IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES	Appellee	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.		Docket No. ARMY 20230233
First Sergeant (E-8) **STEVEN K. WILSON,** United States Army,	Appellant	Tried at Vilseck, Germany, on 3 March 2023, 30 March 2023, 26 April 2023, and 27-28 April 2023 before a special court-martial appointed by the Commander, 7th Army Training Command, Lieutenant Colonel Thomas Hynes, military judge, presiding.

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

On 2 February 2024, appellant, First Sergeant Steven K. Wilson filed his initial brief. On 27 February 2024, the government filed its answer brief. This is appellant's reply.

I. WHETHER APPELLANT'S CONVICTION FOR CHARGE I AND ITS SPECIFICATION IS FACTUALLY AND LEGALLY INSUFFICIENT.

A. "Seize" and "carry away" in Article 125, UCMJ, requires physical force.

The government in its brief asks this court to reject the ordinary meaning of the terms "seize" and "carry away," and precedent addressing this element as a *physical* taking. *United States v. Macklin*, 671 F.2d 60, 65-66 (2d Cir. 1982)

Panel No. 3

("seizing, confining, kidnapping, abducting, and carrying away-involve an actual physical or bodily carrying away or restriction of the victim. The remaining two methods-inveigling or decoying-involve nonphysical takings by which the kidnapper, through deception or some other means, lures the victim into accompanying him."); *see also United States v. Corralez*, 61 M.J. 737, 744 (A.F. Ct. Crim. App. 2005) ("the five ways that kidnapping can be committed under the *Manual*--seize, confine, inveigle, decoy, or carry away--are taken from the federal kidnapping act, 18 U.S.C. § 1201(a), and are generally given the same meaning as the federal statute."). Contrary to the government's assertion, evidence of physical interference or force from appellant was required to reach the finding appellant seized and carried away [redacted].

B. [redacted] and [redacted] testimony do not credibly establish appellant physically "forced" [redacted] into his truck.

When the government uses appellant's purported statements to [redacted] and [redacted] to support scant evidence of appellant's use of physical force, they rely on testimony based on out-of-court statements fraught with bias and motives.[1] [redacted] and [redacted] were not eyewitnesses to the charged kidnapping.

[1] [redacted] was as an employee of Child and Youth Services [CYS]. (R. at 191). [redacted] coached the flag football team as a CYS employee. (R. at 211). [redacted] was [redacted] former platoon sergeant, in his supervisory and rating chain, and had influence over his evaluations. (R. at 177-79). Both witnesses acknowledged the career ramifications for not reporting [redacted]

(R. at 205; R. at 238). Both [redacted] and [redacted] effectively undercut [redacted] testimony with [redacted] inconsistent retelling of the incidents in out-of-court statements.[2]

C. [redacted] was not held against his will.

In its brief, the government states "[s]imilar to the facts in *United States v. Acevedo*, [redacted] felt coerced into getting into appellant's truck." (Gov. Br. at 11). However, the contrary is apparent. Unlike the victim in *Acevedo*, [redacted] was not new to the military; he was a senior non-commissioned officer and interacted with many first sergeants. (R. at 454); *see* 77 M.J. 185, 188 (C.A.A.F. 2018). [redacted] vulnerable position, after he threw a flag at [redacted] face, is an analogous scenario faced by the victim in *Acevedo*. But [redacted] offer to apologize to appellant's 10-year-old daughter to curb a potential reporting of child assault tends to support the argument that [redacted] voluntarily entered appellant's truck and appellant honestly and reasonably believed [redacted] acted voluntarily. (R. at 131).

---

assault on [redacted] at the flag football game. (R. at 216-17; R. at 240-41; R. at 439-40).

[2] For example, [redacted] testified [redacted] told him appellant came to his house and slapped him in front of his family (R. 211-12); and [redacted] testified [redacted] told him appellant grabbed him by the collar before getting in appellant's truck. (R. at 231-32).

In finding an offense of kidnapping factually insufficient, this court in *Camacho* "factored in the 'availability or nonavailability'. . . of a means of exit or escape and evidence of threats or force (or lack thereof)" and found the victim "was not in a remote location where help could not be obtained." ARMY 20140495, 2018 CCA LEXIS 607, *22 (Army Ct. Crim. App. 30 Nov 2018) (mem. op.). The government attempts to distinguish *Camacho* from the case at hand because "[appellant] never asked [redacted] to leave," but ignores that redacted was just outside of his quarters, in the parking lot, when appellant approached him. (Gov. Br. at 11-12); (R. at 129). Here, redacted had the option of remaining in his quarters where he could have refused appellant's demand to come outside, and he could have called a commander or the military police for assistance.

II. WHETHER APPELLANT'S CONVICTION FOR CHARGE IV AND ITS SPECIFICATION IS FACTUALLY AND LEGALLY INSUFFICIENT.

A. Appellant's conviction is factually and legally insufficient.

The government argues appellant's conduct and "racist" statement were provoking and reproachful speech and gestures, therefore, his conviction is factually and legally sufficient. (Gov. Br. at 17). To support this contention, the government states "the context of the interaction matters." (Gov. Br. at 16). Yet, they fail to account for the full context, i.e., appellant approached redacted to address redacted son hitting appellant's son and asking him about his penis size,

and [redacted] children calling appellant's son racist names. (R. at 337) (R. at 266); ("[t]hey were calling them chink, ching chong, pulling their eyes back making them slanted.") (R. at 328-30). Furthermore, appellant only told [redacted] "you look like a fucking moron," when [redacted] put on a "tough guy" act *and lunged at appellant*. (R. at 333-34). This missing context from the government's brief lends support to appellant's arguments that, under the circumstances the speech was used: (1) a reasonable person would not expect to induce a breach of the peace; and (2) the government failed to prove appellant had a subjective understanding of the threatening nature of his statements. *See MCM*, pt. IV, ¶ 55c; *see Counterman v. Colorado*, 600 U.S 66, 69 (2023). The government did not address whether appellant's "racist" statement to [redacted] was protected by the First Amendment or if government had to prove appellant had some subjective understanding of the threatening nature of his statements. (Appellant's Br. 16–17).

B. Appellant's speech is protected under the First Amendment and his conviction is unconstitutional.

The First Amendment prohibits the Government from proscribing speech. U.S. Const. amend. 1. "[A]s a general matter, the First Amendment means that the government has no power to restrict expression because of . . . its content." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002). As such, content-based restrictions of speech are presumed unconstitutional. *United States v. Alvarez*, 567 U.S. 709, 716-17 (2012).

To sustain a conviction for provoking speech, the First Amendment demands proof that the words fell within a category of unprotected speech. The Supreme Court has defined certain limited and narrow categories of speech which are afforded no protection. *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of [is permitted]."). "These 'historic and traditional categories' are 'long familiar to the bar.'" *Counterman*, 600 U.S at 73 (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010)). The classes of unprotected speech have been described by the Court as having "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Stevens*, 559 U.S. at 470. "Fighting words" is a category of unprotected speech. *Chaplinsky*, 315 U.S. at 572.

The President has defined "provoking" words under Article 117, UCMJ, in a manner that closely mirrors the definition of fighting words. *Compare Texas v. Johnson*, 491 U.S. 397, 409 (1989), with *MCM*, pt. IV, ¶ 55c(1). As the Supreme Court has stated, "fighting words" are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*, 315 U.S. at 572. Fighting words are "those personally abusive epithets which, when addressed to the ordinary citizen, are as a matter of common knowledge, inherently likely to

provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20 (1971) (citing *Chaplinsky*, 315 U.S. 568). In *Texas v. Johnson*, the Supreme Court further refined the scope of fighting words to those that are: (1) a "direct personal insult;" or (2) "an invitation to exchange fisticuffs." 491 U.S. at 409. The C.A.A.F. has echoed this language stating, "[i]n order to be fighting words, the words must constitute a direct personal insult." *United States v. Brown*, 45 M.J. 389, 395 (C.A.A.F. 1996) (citing *Cohen*, 403 U.S. 15). As the government concedes, "there are certainly instances where identifying actions or statements as 'racist' are not provocative or reproachful." (Gov. Br. at 16). The government failed to prove: (1) appellant's use of the term "racist" amounted to fighting words; or (2) appellant's subjective understanding of the threatening nature of his statements. The conviction for Charge IV and its specification is unconstitutional.

III. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED PRODUCTION OF A NECESSARY AND RELEVANT WITNESS.

The government argues [redacted] "potential testimony was not relevant and necessary and would have been cumulative with other witnesses who testified." (Gov. Br. at 21).

A. [redacted] potential testimony was relevant and necessary.

The military judge's two denials of appellant's requests for [redacted] production precluded appellant from placing fair and reasonable hypotheses of the

evidence, except that of his guilt, before the factfinder. The government in its brief, like the military judge at trial, narrow in on the government's theory of the case to explain why [redacted] testimony is not relevant and necessary to the charged offenses. (Gov. Br. at 22-23). As civilian defense counsel stated in his motion to reconsider when he advanced the defense's theory: [redacted] testimony impeaches [redacted] assertion that he offered to apologize to appellant's children for unknown reasons and this impeachment was relevant because it tended to show [redacted] "voluntarily got into the truck to apologize [to appellant's children], he was not seized, carried away, or held against his will." (App. Ex. XA, p. 8). The denial of [redacted] production effectively limited appellant to contesting his guilt only insofar as he did not deviate from the government theory of the case.

[redacted] had a unique perspective not shared by other witnesses. Testimony at trial revealed conflicting versions of what occurred during the flag football game. [redacted] potential testimony was not cumulative because it had a unique incidental effect in that it independently and directly corroborated [redacted] and [redacted] challenged testimony and impeached [redacted] credibility. This testimony was evidence from someone outside of the appellant's family. It tended to show [redacted] motive to fabricate to avoid culpability for throwing a flag at [redacted]. Finally, it showed [redacted] willingness to apologize to

appellant's children because he had something to apologize for *without* appellant's threat of harm or kidnapping.

B. The denial of [redacted] was not harmless beyond a reasonable doubt.

The government does not pointedly address whether the military judge's error of denying [redacted] production withstands the beyond a reasonable doubt standard for prejudice. Instead, they analyze the potential error as a nonconstitutional evidentiary error. (Gov. Br. at 23-24). The appropriate test for prejudice is whether the "evidence in the record of trial demonstrates beyond a reasonable doubt that the unadmitted testimony would not have tipped the balance in favor of the accused and the evidence of guilt is so strong as to show no reasonable possibility of prejudice." *United States v. Fisher*, 24 M.J. 358, 362 (C.M.A. 1987) (citations omitted).

[redacted] testimony would tip the balance in favor of the appellant because the credibility attack, which would have been offered through the testimony of [redacted], impeaches: (1) [redacted] inclination to tell the truth (considering his motive to fabricate to avoid culpability); and (2) the extent to which [redacted] testimony was contradicted by other evidence.[3] The evidence of guilt in the

[3] While the government posits the flag football game occurred hours before the alleged kidnapping, the evidence at trial establishes a smaller duration of time. (R. at 128-29).

Specification of Charge I, the Specification of Charge II, and the Specification of Charge III was not disproportionately strong to show no reasonable possibility of prejudice.

Conclusion

For the reasons above, appellant respectfully requests this honorable court set aside all findings of guilt.

[redacted]

AMIR R. HAMDOUN
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division

[redacted]

MITCHELL D. HERNIAK
Lieutenant Colonel, Judge Advocate
Branch Chief
Defense Appellate Division

[redacted]

AUTUMN R. PORTER
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division

[redacted]

PHILIP M. STATEN
Colonel, Judge Advocate
Chief
Defense Appellate Division

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court of Criminal Appeals and the Government Appellate Division on 12 March 2024.

Amir R. Hamdoun
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division