

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20220209

Sergeant (E-5)

JASON L. BAILEY

United States Army,

Appellant

Tried at Fort Drum, New York, on 27 July 2021, 29 November 2021, and 25-26 April 2022, before a general court-martial appointed by the Commander, 10th Mountain Division, COL Gregory R. Bockin, military judge, presiding.

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

Assignment of Error¹

**I. WHETHER THE MILITARY JUDGE'S INADEQUATE
STATEMENT OF SPECIAL FINDINGS VIOLATES R.C.M.
918(b).**

Statement of the Case

On 26 April 2022, a military judge sitting as a general court-martial convicted appellant, Sergeant (E-5) Jason L. Bailey, contrary to his pleas, of one specification of strangulation, in violation of Article 128b, Uniform Code of Military Justice [UCMJ], and one specification of assault consummated by a

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

battery upon a spouse in violation of Article 128, UCMJ.² (R. at 417; Charge Sheet). On the same day, the military judge sentenced appellant to a Bad Conduct Discharge and reduction to the grade of E-1. (R. at 465).

On 31 May 2022, the convening authority approved the findings and adjudged sentence. (Convening Authority Action). On 1 June 2022, the military judge entered Judgment. (Modified Judgment of the Court). This court docketed appellant's case on 8 February 2023. (Referral and Designation of Counsel).

Statement of Facts

Appellant was married to Ms. [REDACTED] for three years. (R. at 148.) After drinking alcohol with a friend on New Year's Eve, the couple got into an argument. (R. at 26). Later, appellant was accused of punching and strangling Ms. [REDACTED] after the party concluded. (R. at 161-165).

A. Witness testimony about the altercation.

Special Agent [REDACTED], who responded to the domestic call, arrived at the [REDACTED] residence to find Ms. [REDACTED] "yelling." (R. at 266). The agent noted that both Ms. [REDACTED] and appellant exhibited signs of a clash, as he observed redness to appellant's face, neck, and hands. (R. at 271). The agent took photographs of appellant's injuries

² Appellant was acquitted of Specification 2 of Charge II and Specification 3 of Charge II.

after learning that Ms. ■ had become physical with appellant. (R. at 271). At trial, Ms. ■ claimed, among other things, she never hit appellant. (R. at 34).

B. Evidence of Ms. ■ character for truthfulness and character for violence were admitted at trial.

Multiple witnesses testified that Ms. ■ lacked a character for truthfulness. (R. at 338, 348, and 392). Witnesses also testified that Ms. ■ was a violent person. (R. at 340, 349, 355).

At trial, Ms. ■ mother admitted Ms. ■ had attacked Ms. ■ sister in “a violent way.” (R. at 298). Another witness testified to Ms. ■ behavior at a different party where, Ms. ■ violently shoved a water bottle in appellant’s face and forced him to drink from it after noticing he was intoxicated. (R. at 357). At that same party, Ms. ■ struck a different intoxicated servicemember with her hands so many times the witness lost count of the blows. (R. at 355).

C. Trial defense counsel submitted a timely request for special findings before the verdict.

On 26 April 2022, before announcement of findings, trial defense counsel submitted a timely request for findings of guilt to be accompanied by an explanation of the facts the military judge used to find appellant guilty. (App. Ex. XXXVI).

E. Military Judge’s “special findings” included the elements of Charge I and its Specification and Specification 1 of Charge II, but failed to weigh the evidence and make specific findings of facts

The military judge granted the defense request and put his “special findings” on the record. (R. at 416, 419). The military judge recited the elements of each specification of each charge, but far from addressing the appellant’s affirmative defense and Ms. ■■■■■ own propensity for violence and character for dishonesty with specific findings of fact, he only stated that the court “resolved all issues of credibility” and that there were “no reasonable grounds” for appellant to fear imminent bodily harm. (Special Findings).

WHETHER THE MILITARY JUDGE’S INADEQUATE STATEMENT OF SPECIAL FINDINGS VIOLATES R.C.M. 918(b).

Summary of Argument

Rather than making specific factual findings based on the evidence admitted, the military judge merely listed the elements of the offenses and his conclusion that no reasonable grounds supported appellant’s self-defense theory. Because the “findings” did not address the facts that supported appellant’s affirmative defense and failed to address credibility issues surrounding the complaining witness, the military judge’s special findings did not comply with Rule for Courts-Martial [R.C.M.] 918(b).

Standard of Review

Special findings on the ultimate issue of guilt are subject to the same appellate review as a general finding of guilt, while other special findings are reviewed for clear error. *United States v. Truss*, 70 M.J. 545, 545 (Army Ct. Crim. App. 2011).

Law

A. Special findings are an important right of the appellant in a trial by military judge alone.

Article 51(d), UCMJ is derived from Rule 23(c) of the Federal Rules of Criminal Procedure and is an important right of the defendant in judge-alone cases. *United States v. Gerard*, 11 M.J. 440, 441 (C.M.A. 1981) (internal signals omitted). Special findings are to a bench trial as instructions are to a trial before members. *Cesario v. United States*, 200 F.2d 232, 233 (1st Cir. 1952).

Special findings are designed to preserve questions of law for appeal. *Id.* It is the remedy intended to rectify possible judicial misconceptions regarding the significance of a particular fact, *Wilson v. United States*, 250 F.2d 312, 325 (9th Cir. 1958); ensure the trial judge has properly applied any presumption, *Howard v. United States*, 423 F.2d 1102, 1104 (9th Cir. 1970); and applied the appropriate legal standard, *United States v. Morris*, 263 F.2d 594 (7th Cir. 1959).

B. Special findings are required in certain circumstances upon proper request.

Pursuant to Article 51(d), UCMJ, 10 U.S.C. § 851(d), codified in R.C.M. 918(b), in a judge alone trial, the military judge is required to make special findings of fact under certain circumstances upon a proper request. Historically, even without a request, the military judge may make such special findings if appropriate. *United States v. Gibson*, 44 C.M.R. 333, 338 n.2 (A.C.M.R. 1971); *see also United States v. Hussey*, 1 M.J. 804, 808, 51 C.M.R. 878 (A.F.C.M.R. 1976).

C. Special findings should preserve questions of law for appeal and cover the same issues upon which instructions would be required in a jury trial.

Congress mandated special findings upon request of the accused to preserve questions of law for appeal, and those findings should address the same matters as the instructions required in a jury trial. *Hussey* at 11. Congress obligated military judges to make special findings of fact upon the request of a party. This is mandatory. *Id.* at 8.

Argument

To satisfy R.C.M. 918(b), special findings must address the elements of the offenses and identify the facts that support each element and those that rebut any affirmative defenses. The special findings in the instant case fall far short of that

standard. Without special findings that address the military judge's application of the facts to the law, this court cannot properly evaluate the legal sufficiency of appellant's conviction, which denies appellant meaningful appellate review. See *United States v. Reinecke*, 30 M.J. 1010, 1015 (A.F. Ct. Crimm. App. 1990), rev'd on other grounds, *United States v. Strozier*, 31 M.J. 283 (C.M.A. 1990) (discussing that insufficient findings hinder appellate review by obscuring the factual basis, application of legal standards, and potential errors or abuse of discretion).

Special findings are meant to preserve questions of law for appeal, a crucial right of an appellant in a judge-alone trial. *Hussey*, at 11. Special findings also provide a means to understand how the court reached its verdict. *Id.* In this case, appellant specifically requested special findings pursuant to R.C.M. 918(b), and the court granted that request but failed to deliver. The special findings provided by the military judge were insufficient to allow for a fair review by this court, leaving the court and others unable to determine the legal significance attributed to the set of facts presented by the defense.

Evidence of Ms. [REDACTED] dishonest character was admitted throughout the course of the trial. (R. at 338, 348, 355). Furthermore, witnesses testified as to Ms. [REDACTED] violent character. (R. at 298, 340, 349, 355, 357). The agent investigating the incident testified appellant's arms and face were red. The

military judge's findings, however, ignored this evidence without any explanation. Instead, the military judge merely provided a conclusory statement that "all credibility issues were resolved." (Special Findings). The findings fall far short of R.C.M 918(d)'s requirements. *See Hussey*, at 12, (special findings will usually include findings as to the elements of the offenses of which the accused may be found guilty and findings of special defenses reasonably in issue).

Because the special findings at hand merely restate the elements of the offenses, such bereft of analysis, they are worthy of little, if any, deference. *See e.g. United States v. Fisher*, 73 M.J. 303, 312 (C.A.A.F. 2014). The trial court's failure to engage in a comprehensive analysis of appellant's self-defense claim and Ms. [REDACTED] untruthful character disturb the public's confidence in the military justice system, but most importantly, deny appellant the right to a full and fair review of his conviction by this court. *See United States v. Walters*, 58 M.J. 391, 392 (C.A.A.F. 2003) (holding, inter alia, when a factfinder's ultimate findings are ambiguous, review by that court is precluded).

Conclusion

Appellant requests this honorable court grant meaningful relief by setting aside the findings and sentence.



Rachel M. Rose
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division



Rachel P. Gordienko
Major, Judge Advocate
Branch Chief
Defense Appellate Division



Jonathan F. Potter
Senior Capital Defense Counsel
Defense Appellate Division



Dale C. McFeatters
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on May 25, 2023.



MICHELLE L.W. SURRETT
Paralegal Specialist
Defense Appellate Division

