IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES	Appellee	**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

Assignments of Error[1]

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

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

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

Statement of the Case

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant personally asserts those matters set forth in the Appendix.

On 28 April 2023, a military judge, sitting as a military judge alone special court-martial, convicted appellant, First Sergeant [1SG] Steven K. Wilson [appellant], contrary to his pleas, of one specification of kidnapping, one specification of assault consummated by a battery, one specification of communicating a threat,[2] and one specification of provoking speeches and gestures,[3] in violation of Articles 125, 128, 115, and 117, Uniform Code of Military Justice, 10 U.S.C. §§ 925, 928, 915, and 917 [UCMJ], respectively. (R. at 450). The military judge sentenced appellant to no punishment. (R, at 549; Statement of Trial Results). On 8 June 2023, the convening authority took no action. (Action). On 20 July 2023, the military judge entered the judgment of the court. (Judgment). On 5 October 2023, appellant elected to appeal his convictions to this court under Article 66(b)(1), UCMJ. (Election to Appeal).

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

Statement of Facts Relevant to Assignment of Error

Appellant's convictions of kidnapping, assault consummated by a battery, and communicating a threat derive from appellant's argument with [redacted]

[2] Appellant was found guilty of this specification, except the words, "'I'm going to knock you out', or words to that effect, and by saying." (R. at 450).
[3] Appellant was found guilty of this specification, except the words, "'You and your wife are bad parents.'" (R. at 450).

[redacted] as a result of [redacted] actions at a 19 October 2022 flag football game. (Statement of Trial Results). On that day, [redacted] played in a Child and Youth Services (CYS) flag football game designed to pit parents against players. (R. at 128). Appellant's children, [redacted] and [redacted], also played in the game. (R. at 128).

What exactly occurred at the game is not clear from the testimony at trial. On the one hand, [redacted] denied throwing flags into eleven-year old [redacted] face and denied taunting her. (R. at 146). However, [redacted] said [redacted] threw flags into her face and mocked the eleven-year old after the game. "I told you I put you down in the ground." (R. at 317; 319-20).[4]

Appellant returned home to see his daughter "so distraught . . . and shaking . . . . so upset she couldn't even get the words out." (R. at 340). [redacted], who was ten years old, told appellant he caused [redacted] to fall during the flag football game, [redacted] got upset, pulled off [redacted] flag belt and threw it into [redacted] face. (R. at 309; 313-14).

Appellant called [redacted] and left to meet him at [redacted] quarters. (R. at 293, 314, 321, 342). During direct examination, [redacted] claimed appellant sounded "extremely irritated and angry" on the phone when he told [redacted] to meet him

[4] [redacted], a coach for the flag football team, testified he "didn't know. . .what had happened [at the game]." (R. at 225). [redacted], appellant's ten-year-old son, testified he saw [redacted] throw his flags at his sister's face. (R. at 309, 313).

outside. (R. at 129). [redacted] went outside and waited for appellant, despite testifying that he "didn't know what was going on." (R. at 129). According to [redacted] testimony, appellant pulled up in a truck, approached [redacted] enraged, his forehead touching [redacted] face and his fists a couple inches away from [redacted] chin and told [redacted], "I'm going to fuck you up," and "my daughter never cries." (R. at 129-130). [redacted] testified he tried to de-escalate the situation and offered to apologize to Appellant's children even though he claimed he did not know what he was apologizing for. (R. at 131, 154).

During his testimony, [redacted] explained the driving force behind his decision to ride as a passenger in appellant's truck and walk into appellant's residence: "[I] offered to apologize to [appellant's] children . . . . because [I was] trying to de-escalate the situation that just happened in front of [me] . . . . [and] at that moment, it seemed like the best option." (R. at 131). When [redacted] offered to apologize, appellant responded with, "get in the fucking truck." (R. at 131). Because appellant "was very aggressive," [redacted] stated he did not have a choice. (R. at 131).

[redacted] walked towards the passenger side door and entered appellant's truck. (R. at 157). As appellant was driving [redacted] to his house, [redacted] stated appellant told him "don't say a word [, s]hut the fuck up," reached out with one hand, and lunged at [redacted] with a balled fist. (R. at 132). The length of

time it took appellant to drive [redacted] to appellant's home was approximately two minutes. (R. at 158, 346). When [redacted] followed appellant into his apartment after they got out of the truck, appellant told [redacted], "you better fucking apologize." (R. at 132). [redacted] claimed he did not walk way "because, more than likely, [appellant] was so enraged, he would have chased me down." (R. at 133). Asked again by trial counsel if [redacted] felt like he had a choice, [redacted] stated, "I did not." (R. at 133). As a result, [redacted] followed appellant into his apartment complex and up the stairs to appellant's second floor apartment. (R. at 133-34). [redacted] had visited appellant's residence once before and [redacted] children would have sleepovers at appellant's apartment. (R. at 132; 337-38).

When [redacted] walked into the front door of appellant's apartment, appellant's children stood in the living room. (R. at 133-34). Eventually, [redacted] got on one knee and apologized to [redacted] and [redacted].[5] (R. at 135). Then

[5] On his direct testimony, [redacted] testified he did not know why he apologized to appellant's children, but [redacted] impeached [redacted] and testified [redacted] apologized to [redacted] for throwing flags in her face and taking the game too seriously, and to [redacted] for saying "mean things to [redacted] and [his sister]." (R. at 154; 302). Moreover, [redacted] testified [redacted] apologized to [redacted] for throwing flags in her face and disrespecting her and apologized to him for ripping flags off his waist and disrespecting him. (R. at 314). Additionally, [redacted] testified [redacted] apologized to her for throwing flags in her face and apologized to [redacted] for snatching his flags so aggressively. (R. at 322).

[redacted] testified as soon as he started to stand up, appellant struck him and caused [redacted] head to hit a door pillar. (R. at 135-36). [redacted] testified when he was leaving appellant's apartment, appellant kicked [redacted] in the lower back. (R. at 136).

On cross examination, [redacted] confirmed appellant did not hit him, kick him, push him, grab him by the collar, pull him or push him, or in any other way physically force him into the truck. (R. at 149). Appellant did not have a weapon. (R. at 149-50). [redacted], by his own admission, walked to the passenger side and got in appellant's truck. (R. at 149-50).

Appellant testified (1) he did not ball up his fists or get in [redacted] face before [redacted] told appellant "no problem. I'll [apologize to your kids] right now." (R. at 344); (2) he did not tell [redacted] he was "going to fuck [him] up," or threaten to harm [redacted] before [redacted] went into appellant's truck (R. at 344); and (3) he did not force [redacted] to get into his truck. (R. at 345).

Appellant and [redacted] had limited interaction before the game; they would greet each other at practice or games but would not socialize. (R. at 127, 338).

Standard of Review

Questions of legal sufficiency and factual sufficiency are reviewed de novo. *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003). "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable

to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (citation omitted) (quotation omitted).

Because one finding of guilty in the entry of judgment is for an offense that occurred before 1 January 2021,[6] the test for factual sufficiency is "whether after weighing the evidence in the record of trial, and making allowances for not having personally observed the witnesses, [this Court is] convinced of [appellant's] guilt beyond a reasonable doubt." *United States v. Walters*, 58 M.J. at 396 (citation omitted).

Convictions are not reviewed under a "preponderance of the evidence" standard—rather, this Court "may only affirm convictions that we are ourselves convinced have been proven beyond a reasonable doubt." *United States v. Whisenhunt*, ARMY 20170274, 2019 CCA LEXIS 244, at *6 (Army Ct. Crim. App. 3 Jun. 2019) (summ. disp.). If the defense, at trial or on appeal, lays out a scenario that leaves this Court with a fair and rational hypothesis of the evidence other than appellant's guilt, Article 66, UCMJ, mandates this Court *must* set aside and dismiss the findings of guilt. *Id.*

[6] In Charge IV and its specification, Appellant was found guilty of an offense that occurred on 11 September 2020. *See* National Defense Authorization Act for FY2021, Pub. L. No. 116-283, § 542(e)(2), 134 Stat. 3611-12.

"In sum, to sustain appellant's conviction, [this court] must find that the government has proven all essential elements and, taken together as a whole, the parcels of proof credibly and coherently demonstrate that appellant is guilty beyond a reasonable doubt." *United States v. Gilchris*t, 61 M.J. 785, 793 (Army Ct. Crim. App. 2005) (citation omitted).

Law

The elements of kidnapping, Article 125, UCMJ are:

(1) That the accused seized, confined, inveigled, decoyed, or carried away a certain person;

(2) That the accused then held such person against that person's will; and

(3) That the accused did so wrongfully.

Manual for Courts—Martial, United States (2019 ed.) [*MCM*], pt. IV, ¶ 74b. Appellant was prosecuted under the theory he wrongfully seized *and* carried away [redacted] and held him against his will wrongfully.

"Seize" ordinarily means "to forcibly take possession [of a person]" and "to place (someone) in possession." *See* Black's Law Dictionary 1363 (11th ed. 2019); *see also United States v. Schloff*, 74 M.J. 312, 313 (C.A.A.F. 2015) ("in the absence of a statutory definition, this Court looks to the ordinary meaning of a statutory term."); *see, e.g., United States v. Craig,* 19 M.J. 166 (C.M.A. 1985) (attempted kidnapping conviction affirmed where appellant grabbed a woman,

seized her, and forcibly placed her into his car, closing the car door while displaying a knife as a threat).

"Carry away" ordinarily means "to take or move." *See* Black's Law Dictionary 242 (9th ed. 2009); *see, e.g.*, *United States v. Jeffress*, 28 M.J. 409, 410 (C.M.A. 1989) (appellant kidnapped victim when he grabbed her, and despite her struggling, pulled her into an area 15 feet away); *United States v. Bailey*, 52 M.J. 786, 793 (A.F. Ct. Crim. App. 1999) (appellant kidnapped victim by chasing her after she left his pickup truck, picking her up, and carrying her to the truck, where he then held her against his will; the court found that the kidnapping was complete when he carried his unwilling victim back to the truck).

To hold a person "[a]gainst that person's will" means to hold the victim involuntarily. *MCM*, pt. IV, ¶ 74c(3). "The involuntary nature of [detention] may result from force, mental or physical coercion . . . . [e]vidence of the availability or nonavailability to the victim of means of exit or escape is relevant to the voluntariness of the detention, as is evidence of threats or force, or lack thereof." *Id*; *see United States v. Acevedo*, 77 M.J. 185 (C.A.A.F 2018) (holding evidence sufficient to find mental coercion where the appellant, a non-commissioned officer, had threatened to report the victim, a private E-2 in appellant's platoon, for underage drinking if she left the taxi into which he inveigled her; the significant rank difference between appellant and the victim was an important factor in

establishing mental coercion). The involuntariness of the seizure and detention is the essence of kidnapping. *Bailey*, 52 M.J. at 793 (citing *Chatwin v. United States*, 326 U.S. 455, 464 (1946)).

The *mens rea* required for kidnapping is "wrongful." *MCM*, pt. IV, ¶ 74b(3). Kidnapping is a general intent crime; the second element is negated if Appellant honestly and reasonably believed that the victim acted voluntarily, even if appellant's belief was incorrect. *United States v. Stefanek*, ACM 39895, 2021 CCA LEXIS 217, at *15 (A.F. Ct. Crim. App. 5 May 2021) (mem. op.) (citing *United States v. Corralez*, 61 M.J. 737, 743 (A.F. Ct. Crim. App. 2005); *see also United States v. Rapert*, 75 M.J. 164, 169 (C.A.A.F. 2016).

Argument

Even when considering all the evidence in the light most favorable to the Government: (1) there is no evidence appellant seized and carried away [redacted]; (2) appellant did not overcome [redacted] will because [redacted] offered to apologize to appellant's children; and (3) appellant honestly and reasonably believed [redacted] acted voluntarily when he entered appellant's truck to apologize to his children.

A. Appellant did not seize and carry away [redacted].

There is no evidence appellant forcibly placed [redacted] in his truck by seizing him and carrying him away. There was simply no physical interference from appellant to force [redacted] into his truck; [redacted] walked to the passenger side of

appellant's truck on his own volition. (R. at 148-50). Nothing in the record of trial satisfies the government's burden to prove appellant seized and carried away [redacted].

R. [redacted] **acted under his own volition when he entered appellant's truck and residence.**

Moreover, [redacted] was not held against his will. In the situation presented, a person of reasonable mental fortitude would not feel compelled to enter appellant's truck or residence. Appellant's words and actions did not rise to a credible and imminent threat to commit violence against [redacted]; appellant did not credibly coerce [redacted] or create an environment where [redacted] acted involuntarily and could not escape.

Even viewing the evidence in the light most favorable to the government, one fair and rational hypothesis to explain the voluntariness of [redacted] presence in appellant's truck and home derives from [redacted] prior interactions with appellant. Despite appellant telling [redacted] he was "going to fuck [him] up," with his forehead touching [redacted] face and fists a couple inches away from [redacted] chin, there is no evidence to suggest [redacted] was in or felt he was in imminent danger, in part because [redacted] visited appellant's residence before and [redacted] children would sleepover at appellant's house. (R. at 129-130, 132, 337-38).

When he offered to apologize to appellant's children, [redacted] claimed he did not know what to apologize for. (R. at 154). A person of reasonable mental

fortitude (and a senior non-commissioned officer) would not involuntarily offer to apologize for circumstances unknown, especially in immediate fashion, after appellant did not brandish a weapon or engage in particularly coercive or forcible behavior.

R. **Appellant lacked the requisite mental state to kidnap [redacted] because he honestly and reasonably believed [redacted] acted voluntarily.**

Direct and circumstantial evidence show appellant did not intend to hold [redacted] against his will through force or coercion. First, appellant met [redacted] outside of [redacted] home. (R. at 129). There is no evidence appellant cornered [redacted]; [redacted] was free to leave and return to his home. (R. at 155-57). Second, Appellant did not demand [redacted] apologize; [redacted] *offered* to apologize. (R. at 131). Third, [redacted] walked away from appellant and entered appellant's truck under his own power. (R. at 148-50). Appellant operated with the knowledge and belief [redacted] threw flags into his daughter's face. (R. at 340-41). When [redacted] offered to apologize to appellant's children, appellant responded by driving [redacted] to his children's location. (R. at 345).

Evidence at trial supports appellant honestly and reasonably believed [redacted] voluntarily placed himself in appellant's truck because all outward indications and statements from [redacted] communicated to appellant that [redacted] felt guilty

about appellant's daughter "never [crying].[7]" Therefore, appellant's conviction for Charge I and its Specification is factually and legally insufficient.

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

Statement of Facts Relevant to Assignment of Error

Before appellant's court-martial, [redacted] reached out via Facebook to [redacted],[8] [redacted] former neighbor, and asked [redacted] if he had any past issues with appellant "because [he] was trying to figure out if there was [sic] more people that . . . had witnessed that kind of behavior from [appellant]." (R. at 263, 268). After [redacted] failed to text back, [redacted] called [redacted] and told [redacted] "there's something." (R. at 264). [redacted] transmitted a copy of [redacted] contact to trial counsel. (R. at 269).

During direct examination, [redacted] testified he engaged with appellant in a roughly thirty-minute conversation, first outside [redacted] door and then in front of

[7] During cross examination, [redacted] stated he only once asked appellant "what was going on," but that was during the car ride to appellant's home. (R. at 158-59). On direct examination, appellant testified [redacted] told appellant he "overreacted" when appellant initially asked him about what happened at the game. (R. at 342-43). Appellant testified he told [redacted] he needed to apologize to his kids and [redacted] replied, "no problem." (R. at 343-44).

[8] [redacted] at the time of the offense in Charge IV and its specification, held the rank of staff sergeant (SSG). (R. at 247).

his building.[9] (R. at 249, 253). Initially, [redacted] did not recognize appellant, who was dressed in civilian clothes, until appellant said he was [redacted] dad – [redacted] kids played with appellant's kids. (R. at 246-49).

[redacted] testified his conversation with appellant escalated "from talking to not quite shouting but [a] raised voice at me." (R. at 249). When it "got to the point of screaming," [redacted] and appellant went to the front of the building. (R. at 249). At that time, appellant claimed [redacted] children called appellant's children racist names. (R. at 266). [redacted] let appellant scream and yell at him "for the most part . . . and [did] not return the screams and yells until [appellant] accused us of being racist." (R. at 250). When asked if appellant called him any names, [redacted] said, "I don't think there was anything, just, '[y]ou're stupid'." (R. at 250). According to [redacted], appellant seemed to be "very angry." (R. at 251). [redacted] testified:

> [appellant] balled up [his hands] like in a fist . . . . they were to his side [a majority of the time]. So I didn't immediately take it as a threat and I didn't [think] it was a threat at the time. At the end, when he started calling myself and my family the names, he was getting closer and closer to my face. And there was no physical altercation; we did not, in no way shape, or form, touch each other. But, as somebody is getting into your face, it does become more threatening over that time . . . . he didn't talk with his hands, but there were certain gestures with his hands but then they'd go back to his side. But, again, it never came up to my face or near my face [as] a specific threat to physical violence, nothing like that, sir.

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[9] On direct examination, [redacted] did not remember the date of the incident. (R. at 247). On cross examination, the defense established [redacted] provided the statement on 11 September 2020, the day of the alleged offense. (R. at 260).

(R. at 252). Appellant kept his hands at his sides, though he did call [redacted] a racist, "egging" him on. (R. at 256). [redacted] became mindful of not throwing the first punch. (R. at 256).

However, in his statement to an investigator, [redacted] did not claim appellant got in his face or egged him on. (R. at 262-63). Furthermore, [redacted] stated it would not surprise him if he also omitted appellant balled up his fists in that statement. (R. at 261).

Appellant testified [redacted] "whole demeanor changed," when he noticed his wife open the blinds and observe the exchange. (R. at 333). At that point, [redacted] put on a "tough guy" act. (R. at 333). Appellant told [redacted] that he "look[ed] like a fucking moron" when [redacted] lunged him and tried to fight him. (R. at 334). Appellant denied he used the words "you're a fucking little bitch," "you're a fucking stupid moron," or "you and your family are fucking racists," but acknowledged he called [redacted] a "racist." (R. at 335).

Standard of Review

Adopted from the first assignment of error.

Law

The elements of provoking speeches or gestures, Article 117, UCMJ are:

(1) That the accused wrongfully used words or gestures toward a certain person;

(2) That the words or gestures used were provoking or reproachful; and

(3) That the person toward whom the words or gestures were used was a person subject to the UCMJ.

MCM, pt. IV, ¶ 55b. According to the explanation: "provoking and reproachful describe those words or gestures which are used in the presence of the person to whom they are directed and which a reasonable person would expect to induce a breach of the peace under the circumstances." *MCM*, pt. IV, ¶ 55c.

"[T]he provocative nature of speech for the purposes of Article 117, UCMJ, depends upon the context in which the words are spoken and the audience to whom they are addressed." *United States v. Killion*, 75 M.J. 209, 214 (C.A.A.F. 2016). "Thus, the reasonable reaction of the person to whom the words are addressed factors heavily into a determination of whether speech is provocative; the calculus is far more expansive than simply examining the volatility of the speaker's demeanor and the offensive nature of the words." *Id*. at 215. For true threats of violence that are outside the bounds of First Amendment protection, "the First Amendment still requires proof that a defendant had some subjective understanding of the threatening nature of his statements." *See Counterman v. Colorado*, 600 U.S 66 (2023). In *Counterman*, the Supreme Court rejected an objective analysis for whether a statement constitutes a threat. *Id*. The same

principle should be followed by this court in determining whether appellant used provoking and reproachful speech or gestures per Article 117, UCMJ.

Argument

While appellant was convicted of provoking and reproachful speech, testimony at trial provided no evidence the words in the specification were uttered. In this specification, appellant was charged with voicing the following provoking and reproachful words to [redacted]: (1) "you're a little fucking bitch," (2) "you're a fucking stupid moron," (3) "you and your wife are bad parents,"[10] and (4) "you and your family are fucking racists," or words to that effect. Even considering all the evidence in the light most favorable to the Government, appellant's speech and gestures are not provoking or reproachful, and the conviction is legally and factually insufficient.

The government's case in chief presented no evidence of appellant's use of the charged speech. The only witness to address the speech as charged was appellant, who categorically denied their utterance. [redacted] denied appellant called him any names, beyond "you're stupid" and "racist." (R. at 250). [redacted] testified appellant called him and his family "racist," but did not testify appellant said, "fucking racists." (R at 249-50). The omission of "fucking" creates a material

[10] The military judge excepted the words "you and your wife are bad parents," when he found appellant guilty of this charge and its specification. (R. at 450).

variance between the specification as alleged and the evidence as it was introduced at trial because the term, "racist," by itself does not connote provoking or reproachful speech.

Appellant's "racist" remark is not provoking or reproachful speech and is legally insufficient. Appellant alerted [redacted] to the claim that [redacted] children were calling his children racist names. (R. at 266). An objectively reasonable person under the same circumstances would not view the term "racist" as provocative because it was not used randomly.

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

Statement of Facts Relevant to Assignment of Error

During an Article 39(a), UCMJ, session on 30 March 2023, civilian defense counsel argued for the military judge to compel production of [redacted] after government denied production of defense's request for [redacted] as a merits witness. (R. at 21; App. Ex. IVB1, p. 6). Defense proffered [redacted], eleven years old at the time, would testify he witnessed [redacted] rip [redacted] flag off his waist, throw it in the face of [redacted], and taunt [redacted]. (R. at 21; App. Ex. IVA, p. 4). Defense distinguished [redacted] from every other merits witness: [redacted] was the only witness, not related to appellant, who saw [redacted] throw flags into [redacted] face. (R. at 23).

In his written ruling, the military judge denied the motion to compel production of [redacted] because his testimony "is not relevant on [sic] any of the charged offenses." (App. Ex. IVC, p. 2). The military judge further found "the parties agree" to what the witness would testify. (App. Ex. IVC, p. 2). The military judge also ruled that [redacted] testimony, "[a]s an impeachment witness (on whether [redacted] pushed, taunted, and threw a flag at the accused's children) . . . is both irrelevant and cumulative with at least two other witnesses the Government has agreed to produce (the accused's son and daughter)." (App. Ex. IVC, p. 2).

On 11 April 2023, civilian defense counsel filed a motion to reconsider production of [redacted]. (App. Ex. XA). In the motion, civilian defense counsel advanced the relevance of [redacted] and the flag football incident, where [redacted] witnessed [redacted] rip the flags off [redacted], throw it into the face of [redacted] and taunt her. (App. Ex. XA, p. 3). Civilian defense counsel posited, *inter alia*, that [redacted] testimony impeaches [redacted] assertions that [redacted] offered to apologize to appellant's children, though he didn't know for what, and [redacted] was unaware why appellant was upset. (App. Ex. XA, p. 8). 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).

Defense argued [redacted] testimony was not cumulative because [redacted] provided corroboration to the testimony of [redacted] and [redacted], who otherwise could be attacked, "either directly or indirectly, as having a motive to misrepresent to protect their father." (App. Ex. XA, p. 11). [redacted] testimony "as an unrelated witness may be given greater weight than the testimony of the children of the [appellant]." (App. Ex. XA, p. 11). Additionally, [redacted] was an uninvolved, observing witness. (App. Ex. XA, p. 11).

In a written ruling on 18 April 2023, the military judge ruled, "[h]aving considered the motions of both the Government and Defense and finding no new evidence or law warranting reconsideration of the original ruling, the Defense motion [to reconsider] is denied." (App. Ex. XC).

In the defense case-in-chief, civilian defense counsel asked [redacted] if "there was an allegation of flag throwing at a flag football field." (R. at 274). Trial counsel objected on grounds of relevance. (R. at 274). Civilian defense counsel responded the testimony was relevant because the allegation against [redacted] created a motive to misrepresent or lie on the part of [redacted]. (R. at 274-75). Contrary to his denial of [redacted] testimony, the military judge said that "[g]iven the low threshold for relevance, I will overrule the objection." (R. at 275).

In government's rebuttal argument, trial counsel argued "the three Wilson children [in] their testimony. . .[wanted] to help their dad out," and their testimony used the same descriptions and phrases. (R. at 447-48).

Standard of Review

A military judge's ruling on a request for a witness is reviewed for abuse of discretion. *United States v. McElhaney*, 54 M.J. 120, 126 (C.A.A.F. 2000) (citing *United States v. Rockwood*, 52 M.J. 98, 104 (C.A.A.F. 1999)).

"A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008). "We will not set aside a judicial denial of a witness request "unless [we have] a definite and firm conviction that the [trial court] committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *McElhaney*, 54 M.J. at 126.

If the judge committed constitutional error by depriving the appellant of his right to present a defense, "the test for prejudice on appellate review is whether the appellate court is 'able to declare a belief that it was harmless beyond a reasonable doubt.'" *United States v. Buenaventura*, 45 M.J. 72, 79 (C.A.A.F. 1996) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

Law

Article 46, UCMJ, 10 USC § 846, provides all parties to a court-martial with "equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." This ensures that "'[j]ust as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.'" *United States v. McAllister*, 64 M.J. 248, 249 (C.A.A.F. 2007) (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)).

Under Rule for Court-Martial [R.C.M.] 703(b)(1), each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be necessary and relevant. Factors to be weighed to determine whether personal production of a witness is necessary include: the issues involved in the case and the importance of the requested witness to those issues; whether the witness is desired on the merits or the sentencing portion of the case; whether the witness's testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness, such as depositions, interrogatories, or previous testimony. *United States v. McElhaney*, 54 M.J. 120, 127 (C.A.A.F. 2000).

Relevant evidence is any "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Military Rule of Evidence [Mil. R. Evid.] 401. "Relevant testimony is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." R.C.M. 703(b)(1), Discussion.

Military Rule of Evidence 403 allows the military judge to exclude relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Mil. R. Evid. 403.

Argument

The defense demonstrated production of [redacted] was necessary and relevant to the defense's theory. In denying appellant's motion to compel production of [redacted] and appellant's motion to reconsider, the military judge abused his discretion. This error prejudiced appellant because it hamstrung his ability to present his main theories of defense.

The government charged appellant with kidnapping [redacted], which required the wrongful holding of [redacted] against his will. Therefore, it was crucial to the defense case for the factfinder to thoroughly assess [redacted] credibility with

relevant testimony. As [redacted] was the only person unrelated to appellant who claimed to see the flag football incident between [redacted] and [redacted], his testimony would: (1) impeach [redacted] credibility; (2) make it less likely that [redacted] was forced into appellant's truck (because [redacted] knew what he was apologizing for); and (3) make it more likely that appellant was operating under a honest and reasonable belief that [redacted] voluntarily entered his truck (because [redacted] displayed his willingness to apologize to appellant's children).

The military judge allowed [redacted] to testify about [redacted] "flag throwing" because of the "low threshold for relevance." (R. at 274-75). In that context, the military judge twice denying the defense motion to compel production of [redacted] on the grounds of relevance doesn't make sense because [redacted] corroborating testimony went to the heart of [redacted] credibility. The military judge misinterpreted the requirements of R.C.M. 703 when he concluded [redacted] testimony was irrelevant and did not "have any tendency to make any fact of consequence more or less likely." (App. Ex. IVC, p. 2).

The military judge ruled contrary to the principles found in *McElhaney* when he found [redacted] testimony was cumulative. As civilian defense counsel set forth in his motion to reconsider: "The two produced witnesses will both be attacked, either directly or indirectly, as having a motive to misrepresent to protect their father . . . . [redacted] testimony as an unrelated witness may be given

greater weight than the testimony of the children of the [accused]." (App. Ex. XA, p. 11). [redacted] and [redacted] credibility were indeed attacked during the government's rebuttal argument, as defense warned in its motion. (R. at 447-48). The military judge's decision should receive no discretion as he made impermissible findings, misinterpreted the requirements of R.C.M. 703, and ruled contrary to the principles of *McElhaney*.

Because the military judge prevented appellant from calling a relevant and necessary witness, this court must determine whether the error was harmless beyond a reasonable doubt. Appellant's due process, compulsory process, and confrontation rights were violated. This error prejudiced appellant because it hamstrung his ability to impeach [redacted] and present appellant's main theories of defense: (1) [redacted] motive to fabricate to avoid culpability and (2) [redacted] willingness to apologize to appellant's children, because he had something to apologize for, *without* appellant's threat of harm or kidnapping. Without [redacted] corroborating evidence, appellant's main theories of defense against [redacted] allegations rested on his children's testimony, which were ultimately unfairly challenged as biased.

Conclusion

The military judge's findings of guilt as to the Specification of Charge I and the Specification of Charge IV are factually and legally insufficient. Appellant requests the court set aside those convictions. Additionally, the military judge's denial of a relevant and necessary witness resulted in a fundamentally unfair trial where appellant's due process, compulsory process, and confrontation rights were violated. Therefore, Appellant requests the court set aside the findings of guilt as to the Specification of Charge I, the Specification of Charge II, and the Specification of Charge III.

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Appendix A: Matters Submitted Pursuant to *United States v. Grostefon*

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant, through appellate defense counsel, personally requests that this court consider the following matters:

I. WHETHER "GOOD FATHER" EVIDENCE IS A PERTINENT CHARACTER TRAIT WITHIN THE MEANING OF MIL. R. EVID. 401(a)(2)(A) AND THE MILITARY ERRED WHEN HE RULED IT DID NOT APPLY TO APPELLANT'S COURT-MARTIAL IN LIGHT OF *UNITED STATES V. ELLIOT*, 23 M.J. 1 (C.M.A. 1986).

II. WHETHER THE COURT-MARTIAL CONVENED BY THE COMMANDER, 7TH ARMY TRAINING COMMAND, HAD PROPER JURISDICTION WHEN CHARGES WERE IMPROPERLY REFERRED TO TRIAL "IN ACCORDANCE WITH ARTICLE 19(b), UCMJ," IN BLOCK 14 OF THE CHARGE SHEET AND IN TRIAL COUNSEL'S ANNOUNCEMENT DURING ARRAIGNMENT OF APPELLANT.

III. WHETHER APPELLANT'S CONVICTION FOR CHARGE II AND ITS SPECIFICATION IS FACTUALLY AND LEGALLY INSUFFICIENT, WHERE THERE WERE SIGNIFICANT CREDIBILITY ISSUES IN THE VICTIM'S TESTIMONY, OUTCRY WITNESSES TESTIFIED INCONSISTENTLY WITH THE VICTIM'S REPORT, THE VICTIM'S MINOR INJURIES WERE NOT CORROBORATED, AND EYE WITNESSES TESTIFIED THEY DID NOT WITNESS AN OFFENSIVE TOUCHING.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on February 2, 2024.

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