actually use the knife on him would not prevent a rational trier of fact from finding Appellant had caused apprehension. The existence of reasonable apprehension does not rely on the victim's belief in any particular degree of probability that bodily harm would actually result. Even if CC believed it was unlikely Appellant would use the knife on him, the military judge could reasonably focus on CC's immediate reaction and find CC felt, at least initially,

¹¹ Because we find Appellant's conviction legally and factually sufficient under an offer-type theory of simple assault, we find it unnecessary to analyze whether the conviction would be sufficient under an attempt-type theory of simple assault.

some reasonable apprehension. [*25]

As with Specification 4 of Charge I, Appellant cites *Walters* to contend that we cannot perform our Article 66, UCMJ, factual sufficiency review of Specification 2 of Charge I because we cannot tell whether the military judge convicted Appellant of simple assault under an attempt-type or an offer-type theory. As with Specification 4, we are not persuaded. This is not a situation where the military judge created a fatal ambiguity by excepting "on divers occasions" language from the specification, and the evidence supports the military judge could find at least one theory of guilt beyond a reasonable doubt. See *Brown*, 65 M.J. at 359 (citations omitted).

Having given full consideration to Appellant's arguments, and drawing every reasonable inference from the evidence of record in favor of the Government, we conclude the evidence was legally sufficient to support Appellant's conviction for simple assault as a lesser included offense under Specification 2 of Charge I. Additionally, having weighed the evidence in the record of trial, and having made allowances for the fact that the trial judge personally observed the witnesses and we did not, we also find the evidence factually sufficient.

c. Charge I, Specification 3 (Aggravated Assault) [*26]

Specification 3 of Charge I alleged Appellant: "did, at or near Cannon [AFB], New Mexico, on or about 6 June 2020, with the intent to inflict bodily harm, commit an assault upon [CC] . . . by pointing at him and touching him with a dangerous weapon to wit: a loaded firearm."

Appellant contends, *inter alia*, the Government failed to prove beyond a reasonable doubt that the gun Appellant pointed at CC and touched him with was loaded. The Government's theory, at trial and on appeal, is that the loaded black .40 caliber handgun recovered from Appellant's truck was the same gun Appellant pointed at CC. We acknowledge that by drawing every reasonable inference in favor of the Government, a rational factfinder could make such a finding beyond a reasonable doubt, and therefore the military judge's finding is legally sufficient. However, we are not ourselves convinced beyond reasonable doubt that the Government proved Appellant used a loaded firearm. Therefore, we must set aside Appellant's conviction for aggravated assault as a matter of factual sufficiency review.

Based on the evidence, we perceive two reasonable possibilities that the gun Appellant aimed at CC was not loaded. First, CC specifically [*27] described the pistol as "tan" in color. The handgun recovered from Appellant's truck was described as all black. CC testified he knew Appellant owned multiple weapons. No firearm or image of a firearm belonging to Appellant—black, tan, or otherwise—was actually introduced at trial. Based on the evidence, it is possible Appellant used one pistol to threaten CC and decided to take a different pistol with him in his truck. It is true that Appellant did not tell the AFOSI agents during his interview that he remembered handling two different firearms inside his house. However, on appeal Appellant aptly notes he apparently had the opportunity to also arm himself in the house with a different and much larger knife than the pocketknife he brandished at SrA KC and CC, as TSgt DC observed. Similarly, CC testified it was possible Appellant "put [the gun] away or stopped" before he went outside, because Appellant was behind CC and CC could not observe him. It is reasonable to conclude that if Appellant had the opportunity to pick up a different knife inside his house, and could have stopped and "put away" the gun he held without CC observing him, then Appellant could have put down one gun and [*28] picked up another. If CC's testimony is correct that Appellant was holding a "tan" handgun, not the black one recovered later, there is no evidence in the record to prove the "tan" one was loaded.

Additionally, assuming for our analysis that CC was mistaken about the color, and that the pistol CC saw was the same black one security forces found in the truck, we are not persuaded the Government proved beyond reasonable doubt it was loaded at the time he pointed it at CC. Appellant told the AFOSI agents he left it unloaded on a table in his house when he was not carrying it. This assertion, although arguably self-serving, was not contradicted by any evidence the Government introduced. Appellant told the agents he could not remember whether he confronted CC before or after he picked up the pistol. CC could not tell if the pistol was loaded or not. Although security forces later found it loaded, Appellant might have loaded it in his house after he told CC to turn around and leave, or at some point while he was in his truck.

"A weapon is dangerous when used in a manner capable of inflicting death or grievous bodily harm. What constitutes a dangerous weapon depends not on the nature of the [*29] object itself but on its capacity, given the manner of its use, to kill or inflict grievous bodily harm." *MCM*, pt. IV, ¶ 77.c.(5)(a)(iii). The evidence does

not indicate Appellant used or threatened to use the gun in a manner that would have constituted a dangerous weapon if it was unloaded, for example as a club. Accordingly, if the gun was not loaded, then Appellant would not be guilty of aggravated assault by pointing it at CC and touching him with "a dangerous weapon, to wit: a loaded firearm," as the military judge found. The two reasonable alternative possibilities presented by the evidence as described above lead us to agree with Appellant that his conviction for the aggravated assault alleged in Specification 3 of Charge I must be set aside.

However, we find the evidence both legally and factually sufficient to support Appellant's conviction for simple assault with a firearm as a lesser included offense under Specification 2 of Charge I, by excepting the words "dangerous" and "loaded." See *Riley*, 50 M.J. at 415 ("Appellate courts have authority to set aside a finding of guilty and affirm only a finding of a lesser-included offense"); Article 59(b), UCMJ, 10 U.S.C. § 859(b). The Government introduced sufficient evidence to prove beyond [*30] a reasonable doubt Appellant offered to do bodily harm to CC, that he did so unlawfully, and that he did so with force or violence by using a firearm. Moreover, we find Specification 3 of Charge I alleged each of these elements either expressly or by necessary implication.

Appellant's remaining arguments regarding Specification 3 of Charge I do not impede us from affirming Appellant's conviction of the lesser included simple assault. Appellant contends he was too intoxicated to form the specific intent to inflict bodily harm, one of the elements of aggravated assault with a dangerous weapon under Article 128, UCMJ. However, the lesser included offense of a simple offer-type assault does not include this specific intent element. Moreover, the evidence that Appellant was able to walk, enter and exit buildings, handle weapons, converse with those around him, and operate a motor vehicle simply belies the contention that he was too intoxicated to form such specific intent. Appellant also contends the evidence does not prove CC believed he was at risk of immediate bodily harm when Appellant pointed the gun at him. We disagree. CC testified that he did feel fear and became afraid when Appellant pointed the [*31] gun at him. In addition, TSgt DC described CC as appearing "shaken up" and "afraid" immediately afterward, when CC said Appellant had pulled a gun on him. Again, so long as Appellant's offer of violence created reasonable apprehension in CC of imminent bodily harm, the Government did not need to prove CC believed in any specific probability that bodily harm would actually

occur.

Accordingly, we set aside Appellant's conviction for assault with a dangerous weapon in violation of Article 128, UCMJ. Further, we except the words "dangerous" and "loaded" from Specification 3 of Charge I, find Appellant not guilty of the excepted words, and find him guilty of the lesser included offense of simple assault in violation of Article 128, UCMJ, and guilty of the remaining words in the specification.

d. Sentence Reassessment

Having modified the findings, we have considered whether we may reliably reassess Appellant's sentence in light of the factors identified in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013). We conclude that we can. The modification results in a significant change to the penalty landscape and Appellant's exposure, but not necessarily a "dramatic" one. See *id.* at 15. Appellant's conviction for simple assault with a firearm not proven to be loaded rather than aggravated [*32] assault with a dangerous weapon reduces the maximum imposable term of confinement for the combined convictions from 11 years and 3 months to 6 years and 3 months; the remaining elements of the maximum punishment are unchanged. To be sure, Appellant's aggravated assault conviction carried by far the highest maximum term of confinement—eight years—and the military judge imposed a partially concurrent, partially consecutive term of 12 months of confinement for that offense alone. However, the lesser included offense of simple assault when committed with an unloaded firearm is punishable by three years in confinement and a dishonorable discharge, and remains the most serious of Appellant's offenses in terms of maximum punishment. See *MCM*, pt. IV, ¶ 77.d.(1)(b).

We find the remaining *Winckelmann* factors also favor reassessment. Appellant was sentenced by a military judge alone; the affirmed lesser included offense and remaining convictions very much "capture the gravamen of [the] criminal conduct included within the original offenses;" and the remaining offenses are of a type with which the judges of this court have "experience and familiarity." *Winckelmann*, 73 M.J. at 16. Furthermore, reassessment is greatly simplified by the fact the military judge [*33] imposed specific terms of confinement for each offense, each concurrent or consecutive with the terms of confinement for the other offenses. Accordingly, we find sentence reassessment is

appropriate.

The next question is what sentence the military judge would have imposed had he convicted Appellant of the lesser included simple assault with a firearm under Specification 3 of Charge I, rather than the charged offense. See *id.* at 15 (holding Courts of Criminal Appeals may reassess a sentence if it "can determine to its satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity") (quoting *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986)). Taking all factors into consideration, including *inter alia* the relationship of the affirmed lesser included offense to Appellant's other offenses, and that the essential nature of Appellant's misconduct remains unchanged, we conclude that the military judge would have imposed a sentence of at least four months in confinement for Specification 3 of Charge I (simple assault against CC by pointing at him with a knife) and consecutive with all other specifications. We further conclude our modifications to [*34] the findings undermine the language of the adjudged reprimand. Accordingly, we reassess the sentence to consist of a bad-conduct discharge, confinement for a total of seven months, and reduction to the grade of E-1.

B. Trial Counsel's Argument

1. Law

"We review prosecutorial misconduct and improper argument de novo and where . . . no objection is made, we review for plain error." *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citing *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018)). Under plain error review, the appellant bears the burden to demonstrate error that is clear or obvious and results in material prejudice to his substantial rights. *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014) (citation omitted). "When the issue of plain error involves a judge-alone trial, an appellant faces a particularly high hurdle." *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000). A military judge is "presumed to know the law and to follow it absent clear evidence to the contrary," and to "distinguish between proper and improper" arguments. *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) (citation omitted). Therefore, appellate relief for "plain error before a military judge sitting alone is rare indeed." *Robbins*, 52 M.J. at 457

(quoting *United States v. Raya*, 45 M.J. 251, 253 (C.A.A.F. 1996)).

"Improper argument is one facet of prosecutorial misconduct." *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (citation omitted). "Prosecutorial misconduct occurs when trial counsel 'overstep[s] the bounds of that propriety and fairness which should characterize [*35] the conduct of such an officer in the prosecution of a criminal offense.'" *United States v. Hornback*, 73 M.J. 155, 159 (C.A.A.F. 2014) (alteration in original) (quoting *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005)). Such conduct "can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, [for example] a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *Andrews*, 77 M.J. at 402 (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)). "[T]rial counsel may 'argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence.'" *United States v. Halpin*, 71 M.J. 477, 479 (C.A.A.F. 2013) (quoting *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000)). "A prosecutorial comment must be examined in light of its context within the entire court-martial." *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005) (citation omitted).

We assess prejudice from improper argument by considering whether the trial counsel's comments were so damaging that we cannot be confident the appellant was convicted on the basis of the evidence alone. See *Halpin*, 71 M.J. at 480; *Fletcher*, 62 M.J. at 184. In assessing prejudice from improper argument, we balance three factors: (1) the severity of the misconduct; (2) the measures, if any, adopted to cure the misconduct; and (3) the weight of the evidence supporting the conviction or sentence, as applicable. See *Halpin*, 71 M.J. at 480; *Fletcher*, 62 M.J. at 184. "[T]he lack of a defense objection is 'some measure of the minimal impact of a prosecutor's improper comment.'" [*36] *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001) (quoting *United States v. Carpenter*, 51 M.J. 393, 397 (C.A.A.F. 1999)).

2. Analysis

Appellant contends trial counsel's closing and rebuttal arguments were improper in three specific respects: mischaracterizing CC's testimony; expressing trial counsel's personal opinions; and mischaracterizing the law. Trial defense counsel did not object to any of the

passages Appellant cites on appeal, so we review for plain error. We address each contention in turn.

a. Characterization of CC's Testimony

Trial counsel's closing argument included the following:

How do we know this gun was loaded? And how do we know it was the gun that was found in the car? Well, Your Honor, when you look at the combination of the evidence in this case, when you look at the fact that [CC's] testimony says a knife was to his face and a gun was to his belly, and *he looked down and he thought he was dead.*

(Emphasis added).

Appellant asserts CC's testimony "never came close" to trial counsel's contention that CC "thought he was dead." The Government responds that trial counsel was merely "forcefully assert[ing]" a reasonable inference from CC's testimony. See *United States v. Kropf*, 39 M.J. 107, 108 (C.M.A. 1994) (citations omitted) (explaining trial counsel may make "vigorous arguments . . . based on a fair reading of the record"). We agree [*37] with Appellant that CC's testimony does not support a reasonable inference that CC "thought he was dead." CC testified that he felt "a little fear" and "betrayed" when Appellant put the pistol against him, but he did not believe Appellant was going to shoot him. Even applying the plain error standard of a "clear" or "obvious" error, CC's testimony simply does not support what trial counsel said.

However, we find no material prejudice to Appellant's substantial rights, particularly in view of the slight nature of the error. This comment was a fleeting exaggeration in a lengthy closing argument, and it was not particularly relevant or impactful regarding the point trial counsel was attempting to make. In addition, Appellant was tried by a military judge alone. We presume the military judge filtered improper argument and based his findings on the evidence, absent indications to the contrary. Nothing in the record suggests the military judge failed to do so, or that Appellant was materially prejudiced by the error.

b. Expressing Personal Opinions

During his rebuttal argument, trial counsel stated the following:

[I]t's the combination of the knife, and then the gun. And the knife is still in [*38] front of [CC's] face.

And that [Appellant] essentially responded to [CC] in that moment. And [Appellant] saw that [CC] wasn't afraid. So what does he do, he put the gun to his belly, to make sure that he was afraid. *If that's not specific intent, I don't know what is, Your Honor.*

....

What do we know, what did you hear the testimony was. [CC] was told to turn around and walk out with his hands up. *If that's not specific intent to -- to use that object [the gun] for a specific purpose, I don't know what it is, but there is no break here, Your Honor. . . .*

....

Your Honor, these Security Forces members put their lives on the line, put their bodies in that situation where they knew he had a weapon. And now [GM] was the one who took that chance in that moment, and as he was pulling [Appellant] to the ground he[] hears knife, knife, knife. Your Honor, *if that's not a reasonable apprehension I don't know what is. And if [Appellant's] conduct isn't criminal, I don't know what it is.*

(Emphasis added).

Appellant contends trial counsel improperly relied on "his own personal judgment" in attempting "to resolve the most contentious points of litigation." See *Sewell*, 76 M.J. at 18 (stating trial counsel "may not . [*39] . . inject his personal opinion into the [] deliberations") (citation omitted). Appellant points to trial counsel's use of the expression that he "did not know" what else could qualify to meet the respective required elements *but* that evidence the Government submitted." Appellant cites *United States v. Horn*, explaining that the injection of trial counsel's personal opinions risks introducing "a form of unsworn, unchecked testimony [that] tend[s] to exploit the influence of his office and undermine the objective detachment which should separate a lawyer from the cause for which he argues." 9 M.J. 429, 430 (C.M.A. 1980) (per curiam); see also *Fletcher*, 62 M.J. at 179-80 (quoting *Horn*).

Assuming without deciding that trial counsel's reference to his own knowledge or lack thereof—albeit in a colloquial expression—was a clear error, Appellant has not demonstrated material prejudice. As above, we find the severity of the error to be slight; and as above, the fact this was a judge-alone trial is significant. The military judge is presumed to filter out improper arguments and to base his findings on the evidence, absent clear evidence to the contrary. We find nothing in

the record suggests the contrary in this case. To begin with, potentially unlike [*40] court members, we find it highly improbable the military judge was impressed by trial counsel's personal authority or opinions. Furthermore, the first two passages Appellant cites relate to trial counsel's argument that CC's testimony demonstrates Appellant had the specific intent to cause apprehension of bodily harm. If the military judge believed CC's testimony that Appellant pointed a gun at CC and held it against him, as the military judge evidently found, it is no great inferential leap to conclude Appellant did so with the intent to cause CC to fear imminent bodily harm. As to the third passage relating to the charged aggravated assault against GM, as described above in relation to legal and factual sufficiency, the evidence supports the military judge having convicted Appellant of an attempt-type lesser included offense of simple assault. In contrast, an offer-type assault theory—such as the theory trial counsel argued here—fails for the reasons described above. Accordingly, we may presume the military judge did not rely on trial counsel's argument in this respect, and Appellant was not prejudiced by it.

c. Characterizing the Law

Trial counsel's closing argument included the following [*41] explanation:

But to be clear, Your Honor, about what the -- if you were giving the member[s] an instruction, what that would require. "An offer to do bodily harm is an unlawful demonstration of violence by an intentional act or omission which creates in the mind of another, or a reasonable apprehension that proceeded [sic] immediate regard for harm." Your Honor, *the other is [SrA AA] watching the accused attempt to stab [GM]*.

(Emphasis added).

Appellant contends trial counsel misstated the law in the passage quoted above. We agree that trial counsel's argument was incorrect as a matter of law. As discussed above in our analysis of legal and factual sufficiency, the evidence is insufficient to support Appellant's conviction of an assault against GM on an offer-type theory, because GM was not aware at the time of Appellant's attempt to stab him and therefore did not apprehend bodily harm from the demonstration of violence. See *MCM*, pt. IV, ¶ 77.c.(2)(b)(ii). Trial counsel's argument that Appellant created apprehension in SrA AA fails because, *inter alia*, SrA AA was not the

named victim of the assault, and because Appellant's demonstration of violence did not cause SrA AA to reasonably apprehend [*42] imminent bodily harm to himself. Trial counsel's argument that the military judge could properly find Appellant guilty on such a theory was incorrect. Although trial counsel was arguably making a good faith attempt to explain how the evidence supported conviction, and not every weak or deficient argument amounts to prosecutorial misconduct, trial counsel are of course not permitted to misrepresent legal principles. *Cf. United States v. Bodoh*, 78 M.J. 231, 237 (C.A.A.F. 2019) ("When examining witnesses, trial counsel . . . cannot misstate legal principles.") (citations omitted). Accordingly, for purposes of our analysis, we will assume without holding that trial counsel's argument was clearly and obviously erroneous.

However, once again we find Appellant cannot demonstrate material prejudice. Again, the military judge is presumed to know the law, to disregard improper arguments, and to base his findings on the evidence, absent a clear indication to the contrary. Once again, the record does not indicate the contrary. The military judge found Appellant not guilty of the charged aggravated assault with a dangerous weapon which, as discussed above, had to be based on an offer-type theory. Instead, the military judge found Appellant guilty of [*43] a lesser included offense of simple assault which, under an attempt-type theory, was both legally and factually sufficient. Accordingly, we presume the military judge disregarded trial counsel's flawed argument, and therefore Appellant suffered no material prejudice.

C. Convening Authority's Denial of Deferment Request

On 16 May 2021, ten days after Appellant was sentenced, one of Appellant's trial defense counsel submitted a memorandum for the convening authority's consideration pursuant to R.C.M. 1106. The memorandum primarily consisted of a brief summary of the findings and sentence, a description of two defense motions the military judge denied, and what was equivalent to a two-page unsworn statement by Appellant to the convening authority through counsel. At the conclusion of the memorandum, trial defense counsel requested the convening authority "grant any and all relief in accordance with the Rules for Courts-Martial, the Uniform Code of Military Justice (UCMJ), and all applicable case law."

On 28 June 2021, the convening authority issued a memorandum in which he took no action on the findings or sentence. The convening authority interpreted Appellant's 16 May 2021 request for "any and all [*44] relief" to include *inter alia* requests that he defer Appellant's adjudged confinement, adjudged reduction in grade, and automatic forfeiture of pay and allowances until entry of judgment. See Articles 57(b)(1) and 58b, UCMJ, 10 U.S.C. §§ 857(b)(1), 858b. The convening authority's memorandum stated that each of these three requests was "hereby denied" without stating a reason for the denial. The convening authority did waive automatic forfeiture of pay and allowances for six months for the benefit of Appellant's dependent child. Appellant received notice of the convening authority's decision on 29 June 2021; trial defense counsel received notice on 5 July 2021. The record discloses no indication the Defense objected or moved for correction of the convening authority's denial of the deferment request.

We review a convening authority's denial of a deferment request for an abuse of discretion. *United States v. Sloan*, 35 M.J. 4, 6 (C.M.A. 1992), *overruled on other grounds by United States v. Dinger*, 77 M.J. 447, 453 (C.A.A.F. 2018); R.C.M. 1103(d)(2). "When a convening authority acts on an [appellant]'s request for deferment of all or part of an adjudged sentence, the action must be in writing (with a copy provided to the [appellant]) and must include the reasons upon which the action is based." *Id.* at 7 (footnote omitted); see also R.C.M. 1103 (providing procedures for deferment). [*45] "A motion to correct an error in the action of the convening authority shall be filed within five days after the party receives the convening authority's action." R.C.M. 1104(b)(2)(B).

Because Appellant did not object or move to correct an error in the convening authority's decision on action, we review the convening authority's decision on action for plain error. See *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017) (citations omitted) (noting appellate courts review forfeited issues for plain error). Under the longstanding precedent of *Sloan*, the convening authority's failure to state his reasons for denying the requested deferments was an error. See 35 M.J. at 7. For purposes of our analysis, we will assume without holding the error was clear or obvious. However, under the circumstances of this case, we find no material prejudice to Appellant. Appellant bore "the burden of showing that the interests of [himself] and the community in deferral outweigh[ed] the community's interests in imposition of the punishment on its effective date." R.C.M. 1103(d)(2). However, Appellant only

impliedly requested deferment of his punishments, and offered no specific justification for any deferment. We further note Appellant not only forfeited the issue at the time, but he has not alleged on appeal [*46] prejudicial error by the convening authority. In the absence of any indication the convening authority entertained an improper rationale for denying the deferments, we find Appellant's material rights were not substantially prejudiced by the convening authority's failure to state his reasons.

III. CONCLUSION

The finding of guilty as to assault with a dangerous weapon in Specification 3 of Charge I is **SET ASIDE**. The words "dangerous" and "loaded" are excepted from Specification 3 of Charge I and the excepted words are **SET ASIDE**; as to the remaining language of Specification 3 of Charge I, the lesser included offense of simple assault is affirmed. We reassess the sentence to a bad-conduct discharge, confinement for seven months, and reduction to the grade of E-1. The findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no additional error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). The findings, as modified, and the sentence, as reassessed, are **AFFIRMED**.

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