IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,	Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.		Docket No. ARMY 20220233
Sergeant (E-5) **CHAS E. PHILLIPS,** United States Army,	Appellant	Tried at Fort Bliss, Texas on 1 November 2021, 6 December 2021, 24 January 2022, and 5–6 May 2022, before a general court-martial convened by the Commander, 1st Armored Division and Fort Bliss, Colonel Robert L. Shuck and Colonel Matthew S. Fitzgerald, Military Judges, presiding.

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

Assignments of Error[1]

I.

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO SUPPRESS APPELLANT'S STATEMENTS TO EL PASO POLICE OFFICERS.

---

[1] The government has reviewed appellant's *Grostefon* matters and agrees with the appellate counsel that they do not warrant full briefing as an assignment of error. Furthermore, the government respectfully submits that they lack merit. The government recognizes this court's authority to elevate *Grostefon* matters deserving of increased attention. *United States v. Grostefon*, 12 M.J. 431, 437 (C.M.A. 1982). Should this court exercise such authority, finding any of appellant's *Grostefon* matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

PANEL NO. 2

II.

WHETHER THE SUBSTANTIAL OMISSION OF A RULING REGARDING MILITARY RULE OF EVIDENCE 404(b) RENDERS THE RECORD INCOMPLETE.

III.

WHETHER APPELLANT'S FACIALLY DUPLICATIVE CONVICTIONS FOR ASSAULT CONSUMMATED BY BATTERY UNDER CHARGE 2, SPECIFICATIONS 1, 2, AND 3 ARE MULTIPLICIOUS.

IV.

IN THE ALTERNATIVE, WHETHER APPELLANT'S CONVICTIONS UNDER CHARGE 2, SPECIFICATIONS 1, 2, AND 3 CONSTITUTE AN UNREASONABLE MULTIPLICATION OF CHARGES.

Table of Contents

Table of Authorities

Manual for Courts-Martial

Statement of the Case

On 6 May 2022, a military judge sitting as a general court-martial, convicted appellant, contrary to his pleas, of one specification of communicating a threat and three specifications of assault consummated by a battery, in violation of Articles 115 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 915 and 928 (2018) [UCMJ]. (R. at 419). The military judge sentenced appellant to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for forty months, and a dishonorable discharge.[2] (R. at 487). On 25 May 2022, the convening authority approved the findings and sentence as adjudged. (Action). On 22 June 2022, the military judge entered judgment. (Judgment).

Statement of Facts

A. Appellant dragged his wife by the hair, pushed her to the ground, punched her face, threatened to chop her up, and whipped her with an extension cord.

Mrs. [redacted] was born in the Philippines and moved to the United States in 2009. (R. at 249). Appellant and Mrs. [redacted] were married in 2018. (Pros. Ex. 7). On the evening of 14 August 2019, about three months after Mrs. [redacted] gave birth to her daughter, appellant and his wife got into an argument at their residence about his

[2] The military judge sentenced appellant to confinement as follows: for the Specification of Charge I, eight months; for Specification 1 of Charge II, eighteen months; for Specification 2 of Charge II, fourteen months; and for Specification 3 of Charge II, ten months. Specifications 2 and 3 of Charge II were adjudged to run concurrently, with all other periods of confinement to run consecutively. (R. at 487).

wife's lack of money. (R. at 250–52). Under an agreement with her husband, Mrs. [redacted] was supposed to pay that month's electric bill, but she did not have enough money. (R. at 252). For work, Mrs. [redacted] delivered food. (R. at 252). Appellant wanted his wife to make up the money, and told her, "you better go out there and get that money to make that bill payment." (R. at 252).

Mrs. [redacted] told appellant that it was already late and that she did not think anybody would want food at that hour. (R. at 252). Instead of delivering food, Mrs. [redacted] went to Staff Sergeant (SSG) [redacted] and Mrs. [redacted]'s house to pick up her daughter. (R. at 252–53). These family friends lived about seven to ten minutes away from appellant and Mrs. [redacted] and she decided to stay for about 30 to 45 minutes to "chitchat and catch up" instead of leaving right away. (R. at 252–53).

After picking up her daughter and returning home, Mrs. [redacted] pulled into her garage. (R. at 253). Then, from inside the house, appellant came out into the garage, took their daughter, and put the baby in the bassinet. (R. at 253). After putting the baby down, appellant returned to the garage and took the keys to his wife's white Honda. (R. at 253).

Appellant asked his wife why it took so long for her to return from the family friends' house. (R. at 253). When Mrs. [redacted] tried to explain, appellant replied, "I don't care. You know, you have this money to make, so you need to go back out there and make this money for this bill." (R. at 253).

Even though Mrs. [redacted] replied that she would go deliver food to make money, appellant refused to return the keys to the white Honda; instead, he told her to either use her old green car (which could not start) or pay for an Uber. (R. at 253–54). Mrs. [redacted] and appellant began arguing about whether she should pay for an Uber ride to deliver food. (R. at 253–54).

They continued arguing, and appellant refused to return the car keys to his wife. (R. at 254). Eventually, appellant went back inside the house and his wife stayed in the garage. (R. at 254–55). Mrs. [redacted] kept trying to get back the car keys by arguing with appellant in the garage, knocking on the house's front door, ringing the doorbell, and knocking on the internal door that connected the garage and house. (R. at 254–55). When Mrs. [redacted] kept knocking on the internal door, appellant finally opened it. (R. at 254–55).

When appellant finally opened the door, he told his wife, "you don't understand what you're doing here. You need to stop doing this or else." (R. at 255). But Mrs. [redacted] insisted that he give her back the car keys, so appellant and Mrs. [redacted] engaged in a back-and-forth dispute in which appellant would keep shutting the door between the house and the garage while his wife was in the garage, and then his wife would keep reopening the door. (R. at 255). Mrs. [redacted] insistence on repeatedly opening the door was "getting on [appellant's] nerves." (R. at 255).

After becoming "aggravated," appellant eventually opened the door and "grabbed [Mrs. [redacted] by the hair and dragged [her] across the floor" in the garage. (R. at 255). Appellant dragged his wife by the hair across the garage—"about a car's length"—from the door to an area between the wall and the white Honda. (R. at 253, 256–58). "It hurt[] a lot" when appellant dragged his wife by the hair; indeed, some of Mrs. [redacted]'s hair was pulled out from the roots while she was being dragged. (R. at 256, 259).

After being dragged across the floor, Mrs. [redacted] "was standing, facing away from" appellant. (R. at 259). She also "had relocated to the other side of" the garage. (R. at 365). Appellant then pushed his wife from behind, and she fell and hit her forehead on the concrete floor. (R. at 259–60). "It hurt a lot" when her head hit the concrete. (R. at 260). After pushing his wife onto the ground, appellant punched her in the face, punched her multiple times in the back, and kicked her. (R. at 260).

While appellant punched his wife, he told her that he could "kill [her] if he wanted to and nobody's gonna miss [her]. Nobody is gonna come looking for [her]. That he can just say that [she] just went home to the Philippines if [she] disappeared. And that he was going to chop [her] up and put [her] in bags and throw [her] in the desert in Chaparral, New Mexico," where appellant used to work. (R. at 260–61). Mrs. [redacted] said that appellant's statement caused her to

become "fearful," and she recounted that she "thought [she] was going to die that night." (R. at 261).

Once appellant stopped punching his wife, he said he felt "like he need[ed] to give [her] a little incentive"—a statement she took as a threat. (R. at 261). Appellant "stopped and left for a little bit and went back to the house." (R. at 261). While appellant was inside the house, Mrs. [redacted] stayed on the floor. (R. at 261–62). She recounted the following: she was "dazed"; she had "sustained a few blows in [her] back"; and "it was really hard for [her] to get up at that time." (R. at 262).

When appellant returned to the garage, he came back with a green extension cord. (R. at 262). Appellant used the extension cord to whip his wife's back and legs, and then he choked her with it. (R. at 263). When recalling the whipping, Mrs. [redacted] testified that she "was just laying there, curled up, because [she could not] scream," and thought "that was probably going to be it for [her]. That [she] was going to die that night." (R. at 264).

During the whipping, Mrs. [redacted] tried talking to her husband; she said she would take an Uber or walk, she told appellant that she would sign divorce papers if he wanted her to, and she said, "[i]t doesn't have to be like this." (R. at 264). Her mention of the divorce papers finally prompted appellant to leave the garage so he could get the divorce papers. (R. at 264–65).

While appellant was gone, Mrs. [redacted] got up, pressed a button to open the outer garage door and crawled out before the door opened completely. (R. at 265). Mrs. [redacted] ran around the block and tried knocking on the first house that had cars parked outside, but nobody answered. (R. at 265). She then waited for cars to pass by and flagged down one of them. (R. at 265). She told the driver, "get me out of the neighborhood, I don't care. Like, even if to the closest gas station, somewhere. Just away." (R. at 265). The driver dropped her off at a gas station near a McDonald's. (R. at 266).

B. About ten minutes after the attack, Staff Sergeant [redacted] met a "very upset and distraught" Mrs. [redacted]—covered in "whip marks" and welts—who told him that appellant had whipped her with an extension cord.

After Mrs. [redacted] got to the gas station, her friends SSG [redacted] and Mrs. [redacted] arrived; SSG [redacted] was in the same unit as appellant, and he knew appellant's wife. (R. at 224, 228–29, 235). Staff Sergeant [redacted] spoke with Mrs. [redacted] (R. at 229). He said that she seemed scared and "[v]ery upset and distraught," and added that she was "in somewhat of a panic." (R. at 229, 238). He also observed "whip marks" across her torso and legs, and he saw welts on her back. (R. at 230–31, 238). Mrs. [redacted] told SSG [redacted] that she had sustained those injuries about ten minutes prior to their meeting, and that appellant had whipped her with an extension cord at their home. (R. at 230–31, 233, 238). Staff Sergeant [redacted] then called law enforcement.

(R. at 230–31). Mrs. [redacted] was interviewed by officers from the El Paso Police Department (EPPD) and treated at the hospital. (R. at 266–67, 274).

C. Mrs. [redacted] suffered numerous injuries at the hands of appellant, including several fractures and a concussion.

Detective [redacted] one of the responding police officers who spoke with Mrs. [redacted] at the gas station, testified that she saw Mrs. [redacted]'s injuries, including a "golf [ball] size" lump on her forehead, redness on her shoulders, and red "lashing marks" on her back. (R. at 179–80, 191). Detective [redacted] also testified that Mrs. [redacted] was crying, in distress, and shocked. (R. at 180). The detective noted that it was "kind of hard to get anything out of her because she was just emotional." (R. at 180).

Additionally, EPPD officers photographed Mrs. [redacted] injuries. (R. at 176, 186–87; Pros. Ex. 5). The photographs show the victim's lashings on the back of her shoulder, lashings on the left and right sides of her back, redness and bruising on her shoulder, a lashing mark on her knee, and a "golf ball"-sized lump on her forehead. (R. at 188–92; Pros. Ex. 5). After speaking with the victim, the police located the extension cord used in the assault and retrieved it for evidence. (R. at 199–203; Pros. Ex. 12). At trial, the victim identified the seized extension cord as the same one that appellant used to whip and choke her. (R. at 282; Pros. Ex. 12).

Once at the hospital, Mrs. [redacted] told medical personnel that she had pain in her stomach, neck, back, and both knees; she also said she was lightheaded. (Pros. Ex. 2, p. 2). Mrs. [redacted] was diagnosed with fractures around the "L1 and L2" vertebrae,

abrasions, a concussion, flank edema, and a knee contusion. (Pros. Ex. 2, p. 2; R. at 243, 267).

D. Appellant told the EPPD that he shoved his wife, punched her, and "may have whipped her with the cord."

After EPPD officers spoke with Mrs. [redacted] the police visited appellant, who told them that his wife had tried to break into his house and that he allegedly defended himself. (R. at 183). Appellant said that he shoved his wife with his forearm down to the ground, that he punched her, and that he "may have whipped her with the cord." (R. at 183).

Additional facts are incorporated below.

Assignment of Error I

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO SUPPRESS APPELLANT'S STATEMENTS TO EL PASO POLICE OFFICERS.

Additional Facts

A. Detective [redacted] testified that appellant had invited the police officers into his home, that the officers stood near the home's entrance while questioning him, and that he was free to go about his house.

Before trial, appellant moved to suppress his statements to EPPD for their alleged failure to properly advise him of his rights under *Miranda v. Ariz.*, 384 U.S. 436, 444 (1966). (App. Exs. III, VI). During the ensuing Article 39(a), UCMJ, 10 U.S.C. § 839(a), evidentiary hearing, Detective [redacted] testified that after the EPPD officers spoke with the victim, they visited appellant's house to speak

with him. (R. at 35–37). The visit occurred between 1700 to 1800, while it was still light outside. (R. at 35–37). Detective [redacted] and Officer [redacted] along with two other police officers, went to appellant's house. (R. at 36–38).

When appellant answered the door, the officers asked him to come out and speak with them, but he did not want to. (R. at 37–39). Instead, appellant told the police that he wanted to keep an eye on his newborn baby, so he invited them to come inside his residence instead. (R. at 37–39, 56). Detective [redacted] testified that appellant "felt more comfortable" inside his own home. (R. at 56).

Detective [redacted] and Officer [redacted] accepted appellant's invitation, but they did not go fully into the house; instead, the two officers stayed around the entrance of the home. (R. at 37–39). At this point, the officers did not handcuff appellant, did not draw their weapons, and did not read him his *Miranda* rights. (R. at 38–39, 42–43).

According to Detective [redacted] the police "simply asked [appellant] if he could just explain his side of the story and what happened." (R. at 43). The two officers asked appellant about his wife's assault allegations, and appellant spoke freely, engaging in a discussion of less than one hour.[3] (R. at 30, 39–44). The police did not threaten appellant with coercive words. (R. at 43).

[3] Appellant testified at the evidentiary hearing that the questioning was less than thirty minutes. (R. at 30).

After deducing that probable cause existed and that there was no justified self-defense, the officers placed appellant under arrest, handcuffed him, and placed him in the patrol car. (R. at 42–43, 51). The police informed him that Mrs. [redacted] would pick up and secure the baby. (R. at 42–43, 51).

B. Detective [redacted] testified that she told appellant about Mrs. [redacted] allegations and wanted to know appellant's response.

During the pretrial hearing, the court had the following exchange with Detective [redacted] about what she told appellant during her questioning of him:

> Q: [W]hen you all were having this discussion in [appellant's] house, was he ever told that he was free to leave?
>
> A: No. No, he was not, sir. We did let him know that.

(R. at 54). The testimony did not make explicit what Detective [redacted] meant by "that" in the last sentence of the exchange. (R. at 54). But right after Detective [redacted] said, "[w]e did let him know that," she provided details about what the police let appellant know:

> Q: You did?
>
> A: Yeah, that we were—we were there to find out what happened.
>
> Q: You did tell him that you—you were there to find out what happened?
>
> A: Yes, sir. We had advised him that his wife had called us and was claiming that the injuries that we observed [were] due to him assaulting her. And so at that point,

> again, we did let him know. And we also advised him that the reason why we were there is because we wanted to see what he had to say about that, you know. If it was true or not or if he could explain how she got those injuries.
>
> Q: But he wasn't left with an impression that he was free to just—
>
> A: No, sir. And at that time he was not free to go.
>
> Q: He was not free to go?
>
> A: He wasn't.

(R. at 54–55).[4]

On redirect examination, Detective [redacted] emphasized that, during the police questioning, appellant was free to go around his home and could have, for example, gone to the kitchen and gotten a glass of water. (R. at 55–56). She added that the police were temporarily detaining appellant until they had enough information "to either say he did do this or he did not do that. But he was not under arrest[.]" (R. at 55–56). Detective [redacted] analogized the detaining of appellant to a temporary traffic stop. (R. at 56).

After Detective [redacted]'s testimony, trial counsel argued that Detective [redacted] "never told the accused that he was not free to leave. She testified that no one ever told him that." (R. at 66). Neither defense counsel nor the court called trial

[4] When purporting to quote the exchange between the court and Detective [redacted] appellant's brief apparently omitted lines 10 through 20 of page 54 of the transcript. (Appellant's Br. 4; R. at 54–55).

counsel's statement a mischaracterization of the testimony—nor did appellant object to this argument. (R. at 66).

The military judge found that the police did not tell appellant that he was detained: "Detective [redacted] asked [appellant] to give his version of the events. . . . The police officers considered him detained (similar to a traffic stop) and [appellant] was not free to leave. However, [appellant] was never told this information." (App. Ex. XLV, p. 2).

C. The military judge ruled that appellant was not in custody during the questioning at his home by the EPPD.

The military judge found that appellant's statements to the EPPD were not given during custodial interrogation, and the court accordingly ruled that the statements were admissible. (App. Ex. XLV, p. 3). After conducting a pretrial hearing, observing the witnesses, and evaluating the totality of the circumstances, the military judge found that all but one factor overwhelmingly supported admissibility. (App. Ex. XLV, p. 2). The military judge also found that Detective [redacted] testified credibly, and he found appellant's testimony at the evidentiary hearing not to be credible. (App. Ex. XLV, p. 1).

The court found the following in its order. Appellant had invited the police officers into his home to be questioned, and he had a pressing need to be near his young child. (App. Ex. XLV, p. 3). Only two officers questioned appellant, the questioning took place in the early evening hours, and it was highly unlikely that

the questioning lasted much more than half an hour. (App. Ex. XLV, p. 3). The officers did not exercise physical dominion over appellant, and he was awake and alert when the officers knocked at his door. (App. Ex. XLV, p. 3). Appellant also did not have physical restraints placed on him, and the police did not make any statement to appellant about his freedom of movement. (App. Ex. XLV, p. 3). Appellant also never requested to move away from the presence of the officers; nor did he ever request that the officers leave his home. (App. Ex. XLV, p. 3).

The court found that the only factor favoring suppression was that the police officers likely used accusatory questioning when confronting appellant about inconsistencies in his answers, given his wife's injuries. (App. Ex. XLV, pp. 2–3). Nonetheless, the court found that the officers' questioning was neither abusive nor threatening. (App. Ex. XLV, pp. 2–3).

Standard of Review

A military judge's denial of a motion to suppress a confession is reviewed for an abuse of discretion. *United States v. Chatfield*, 67 M.J. 432, 437 (C.A.A.F. 2009). A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect. *United States v. Olson*, 74 M.J. 132, 134 (C.A.A.F. 2015). Moreover, when judicial action is taken in a discretionary matter, "such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of

judgment in the conclusion it reached upon weighing of the relevant factors." *United States v. Cannon*, 74 M.J. 746, 750 (Army Ct. Crim. App. 2015) (internal quotation marks omitted).

Whether the accused was in custody is a de novo question of law to be decided on the basis of facts found by the factfinder, so while the "custody" question "may be a question of law, it is one that often turns on facts." *United States v. Lewis*, 78 M.J. 602, 611 (Army Ct. Crim. App. 2018).

Law

A. Determining "custody."

The prosecution may not use statements stemming from "custodial interrogation" of an accused, unless specific warnings are given before questioning. *Miranda*, 384 U.S. at 444; *see also Stansbury v. Cal.*, 511 U.S. 318, 322 (1994) ("In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." (cleaned up)).

To establish whether a person is in "custody," for purposes of *Miranda*, courts must conduct a two-step analysis. *Howes v. Fields*, 565 U.S. 499, 508–509 (2012).

First, the initial step is to ascertain whether—in light of the objective circumstances of the interrogation—a "reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave." *Howes*, 565 U.S. at 508–09 (internal quotation marks and brackets omitted). In order to determine how a suspect would have gauged his "freedom of movement," courts must examine all of the circumstances surrounding the interrogation, including the location of the questioning, the duration of the questioning, and the presence or absence of physical restraints during the questioning. *Id.* at 509.

Second, courts must ask the "additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id.* at 509. The first step ("the freedom-of-movement test") identifies "only a necessary and not a sufficient condition for *Miranda* custody." *Id.* (internal quotation marks omitted); *see also Maryland v. Shatzer*, 559 U.S. 98, 112 (2010) ("We have declined to accord [the freedom-of-movement test] 'talismanic power,' because *Miranda* is to be enforced 'only in those types of situations in which the concerns that powered the decision are implicated.'" (citation omitted)). Not all restraints on freedom of movement amount to custody, for purposes of *Miranda*. *Howes*, 565 U.S. at 509. For example, the "temporary and relatively nonthreatening detention involved in a

traffic stop . . . does not constitute *Miranda* custody." *Id.* (citing *Shatzer*, 559 U.S. at 113; *Terry v. Ohio*, 392 U.S. 1 (1968)).

B. Harmlessness beyond a reasonable doubt.

Constitutional errors are reviewed for harmlessness beyond a reasonable doubt. *United States v. Mott*, 72 M.J. 319, 332 (C.A.A.F. 2013). The erroneous admission of a statement is not harmless beyond a reasonable doubt if there is a reasonable possibility that the evidence complained of might have contributed to the conviction. *Id.* This harmlessness determination is made on the basis of the entire record, and its resolution will vary "depending on the facts and particulars of the individual case." *United States v. Sweeney*, 70 M.J. 296, 306 (C.A.A.F. 2011) (internal quotation marks omitted).

Argument

A. Appellant was not in custody because neither of the *Howes* steps is met.

Under the two-step analysis in *Howes*, appellant was not subjected to custodial interrogation, because, among other things, appellant had invited the officers into his home to be questioned, only two officers questioned appellant for less than an hour, appellant was not told that he was being detained, and appellant was free to go about his home. 565 U.S. at 508–09.

1. Appellant fails the first step under *Howes* because a reasonable person in this case would have felt free to terminate and leave the interview.

a. Appellant declined a police request to go outside, invited them into his home, and enjoyed freedom of movement during the interview.

Under the first step of *Howes*, a reasonable person in appellant's situation would have felt that he was at liberty to terminate and leave the interview for the following reasons: appellant was the one who invited the officers into his home after declining a police request to go outside; he answered questions in his own home, where he "felt more comfortable"; he was not handcuffed during the interview; he testified that he was interviewed for less than half an hour; he was not told by police that he was being detained; and he was free to go about his home to get, for example, a glass of water from the kitchen. (R. at 30, 37–44, 56; App. Ex. XLV, pp. 1–3). Given these circumstances—especially when appellant already demonstrated a comfort and willingness to decline police requests to be questioned outside—appellant would have reasonably felt that he was at liberty to terminate and leave the interview. *Howes*, 565 U.S. at 508–09.

Appellant has cited cases involving suspects who were told by police that they were "not free to leave" —such as *United States v. Catrett*, 55 M.J. 400, 404 (C.A.A.F. 2001)—but those cases are distinguishable from appellant's because the military judge here specifically found that the police never told appellant that he was detained. (App. Ex. XLV, pp. 1–2; Appellant's Br. 9–13).

b. The military judge acted within his discretion when he found that the police did not tell appellant that he was detained.

Because the record can support a finding that appellant was never told that he was detained, the military judge acted within his discretion when he found that the police did not tell appellant that he was detained. (App. Ex. XLV, pp. 2–3; R. at 54–56, 66).

During a pretrial hearing, the military judge asked Detective [redacted] "when you all were having this discussion in his house, was [appellant] ever told that he was free to leave?" Detective [redacted] answered, "[n]o. No, he was not, sir. We did let him know that." (R. at 54). When read in the context of the whole record, there is not just one reasonable interpretation of Detective [redacted] statement, because Detective [redacted] never made explicit what she meant by the word "that." (R. at 54–55).

Read in context, "that" could reasonably refer to the fact that appellant's wife accused him of assault or it could reasonably refer to the fact that the police were there to find out what happened. (R. at 54–55). Indeed, right after Detective [redacted] said, "[w]e did let him know that," the court asked, "[y]ou did?"—and Detective [redacted] replied, "[y]eah, that we were—we were there to find out what happened." (R. at 54).

Immediately after this answer, the court asked, "You did tell him that you—you were there to find out what happened?", and Detective [redacted] further explained: "Yes, sir. We had advised him that his wife had called us and was claiming that

the injuries that we observed [were] due to him assaulting her. And so at that point, again, we did let him know. And we also advised him that the reason why we were there is because we wanted to see what he had to say about that, you know. If it was true or not or if he could explain how she got those injuries." (R. at 54–55). Based on the context of Detective [redacted]'s statement, one could reasonably conclude that Detective [redacted] had let appellant know that his wife had accused him of assault or that the police were there to find out what happened—while also concluding that the police declined to tell appellant that he was being detained. (R. at 54–55; App. Ex. XLV, p. 2). This interpretation of Detective [redacted] testimony would align with appellant's amended motion to suppress, which stated that the "officers advised [appellant] they were responding to a domestic violence incident." (App. Ex. VI, p. 2).

Appellant asserts that there is "only one plausible reading of Officer [redacted]'s statements: appellant was not free to leave his home while under interrogation *and* he knew it." (Appellant's Br. 11). But during the pretrial argument about custodial interrogation, trial counsel argued that Detective [redacted] "never told the accused that he was not free to leave. She testified that no one ever told him that." (R. at 66). If appellant's interpretation is the "only one plausible reading" of Detective [redacted]'s statements, then it is notable that appellant—at trial—did not object

to or dispute trial counsel's characterization of Detective [redacted]'s testimony. (R. at 66; Appellant's Br. 11).

Given the context of the entire exchange and the fact that the military judge was present to observe the witnesses' demeanor, tone, and live testimony, it would be within the bounds of reason for the military judge to make the factual conclusion that Detective [redacted] had let appellant know that his wife had accused him of assault or that the police were there to find out what happened—while also concluding that Detective [redacted] did not let appellant know that he was detained. (R. at 54–55; App. Ex. VI, p. 2; App. Ex. XLV, pp. 1–2).

2. Appellant fails the second step under *Howes* because his interview environment did not include the same coercive pressures faced in station-house questioning.

Even if a reasonable person in appellant's situation would have felt that he was *not* at liberty to terminate and leave the interview, appellant fails under the second step of *Howes* because the environment of his interview did not present "the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes*, 565 U.S. at 508–09.

Here, appellant asserts that the police "told him he couldn't leave" the interview, and that he "was not free to leave his home while under interrogation *and* he knew it." (Appellant's Br. 11). Even if appellant's assertions are true, the Supreme Court in *Howes* held that determining "whether an individual's freedom

of movement was curtailed, however, is simply the first step in the analysis, not the last. Not all restraints on freedom of movement amount to custody for purposes of *Miranda*. We have declined to accord talismanic power to the freedom-of-movement inquiry." 565 U.S. at 509 (cleaned up). For example, even "service of a term of imprisonment, without more, is not enough to constitute *Miranda* custody." *Id.* at 512. And even the detention involved in a traffic stop "does not constitute *Miranda* custody." *Id.* at 510 ("Few motorists, we noted, would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so." (internal quotation marks and brackets omitted)). Indeed, Detective [redacted] compared appellant's detention to a traffic stop, and the military judge found appellant's detention to be "similar to a traffic stop." (R. at 56; App. Ex. XLV, p. 2).

Under the second step of *Howes*, the interview environment here did not present "the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes*, 565 U.S. at 508–09. Even if—as appellant asserts—the police told appellant that he was detained and he thus believed that he was not free to leave the interview, any pressures or restrictions appellant faced in the comfort of his own home were not the same as the coercive pressures and restrictions one would face in station-house questioning, because of the following reasons: appellant was able and willing to decline the officers'

request to go outside for questioning; appellant instead told the police that he wanted to keep an eye on his newborn baby, so he invited them to come inside his home, a personal space where one would feel most in control and comfortable when interacting with invitees; the police officers complied with appellant's request to come into his residence, where appellant "felt more comfortable"; appellant answered questions in his own home while it was light outside; only two officers questioned him while standing around the entrance of the home and while declining to go fully inside, thus not encroaching on appellant's personal space; appellant testified that he was questioned for less than half an hour; appellant was free to go around his home and could have, for example, gone to the kitchen and gotten a glass of water; the police did not threaten appellant with coercive words; and appellant did not have physical restraints, such as handcuffs, placed on him. (App. Ex. XLV, pp. 2–3; R. at 30, 35–44, 51, 55–56).

A suspect undergoing station-house questioning would not have enjoyed the same non-threatening, non-coercive environment that appellant enjoyed here; for example, a formally arrested suspect would not be allowed the opportunity to choose whether to invite the police into his home, would not be given the freedom to choose the location of his own questioning, and would not be allowed to freely move to another room to get water while being questioned. After all—to provide a stark contrasting example—when appellant was later formally arrested, his

freedoms were indeed restricted: the police officers handcuffed him; he was not allowed to hold or watch his newborn baby anymore, and Mrs. [redacted] took charge of the baby; and the police took him from his home and placed him in a patrol car. (R. at 42–43, 51).

Federal courts have found that conditions more restrictive than those faced by appellant did not amount to custodial interrogation. For example, the Fourth Circuit in *United States v. Leshuk* held that "we have concluded that drawing weapons, handcuffing a suspect, placing a suspect in a patrol car for questioning, or using or threatening to use force does not necessarily elevate a lawful stop into a custodial arrest for *Miranda* purposes." 65 F.3d 1105, 1109–10 (4th Cir. 1995). In *United States v. Coulter*, a suspect was pulled over in a traffic stop, was questioned no fewer than five times about whether he had a gun, was frisked, was told by police that he was being detained, was put in handcuffs, and was finally prompted to admit to possession of a gun—all without being read his *Miranda* rights. 41 F.4th 451, 454–55 (5th Cir. 2022). The Fifth Circuit in *Coulter* reversed the district court's decision to suppress the suspect's admissions and found that "a reasonable person in [the suspect's] position would not have equated the restraint on his freedom of movement with formal arrest." *Id.* at 463; *see also id.* at 459 ("a thirty-minute interview suggests that a suspect was not in custody." (internal quotation marks and brackets omitted)).

Because appellant's questioning was similar to a traffic stop and was not "abusive or threatening"—as the military judge found—the police interview here fails to satisfy the two steps under *Howes*, 565 U.S. at 508–509, and accordingly did not amount to custodial interrogation. (App. Ex. XLV, pp. 2–3).

B. Even if appellant's statement should have been suppressed, appellant still would have been convicted based the victim's detailed testimony and the multiple sources of corroboration.

Even if appellant's statement should have been suppressed, such an error would be harmless beyond a reasonable doubt, and appellant would have still been convicted based on the victim's detailed testimony and the corroborating evidence. The victim detailed the specific ways appellant dragged her by the hair, punched and pushed her, and whipped her with an extension cord. (R. at 249–332). Staff Sergeant [redacted] testified about how distraught Mrs. [redacted] was when he met her, about the observed "whip marks" across the victim's torso and legs, and about how he saw welts on her back. (R. at 224, 227–34, 235, 238).

The medical records from the day of the attack show that Mrs. [redacted] was diagnosed with fractures, abrasions, a concussion, flank edema, and a knee contusion; and the records also document that she told medical personnel that "her husband punched her, kicked her, choked her, and hit her with an extension cord." (Pros. Ex. 2 p. 2; R. at 243). According to the doctor who examined, diagnosed, and treated the victim, her injuries were consistent with being dragged by her hair

across a hard surface floor, being punched, being pushed to the ground, and being struck with an electrical cord. (R. at 243).

Detective [redacted] also observed Mrs. [redacted]'s injuries and spoke with her, testifying that Mrs. [redacted]'s injuries included a "golf [ball] size" lump on her forehead, redness on her shoulders, and red "lashing marks" on her back. (R. at 179–80). Detective [redacted] also testified that, at the gas station, Mrs. [redacted] was crying and was in distress and shocked. (R. at 180).

The police also photographed Mrs. [redacted]'s injuries, which showed how she looked on the day of her attack. (R. at 176, 186–87; Pros. Ex. 5). The photographs show the victim's lashings on the back of her shoulder, lashings on the left and right sides of her back, redness and bruising on her shoulder, an injury on her knee, and a "golf ball"-sized lump on her forehead. (R. at 188–92; Pros. Ex. 5).

After speaking with the victim, the police looked for and found a green extension cord at appellant's house, and the victim identified the seized extension cord as the same one that appellant used to whip and choke her. (R. at 192–93, 202–03, 282; Pros. Ex. 12).

Appellant's statement provided reiterative evidence to a case that already had the victim's detailed testimony, corroborated by various sources of testimonial and physical evidence, including SSG [redacted] the EPPD, medical records, the extension cord, Mrs. [redacted] treating physician, photographs, and the victim's

recorded interview. Therefore, if appellant's statement was admitted in error, the error was harmless beyond a reasonable doubt. *Mott*, 72 M.J. at 332. As trial counsel stated during closing argument, "You can convict [appellant] of those specifications and charges based on [Mrs. ■■■'s] testimony alone." (R. at 374–75).

Assignment of Error II

WHETHER THE SUBSTANTIAL OMISSION OF A RULING REGARDING MILITARY RULE OF EVIDENCE 404(b) RENDERS THE RECORD INCOMPLETE.

Additional Facts

On 29 November 2021, appellant filed a motion under Military Rule of Evidence (Mil. R. Evid.) 404(b), and the parties argued the motion on 6 December 2021, without a resolution. (App. Ex. XVII; R. at 77–81).

On 24 January 2022, the first military judge and counsel discussed the military judge's pending recusal, appellant's decision to no longer plead guilty, the motion to compel a witness, the motion to suppress appellant's statement, and potential trial dates. (R. at 83–107). After discussing these various matters, the court asked, "Is there anything else that we need to discuss?"; counsel answered no. (R. at 106). In particular, defense counsel said, "Nothing from the defense, Your Honor." (R. at 106). Counsel did not mention the 29 November 2021 motion. (R. at 106).

On or about 20 April 2022, in an e-mail exchange, the new military judge, Colonel Matthew S. Fitzgerald, was informed that the 29 November 2021 motion under Mil. R. Evid. 404(b) was still outstanding, and trial counsel told Judge Fitzgerald that he would send the court a copy of the motion and the response. (Email from [redacted], to Military Judge Fitzgerald, Subject: RE: U.S. v. Phillips - Outstanding Motions (Apr. 20, 2022, 1411)).[5]

On 5 May 2022, Judge Fitzgerald, near the beginning of a pretrial session, told counsel, "So I just want to make sure I cover some of the rulings that I believe are out." (R. at 111). Judge Fitzgerald added, "I'm trying to make sure the [record's] clean." (R. at 112).

During this pretrial session, Judge Fitzgerald discussed the following: a motion to suppress that had been ruled on; a motion to compel that had been ruled on; a motion to reconsider the motion to compel, and then the subsequent ruling on the motion to reconsider; a motion under Mil. R. Evid. 803 that was withdrawn; a motion for a uniform exception that was withdrawn; a motion asking the court to rule on impeachment evidence that was mooted; a 24 November 2021 motion regarding unreasonable multiplication of charges that would be ruled on later; a motion for continuance; a motion to supplement the government witness list that

[5] On 1 August 2023, appellee moved to have this 20 April 2022 e-mail exchange (marked as Government Appellate Exhibit 2 for identification) entered into the record, and this court is currently reviewing the motion.

was ruled on; and an outstanding 21 April 2022 motion under Mil. R. Evid. 404(b) that was still pending. (R. at 107–149; App. Ex. LI).

After discussing and recapping numerous motions and matters, Judge Fitzgerald stated, "So I think the only motions we have outstanding, are we have a [Mil. R. Evid.] 404(b) motion [the one dated 21 April 2022] that I am going to take up before we begin." (R. at 116–17). When Judge Fitzgerald asked whether there were "[a]ny other outstanding motions, counsel?", defense counsel replied, "Your Honor, there was the one for the government motion for good cause" to supplement the government's witness list. (R. at 117). But counsel did not mention the 29 November 2021 motion under Mil. R. Evid. 404(b). (R. at 117).

After ruling on the government's motion for good cause and then considering counsel's argument on the 21 April 2022 motion under Mil. R. Evid. 404(b), Judge Fitzgerald ruled on the latter motion. (R. at 117–20, 148–49; App. Exs. LI, LIX, LX, LXI). After issuing his ruling, he asked counsel, "Anything further?" to which defense counsel replied, "No, Your Honor." (R. at 149).

Finally, on 6 May 2022, near the end of the merits phase, the military judge asked counsel if they had any other matters to discuss, and counsel both said no. (R. at 417–18).

Appellant now insists that a ruling "must have been made" on the 29 November 2021 motion and claims that such a ruling must have been omitted from the record of trial. (Appellant's Br. 19).

On 27 July 2023, Judge Fitzgerald stated in an e-mail that he did not believe that he issued a written ruling on the 29 November 2021 motion. (Email from [redacted], to Court Reporter, Subject: RE: U.S. v. Phillips - Outstanding Motions (Jul. 27, 2023, 2359)).[6]

Standard of Review

Whether a record is complete is a question of law reviewed de novo. *United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014).

Law

A complete record of proceedings and testimony shall be prepared in any case of a sentence of discharge. Article 54(c)(2), UCMJ, 10 U.S.C. § 854(c)(2). Rule for Courts-Martial (R.C.M.) 1112(a) states, "Each general and special court-martial shall keep a separate record of the proceedings in each case brought before it." All rulings made by the military judge must be made part of the record. R.C.M. 801(f). Appellate exhibits are required for the record of trial to be complete. R.C.M. 1112(b)(6).

[6] On 1 August 2023, appellee moved to have this 27 July 2023 e-mail (marked as Government Appellate Exhibit 1 for identification) entered into the record, and this court is currently reviewing the motion.

Argument

A. The record is complete because there is no evidence establishing that any ruling is missing from the record.

The record of trial is complete and nothing in the record establishes that any ruling has now gone missing from the record. (Index).

The record of trial never refers to a specific issued ruling from the court regarding the 29 November 2021 motion, but appellant insists that such a ruling must have been made and that the ruling must have been omitted from the record of trial. Referring to the 29 November 2021 motion, appellant writes, "The relevant ruling must have been made . . . . The [omission] of such a ruling constitutes a substantial omission[.]" (Appellant's Br. 19; App. Ex. XVII).

Neither the court nor the parties ever mentioned such an issued ruling during the pretrial sessions, the merits phase, the presentencing phase, or any session under Article 39(a), UCMJ. Specifically, on 24 January 2022, the court and counsel discussed multiple pending and resolved motions and matters, but no one mentioned the 29 November 2021 motion. (R. at 83–107). On 5 May 2022, Judge Fitzgerald sought to "make sure I cover some of the rulings that I believe are out," and he discussed multiple pending and resolved motions and matters of varying complexity, but nobody mentioned the 29 November 2021 motion—let alone the existence of an issued ruling on the motion. (R. at 107–149). Therefore, insufficient evidence exists to show that the court ever issued a ruling that has now

gone missing from the record, and the record of trial is complete under R.C.M. 1112.[7]

B. Because appellant affirmatively failed to tell the court about the 29 November 2021 motion when asked three times by the military judge, he waived the right to claim that the record is incomplete.

Appellant waived the right to claim that the record is incomplete because appellant affirmatively failed to mention the 29 November 2021 motion after the military judge asked him three times about any issues that needed to be discussed. (R. at 106, 117–20, 148–49, 417–18). So even if the military judge wrongfully failed to rule on the 29 November 2021 motion, appellant waived any right to now claim that the record is incomplete. *See United States v. Hardy*, 76 M.J. 732, 736 (A.F. Ct. Crim. App. 2017), aff'd 77 M.J. 289 (C.A.A.F. 2018) (appellate courts generally "do not review waived issues because a valid waiver leaves no error to correct on appeal."). And if appellant did not waive the claim, then he certainly forfeited it by failing to mention the motion when the military judge asked about any issues that need to be addressed. *United States v. Rich*, 79 M.J. 472, 475 (C.A.A.F. 2020).

In the first instance of waiver, on 24 January 2022, the first military judge and counsel discussed a variety of pending and resolved matters—including the

[7]Appellant's argument focuses on whether the record of trial is complete based on an allegedly missing ruling; he does not allege that the military judge failed to issue such a ruling. (Appellant's Br. 14–20).

first military judge's recusal, appellant's decision to no longer plead guilty, the motion to compel a witness, the motion to suppress appellant's statement, and potential trial dates—but appellant never brought up his 29 November 2021 motion. (R. at 83–107). Even when the court asked counsel, "Is there anything else that we need to discuss?", defense counsel said, "Nothing from the defense, Your Honor." (R. at 106).

In the second instance of waiver, on 5 May 2022, the new military judge told counsel, "I just want to make sure I cover some of the rulings that I believe are out," and "I'm trying to make sure the [record's] clean." (R. at 111–12). The military judge and counsel discussed numerous pending and resolved matters—including a motion to suppress that had been ruled on; a motion to compel that had been ruled on; a motion to reconsider the motion to compel, and then the subsequent ruling on the motion to reconsider; a motion under Mil. R. Evid. 803 that was withdrawn; a motion for a uniform exception that was withdrawn; a motion asking the court to rule on impeachment evidence that was mooted; a 24 November 2021 motion regarding unreasonable multiplication of charges that would be ruled on later; a motion for continuance; a motion to supplement the government witness list that was ruled on; and an outstanding 21 April 2022 motion under Mil. R. Evid. 404(b) that was still outstanding—but appellant did not mention the 29 November 2021 motion. (R. at 107–149; App. Ex. LI). After a

discussion on a variety of matters, when the court asked whether there were "[a]ny other outstanding motions," defense counsel mentioned one outstanding government motion to supplement the witness list but not the 29 November 2021 motion. (R. at 117). And after the court ruled on that government motion and on another separate matter, the court once against asked counsel, "[a]nything further?", but defense counsel replied, "[n]o, Your Honor." (R. at 149).

Lastly, on 6 May 2022, near the end of the merits phase, the military judge asked counsel if they had any other matters to discuss, and counsel both said no. (R. at 417–18).

Because appellant in these three instances failed to mention the 29 November 2021 motion, he waived any right to claim that the record is incomplete, and this court should not provide relief for any alleged wrongful failure to rule on the motion. *Hardy*, 76 M.J. at 736.

Assignment of Error III

WHETHER APPELLANT'S FACIALLY DUPLICATIVE CONVICTIONS FOR ASSAULT CONSUMMATED BY BATTERY UNDER CHARGE 2, SPECIFICATIONS 1, 2, AND 3 ARE MULTIPLICIOUS.

Additional Facts

Appellant was convicted of three specifications of assault consummated by a battery on his spouse, Mrs. [redacted] under Article 128, UCMJ. (Charge Sheet; R. at

419). Specifically, appellant was convicted of dragging her by the hair, pushing her onto the ground and punching her, and striking her "on the back with an extension cable," under Specifications 3, 2, and 1, respectively, of Charge II. (Charge Sheet). Chronologically, appellant first dragged the victim by the hair, then pushed and punched her, and finally whipped her with an extension cord. (R. at 256, 259–60, 263).

The record reflects that appellant never claimed multiplicity during the court-martial.

Standard of Review

Courts review multiplicity claims de novo. *United States v. Anderson*, 68 M.J. 378, 385 (C.A.A.F. 2010).

Law

Under R.C.M. 907(b)(3)(B), a specification may be dismissed when the "specification is multiplicious with another specification." One instance of multiplicity occurs when charges for multiple violations of the same statute are predicated on arguably the same criminal conduct. *United States v. Forrester*, 76 M.J. 389, 395 (C.A.A.F. 2017). To resolve this "species" of multiplicity, the court must first determine the "allowable unit of prosecution, which is the *actus reus* of the defendant." *Id.* (cleaned up). This question is significant for the purposes of determining a maximum sentence. *Id.*

Separate assaults consummated by battery of a single person that are "united in time, circumstance, and impulse" fall within one unit of prosecution under Article 128, UCMJ. *United States v. Hernandez*, 78 M.J. 643, 647 (C.G. Ct. Crim. App. 2018); *see also United States v. Clarke*, 74 M.J. 627, 628 (Army Ct. Crim. App. 2015) (counting units of prosecution as "the number of overall beatings the victim endured rather than the number of individual blows suffered").

Forfeiture is the "failure to make the timely assertion of a right" and is reviewed for plain error. *Rich*, 79 M.J. at 475.

Argument

Appellant's three assaults were separated by time, circumstance, and impulse. Specifically, appellant dragged his wife by the hair; then, after his wife relocated to the other side of the garage and was standing up again, appellant pushed her down and punched her; and finally, appellant left the garage, obtained an extension cord, returned with an extension cord, and proceeded to whip and choke his wife with it.

A. The punching and pushing were separate from the dragging.

The punching-pushing assault is separate and different from the dragging of the victim by the hair because the punching and pushing commenced only after appellant did the following: stopped dragging the victim by the hair across the garage floor; released the victim; and then allowed the victim to get back to her

feet. (R. at 255–62). The punching and pushing also occurred after the victim had already relocated to the other side of the garage. (R. at 365).

After dragging his wife by the hair across the garage floor for about a car's length, appellant started a separate beating when he later pushed his wife back down and punched her in the face in a different part of the garage. (R. at 365). As the military judge found, between the time of the dragging assault and punching-pushing assault, Mrs. [redacted] "had relocated to the other side of a building." (R. at 365). Specifically, the military judge found appellant dragged the victim "to a location in the garage between the garage wall and an automobile," but "[a]t some point at that location the [appellant] let go of [Mrs. [redacted]'s] hair" and "[a]t some point afterwards, [Mrs. [redacted] ended] up back in front of the automobile, on the other side, in front of the right passenger portion of the vehicle, towards the front of the vehicle and [was] no longer on the driver's side of the car next to the wall." (R. at 365). This new location is where "the accused pushed and punched [Mrs. [redacted]], resulting in injuries to include a contusion to her forehead." (R. at 365).

The punching and pushing of the victim were also not united with the dragging, because the punching and pushing inflicted a different type of pain and injury (e.g., ripped-out hair versus golf-ball-sized lump on the forehead) to a different part of the body (e.g., scalp versus face and back) at a different location in the garage. (R. at 179–80, 260, 273–74, 365). Lastly, the two assaults are separate

because the pushing and the punching were accompanied by the threat to chop up Mrs. [redacted]'s body and put it in bags; thus the punching-pushing assault had a different effect on the victim's mental state: it made her think she "was going to die that night." (R. at 260–61).

B. The whipping assault was separate—in time, circumstance, and impulse—from the dragging, pushing, and punching.

The whipping of the victim was separate and distinct from the pushing, punching, and dragging of the victim because the whipping occurred at a separate time, under a different circumstance, and under a different impulse: the whipping occurred only after appellant stopped punching and pushing the victim, left the garage, went back into his home, secured an extension cord, and came back to whip the victim. (R. at 261–65). Indeed, the defense counsel described the time between the punching-pushing assault and the whipping as "kind of the lull in time." (R. at 337).

The whipping of the victim was also a separate and distinct beating (i.e., not united with the pushing, punching, and dragging) because the whipping inflicted a different type of pain and injury at a later time; it involved a weapon instead of a hand; and it occurred only after appellant told the victim that "he need[ed] to give [Mrs. [redacted]] a little incentive"—a statement Mrs. [redacted] took as a threat. (R. at 261–65).

C. Appellant forfeited his multiplicity claim.

In addition, appellant forfeited his multiplicity claim because he failed to raise it during his court-martial. (Index). In any event, because appellant's multiplicity claim fails under de novo review, it would certainly fail under plain-error review. *Rich*, 79 M.J. at 475.

Assignment of Error IV

IN THE ALTERNATIVE, WHETHER APPELLANT'S CONVICTIONS UNDER CHARGE 2, SPECIFICATIONS 1, 2, AND 3 CONSTITUTE AN UNREASONABLE MULTIPLICATION OF CHARGES.

Standard of Review

A military judge's decision to deny relief for unreasonable multiplication of charges [UMC] is reviewed for an abuse of discretion. *United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2012).

Law

Courts consider five factors (known as the *Quiroz* factors) when evaluating a UMC claim:

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?
>
> (2) Is each charge and specification aimed at distinctly separate criminal acts?

> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
>
> (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure?
>
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

United States v. Pauling, 60 M.J. 91, 95 (C.A.A.F. 2004) (citing *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001)).

Argument

Based on the points set forth in the "Argument" subsection of the section on Assignment of Error III, the military judge did not abuse his discretion when he denied appellant's UMC claim. (R. at 363–66). Specifically, only the first *Quiroz* factor favors appellant because he objected at trial by filing a UMC motion. (R. at 363–66). The rest of the factors favor denial of the UMC claim. *Quiroz*, 55 M.J. at 338.

As to the second factor, each specification of Charge II is aimed at a distinct, separate criminal attack separated by time, circumstance, and impulse. Appellant first dragged his wife by the hair across the garage floor, pulling out some hair (the first attack). (R. at 256–59). Appellant then released his wife, and, as noted by the military judge, she "relocated to the other side of a building." (R. at 365).

While she was standing again and facing away from appellant, he pushed her back to the ground and started punching her back and face while threatening to

chop her up and putting her in fear for her life (the second attack). (R. at 256–61). After appellant finally stopped punching and pushing the victim, he said his wife needed "a little incentive"; so he then left the garage and went back into his home to get an extension cord; and after spending time retrieving the cord, he brought it back to the garage. (R. at 260–62). After doing all these prefatory acts, he then whipped and choked his wife with the cord (the third attack). (R. at 262, 264, 269).

As to the third factor, the three separate specifications properly represent appellant's criminality because appellant's three attacks were separate. *Quiroz*, 55 M.J. at 338. Appellant's attack was not one continuous, uninterrupted attack; rather, each of appellant's attacks was interrupted and different in kind.[8] *Id.*

As to the fourth factor, the three specifications of assault consummated by a battery upon a spouse do not unreasonably increase appellant's punitive exposure because the maximum punishment for the three specifications is fair and aligns with the enormity of appellant's crimes: dishonorable discharge, forfeiture of all pay and allowances, and confinement for six years. Article 128, UCMJ; *Manual for Courts-Martial, United States* (2019 ed.) [MCM], pt. IV, ¶77.d.(2)(f) and ¶77.d.(3). Such a punishment is apt for a person who attacked his wife three separate times, with his hands and with a weapon—leaving welts, a golf-ball-sized

[8] The second and third *Quiroz* factors also weigh against appellant's multiplicity claim. 55 M.J. at 338.

lump, bruises, and whip marks on her body—only about three months after the victim gave birth to their daughter, who was in the same home while her father punched and choked her mother.

As to the last factor, appellant has presented no evidence of any prosecutorial overreaching or abuse in the drafting of the charges; rather, the evidence at trial supported the prosecution's charging theory because each attack was separate and interrupted. For example, the prosecution did not charge each punch as a separate specification, and it charged the pushing and the punching as one. (Charge Sheet).

Because each of appellant's assaults was interrupted and distinct, each assault was separate, deserving its own punishment and warranting a separate conviction. *Pauling*, 60 M.J. at 95.

Conclusion

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

[redacted]

JOSEPH H. LAM
MAJ, JA
Appellate Attorney, Government
Appellate Division

[redacted]

JUSTIN L. TALLEY
MAJ, JA
Branch Chief, Government
Appellate Division

[redacted]

KALIN P. SCHLUETER
MAJ, JA
Branch Chief, Government
Appellate Division

CERTIFICATE OF SERVICE, U.S. v. PHILLIPS (20220233)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on the 23rd day of August, 2023.

[redacted]
Senior Paralegal Specialist
Government Appellate Division
[redacted]