IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Sergeant (E-5)
JASON L. BAILEY
United States Army,
Appellant

BRIEF ON BEHALF OF APPELLEE

Docket No. ARMY 20220209

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

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

Assignment of Error[1]

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

[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.

Statement of the Case

On 26 April 2022, a military judge sitting as a general-court martial convicted appellant, contrary to his pleas, of one specification of strangulation, and one specification of assault consummated by a battery upon a spouse, in violation of Articles 128 and 128b, Uniform Code of Military Justice, 10 U.S.C. §§ 928, 928b (2019) [UCMJ]. (Statement of Trial Results [STR]).[2] The military judge sentenced appellant to be reduced to the rank of E-1 and a bad-conduct discharge. (R. at 465; STR). On 31 May 2022, the convening authority took no action. (Action). On 1 June 2022, judgment was entered. (Judgment). The case was docketed with this court on 8 February 2023. (Referral).

Statement of Facts

A. Appellant beat his wife after an argument.

In the early morning hours of 1 January 2021 appellant and his wife, [redacted], got into an argument that escalated to physical violence. (R. at 149–53, 159–61). Appellant punched [redacted] in the face, causing her vison to go "black" and knocking her into a bookshelf. (R. at 161–63). Appellant then grabbed [redacted]'s shoulders, wrapped his arm around her neck and squeezed until [redacted] had difficulty breathing and lost consciousness. (R. at 163–65). When [redacted] regained consciousness,

[2] Appellant was acquitted of two specifications of assault consummated by a battery upon a spouse. (R. at 417; STR).

appellant confronted her, asking, "Why did you make me do this? Why did you do this? Why did you hit me?" (R. at 165). When [redacted] denied hitting him, appellant responded by placing his hands over her mouth. (R. at 165). [redacted] ran to the bathroom and saw that her face was swollen and that her nose was cut and bloody. (R. at 165–66).

[redacted] eventually made her way upstairs and hid in the bedroom closet, where she called her mother on FaceTime and then called 911.[3] (R. at 175, 286). [redacted]'s mother, KR, recalled that [redacted] was shaking, crying, and visibly upset. (R. at 287). KR also noticed that [redacted]'s face was red on each side "like maybe she had been punched" and a black eye was beginning to form. (R. at 288). [redacted]'s neck also appeared to be "very, very red." (R. at 288).

B. Appellant admitted to choking [redacted].

Law enforcement arrived between approximately 0500 and 0600 and found [redacted] visibly upset, with bruising and marks on her face and a cut on the bridge of her nose. (R. at 235, 242, 280). The first law enforcement officer to arrive on the scene, Sergeant [SGT] MP, did not see any injuries to appellant's face or neck. (R. at 279). When Special Agent [SA] KK arrived, appellant claimed [redacted] hit him in the face and left marks on his neck. (R. at 272). Following the standard practice, photos were taken of both [redacted] and appellant. (R. at 271). Law enforcement later

[3] FaceTime is a video call application.

recovered video footage from within the home, which recorded appellant admitting, "I shouldn't have choked you." (R. at 247–48, 264; Pros Exs 2, 3).

C. Conflicting character evidence of [redacted] was presented at trial.

At appellant's court-martial the parties presented conflicting evidence of [redacted]'s character for truthfulness and peacefulness. (R. at 340, 348–49, 385–86, 390–91). Appellant's friends, Specialist [SPC] AB and his wife AJ, testified [redacted] was violent and not truthful. (R. at 340, 348–49). However, [redacted]'s friend Ms. MP and neighbor FS testified that [redacted] was truthful and peaceful. (R. at 385–86, 390–91). Appellant also elicited past instances of [redacted]'s purported violent behavior.[4] (R. at 298, 355–57).

Prior to the announcement of findings, defense counsel requested special findings "to the elements of the offense of which the accused has been found guilty, and any affirmative defense relating thereto." (App. Ex. XXXVI). The military judge made special findings both orally on the record and in writing. (R. at 418–19; App. Ex. XXXVII). The military judge discussed the elements of the

[4] The first incident was an alleged childhood "attack" by [redacted] on her sister that her mother KR neither confirmed nor denied: "I understand that there could have been." (R. at 297–98). The second incident involved an extremely intoxicated soldier whom [redacted] slapped on the face and yelled at before attempting to get him to vomit. (R. at 360–61). Throughout that incident, [redacted] stated she "was certified" and would not leave the soldier's side. (R. at 361). The third incident involved [redacted] "forcibly" putting an open water bottle in appellant's mouth to get him to drink water when he was incapacitated from alcohol. (R. at 356–57).

offense in his special findings. (R. at 418–19; App. Ex. XXXVII). Additionally, the military judge found:

> With respect to [appellant's] claim of self-defense, in accordance with R.C.M. 916(e)(3), the court finds that, under the circumstances, there was no reasonable grounds for the [appellant] to apprehend that [redacted] was about to wrongfully inflict bodily harm upon [appellant]. The evidence clearly demonstrated that [appellant], without reasonable apprehension that bodily harm was about to be wrongfully inflicted upon him, struck [redacted] in the face with his hand, and strangled her neck with his arm.
>
> Consequently, the court finds beyond a reasonable doubt, that [appellant] did not act in self-defense and that the force used by [appellant] was not necessary for protection against bodily harm.
>
> The court considered all legal and competent evidence, and the reasonable inferences to be drawn therefrom. The court resolved all issues of credibility.

(R. at 419; App. Ex. XXXVII).

Standard of Review

"Special findings for an ultimate issue of guilt or innocence 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). The legal and factual sufficiency of a conviction are reviewed de novo. *United States v. Washington,* 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

"Once the right [to special findings] has been requested in a timely manner by the defendant, compliance is mandatory." *United States v. Gerard*, 11 M.J. 440, 442 (C.M.A. 1981) citing *United States v. Morris*, 263 F.2d 594 (7th Cir. 1959).

> It is generally stated that the purpose of special findings is to preserve questions of law for appeal. . . . [S]pecial findings enable the appellate court to determine the legal significance attributed to particular facts by the military judge, and to determine whether the judge correctly applied any presumption of law, or used appropriate legal standards.

United States v. Hussey, 1 M.J. 804, 808–809 (A.F.C.M.R. 1976).

> Special findings are to a bench trial as instructions are to a trial before members. Such procedure is designed to preserve for appeal questions of law. It is the remedy designed to rectify judicial misconceptions regarding: the significance of a particular fact, the application of any presumption, or the appropriate legal standard.

Truss, 70 M.J. at 546–47 (citing *United States* v. *Falin*, 43 C.M.R. 702, 704 (A.C.M.R. 1971)).

Special findings "primarily aid the defendant in preserving questions for appeal and aid the appellate court in delineating the factual bases on which the trial court's decision rested." *United States v. Livingston*, 459 F.2d 797, 798 (3d Cir.

1972).[5] Special findings are "sufficiently complete to satisfy [the] minimum requirement[s]" of R.C.M. 918 where the appellate court is able to discern the "legal and factual basis of trial court's verdict" and appellant's "ability to appeal all assignments of error" is not impaired. *United States v. Bohn*, 508 F.2d 1145, 1148 (8th Cir. 1975). Special findings do not require a military judge to "make superfluous findings,"[6] and will "usually include findings as to the elements of the offenses of which the accused may be found guilty . . . and findings on special defenses reasonably in issue." *Hussey*, 1 M.J. at 809. "Neither the Code nor the Manual contemplate that a military judge could be required by counsel to analyze in detail the evidence which led to certain findings or to justify the findings which were made." *United States v. Orben*, 28 M.J. 172, 175 (C.M.A. 1989); *see also United States v. Matthews*, 68 M.J. 29, 42–43 (C.A.A.F. 2005) (incorporating "the federal common law protection of the deliberative processes of judges" into military law "through the privilege of deliberations afforded via [Military Rule of Evidence] 509.") "Requests that the military judge recapitulate all the evidence or summarize all the evidence on which he relied" are not required to be granted. *Id.*

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[5] *See Gerard*, 11 M.J. at 441 (noting that "the federal civilian courts' experience with this type of statute will be most enlightening" to analyzing this issue).

[6] *Hussey*, 1 M.J. at 809 (citing *Cesario v. United States*, 200 F.2d 232 (1st Cir. 1953); *United States v. Peterson*, 338 F.2d 595 (7th Cir. 1964), cert. den. 380 U.S. 911; *United States v. Baker*, 47 C.M.R. 506 (A.C.M.R. 1973)).

Argument

A. The military judge's special findings were complete and sufficient.

Appellant asserts that this court should set aside his bad-conduct discharge because the military judge's special findings allegedly consisted of a perfunctory recitation of the offense's elements and a mere acknowledgment that appellant raised the issue of self-defense. (Appellant's Br. 8–9). Appellant may well be entitled to relief were his allegation supported by fact and law. However, this court should deny appellant any relief because the military judge's special findings unquestionably adhered to R.C.M. 918(b) and established precedent.

Special findings "ordinarily include findings as to the elements of the offense . . . and any affirmative defenses related thereto." R.C.M. 918(b) discussion. The military judge made special findings for each element of the offenses of which appellant was convicted. (App. Ex. XXXVI, p. 1). Specifically, for The Specification of Charge I, the military judge found that on or about 1 January 2021, appellant assaulted [redacted] by using his arm to strangle her neck while [redacted] was his wife and that the assault occurred at or near Fort Drum, New York. (R. at 419; App. Ex. XXXVI, p. 1). For Specification 1 of Charge II, the military judge found that on or about 1 January 2021, appellant unlawfully, violently, and forcefully struck [redacted] in the face with his hand, caused bodily harm in doing so, that

[redacted] was the spouse of appellant, and that these events occurred at or near Fort Drum, New York. (R. at 418, 419).

Similarly, the military judge's special findings about appellant's purported defense, while succinct, clearly demonstrate that he considered—and appropriately disregarded—appellant's incredible self-defense claim. (R. at 419). Specifically, the military judge found, "there was no reasonable grounds for the accused to apprehend that [redacted] was about to wrongfully inflict bodily harm upon the accused" and "the accused did not act in self-defense and that the force used by the accused was not necessary for protection against bodily harm." (R. at 419; App. Ex. XXXVI, pp. 1–2).

Much of appellant's argument focuses on [redacted]'s alleged lack of credibility and the military judge's failure to address that evidence. (Appellant's Br. 7–8). Credibility is neither an element of the offenses nor a special defense enumerated in R.C.M. 916 and is therefore outside the scope of the defense's request for special findings. (R.C.M. 916; App. Ex. XXXVI). Even so, the military judge acknowledged the challenge to [redacted]'s credibility and stated that he "resolved all issues of credibility," thus providing the factual bases on which his decision rested, namely that [redacted]'s testimony to the offenses was credible. *Livingston*, 459 F.2d at 798; (R. at 419; App. Ex. XXXVII).

Further, the military judge stated that "[t]he evidence clearly demonstrated that the accused, without reasonable apprehension that bodily harm was about to be inflicted upon him, struck [redacted] in the face with his hand and strangled her neck with his arm." (R. at 419). In arriving at this conclusion, the military judge described considering all evidence and the reasonable inferences that could be drawn from the evidence, while also resolving all issues of credibility. (R. at 419).

The military judge's oral and written special findings sufficiently enable this court to determine the legal and factual basis for appellant's conviction. *See Truss*, 70 M.J. at 546–47; (R. at 418–20; App. Ex. XXXVII). Additionally, the military judge's special findings have not impaired appellant's ability to raise assignments of error—indeed, the form of the court's findings is the only error appellant raises. Accordingly, this court should deny appellant relief.

B. Appellant asks this court to require military judges to invasively catalog their deliberative processes whenever special findings are requested or else risk reversal.

Appellant's assertion that R.C.M. 918(b) requires that the military judge "identify the facts that support each element and those that rebut any affirmative defense" is unfounded. (Appellant's Br. 6). Rather, special findings "ordinarily include findings as to the elements of the offense . . . and any affirmative defenses related thereto." R.C.M. 918(b) discussion. In fact, appellant's imposition runs counter to the precedent that military judges are not required to "analyze in detail

the evidence which led to certain findings or to justify the findings which were made." *Orben*, 28 M.J. at 175.

In order to support his proposition appellant unpersuasively relies on *United States v. Reinecke*, 30 M.J. 1010 (A.F. Ct. Crim. App. 1990) and *United States v. Strozier*, 31 M.J. 283 (C.M.A. 1990). Neither case is analogous to present. *Reinecke* deals with the lack of essential findings in a motion to suppress before the court via an Article 62, UCMJ appeal and not special findings to the ultimate issue in a case undergoing Article 66, UCMJ review.[7] *Reinecke*, 30 M.J. at 1015. Likewise in *Strozier*, the Court of Appeals for the Armed Forces [C.A.A.F.] determined that a military judge's essential finding in a motion to suppress were sufficiently supported by the evidence and should be upheld. 31 M.J. 283 (C.M.A. 1990).

Rather, this case is analogous to *United States v. Truss* in which this court dealt squarely with the sufficiency of special findings. 70 M.J. at 546–47. Like the military judge in this case, the military judge in *Truss* made a special findings to consent and forcible sodomy.[8] *Id.* As in the present case, the military judge

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[7] The issue was that under Article 62(b), UCMJ the *Reinecke* court did not have the factfinding powers that accompany an Article 66 review, making it difficult for the court to resolve the abuse of discretion claim. *Reinecke*, 30 M.J. 1015.

[8] The special finding was: "The conduct of the accused occurred in the early morning hours in a barracks room after an evening of drinking alcohol. Both the accused and [victim] were intoxicated. They are both young soldiers that were assigned to the same company. The court does not find consent by [victim],

provided enough detail to indicate he considered the significance of a particular fact, the application of any presumption, and employed the appropriate legal standard.[9] *Truss,* 70 M.J. at 546–47; *Hussey*, 1 M.J. at 808–09; *see also United States v. Tucker*, 82 M.J. 553, 568 (C.G. Court Crim. App. 2022) (rejecting the proposition that a robust discussion of a defense is necessary and stating "all that is required is that the military judge's findings address factual issues reasonably raised by the evidence such that we can be satisfied that she properly considered them, not that they address every possible permutation negating guilt or include a recitation of legal standards"). This court in *Truss* held that the special findings were legally and factually sufficient and not inconsistent.[10] 70 M.J. at 548.

As evidenced by *Truss*, the level of factual explanation that appellant demands is not required for a special finding to be sufficient. *Id.* Rather, it is clear

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although the court finds a failure of proof beyond a reasonable doubt of the lack of consent."

[9] Appellant cites *United States v. Fisher* to argue that the military judge's special findings should be afforded little deference. 73 M.J. 303, 312 (C.A.A.F. 2014). (Appellant's Br. 8). *Fisher* is inapplicable as it was reviewed under a different standard, abuse of discretion, and has a different procedural posture, reviewing a military judge's essential findings regarding evidentiary rulings and motion to compel. *Id.* at 312.

[10] The military judge's special findings are in no way ambiguous and certainly do not create a *United States v. Walters* issue. 58 M.J. 391, 392 (C.A.A.F. 2003). *Walters* deals with the exception of the word "divers occasions" and the substitution of "one occasion" from a finding without clearly reflecting the specific instance their finding of guilt is based upon making it impossible for the courts to know which instance to review for legal and factual sufficiency. *Id.* at 394, 396-97.

that the military judge correctly considered and addressed in sufficient detail appellant's weak claim of self-defense and his findings allow for full Article 66 review by this court. *See Orben*, 28 M.J. at 175; *Truss,* 70 M.J. at 548; *Bohn*, 508 F.2d at 1148; *Hussey*, 1 M.J. at 808–09.

C. Even if the special findings are insufficient, setting aside the findings and sentence is not the proper remedy.

If the special findings are deemed insufficient, the case should be returned to the military judge for additional findings. Setting aside the findings and sentence, as proposed by appellant, is an extreme remedy. (Appellant's Br. 9). The remedy for a military judge failing to make special findings is to return the case to him to make those findings. *Gerard*, 11 M.J. at 442 (where the court returned the record of trial to the military judge for preparation of special findings when none had been completed); *Hussey*, 1 M.J. at 810 (the Air Force court remanded the case to the military judge for the preparation of special findings prior to conducting its Article 66 Review.)

Conclusion

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

[redacted]

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CERTIFICATE OF SERVICE

UNITED STATES v. JASON L. BAILEY

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

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