

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Docket No. ARMY 20220231

Private (E-2)
TREVON K. COLEY,
United States Army,
Appellant

Tried at Kaiserslauter, Germany, on 6
January and 2–6 May 2022, before a
general court-martial convened by the
Commander, 21st Theater
Sustainment Command, Lieutenant
Colonel Charles L. Pritchard, Jr. and
Lieutenant Colonel Lance R. Smith,
Military Judge, presiding.

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

Assignment of Error I¹

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

Assignment of Error II

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

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

Assignment of Error III

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

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Statement of the Case

On 6 May 2022, a military judge, sitting as a general court-martial, convicted appellant, pursuant to his pleas, of one specification of violating a general regulation and one specification of conspiracy to obstruct justice, in violation of Articles 92 and 81, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 892 and 881 (2019). (R. at 81; Statement of Trial Results). An enlisted panel, sitting as a general-court martial, convicted appellant, contrary to his pleas, of one specification of involuntary manslaughter by culpable negligence and one specification of aggravated assault, in violation of Articles 119 and 128, UCMJ, 10 U.S.C. § 919 and 928 (2019).² (R. at 789; Statement of Trial Results). The panel sentenced appellant to be reduced to the grade of E-1, to be confined for eight years, total forfeitures, and a bad-conduct discharge. (R. at 904; Statement of Trial Results). On 1 June 2022, the convening authority denied appellant's request to defer confinement; the convening authority took no action on the adjudged findings and sentence. (Action). On 21 June 2022, the military judge entered judgment. (Judgment).

² Appellant was acquitted of one specification of murder while engaging in an inherently dangerous act to another, in violation of Article 118, UCMJ, and one specification of leaving the scene of a vehicle accident as the driver, in violation of Article 111, UCMJ. (R. at 789). Pursuant to the defense's Rule for Courts-Martial 907 motion, the military judge dismissed one specification of drunken or reckless operation of a vehicle in violation of Article 113, UCMJ. (R. at 24).

Statement of Facts

A. Appellant was driving 107 miles per hour³ when he crashed into SPC [REDACTED]'s vehicle.

On 5 March 2021, at approximately 2130, appellant and his two friends, Private Second Class (PV2) [REDACTED] and Specialist (SPC) [REDACTED]⁴, were all driving back home separately in their respective vehicles at night.⁵ (R. at 209, 276, 304, 346). On Mannheimer Strasse, which is a residential street with a speed limit of thirty miles per hour (mph) (fifty kilometers per hour (kph)), the three soldiers started racing each other by accelerating, alternating back and forth between the vehicles, and switching lanes. (R. at 276, 306–07, 491, 534). Appellant, who had passed both SPC [REDACTED] and PV2 [REDACTED]'s vehicles, “mashed the accelerator pedal,” as he crested a hill on Mannheimer Strasse, accelerating up to 107 mph (172 kph). (R. at 276, 307, 495–97, 520–21).

As appellant raced down Mannheimer Strasse at 107 mph, SPC [REDACTED], who was driving her vehicle with (Private First Class) PFC [REDACTED] as her passenger,⁶ came

³ Throughout trial, both miles per hour and kilometers per hour were used for the vehicle speeds. (R. at 415–416, 490–91).

⁴ Both SPC [REDACTED] (appellant's friend) and SPC [REDACTED] (deceased victim) have the same first and last name initials. Appellant refers to the victim as “SPC [REDACTED]” in his brief, but since appellee's brief references appellant's friend, appellee will refer to the victim as “SPC [REDACTED]” and will refer to appellant's friend as “SPC [REDACTED].” (R. at 272).

⁵ Appellant was driving a Dodge Charger. (R. at 237, 275).

⁶ SPC [REDACTED] was driving a Ford Fusion. (R. at 238, 509).

into the intersection from Daennerstrasse. (R. at 350, 443). Because SPC [REDACTED]'s visibility of Mannheimer Strasse was limited by a seven-foot fence, she had to drive past the stop sign on Daennerstrasse in order to see approaching vehicles coming west from Mannheimer Strasse. (R. at 442–444, 527). Due to appellant's speed, by the time SPC [REDACTED] saw appellant's vehicle coming towards her, SPC [REDACTED] only had 1.4 to 1.5 seconds to react. (R. at 529). At that point when appellant's vehicle was finally visible to her, there "was nothing she could do," due to the extremely short amount of time available to her, as appellant's vehicle crashed into hers at an impact speed of 68 mph (109 kmh).⁷ (R. at 530).

The collision was fatal—SPC [REDACTED] died from multiple blunt force injuries that she sustained in the collision. (R. at 616). Furthermore, PFC [REDACTED], SPC [REDACTED]'s passenger, suffered grievous injuries: she had to be intubated at the scene and undergo cardiopulmonary resuscitation. (R. at 641). She also suffered a severe traumatic brain injury; fractures in her skull, ribs, and clavicle; microhemorrhages in her occipital lobes; disc herniation; and multiple other injuries. (R. at 641–42; Pros. Ex. 16 (sealed)). Appellant's only injury was "a limp." (R. at 259, 309).

⁷ Appellant's speed was 107 mph five seconds prior to the collision, 97 mph at 2.9 seconds to impact as he started to brake, and 68 mph at impact. (R. at 490–92, 500–01).

B. Appellant left the scene of the accident and told emergency services that he was a passenger in his vehicle.

After appellant crashed into SPC [REDACTED], PV2 [REDACTED] and SPC [REDACTED] caught up to appellant and arrived at the crash site. (R. at 308). Appellant got out of his vehicle and said to them, “Someone has to say they were driving the car.” (R. at 309). PV2 [REDACTED], who knew that appellant’s license was suspended, said she would tell people she was the driver of his car. (R. at 285, 309). Appellant told PV2 [REDACTED] and SPC [REDACTED] to check on SPC [REDACTED]’s vehicle; appellant then left the scene of the accident. (R. at 310, 371, 378). Appellant returned back to the scene approximately five to ten minutes later. (R. at 384). When emergency services arrived, appellant approached SGT [REDACTED], a military police (MP) officer, and said that he had been a passenger in his vehicle. (R. at 259).

Additional facts are incorporated below.

Assignment of Error I

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

Additional Facts

During an Article 39(a), UCMJ, session, the military judge noted that both parties had reviewed the draft instructions and that they had discussed those

instructions during a Rule for Courts-Martial [R.C.M.] 802 session. (R. at 714).

The military judge then asked whether either side had any objection to the instructions, which both sides answered in the negative. (R. at 716). The military judge next asked “What other instructions do you request, if any?” (R. at 717).

Both sides stated “none.” (R. at 717). The military judge inquired whether both sides had seen the Findings Worksheet, and he again asked whether either side had any objections. (R. at 717). Both parties acknowledged that they had seen the

Findings Worksheet but stated that they did not have any objections. (R. at 717).

After noting that he would provide the Findings Worksheet to the panel president, the military judge asked the parties if there was “anything that needs to be taken up before the members are called.” (R. at 717). Both parties answered in the negative. (R. at 717).

After the military judge read the instructions to the panel, to include the contributory negligence instruction for involuntary manslaughter by culpable negligence, the military judge asked both counsel whether they “object[ed] to the instructions given or request[ed] additional instructions.” (R. at 775). Both parties again answered in the negative. (R. at 726, 775).

Standard of Review

This court conducts a de novo review on whether a military judge properly instructed a panel. *United States v. Payne*, 73 M.J. 19, 22 (C.A.A.F. 2014). When there is no objection to an instruction, this court reviews for plain error. *Id.*

Law

Waiver is the intentional relinquishment or abandonment of a known right. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (cleaned up).⁸ “[E]xpressly and unequivocally acquiescing” to the military judge’s instructions “waive[s] all objections [on appeal] to the instructions, including in regards to the elements of the offense.” *Id.* (citing *United States v. Smith*, 2 C.M.A. 440, 442 (C.M.A.1953)); *see also United States v. Schmidt*, 82 M.J. 68, 72 (C.A.A.F. 2022) (reiterating *Davis*’s holding that the appellant affirmatively waived any objection to the instructions when defense counsel twice told the military judge that the defense had no objections).

“The military judge shall give the members appropriate instructions on findings.” R.C.M. 920(a). This duty includes “other explanations, descriptions, or

⁸ R.C.M. 920(f) states that “[f]ailure to object to an instruction or to omission of an instruction before the members close to deliberate forfeits the objection.” However, in *Davis*, the Court of Appeals for the Armed Forces held that “expressly and unequivocally acquiescing” to a military judge’s instructions, such as by affirmatively declining to object to the military judge’s instructions, constitutes waiver. 79 M.J. at 331.

directions *as may be necessary* . . . or which the military judge determines, sua sponte, should be given.” R.C.M. 920(e)(7) (emphasis added). A military judge is required to instruct the members on affirmative defenses “in issue.” R.C.M. 920(e)(3). A matter is considered “in issue” when “some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose.” R.C.M. 920(e) discussion. However, “required findings instructions can be waived.” *United States v. Rich*, 79 M.J. 472, 475 (C.A.A.F. 2020) (citing *Davis*, 79 M.J. at 331); *see also United States v. Gutierrez*, 64 M.J. 374, 376 (C.A.A.F. 2007) (“[E]ven if an affirmative defense is reasonably raised by the evidence, it can be affirmatively waived by the defense.”).

Argument

Since appellant affirmatively waived his objections to the instructions, this court should decline to exercise its unique authority and pierce waiver. *United States v. Olson*, ARMY 20190267, 2021 CCA LEXIS 160, at *10–11 (Army Ct. Crim. App. 1 Apr. 2021) ([mem. op.](#)) (cleaned up). However, even if this court chooses to pierce waiver, the military judge’s instructions were not deficient—the military judge provided the contributory negligence instruction for involuntary manslaughter by culpable negligence to the panel. (R. at 775).

A. Appellant waived any objection to the instructions.

Appellant had at least six opportunities to request additional or revised instructions: during the R.C.M. 802 conferences when the parties reviewed the instructions; during the Article 39(a) session when the military judge asked counsel four different times whether they had any objections and/or requested additional instructions; and when, after the military judge read the instructions to the panel, the military judge asked a final time whether counsel objected to the instructions given or requested additional instructions. (R. at 714, 716–17, 726, 775). At all offered opportunities, appellant affirmatively indicated that he did not object nor desire any additional instructions. (R. at 714, 716–17, 775). “By expressly and unequivocally acquiescing to the military judge’s instructions, [a]ppellant waived all objections to the instructions” *Davis*, 79 M.J. at 331.

Even if this court looks to its broad plenary authority to review waived issues, this is not one of “those cases which have disadvantaged the accused in a manner that the [Court of Criminal Appeals] determined needs correction, or a court-martial in which the perception of unfairness in the trial may have the actual effect of undermining good order and discipline.” *Olson*, 2021 CCA LEXIS 160 at *10–11 (cleaned up). None of the unique military circumstances, “such as being tried in a remote location without the ease of access to familial support, misuse of broad command authority, and uniquely military offenses,” are present here to

warrant exercising this court’s unique authority. *Id.* at *11 (citing *United States v. Conley*, 78 M.J. 747, 751–52 (Army Ct. Crim. App. 28 Feb. 2019)).

B. The military judge provided the correct contributory negligence instruction.

Even if this court decides to pierce appellant’s unequivocal waiver, there is no error to correct. Appellant avers that the military judge should have provided the “affirmative defense instruction for contributory negligence.” (Appellant’s Br. 8). The instruction that appellant cites to is used “[w]hen a Benchbook instruction on a punitive article does not include [contributory negligence] instructions.” Dep’t of Army, Pam. 27-9, Legal Services: Military Judges’ Benchbook, para. 5-19, note 1 (29 Feb. 2020) [Benchbook].

However, involuntary manslaughter by culpable negligence has its own tailored contributory negligence instruction—and it is the instruction that the military judge provided to the panel at appellant’s court-martial. (R. at 723, 726); Benchbook, para. 3A-43-2, note 2. Furthermore, the contributory negligence instruction, in conjunction with the proximate cause instruction, that the military judge provided to the panel was substantially similar to the one that appellant is now—belatedly—requesting. Both instructions put the panel on notice that (1) the victim’s alleged contributory negligence may impact whether an accused’s culpable negligence was the proximate cause of death, and (2) that the government had “to prove beyond a reasonable doubt that there was no independent intervening

cause and that the accused's culpable negligence was a proximate cause of the victim's death." (R. at 723, 726); Benchbook, para. 5-19. *See United States v. Carruthers*, 64 M.J. 340, 346–47 (C.A.A.F. 2007) (finding that the military judge's given instruction was "substantially similar" to the sample instruction on accomplice testimony); *United States v. Gay*, 16 M.J. 475, 477–78 (C.M.A. 1983) (holding that the military judge's instruction on reasonable doubt "substantially covered" the defense's requested instruction where defense did not object or request additional instructions); *United States v. Oxendine*, 54 M.J. 508, 512 (N.M. Ct. Crim. App. 2000), *aff'd*, 55 M.J. 323 (C.A.A.F. 2001) (finding that the military judge's instructions on contributory negligence, similar to the one given at this appellant's court-martial, substantially followed the guidance provided in the Benchbook and were sufficient). Therefore, the contributory negligence instruction for involuntary manslaughter by culpable negligence, while not identical to the instruction in Benchbook, para. 5-19, "adequately conveyed the essential aspects of the instructions pertinent to the circumstances of the case." *United States v. McDonald*, 57 M.J. 18, 22 (C.A.A.F. 2002).

C. Even if the military judge erred by not providing an additional instruction on contributory negligence, there was no prejudice.

Assuming *arguendo* that this court finds that the military judge erred by not providing Benchbook Instruction 5-19, the error was harmless beyond a reasonable

doubt.⁹ *United States v. Davis*, 73 M.J. 268, 271 (C.A.A.F. 2014) (noting that instructional errors that raise constitutional implications are tested for prejudice under the standard of harmlessness beyond a reasonable doubt).

The evidence establishing appellant's guilt was overwhelming. Even if every one of appellant's allegations against SPC [REDACTED] were true—that she had been drinking, ignored stop signs, and hesitated in the intersection—appellant's actions of driving over 107 mph, by a “dangerous intersection,” in a residential area with narrow streets and obstructed visibility at night, still constituted culpable negligence. (Appellant's Br. 11–12, 21). SPC [REDACTED]'s actions did not “loom[] so large in comparison with the negligence by [appellant] that [appellant's] conduct should not be regarded as a substantial factor in the final result.” Benchbook Instruction 5-19. Since “[i]t is clear beyond a reasonable doubt that the court members would have found appellant guilty even if properly (and, perhaps, redundantly) instructed on” Benchbook Instruction 5-19, appellant suffered no prejudice from the alleged instructional error. *McDonald*, 57 M.J. at 22.

⁹ As discussed *supra* para. A of this section, appellant affirmatively waived this contributory negligence instruction. See *Rich*, 79 M.J. at 475 (“required findings instructions can be waived” and “when counsel affirmatively declines to object and offers no additional instructions, counsel expressly and unequivocally acquiesces to the military judge's instructions”) (cleaned up); *Davis*, 79 M.J. at 331 (holding that the accused waived the issue of whether the mens rea of “knowingly” applies to the consent element of Article 120c(a)(2)); *Gutierrez*, 64 M.J. at 376 (“[E]ven if an affirmative defense is reasonably raised by the evidence, it can be affirmatively waived by the defense.”).

Since appellant waived any objections to the instructions, and, assuming there was error, the military judge's alleged error did not contribute to appellant's conviction, this court should affirm the findings.

Assignment of Error II

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

Standard of Review

This court reviews assertions of ineffective assistance of counsel (IAC) de novo. *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009)).

Law

“To prevail on an ineffective assistance claim, the appellant bears the burden of proving that the performance of defense counsel was deficient and that the appellant was prejudiced by the error.” *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) (citing *Strickland v. Washington*, 466 U.S. 668, 698 (1984)). “Judicial scrutiny of counsel’s performance must be highly deferential.” *Strickland*, 466 U.S. at 689. Courts “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* “To overcome the presumption, an appellant must show specific defects in counsel’s performance that were unreasonable under prevailing

professional norms.” *United States v. Carter*, 79 M.J. 478, 480–81 (C.A.A.F. 2020) (cleaned up).

The deficiency prong requires appellant to prove “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. The Sixth Amendment is not a mechanism “to improve the quality of legal representation . . . the purpose is simply to ensure that criminal defendants receive a fair trial.” *Id.* at 689. Accordingly, “[j]udicial scrutiny of counsel’s performance must be highly deferential.” *Id.* In assessing an ineffectiveness claim, a court must “judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690. Defining what constitutes deficiency in a claim of IAC, the Supreme Court has stated a “defendant must show that counsels’ representation fell below an objective standard of reasonableness.” *Id.* at 688.

Even where counsel has committed an error deemed unreasonable, it “does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Id.* at 691. Appellant must “affirmatively prove prejudice.” *Id.* at 692. This means appellant “must show that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the

outcome.” *Id.* at 694. In other words, “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (emphasis added). This requires consideration of “the totality of the evidence before the judge or jury.” *Strickland*, 466 U.S. at 695. An appellate court “need not determine whether counsel’s performance was deficient before examining the prejudice suffered by defendant as a result of the alleged deficiencies . . . if it is easier to dispose of an [IAC] claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” *Strickland*, 466 U.S. at 697.

Trial defense counsel have “a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691. “Strategic choices made by counsel after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015) (cleaned up). “In considering whether an investigation was thorough, we address not what is prudent or appropriate, but only what is constitutionally compelled.” *Id.* at 379–80 (citing *Burger v. Kemp*, 483 U.S. 776, 794 (1987)). “The Supreme Court has rejected the notion that the same type and breadth of investigation will be required in every case. *Id.* at 380 (cleaned up).

Argument

Appellant's ineffective assistance of counsel claim fails to meet the high burden to demonstrate that his counsel was deficient or that any alleged deficiency resulted in prejudice.

A. Appellant has not demonstrated deficient performance by his defense counsel.

Appellant cannot meet his burden to demonstrate that his defense counsel was deficient because he has not offered evidence to show that his counsel's performance fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence," and that is precisely what appellant is doing in the present case. *Id.* at 689.

Appellant's argument, that "negligent medical care contributed to SPC [REDACTED]'s death by improper administration of ketamine," was not credible. (Appellant's Br. 17). SPC [REDACTED]'s death was clearly attributable to appellant's actions. (R. at 256, 530, 616; Pros. Ex. 5). CAPT [REDACTED], the medical examiner who performed SPC [REDACTED]'s autopsy, concluded that SPC [REDACTED]'s death was due to "multiple blunt force injuries sustained in a motor vehicle collision." (R. at 616). During the autopsy, CAPT [REDACTED] conducted a complete internal examination to rule out other causes of death. (R. at 639). Her internal examination of SPC [REDACTED] included an examination of SPC [REDACTED]'s central nervous system, respiratory

system, and cardiovascular system; she did not find “anything remarkable” about those systems. (R. at 639–40).

Furthermore, the evidence that was elicited at trial rebutted appellant’s negligent medical care theory: Dr. ■■■, an expert in forensic toxicology, testified that, if a patient is intubated, the patient “will never overdose on it” because the patient has a protected airway and can thus sleep off any such overdose. (R. at 680). And as CAPT ■■■ noted, there was evidence of medical intervention when she opened SPC ■■■’s human remains pouch, including an “endotracheal tube, which is a breathing tube, inserted in her oral cavity or in her airway.” (R. at 630). Lastly, the defense counsel had their own forensic toxicology expert, Dr. ■■■, who presented no evidence of a ketamine overdose. (R. at 682–83).

In terms of Mr. ■■■, contrary to appellant’s assertion, Mr. ■■■ did not note that “there are no indications of traffic-juridical wrongdoing by” appellant. (Appellant’s Br. 15; Appellant’s Mot. to Attach Def. App. Ex. A). Further, as Mr. ■■■, the government’s reconstruction expert, testified at trial, SPC ■■■ necessarily had to “roll past the ‘Stop’ sign”: due to the way the roads intersect, SPC ■■■ had to pass the “Stop” sign in order to see into the incoming intersection.¹⁰ (R. at 436–37, 441–44). Also, unlike Mr. ■■■, Mr. ■■■ and the

¹⁰ Furthermore, even if SPC ■■■ should have stopped at the “Stop” sign, appellant, “at those speeds,” still did not have the right of way. (R. at 563).

German police were not accident reconstruction experts and their lack of expertise was reflected in their level of competency. (R. at 591, 597). As Mr. ■■■, who had reviewed Mr. ■■■'s report, pointed out, it was “extremely clear” that Mr. ■■■ and the German police did not have a basic understanding of vehicle dynamics since they were unable to ascertain the vehicles’ rotational direction. (R. at 591).

Lastly, since the defense counsel had access to their own confidential accident reconstruction expert consultant, the defense counsel did not need to resort to Mr. ■■■, who was only an “accident investigator.” (R. at 597). *See United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F. 2009) (“[w]here . . . an appellant attacks the trial strategy or tactics of the defense counsel, the appellant must show specific defects in counsel’s performance that were “unreasonable under prevailing professional norms.”) (quoting *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006)); *United States v. Osheskie*, 63 M.J. 432, 436 (C.A.A.F. 2006) (finding no deficiency in the defense counsel’s performance where the decision not to investigate further was reasonably made). Appellant’s claim that his counsel was deficient is a far cry from the high standard delineated in *Strickland* where an appellant must “show” that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” 466 U.S. at 687.

B. Defense counsel's alleged deficient performance would not have altered the outcome.

Assuming *arguendo* that defense counsel's performance was deficient, appellant still cannot demonstrate that the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694 (stating that an appellant must demonstrate "a reasonable probability that, but for counsel's [deficient performance] the result of the proceeding would have been different"). The prosecution presented a strong case. In addition to their qualified and credible reconstruction expert, Mr. [REDACTED], who concluded "without a doubt" that appellant was the cause of the crash due to his "high speed operation," the government presented testimony from the medical examiner who performed SPC [REDACTED]'s autopsy and found her cause of death to be "multiple blunt force injuries sustained in a motor vehicle collision." (R. at 609, 616). The government also presented testimony from PV2 [REDACTED], who detailed how appellant raced ahead of her, and when she found him at the crash site, his first words were, "Someone has to say they were driving the car," that appellant had a suspended driver's license, and that appellant initially left the scene of the accident. (R. at 307–10). Furthermore, it was undisputed that appellant had been driving 107 mph five seconds prior to the collision, which was "three-and-a-half times the posted speed limit," on narrow lanes in a residential area at night. (R. at 490–91, 532, 534–35).

Given the strength of the prosecution's case, even if defense counsel had

offered Mr. ■■■'s testimony that SPC ■■■ did not fully stop at the intersection and that there were “no indications of traffic-juridical wrongdoing” by appellant, the result would not have been different. (Appellant’s Br. 15). “The likelihood of a different result must be substantial, not just conceivable.” *Harrington*, 562 U.S. at 112.

Accordingly, should this court decline to dispose of appellant’s ineffective counsel claim on the grounds of lack of demonstration of deficient performance, it can easily do so on the basis of lack of prejudice.¹¹ *See Strickland*, 466 U.S. at 697 (“if it is easier to dispose of an [IAC] claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.”).

¹¹ Should this Court elect to examine whether defense counsel was deficient and deem the presumption of competence overcome, the government respectfully requests to “submit a statement or affidavit from . . . defense counsel to rebut the allegations.” *United States v. Melson*, 66 M.J. 346, 347 (C.A.A.F. 2008).

Assignment of Error III

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

Standard of Review

Questions of legal sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). In the National Defense Authorization Act of 2021, Congress limited the Criminal Court of Appeals’ (CCA) de novo and unreviewable factual sufficiency powers. 10 U.S.C. § 866(d)(1)(A-B) (2021); *see* Office of the General Counsel, Dep’t of Defense, Report of the Military Justice Review Group Part I: UCMJ Recommendations (Report of the Military Justice Review Group)¹² at 610, 615 (Dec. 22, 2015). Now, a CCA must apply a “weight of the evidence” review and accord “deference” to all evidence and witnesses and judicial findings of fact when conducting its factual sufficiency review. Art. 66(d)(1)(B), UCMJ.

¹² <https://jsc.defense.gov/Portals/99/MJRG%20Part%201.pdf>.

Law

A. Legal sufficiency.

The standard for legal sufficiency is “whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.” *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In resolving questions of legal sufficiency, the court is “bound to draw every reasonable inference from the evidence of record in favor of the prosecution.” *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). During its legal sufficiency review, the court considers all available facts within the record and is “not limited to the appellant’s narrow view of the record.” *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996).

B. Factual sufficiency.

Regarding factual sufficiency, an appellant must first make a “specific showing of a deficiency in proof.” Art. 66(d)(1)(B), UCMJ.¹³ After an appellant has made such a showing, this court “may weigh the evidence and determine controverted questions of fact;” however, this review must provide “appropriate deference to the fact that the trial court saw and heard the witnesses and other

¹³ Since every finding of guilty in this case is for an offense that occurred on or after 1 January 2021, the revised standards set forth in Article 66(d)(1)(B), UCMJ (effective 1 January 2021), apply.

evidence” and “appropriate deference to findings of fact entered into the record by the military judge.” Art. 66(d)(1)(B)(iii), UCMJ. This court must be “clearly convinced that the finding of guilty was against the weight of the evidence” before it may modify the findings or sentence. Art. 66(d)(1)(B)(iii), UCMJ.

1. “Specific showing.”

An appellant must make a “specific showing” by pointing to a specific deficiency; under common usage, this precludes summary allegations, that a finding was factually insufficient, without identifying what evidence was lacking from which element of a specific finding of guilty. Art. 66(d)(1)(B), UCMJ. Further, a “specific showing” means a CCA would be limited to the grounds raised by the appellant. *See United States v. Huy Tan Nguyen*, 507 F.3d 836, 837 (5th Cir. 2007) (finding that a trial court has no authority to conduct a “weight of evidence” review, in a motion for a new trial, on bases not raised by the accused).

2. “Deficiency of proof.”

A “deficiency of proof” must be one that would result in a different verdict if the allegations were true. *See United States v. Lofton*, 233 F.3d 313, 318 (4th Cir. 2000) (new trial motion properly denied since defendant merely presented evidence which, whether true or false, was irrelevant to essential elements). Similarly, within Rule 33(a) of the Federal Rules of Criminal Procedure, courts have identified some arguments as frivolous when there is overwhelming evidence

of a defendant's guilt. *United States v. Boros*, 636 Fed. Appx. 688, 692 (7th Cir. 2016).

3. “Clearly convinced.”

The court may only grant relief if it is “clearly convinced that the findings of guilty was against the weight of the evidence.” Art. 66(d)(1)(B)(iii), UCMJ.

When considering the meaning of this language, military and federal appellate courts’ “clear error” test provides useful guidance. Military and federal appellate criminal courts review trial level findings of fact for clear error, requiring a complete lack of evidence or a definite and firm conviction that the factfinder’s determination was erroneous. *See, e.g., United States v. Horne*, 82 M.J. 283, 286 (C.A.A.F. 2022); *United States v. Carpenter*, 77 M.J. 284, 289 (C.A.A.F. 2018). Findings of fact are “clearly” erroneous “when there is *no evidence* to support the finding, or when, although there is evidence to support it, the reviewing court on the entire evidence is left with the *definite and firm conviction* that a mistake has been committed.” *Horne*, 82 M.J. at 289 (C.A.A.F. 2022) (internal citation omitted) (emphasis added).

A heightened standard of proof should require that either no evidence supported the finding, or that the court holds a “definite and firm conviction that a mistake has been committed.” *Horne*, 82 M.J. at 289. Such a heightened standard should give “great deference”—which is the “appropriate deference”—to the trial

factfinder's explicit and implicit determinations on the basis of credibility. *See* Art. 66(d)(1)(B)(ii); *United States v. Hernandez*, 81 M.J. 432, 442 (C.A.A.F. 2021) (“Credibility determinations are entitled to great deference on appeal and will not be reversed absent a clear abuse of discretion.”) (cleaned up). Lastly, this court should only be “clearly convinced” of such a mistake if the evidence that is lacking is “substantial evidence.” *See United States v. Span*, 789 F.3d 320, 325 (4th Cir. 2015).

C. Involuntary Manslaughter (The Specification of Charge II).

To convict appellant of involuntary manslaughter, the government was required to prove beyond a reasonable doubt: (1) that SPC [REDACTED] was dead; (2) that the death resulted from appellant's act; (3) that the killing was unlawful; and (4) that appellant's act constituted culpable negligence. Article 119, UCMJ; *Manual for Courts-Martial, United States* (2019 ed.) [MCM], pt. IV, ¶ 57.b.(2). “Culpable negligence” is a negligent act “accompanied by a culpable disregard for the foreseeable consequences to others of that act” MCM, pt. IV, ¶ 57.c.(2)(a). “Thus, the basis of a charge of involuntary manslaughter may be a negligent act or omission, which, when viewed in the light of human experience, might foreseeably result in the death of another, even though death would not necessarily be a natural and probable consequence” of the act. MCM, pt. IV, ¶ 57.c.(2)(a).

D. Aggravated Assault (The Specification of Charge III).

To convict appellant of aggravated assault in which grievous bodily harm is inflicted, the government was required to prove beyond a reasonable doubt: (1) that appellant assaulted PFC ■■■; and (2) that the grievous bodily harm was thereby inflicted on PFC ■■■. Article 128, UCMJ; MCM, pt. IV, ¶ 77.b.(4)(c). “Grievous bodily harm” means a bodily injury that involves “a substantial risk of death,” “extreme physical pain,” “protracted and obvious disfigurement,” or “protracted loss or impairment of the function of a bodily member, organ, or mental faculty.” MCM, pt. IV, ¶ 77.c.(1)(c).

Argument

A. Appellant’s convictions are legally sufficient.

The government’s evidence satisfied every element of involuntary manslaughter and aggravated assault. For involuntary manslaughter, CAPT ■■■ testified that SPC ■■■’s cause of death was from multiple blunt force injuries sustained in a motor vehicle collision. (R. at 616). It was undisputed that appellant drove his Dodge Charger into SPC ■■■’s Ford Fusion, which ultimately killed her; furthermore, appellant had no legal justification or excuse for killing SPC ■■■. (R. at 237, 238, 275, 509, 530). Additionally, appellant’s act of

racing¹⁴ and driving over 107 mph, moments before killing SPC [REDACTED], in a residential area with narrow streets and obstructed visibility at night, demonstrated appellant's culpable disregard for the foreseeable consequences of his act. (R. at 276, 306–07, 491, 495–97, 534). The panel agreed: after hearing the military judge's instructions on what constituted culpable negligence, the panel found appellant guilty of involuntary manslaughter by culpable negligence. (R. at 725, 789).

In terms of appellant's aggravated assault conviction, there was no question that PFC [REDACTED] was a passenger in SPC [REDACTED]'s vehicle. (R. at 279, 509). Moreover, the government provided evidence of PFC [REDACTED]'s extensive and grievous injuries, such as her severe traumatic brain injury, multiple fractures, and microhemorrhages in her occipital lobes—her injuries were so serious that she had to be intubated at the scene and undergo cardiopulmonary resuscitation. (R. at 641–42; Pros. Ex. 16 (sealed)). *See United States v. Vigil*, 3 U.S.C.M.A. 474, 476–

¹⁴ The government contends that appellant was racing moments before he collided into SPC [REDACTED], as indicated by witness testimony and appellant's rate of speed. SPC [REDACTED] testified that she, appellant, and PV2 [REDACTED] were all speeding, that she lost sight of appellant, and that when she got to the intersection of Daenner and Mannheimer Strasse, she saw the accident. (R. at 276–77). PV2 [REDACTED] testified that all three of them had “stepped on the gas,” were “switching lanes” for about two minutes, that SPC [REDACTED] and appellant “raced ahead” of her, and that when she approached the intersection of Daenner and Mannheimer Strasse, she saw the accident.” (R. at 306–308). The evidence also showed that appellant's speed was 107 mph five seconds prior to the collision, 97 mph at 2.9 seconds to impact as he started to brake, and 68 mph at impact. (R. at 490–92, 500–01).

77, 13 C.M.R. 30, 32–33 (1953) (finding that the victim’s injuries of fractured cheek bones, nose, and jaw constituted grievous bodily harm); *United States v. Haynes*, 29 M.J. 610, 612–13 (A.C.M.R. 1989) (finding that grievous bodily injury occurred where the victim was sliced across the chest and required stitches, but did not cut the underlying muscle); *see also* MCM, pt. IV, ¶ 77.c.(1)(c) (defining grievous bodily harm); Benchbook, para. 3A-43-2, para. d (providing instructions on aggravated assault and the definition of grievous bodily harm).

Thus, “draw[ing] every reasonable inference from the evidence of record in favor of the prosecution,” and “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. King*, 78 M.J. 218, 221 (C.A.A.F. 2019). Appellant’s convictions are therefore legally sufficient.

B. Appellant’s convictions are factually sufficient.

Appellant was the proximate cause of SPC ██████’s death and PFC ██████’s grievous injuries. Appellant’s act of racing and driving over 107 mph, especially in a residential area with narrow streets and obstructed visibility at night, demonstrated appellant’s culpable disregard for the foreseeable consequences of his act. (R. at 276, 306–07, 491, 495–97, 534).

Appellant attempts to shift blame towards SPC [REDACTED] are unavailing. (Appellant's Br. 21–22). Appellant's claim, that SPC [REDACTED] had been drinking that night and thus contributed to the crash, amount to speculation: SPC [REDACTED]'s toxicology report showed a .005% of blood alcohol content (BAC)¹⁵ immediately after the crash. (Appellant's Br. 22; R. at 648, 669–70). Such a low BAC would have a “negligible” effect on a person. (R. at 684). Furthermore, all of this evidence was presented to the panel at appellant's court-martial; after hearing the military judge's instructions, the panel rejected appellant's arguments and found him culpably negligent. (R. at 192, 195, 721–265, 789).

Appellant then contends that “this accident would not have occurred” if SPC [REDACTED] exercised reasonable care and adhered to German traffic laws. (Appellant's Br. 22). Specifically, appellant argues that SPC [REDACTED] failed to stop at a stop sign and hesitated in the middle of an intersection. (Appellant's Br. 22). However, the government's expert already rebutted this argument at trial. Mr. [REDACTED] testified that, due to SPC [REDACTED]'s obstructed view of the intersection, she necessarily had to roll past the stop sign in order to see into the intersection. (R. at 444). And due to appellant's extreme speed, SPC [REDACTED] only had a mere 1.4 to 1.5 seconds to react once she saw appellant's vehicle; with that little time, there “was nothing she could

¹⁵ An average-sized person who has one standard alcoholic drink would have an approximately .02 BAC. (R. at 685).

do.” (R. at 529–30). Mr. [REDACTED] further testified that, even when he viewed the evidence “in the light most favorable to [appellant],” “the cause of this crash was [appellant’s] high speed operation.” (R. at 541–42, 609). If appellant had been going the speed limit, he would not have collided with SPC [REDACTED]. (R. at 542). If appellant had been going 60 mph, which was double the speed limit, he would not have collided with SPC [REDACTED]. (R. at 543). Even if appellant had been going eighty-six mph, he would not have collided with SPC [REDACTED]. (R. at 543). However, because appellant was speeding at 107 mph, appellant was, “without a doubt,” at fault. (R. at 490, 528–29, 609).

Appellant believes that his conduct was “simple negligence.” (Appellant’s Br. 23). Racing and driving over 107 mph, especially in a residential area with narrow streets at night, is not just simple negligence—it is culpable negligence. (R. at 276, 306–07, 491, 495–97, 534). Appellant attempts to support his argument by pointing to civilian jurisdictions where “something more than excessive speeding is ordinarily required to render one guilty of involuntary manslaughter by culpable negligence.” (Appellant’s Br. 23). Because appellant’s speed was so excessive—driving 107 mph in a 31 mph road—nothing more is needed to show culpable negligence. (R. at 416, 490); *see United States v. Cox*, ACM 38885, 2017 CCA LEXIS 169, at *7 (A.F. Ct. Crim. App. 22 Feb. 2017) ([unpub. op.](#)) (“While exceeding the speed limit by a few miles per hour would not, by itself, establish

culpable negligence, there are circumstances where sufficient excess speed alone could do so.”). Moreover, there was “something more than excessive speed” in appellant’s case: despite having a suspended license, appellant raced two of his friends, at night on a residential area, on a narrow street that had a curve and a hill. (R. at 276, 306–07, 429, 491, 495–97, 534).


Appellant unsuccessfully attempts to distinguish his case from *People v. Ricardo B.*, 518 N.Y.S.2d 843 (N.Y. App. Div. 1987)¹⁶, and *People v. Soto*, 376 N.E.2d 907 (N.Y. App. Div. 1978). (Appellant’s Br. 24). According to appellant, unlike in *Ricardo* and *Soto*, where “the accidents were caused by the culpably negligent act of racing on the street,” he “had not planned, discussed, or orchestrated a ‘race’.” (Appellant’s Br. 24). Appellant and his friends did not need to plan, discuss, or orchestrate a race. The evidence demonstrated that appellant and his friends actually participated in one that night in a residential area: they were “speeding,” “switching lanes,” and alternating getting in front of each other’s vehicles prior to appellant’s collision into SPC [REDACTED]. (R. at 276, 306–08).

¹⁶ Additionally, the *Ricardo B.* court rejected the defendants’ argument, which is similar to appellant’s here, that there was lack of causation because the victim was intoxicated. 518 N.Y.S.2d at 847–48. The *Ricardo B.* court rejected the defendants’ argument because the jury clearly found that each defendant’s conduct was a “sufficiently direct cause” of the victim’s death, regardless of her intoxicated state. *Id.*

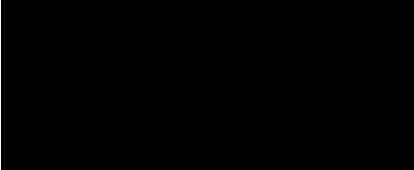
Because it was “foreseeable that [appellant’s] unlawful act of driving well over the speed limit in a residential area would result in a fatal collision,” appellant’s actions constituted culpable negligence and his convictions were therefore factually sufficient. *United States v. Smith*, ACM 39816, 2021 CCA LEXIS 218, at *33 (A.F. Ct. Crim. App. 5 May 2021) ([unpub. op.](#)); *see also Cox*, 2021 CCA LEXIS 218, at *10 (finding it foreseeable that death of a car occupant is a foreseeable result of a crash at speeds of 80 mph on a stretch of road with curves and downhill grade).

Conclusion

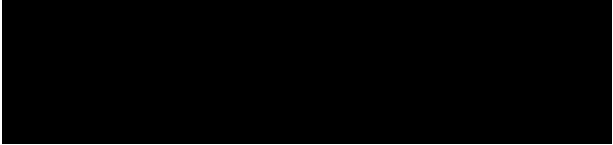
WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and the sentence and deny relief.



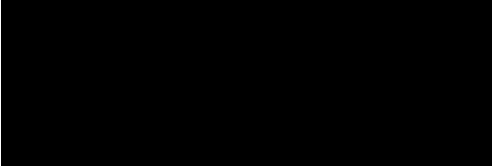
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CERTIFICATE OF SERVICE U.S. v. Coley (20220231)

I certify that a copy of the foregoing was sent via electronic submission to
the Defense Appellate Division at [REDACTED]

[REDACTED] on this 25th day of May 2023.

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