

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Docket No. ARMY 20230100

Staff Sergeant (E-6)
DAVID K. MYERS
United States Army,
Appellant

Tried at Fort Benning¹ Georgia, on
6 October 2022, 9 December 2022,
27-28 February 2023, and 2 March
2023 before a general court-martial
appointed by the Commander,
Maneuver Center of Excellence,
Lieutenant Colonel Trevor Barna,
military judge, presiding.

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

¹ At the time of trial, the installation was named Fort Benning. Fort Benning was officially redesignated as Fort Moore on 11 May 2023. *See* <https://www.armytimes.com/news/your-army/2023/05/12/halfway-through-base-name-changes-business-as-usual-across-the-army/>.

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Assignments of Error²

I.

WHETHER THE EVIDENCE SUPPORTING APPELLANT'S CONVICTION WAS LEGALLY AND FACTUALLY SUFFICIENT WHEN THE EVIDENCE FAILED TO LINK APPELLANT TO THE CHARGED ACTUS REUS AND/OR HOW THAT ACTUS REUS ENDANGERED THE CHILDREN.

II.

WHETHER THE MILITARY JUDGE ERRONEOUSLY FOUND THAT LAW ENFORCEMENT'S ENTRY INTO APPELLANT'S HOME WAS OBJECTIVELY REASONABLE UNDER THE EMERGENCY AID EXCEPTION TO THE FOURTH AMENDMENT.

Statement of the Case

On 28 February 2023, a military judge found appellant, contrary to his pleas, guilty, by exceptions, of three specifications of child endangerment, in violation of Article 119b, Uniform Code of Military Justice, 10 U.S.C. § 919b [UCMJ]. (R. at 576; Statement of Trial Results [STR]). The military judge sentenced appellant to 90 days of confinement for each specification, to run consecutively, for a total of

² The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. Should this Court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

270 days; reduction to the grade of E-1; and a bad-conduct discharge. (R. at 674).

On 13 March 2023, the convening authority approved the findings and sentence as adjudged and disapproved appellant's request for deferment of reduction in grade and automatic forfeitures, as well as his request for waiver of automatic forfeitures. (Action). On 14 March 2023, the military judge entered judgment. (Judgment).

Statement of Facts

A. Military Police Find Appellant's Unattended Children Locked in Their Rooms on 15 July 2022

This case began with a call to 911. On 15 July 2022, the Fort Benning military police, led by Detective PT, were dispatched to appellant's home in response to a 911 report of appellant's children having been left unattended at the home. (R. at 20–21, 257–259). Upon arrival, the military police found no cars in the driveway. (R. at 20–21, 64, 259). No lights appeared to be on inside the house. (R. at 259). The military police knocked on the front door and rang the doorbell, but no one answered. (R. at 21, 286–87).

Detective PT also spoke directly to the 911 caller, who, according to Detective PT, was "adamant" that appellant's young children had been left unattended inside the house. (R. at 21, 260). The caller also indicated that feces was scattered throughout the home and that the children were locked in their rooms, with the doorknobs turned around so that they could only be unlocked from

the outside. (R. at 22, 260).

After Detective PT spoke to the 911 caller, the military police began walking around the perimeter of the house. (R. at 22, 260–61). While they were surveying the property, a young boy appeared in one of the windows:

He was naked, dirty, very dirty; hair looked like it was matted together. The window he was at was also dirty. He was – kind of had his hands on the window and wouldn't respond to just the basics, you know, trying to get him to verbally respond or say anything, do anything. He just kept looking with his hands upon the window at us.

(R. at 23; *see also* R. at 260–61).³ Detective PT considered seeing the boy at the window “an immediate call for alarm” and assessed the situation to be an emergency. (R. at 23, 262). Detective PT was calling the military police dispatch to request emergency medical services when appellant pulled into the driveway. (R. at 24–26, 262).

Appellant unlocked the front door to the house and let the military police officers inside.⁴ (R. at 262). Upon entering, the military police were confronted by the strong odor of feces and urine. (R. at 263, 290). Appellant led the military

³ Another military police officer, SGT JS, also recalled seeing a boy in the window, but he testified that the boy was not touching the window and waived to the military police. (R. at 288).

⁴ On appellant's motion, the military judge found that appellant's consent to law enforcement's initial entry into the house was not voluntary, but that it was justified by exigent circumstances. (App. Ex. VIII at 8–9).

police upstairs to the children's rooms. The stairway had piles of feces on it. (R. at 300). Appellant walked upstairs and first unlocked the door to his son DKM Jr.'s room, which was locked from the outside, with the doorknob having been reversed from its typical position. (R. at 263, 291). Detective PT stated:

I observed the nude young man come out, covered in feces, hair matted, long, greasy looking; and [appellant] allowed him to come out of the room at that point.

To be honest, he was almost . . . animal like, like you would let an animal out of a cage. He was ready to get out, . . . non-verbal. He just kept grunting.

(R. at 264).

Detective PT observed that DKM Jr.'s room was in "horrible condition." (R. at 265). "The entire room was completely trashed with more feces, dirt; again, no sheets and a blanket. The furniture was turned around backwards up against the windows. All the toys in the room were – it appeared he may have smeared feces all on the toys, on the bed, on the walls, empty wrappers of granola bars and some other food products all over the place." (*Id.*). SGT JS also testified regarding several photos he took in the house, including a photo showing a dresser covered in feces. (R. at 304) (discussing Pros. Ex. 1).

After releasing DKM Jr. from his room, appellant led Detective PT to the room occupied by his daughters, ELM and CEM. The hallway connecting the two rooms "was covered in feces. There was a litter box that was half full of feces.

Throughout the hallway it was piles of dog feces from one end to the other.” (R. at 266). Upon reaching his daughters’ room, appellant unlocked the door, which was also locked from the outside, with the doorknob having been reversed from its typical position. (R. at 265–66). The girls were wearing diapers that were heavy with feces and urine. (R. at 266). They appeared to be emaciated; their hair was matted, greasy, and dirty. (R. at 267). Like DKM Jr., both ELM and CEM were non-verbal; Detective PT testified that “they were only just grunting. None of them spoke a word the whole time we were there.” (*Id.*).

The girls’ room was in a condition similar to the room belonging to DKM Jr. “They had like a kitchen set that you would give a little kid [that was] covered in feces as well; dirt and trash throughout the room; and again, the food wrappers, the granola bar wrappers excessive all throughout the room.” (*Id.*). Detective PT testified that, based on his experience, the accumulation of feces and garbage he observed in the children’s rooms could not have happened in only a few hours. (R. at 267–68).

After releasing the children from their locked rooms, appellant took them downstairs. (R. at 268). Emergency medical services [EMS] arrived and immediately determined that the children should be transported to the hospital. (R. at 269). Appellant’s wife, RM, also arrived at the house at around the same time. (*Id.*).

Late in the evening on 15 July 2022, appellant called SSG ZH, a fellow drill sergeant. Appellant said to SSG ZH, “I fucked up. I can’t tell you exactly what happened right now, but I need you to tell me you can watch my kids.” (R. at 336).

B. Observations of the Children’s Behavior

SSG ZH’s wife, RH, picked appellant’s children up from the hospital. At the hospital, RH observed that the children’s hair was matted and that their “hands and faces were brown” and appeared to be covered in feces. (R. at 362). After being released from the hospital, the children were taken to SSG ZH’s and RH’s home. (R. at 337). RH bathed the children. ELM, approximately five years old, was covered in feces, including dried feces stuck to her bottom, and she had a hair tie stuck in her matted hair. (R. at 365). ELM also had clumps of headlice on her reddened scalp, “like a little group, like a little nest [of headlice] in different spots around her scalp.” (R. at 366). CEM, approximately three years old, also had a hair tie stuck in her hair, headlice on her scalp—“it seemed to have more of the white pockets of headlice than [ELM’s] did”—and open sores on her bottom. (R. at 367). CEM did not speak; she grunted. (R. at 367–68). RH did not observe that DKM Jr., approximately two years old, had headlice on his scalp, but she noticed

that his penis and bottom were extremely red. (R. at 368).⁵ ES, a military spouse and nurse with several years of experience, helped RH bathe the children on 16 July 2022. ES observed headlice on all three children, and testified to the state of their scalps: “They were very red and irritated, skin flakes present in addition. And then there were also in some areas of the scalp parts of feces that [were] matted into some of the hair roots within the scalp as well. That was in yet again varying degrees for the children.” (R. at 415).

SSG ZH observed that the children “never spoke. . . . They just communicated . . . with their hands and by grunting and everything.” (R. at 339). The children were also “really dirty.” (*Id.*). When SSG ZH and RH fed the children peanut butter sandwiches that night, each child reacted in a different way:

The youngest, the boy, he would take his sandwich and his cup, and he would take a bite, and then he would just throw it. Same thing with his drink; he’d take a drink and toss it. The middle – middle girl, she would eat from – she – her plate was in front of her at the table and she would set it down on the floor and got on all four – all fours and ate it from the top down. And the oldest, she would pick it up and just walk around the house and eat the sandwich.

(R. at 340, 369–70). The next day at breakfast, SSG ZH and RH curtailed the amount of food the children could consume, fearing that eating too much would

⁵ At trial, several photos depicting the children’s physical condition were received in evidence. (R. at 383–88).

make them sick. (R. at 341, 371).

SSG ZH observed that appellant's children appeared to be developmentally delayed: "they weren't on par with where my kids were when they were at that age. It just didn't seem – it didn't seem like a level playing field from when my kids were 3 and 5. . . It seemed almost like they were – their bodies were above their minds." (R. at 343). RH also observed aberrant behavior, such as ELM remaining face down in a fetal position behind a chair and refusing to move. (R. at 372). ES, the nurse, observed that "[t]he children notably struggled with communication and an inability to follow instructions or to understand instructions, and an inability to answer questions as well, and in times of perceived frustration, would start to yell or scream as a form of expression." (R. at 417).

C. Expert Testimony

At trial, the government offered expert testimony from two witnesses. Dr. JD was qualified as an expert in the field of child forensic psychology (R. at 483). Dr. SD was qualified as an expert in the field of pediatric medicine. (R. at 526).

In preparation for her testimony, Dr. JD reviewed the police reports in the case; a psychological evaluation of RM; psycho-educational and speech evaluations of ELM; an evaluation of DKM Jr.; and a letter from the children's therapist. (R. at 484). Dr. JD also spent time with appellant's children and interviewed their grandparents, and she participated in pretrial interviews of other

witnesses. (*Id.*).

Dr. JD opined that appellant's children "were experiencing highly pathogenic care based on the conditions of the home and the conditions of the children when they were found[,]" which she defined as "[b]asically, highly neglectful, inadequate, unsafe care that can lead to significant issues for a child if it is maintained. (R. 485). She testified that "neglect is a form of trauma," which can lead to physical changes to the formation of children's brains, emotional harm, developmental impact, and decreased academic performance. (R. at 486–88). Dr. JD personally observed some of the effects of the neglect on appellant's children: the girls—ELM and CEM—were delayed in being toilet-trained; all three children exhibited speech delays, with their speech being "nowhere near the level it should be for each of their ages"; all three children exhibited social abnormalities, such as communication using grunts and hand gestures; ELM had difficulty adjusting to basic routines at school; and all three children had difficulty controlling their emotions. (R. at 489–91).

Dr. SD testified regarding headlice and age-based risks to health. With respect to headlice, Dr. SD testified that pervasive headlice "nits"—eggs laid by female headlice insects—found on a person's scalp indicates that the headlice have "been there for a while." (R. at 530). With respect to age-based levels of risk, Dr. SD testified that generally, older children are less prone than younger children to

infection and less likely to suffer physical or emotional harm due to being left unattended. Older children have stronger levels of immunity; thus, a two-year-old child would be at a greater risk of infection than a five-year-old child. (R. at 529). Similarly, younger children are generally more dependent on caregivers for physical and emotional needs than older children. (R. at 533).

D. Prior Incidents Between 5 May 2022 and 15 July 2022

15 July 2022 was not the first time appellant's children were left unattended, locked in their rooms. A neighbor, EH, testified that on 5 May 2022, appellant's wife, RM, asked her to watch the children, as she and appellant were going out to dinner. (R. at 196). Upon entering appellant's home, EH immediately noticed a strong odor reminiscent of cat urine or ammonia. (R. at 196).

While appellant listened, RM told EH that the children were in their rooms and instructed EH "not to let them out"; RM further told EH to stay on the first floor of the house. (R. at 197–98). Some time after appellant and RM left, however, EH went upstairs to check on the children. (R. at 199) ("I have toddlers and I wouldn't just leave them unsupervised for hours."). EH testified that both DKM Jr.'s and his sisters' doors were locked, with the doorknobs having been turned around so the locks could only be engaged from the outside. (R. at 200–201). Upon unlocking his door, EH noticed the state of DKM Jr.'s room: ". . . the bare mattress on the floor, no bedding, just trash on the floor . . . broken like the

little thin glass Christmas ornaments all over the floor where he was playing” (R. at 200.) DKM Jr.’s body was dirty (“He just wasn’t clean.”) and he had a full diaper; EH looked for, but could not find, a clean diaper with which to replace it. (*Id.*).

After playing with DKM Jr. and returning him to his room, EH unlocked the door to the girls’ room, which EH observed was in “similar shape” as DKM Jr.’s room: “. . . they had bare mattresses. The walls were drawn all over, just dirt – just like trash and just stuff all over the floor.” (R. at 201). EH changed the girls’ pullup diapers and played with them downstairs for a time before returning them to their room. (R. at 205–206). The smell of the “filth” in the home eventually forced EH to wait for appellant and RM on the front porch. (R. at 206).⁶ Appellant and RM arrived home approximately two hours later than they told EH to expect them to return. (*Id.*). Some time after EH’s experience at appellant’s home on 5 May 2022, EH testified that she and her husband called a child welfare agency to report the incident, but the calls were not returned. (R. at 217).

EH testified that, after 5 May 2022, she observed appellant and his wife

⁶ Appellant’s claim that EH simply “decided to finish out her babysitting shift on appellant’s front porch,” Appellant’s Br. At 21, is incorrect. EH was driven out of appellant’s home by the stench of urine and feces, during which time the children were unattended in their rooms, per the instructions given by RM while appellant stood by and listened. (*See* R. at 197–98).

leaving in their respective vehicles at various times “several times a week,” but she never saw the children with either of them. (R. at 210). EH initially observed another car at appellant’s house when appellant’s and RM’s cars were both gone, but EH testified that at some point in early June 2022, that car stopped coming to appellant’s home. (R. at 211–12).⁷

Assignment of Error I

WHETHER THE EVIDENCE SUPPORTING APPELLANT’S CONVICTION WAS LEGALLY AND FACTUALLY SUFFICIENT WHEN THE EVIDENCE FAILED TO LINK APPELLANT TO THE CHARGED ACTUS REUS AND/OR HOW THAT ACTUS REUS ENDANGERED THE CHILDREN.

Standard of Review

The Court reviews questions of legal and factual sufficiency *de novo*.

United States v. Scott, No. ARMY 20220450, 2024 CCA LEXIS 126, at *3 (Army Ct. Crim. App. 14 Mar. 2024) (corrected copy on remand). “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. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017).

⁷ EH’s husband, 1SG TH, also observed no cars being present at appellant’s home on 13 July 2022. (R. at 240).

Pursuant to Article 66(d), UCMJ, 10 U.S.C. § 866(d), the Court may weigh a conviction’s factual sufficiency once appellant has made a “specific showing of a deficiency in proof.” Art. 66(d), UCMJ.⁸ Following such a showing, “the Court may weigh the evidence and determine controverted questions of fact” while giving “appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence” and “appropriate deference to findings of fact entered into the record by the military judge.” Art. 66(d)(1)(B)(ii), UCMJ. If, as a result of the Court’s review, “the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.” Art. 66(d)(1)(B)(iii), UCMJ; *see also Scott*, 2024 CCA LEXIS 126, at *4–*5 (applying factual sufficiency standard).⁹

⁸ Because the offenses at issue in this case occurred after 1 January 2021, the amendments to Article 66, UCMJ enacted as part of the Fiscal Year 2001 National Defense Authorization Act apply to this case. *See Scott*, 2024 CCA LEXIS 126, at *3–*4 (citing Pub. L. No. 116-283, § 542(b), 134 Stat. 3611-12).

⁹ In *Scott*, the Court recognized that, as amended, Article 66, UCMJ “makes it more difficult for one to prevail on appeal,” than under previous versions of the Article, but the Court stated that it would continue to apply the *de novo* standard of review. *Id.* at 4.

Applicable Law

Appellant was convicted of three specifications of child endangerment by culpable negligence. (STR). Under Article 119b, UCMJ, the offense of child endangerment has three elements:

- (1) That the accused had a duty for the care of a certain child;
- (2) That the child was under the age of 16 years; and
- (3) That the accused endangered the child's mental or physical health, safety, or welfare through . . . culpable negligence.

Manual for Courts-Martial, United States (2019 ed.) [MCM], pt. IV, para. 59.b.

Appellant does not contest that he had a duty of care to his children, each of whom was under 16 years of age at the time of the offense; only the third element of child endangerment is at issue before the Court. The third element of the offense has two requirements: “(1) the accused’s acts or omissions must endanger the child’s safety; and (2) the accused’s mental state must be that of culpable negligence.”

United States v. Plant, 74 M.J. 297, 300 n.4 (C.A.A.F. 2015) (citation and quotation marks omitted).

To “endanger” means to subject a child to “a reasonable probability of harm.” MCM, pt. IV, para. 59.c.(4).¹⁰ In addition, “[a]ctual physical or mental

¹⁰ Federal courts have determined that “reasonable probability” is a fairly low standard, though somewhat more likely than “reasonable possibility.” *See, e.g.,*

harm to the child is not required. The offense requires that the accused's actions reasonably could have caused physical or mental harm or suffering." MCM, pt.

IV, para. 59.c.(3). The MCM defines culpable negligence as follows:

Culpable negligence is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. In the context of this offense, culpable negligence may include acts that, when viewed in the light of human experience, might foreseeably result in harm to a child. The age and maturity of the child, the conditions surrounding the neglectful conduct, the proximity of assistance available, the nature of the environment in which the child may have been left, the provisions made for care of the child, and the location of the parent or adult responsible for the child relative to the location of the child, among others, may be considered in determining whether the conduct constituted culpable negligence.

MCM, pt. IV, para. 59.c.(2). The age of the victim is also a factor in determining culpable negligence, with negligence toward younger children more likely to be considered culpable. MCM, pt. IV, para. 59.c.(5). Foreseeability is determined by considering "whether a reasonable person, in view of all the circumstances, would have realized the substantial and unjustifiable danger created by his acts." *United States v. Oxendine*, 55 M.J. 323, 325 (C.A.A.F. 2001) (citation omitted).

As with any offense, findings involving child endangerment may be based

Curry v. Burge, No. 03 Civ. 0901, 2004 U.S. Dist. LEXIS 23095, at *99 (S.D.N.Y. 17 Nov. 2004) ("The phrase 'reasonably probability,' despite its language, should not be confused with 'probable' or 'more likely than not.'") (citations omitted).

on direct or circumstantial evidence. Rule for Courts-Martial [RCM] 918(c). “Circumstantial evidence, standing alone or together with other evidence, can prove a fact necessary to establish an element of an offense beyond a reasonable doubt.” *United States v. Koth*, No. ARMY 20150179, 2017 CCA LEXIS 145, at *3-4 (Army Ct. Crim. App. 16 Mar. 2017) (citing RCM 918(c) discussion).

Argument

The Court should reject each of appellant’s arguments concerning factual and legal sufficiency, and it should therefore affirm the findings and sentence imposed by the military judge.

A. The Military Judge’s Findings by Exceptions

At the conclusion of trial, the military judge found appellant guilty of three specifications of Charge I (Article 119b, UCMJ); the military judge found appellant not guilty of Charge II (Article 134, UCMJ (animal neglect)). (STR). Each guilty finding—one for each of appellant’s three children—was entered by exceptions. For Specification 1, the military judge found appellant guilty of the following:

(Child Endangerment by Culpable Negligence - On or After 1 Jan 2019): In that Staff Sergeant David K. Myers, U.S. Army, at or near Fort Benning, Georgia, on divers occasions between on or about 5 May 2022 and on or about 15 July 2022, had a duty for the care of ELM, a child under the age of 16 years, and did endanger the mental health, physical health, and welfare of said ELM, by locking the said ELM in a bedroom

with no adult present in the home while exposed to animal and human feces and other unsanitary conditions, and that such conduct constituted culpable negligence which resulted in harm, to wit: head lice.

(STR). For Specification 2, the military judge found appellant guilty of the following:

(Child Endangerment by Culpable Negligence - On or After 1 Jan 2019): In that Staff Sergeant David K. Myers, U.S. Army, at or near Fort Benning, Georgia, on divers occasions between on or about 5 May 2022 and on or about 15 July 2022, had a duty for the care of CEM, a child under the age of 16 years, and did endanger the physical health and welfare of said CEM, by locking the said CEM in a bedroom with no adult present in the home while exposed to animal and human feces and other unsanitary conditions, and that such conduct constituted culpable negligence which resulted in harm, to wit: head lice.

(STR). For Specification 3, the military judge found appellant guilty of the following:

(Child Endangerment by Culpable Negligence - On or After 1 Jan 2019): In that Staff Sergeant David K. Myers, U.S. Army, at or near Fort Benning, Georgia, on divers occasions between on or about 5 May 2022 and on or about 15 July 2022, had a duty for the care of DKM Jr., a child under the age of 16 years, and did endanger the physical health and welfare of said DKM Jr., by locking the said DKM Jr. unattended in a room with no adult present in the home while exposed to animal and human feces and other unsanitary conditions, and that such conduct constituted culpable negligence.

(STR). Thus, the military judge's finding of guilty as to Specification 3 differed from the finding as to Specifications 1 and 2 in that it did not find actual harm to DKM Jr.

B. Proof of Acts or Omissions Endangering the Children's Safety

The evidence at trial established, as required, that appellant's acts or omissions endangered his children's safety by locking them in their bedrooms with no adult present in the home while exposed to animal and human feces and other unsanitary conditions.

First, the government presented circumstantial evidence that appellant locked the children in their rooms. On 5 May 2022, appellant and his wife left the house together; after they left, EH went upstairs to find the children locked in their rooms, with the doorknobs turned around backward. (R. at 199–201). While this is not direct evidence that appellant himself locked the children's doors, direct evidence is not required. *See* RCM 918(c); *Koth*, 2017 CCA LEXIS 145, at *3-4. Appellant and RM left home that night with the children locked in their rooms, and appellant's acts—or his omissions—caused the doors to be locked. On 15 July 2022, the evidence established that appellant's children were locked in their rooms for an extended period of time while appellant and RM were away from home, this time, according to RM, so that she and appellant could pick up a vehicle. (App. Ex. I-b at 2).¹¹

¹¹ Alternatively, even if this Court finds the circumstantial evidence presented at trial did not establish that appellant's acts or omissions resulted in the children being locked in their bedrooms, the military judge also heard evidence of appellant

Second, appellant's actions and statements on 15 July 2022 provided additional circumstantial evidence that his acts or omissions caused his children to be locked in their rooms. Detective PT testified that when appellant led the military police upstairs to the children's bedrooms, he simply unlocked the doors and let the children out. (R. at 263–66). Appellant knew exactly where the children were, he knew that the doors were locked, and he knew how to unlock them; he expressed no surprise at finding his children locked in their bedrooms. (*Id.*). And when appellant spoke to one of his fellow drill sergeants late on 15 July 2022, appellant demonstrated consciousness of his own guilt, telling SSG ZH, “I fucked up.” (R. at 336). Appellant understood that he was responsible for violating the duty of care he owed to his children; he acted—or omitted to act—in a manner that resulted in his children being locked in their rooms unsupervised.¹²

acting in concert with RM. (*See* R. at 199-201; App. Ex. 1-b at 2). This evidence is sufficient to uphold appellant's conviction on the basis of vicarious liability. *See United States v. Browning*, 54 M.J. 1, 7 (C.A.A.F. 2000) (citing Art. 77, UCMJ, and noting its consistency “with prevailing federal practice, which permits prosecution on a vicarious liability theory even if aiding and abetting or conspiracy are not pled in the indictment”).

¹² Moreover, even if this Court finds the evidence insufficient to establish appellant's responsibility for locking the doors of his children's rooms, such a variance between pleadings and proof would not require overturning appellant's conviction. *See United States v. Williams*, No. ARMY 20140604, 2017 CCA LEXIS 178, at *4-5 (Army Ct. Crim. App. 21 Mar. 2017) (“[T]o prevail on a fatal variance claim, an appellant must show both that the variance was material and that he was substantially prejudiced thereby.”) (quoting *United States v. Marshall*,

Third, the evidence of endangerment—that appellant subjected his children to “a reasonable probability of harm,” physical or mental—was overwhelming. “Actual physical or mental harm to the child is not required. The offense requires that the accused’s actions reasonably could have caused physical or mental harm or suffering.” MCM, pt. IV, para. 59.c.(3). Moreover, failures to act may give rise to endangerment. *See Koth*, 2017 CCA LEXIS 145, at *7-8 (“When appellant failed to seek medical care for her ten-year-old son after he sustained visible injuries covering 8% of the surface area of his body, her negligent omissions endangered her son—that is, it resulted in a reasonable probability that her son would be harmed.”).

Numerous witnesses described the state of appellant’s home, including the rooms in which his children were locked and left unattended. The smell was overpowering, and there were piles of feces and dirty diapers in numerous places in the house. (R. at 263, 266, 406). In the children’s rooms, the walls and

67 M.J. 418, 420 (C.A.A.F. 2009)). A material variance is one that substantially changes the nature of the offense, increases the seriousness of the offense, or increases the punishment of the offense, and prejudice results from risk of future prosecution for the same conduct, depriving appellant of the ability to prepare adequately for trial, or denying appellant the opportunity to defend against the charged offense. *Id.* Here, assuming a material variance, appellant suffered no prejudice, as the record shows that he is protected from double jeopardy and that he was well-prepared to defend against the charge on which he was tried and convicted.

furniture were smeared with feces, trash was strewn about, and sharp objects were on the floor. (R. at 200, 265–68). The children themselves were filthy, with matted hair, discolored skin, full diapers, and rashes and irritation around their behinds and genital areas. (R. at 200, 367–68). The children were distinctively non-verbal—several witnesses described them communicating with grunts—and did not appear to be toilet-trained. (R. at 195, 264, 407). They had emotional outbursts and appeared to have been denied adequate food. (R. at 268–69). Any of these things “reasonably could have caused harm” to appellant’s children; taken together, there is no real question that a reasonable probability of harm was proven beyond a reasonable doubt.¹³

Although Article 119b, UCMJ, does not require the government to establish actual harm, with respect to appellant’s daughters CEM and ELM and Specifications 2 and 3, the government did just that. Both girls had pervasive headlice, with nits scattered across their irritated scalps, indicating a long-festering problem. (R. at 414, 530–31). While appellant makes much of Dr. SD’s testimony that headlice can only be transmitted from one person to another, *see* Appellant’s Br. at 27–28, this misses the point: appellant caused harm to CEM and ELM due

¹³ The military judge found appellant guilty of endangering ELM’s “mental health, physical health, and welfare” and guilty of endangering CEM’s and DKM Jr.’s “physical health and welfare.” (STR). The evidence presented at trial provided ample proof of, at the very least, a reasonable probability of each type of harm.

to his failure to meet his duty of care when he left them in unsanitary conditions and did not treat their headlice infestations. Precisely how the headlice were transmitted to CEM and ELM is immaterial; they were harmed by the lingering and obvious¹⁴ presence of headlice. No further proof is required, and this Court should affirm the military judge's findings on each Specification.

C. Proof of Culpable Negligence

The evidence at trial also proved that appellant acted with culpable negligence. Appellant plainly disregarded (at the very least) the foreseeable consequences of leaving children locked in their rooms surrounded by filth. Any reasonable person in appellant's circumstances—a noncommissioned officer in his late twenties, with three young children—would understand the reasonably probable harms associated with such acts and omissions.

In addition, the president has provided guidance on how to assess reasonable foreseeability. MCM, pt. IV, para. 59.c.(2). That guidance makes clear that the proof at trial established that appellant's conduct fits squarely within scope of Article 119b, UCMJ. First, the age and maturity of appellant's children: all three children were under five years of age and unable to care for themselves or each

¹⁴ When the children were removed from appellant's home, not only were the headlice infestations obvious (R. at 412–15), so was the treatment. The children's temporary caregivers immediately began treating the headlice infestations with shampoo and combs. (*Id.*).

other. Second, the nature of the environment in which they were left and the provisions made for their care: the unsanitary and unsafe environment in which appellant left his children was established through several witnesses' testimony as well as photographic evidence, as was the fact that such conditions persisted for a long period of time. (R. at 297–315; Pros. Ex. 1). Third, the location of the parent or adult responsible for the children: appellant lived in the house; he saw, every day when he came home, the conditions in which his children were living. This evidence establishes that appellant acted with, at the very least, culpable negligence.

Thus, appellant's conviction was both legally and factually sufficient. When viewed in the light most favorable to the prosecution and giving appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence, the evidence at trial was sufficient for any rational trier of fact to have found the essential elements of a violation of Article 119b, UCMJ. This Court should therefore affirm the military judge's findings and sentence.

Assignment of Error II

**WHETHER THE MILITARY JUDGE
ERRONEOUSLY FOUND THAT LAW
ENFORCEMENT’S ENTRY INTO APPELLANT’S
HOME WAS OBJECTIVELY REASONABLE
UNDER THE EMERGENCY AID EXCEPTION TO
THE FOURTH AMENDMENT.**

Standard of Review

The Court reviews a military judge’s ruling on a motion to suppress for abuse of discretion, and it considers the evidence in the light most favorable to the prevailing party. *United States v. Nelson*, 82 M.J. 251, 255 (C.A.A.F. 2022) (citing *United States v. Mitchell*, 76 M.J. 413, 417 (C.A.A.F. 2017)). “An abuse of discretion occurs when a military judge’s decision is based on clearly erroneous findings of fact or incorrect conclusions of law.” *United States v. Hernandez*, 81 M.J. 432 (C.A.A.F. 2021) (citing *United States v. Erikson*, 76 M.J. 231, 234 (C.A.A.F. 2017)). The abuse of discretion standard “is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.” *United States v. Eugene*, 78 M.J. 132, 134 (C.A.A.F. 2018) (citation and internal quotation marks omitted). It is a standard that “recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range.” *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) (citation omitted).

Additional Facts

On 5 December 2022, appellant moved to suppress his statements to the military police and evidence (including both personal observations and photographs) gathered by the military police after entering appellant's home on 15 July 2022. The government filed its brief in opposition on 8 December 2022. After considering both submissions, the military judge prepared findings, conclusions, and a ruling on the motion, which he entered on 3 February 2023.¹⁵

The military judge considered several aspects of the search, deciding first that appellant's consent to law enforcement's entry into, and search of, appellant's home was not voluntary. (App. Ex. VIII at 8–9). The military judge determined, however, that the military police “had an objectively reasonable basis to believe that very young children were home alone under conditions that posed an immediate danger to their safety.” (*Id.* at 9). The military judge noted that the military police “responded to a [911] call that three young children were home alone and were being kept in unsanitary conditions.” (*Id.*). The military judge continued:

This information was confirmed when the officers personally observed one child who appeared to be home alone, naked, and covered in filth. When [appellant] drove up to the house

¹⁵ Appellant's motion is found at Appellate Exhibit V, the government's opposition is found at Appellate Exhibit VI, and the military judge's ruling is found at Appellate Exhibit VIII.

the suspicion that the children were alone was confirmed, not by the statements he made, but rather coming from somewhere other than the home. While the children were no longer “alone” as their father . . . was now home and could see to their care, whether the children were in immediate harm or needed help was unknown to the officers, as well as to [appellant].

(*Id.*). Based on these findings, as well as the recitation of facts found earlier in his ruling, (*see id.* at 1-4), the military judge concluded that entry into appellant’s home was objectively reasonable under the emergency aid exception to the Fourth Amendment’s warrant requirement. “Based on all the evidence known to the officers it is reasonable to conclude that the officers needed to ensure that the children were safe and that they did not require immediate emergency care.” (*Id.* at 9). Lastly, the military concluded that, following the initial search to establish the children’s safety, the military police stopped searching and asked appellant for consent to search the home. (*Id.* at 10). Appellant consented by signing a consent-to-search form, an act which the military judge found to be voluntary. (*Id.* at 10–11).

Law and Argument

The military judge did not abuse his discretion in denying appellant’s motion to suppress. The “ultimate touchstone” of the Fourth Amendment is “reasonableness.” *Michigan v. Fisher*, 558 U.S. 45, 47 (2009) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). Thus, while warrantless home searches

are presumptively unreasonable, the warrant requirement is subject to exceptions for certain exigencies, including the need to “render emergency assistance to an injured occupant or to protect an occupant from imminent injury.” *Brigham City*, 547 U.S. at 403 (citations omitted).

Searches conducted pursuant to the emergency aid exception are reasonable under the Fourth Amendment if, viewed objectively, the circumstances presented to law enforcement justify the action. *Id.* at 404 (citing *Scott v. United States*, 436 U.S. 128, 138 (1978)). If law enforcement had “‘an objectively reasonable basis for believing’ that ‘a person within [the house] is in need of immediate aid,’” the emergency aid exception applies. *Fisher*, 558 U.S. at 47 (quoting *Brigham City*, 547 U.S. at 404–405 and *Mincey v. Arizona*, 437 U.S. 385, 392 (1978)). Objective reasonableness does not turn on “ironclad proof” of a serious or life-threatening injury; nor does it require that immediate aid was actually required: “Only when an apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances.” *Id.* at 414; *see also Brigham City*, 547 U.S. at 406 (“The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties.”). Courts consider the totality of the circumstances in determining whether law enforcement officers faced an emergency that justified acting without a warrant. *Brigham City*, 547 U.S. at 406.

A. The Military Police's Entry Into Appellant's Home Was Objectively Reasonable

Appellant invites the Court to go well beyond the abuse of discretion standard and to supplant the military judge's discretion over evidentiary matters with a post-hoc, subjective analysis of law enforcement's actions. The Court should decline that invitation.

As noted in the military judge's ruling on appellant's suppression motion, the military police responded to appellant's home on the basis of an anonymous 911 call reporting that children had been left unattended at the home. (App. Ex. VIII at 2; R. at 43–44, 257–58). Thus, from the beginning, law enforcement was presented with what reasonably appeared to be an emergency situation. Courts have long recognized that such emergencies require quick action, often “based on hurried and incomplete information. [Police] actions, therefore, should be evaluated ‘by reference to the circumstances then confronting the officer, including the need for a prompt assessment of sometimes ambiguous information concerning potentially serious consequences.’” *United States v. Holloway*, 290 F.3d 1331, 1339 (11th Cir. 2002) (quoting 3 Wayne LaFare, *Search and Seizure* § 6.6(a), at 391 (3d ed. 1996)). 911 calls “are distinctive in that they concern contemporaneous emergency events, not general criminal behavior.” *Id.* See also *United States v. Richardson*, 208 F.3d 626, 630 (7th Cir. 2000) (“A 911 call is one

of the most common—and universally recognized—means through which police and other emergency personnel learn that there is someone in a dangerous situation who urgently needs help.”). Even erroneous 911 calls may serve as the basis for a warrantless search. *See Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir. 1963) (Burger, J.) (“When policemen, firemen or other public officers are confronted with evidence which would lead a prudent and reasonable official to see a need to act to protect life or property, they are authorized to act on that information, even if ultimately found erroneous.”).

The military police’s understanding of the urgency of the situation was reinforced when Detective PT spoke directly to the 911 caller. The caller indicated familiarity with the house in which appellant and his family lived, gave the young children’s approximate ages, and told Detective PT that the children were often left home unattended, locked in their bedrooms, in unsanitary conditions. (App. Ex. VIII at 9; R. at 22). The caller also said appellant and his wife had left on 15 July 2022, but that no children were seen leaving. (App. Ex. VIII at 9; R. at 21). As noted in the military judge’s ruling, “[t]his information was confirmed when the officers personally observed one child who appeared to be home alone, naked, and covered in filth.” (App. Ex. VIII at 9). Seeing the child in the window was important to Detective PT, as he considered it confirmation of the 911 call:

At this point, we’re really concerned because it kind of

confirmed the complaint's report that the children were unattended at the residence. We immediately contacted 911 for EMS response to show up, and we walked around to the front of the residence to come up with a plan to make entry into the residence.

(R. at 261–262). Appellant arrived on the scene shortly thereafter, confirming the 911 caller's allegation that the children were home unattended. (App. Ex. VIII at 9). Thus, the military police had “concrete facts” supporting the determination that this was an emergency: they knew multiple young children were home unattended; they had seen one of the children, who appeared to be “filthy,” but they could not account for appellant's other two children. As the military judge concluded, it was objectively reasonable, based on the totality of the circumstances presented to the responding officers, to conclude that one or more children inside appellant's home required immediate assistance.

B. Numerous Courts Have Held That Concerns About Child Welfare Can Constitute Exigent Circumstances

Although appellant points to cases in which concerns about the safety of children was not enough to overcome the Fourth Amendment's warrant requirement, numerous federal and state courts have recognized that concerns about child welfare can—and regularly do—constitute exigent circumstances. While such precedent is not binding on this Court, it strongly counsels against finding that the military judge's decision to follow those courts was an abuse of the

broad discretion entrusted to trial judges on evidentiary matters.

The Ninth Circuit Court of Appeals expressly applied the emergency aid exception in a case involving a nine-year-old boy left unattended by his mother. *See United States v. Bradley*, 321 F.3d 1212 (9th Cir. 2003). In *Bradley*, officers received information from an arrestee that her child was home with a friend. *Id.* at 1213. When police went to the home, however, their knocks went unanswered. *Id.* at 1214. The officers tried again, going to another friend's house where the child might have been staying, but still could not find him. *Id.* Eventually, police returned to the arrestee's home, entered through an unlocked door, and found the child, alone but safe. *Id.* The Ninth Circuit upheld the search as objectively reasonable, noting that the police knew the arrestee was not caring for the child but did not know the conditions inside the house. *Id.* at 1215 ("The possibility of a nine-year-old child in a house in the middle of the night without the supervision of a responsible adult is a situation requiring immediate police assistance.") (citing cases). *See also Wolf v. City of Stockton*, 2010 U.S. Dist. LEXIS 24755, at *20 (E.D. Cal. 4 Mar. 2010), *aff'd*, 441 F. App'x 481 (9th Cir. 2011) (immediate aid exception applied to law enforcement search of van based on report from child's father that child was living in van) (citing *Bradley*); *Gong v. City of Alameda*, No. C 03-05495 TEH, 2007 U.S. Dist. LEXIS 8485, at *15-16 (N.D. Cal. 17 Jan. 2007) (finding that police could reasonably conclude child was inside the home and

“given the allegations of abuse and neglect . . . could reasonably conclude that [the child] could be in an unsafe situation and in need of immediate aid.”).

Numerous other federal courts have reached the same conclusion. In *Callahan v. City of New York*, 90 F. Supp. 3d 60 (E.D.N.Y. 2015), for example, police entered plaintiff’s room in a shelter based on a 911 report that children had been left unattended in the room. The district court held that “[t]he harm of being left alone was therefore not only an imminent risk, it was ongoing. This is sufficient to create an exigent circumstance which, when coupled with the probable cause established [by the 911 call], permitted the officers to lawfully enter Plaintiff’s room.” 90 F. Supp. 3d at 70.¹⁶ Similarly, in *Hunsberger v. Wood*, 570 F.3d 546, 555 (4th Cir. 2009), the Fourth Circuit found exigent circumstances where a teenage girl inside a vacant home was not answering her mobile phone. 570 F.3d at 555 (“It turned out that [the teenager] was not in immediate danger, but we cannot judge [the] search based on what we know in hindsight. At the time of the search, there was reason to think she needed help. Under these circumstances, a reasonable officer could conclude that prompt entry was necessary in order to protect the . . . home from potential damage and to locate a missing girl who might

¹⁶ Like many cases in this area of law, *Callahan* arose pursuant to a civil rights claim under 42 U.S.C. § 1983. In finding the existence of exigent circumstances, the court granted the government defendants’ motion for summary judgment, terminating the litigation. *Id.*

be in harm’s way.”). *See also, e.g., United States v. Tepiew*, 859 F.3d 452, 457 (7th Cir. 2017) (upholding search based on report of unspecified head injury to young child and stating, “one cannot deny that a one-year-old is a particularly vulnerable victim—he cannot speak, he cannot protect himself, and he certainly cannot seek help on his own”); *United States v. Reid*, No. 4:11-CR-499 JCH/DDN, 2012 U.S. Dist. LEXIS 24523, at *21 (E.D. Mo. 7 Feb. 2012), *report and recommendation adopted*, 2012 U.S. Dist. LEXIS 24522, (E.D. Mo. 27 Feb. 2012), *aff’d*, 769 F.3d 990 (8th Cir. 2014) (police concern for the welfare of “unattended minor children gave them sufficient grounds to enter the residence in search of the children” prior to transporting their mother incident to arrest); *United States v. Tamborello*, No. CR10-0028, 2010 U.S. Dist. LEXIS 71313, at *17 (N.D. Iowa 15 Jul. 2010), *report and recommendation adopted*, 2010 U.S. Dist. LEXIS 85425 (N.D. Iowa 18 Aug. 2010) (finding exigent circumstances where, based on defendant’s “erratic behavior, a reasonable officer could have been concerned regarding the children’s well-being”).

State court judges have joined their federal brethren on this issue. *See, e.g., Laney v. State*, 117 S.W.3d 854, 863 (Tex. Crim. App. 2003) (“Although there was no immediate threat to the child’s safety or well-being, had the boy been left alone in the trailer while deputies took appellant away, there would have been a substantial risk of harm to the child.”); *State v. Peterson*, 543 S.E.2d 692, 696 (Ga.

2001) (“Knowledge or the reasonable belief that minor children in a residence are without adult supervision is an exigent circumstance that authorizes police entry to help those believed to be in need of immediate aid.”); *State v. Jones*, 937 P.2d 310, 318 (Ariz. 1997) (report that defendant had checked on welfare of children, “combined with the fact that she told them a suspicious story, gave the officers reasonable grounds to check the trailer to ensure the safety of the other children”); *State v. Plant*, 461 N.W.2d 253, 262 (Neb. 1990) (upholding warrantless search where “entering police officers had information from which they could reasonably conclude that two 4-year-old children and a 2-week-old infant were unaccounted for and had been left unattended for several hours”).

To be sure, some courts have found that evidence of unattended children, standing alone, does not constitute exigent circumstances. But even the cases relied upon by appellant demonstrate that the military judge’s finding of exigent circumstances here cannot be considered an abuse of discretion, as the military police responding to appellant’s home did have more than just evidence of unattended children. For example, in *Ford v. District of Columbia*, No. CV 13-1960 (RMC), 2016 U.S. Dist. LEXIS 107962 (D.D.C. 16 Aug. 2016), the district court distinguished the facts before it from cases in which warrantless entry was upheld “to assist unattended young children whom they knew were in danger,” including the Ninth Circuit’s decision in *Bradley*. 2016 U.S. Dist. LEXIS 107962,

at *11. In *Ford*, law enforcement only asserted “that they heard a baby crying, no one responded to their knocks, and they knew Ms. Ford was an attentive mother.”

Id. at *11–*12. In *United States v. Gillespie*, 332 F. Supp. 2d 923 (W.D. Va. 2004), the district court likewise found the search to be unreasonable:

An objectively reasonable officer, with knowledge that Ms. Gillespie had young children who may have been left alone and upon hearing the sound of crying children somewhere in an apartment building, would not assume that this rose to the level of an emergency which required immediate entry (especially if he had not taken steps to rule out adjoining apartments as the source of the crying).

332 F. Supp. 2d at 928. Lastly, in *Shattuck v. Anderson*, No. 2:19-cv-00428-JMS-MJD, 2021 U.S. Dist. LEXIS 24498 (S.D. Ind. 9 Feb. 2021), there was conflicting testimony about whether law enforcement spoke to Shattuck before forcing entry and whether law enforcement believed a child was home alone and in distress. 2021 U.S. Dist. LEXIS 24498, at *6–*34.

Here, in contrast to the cases relied upon by appellant, law enforcement had the “concrete facts” courts have required for findings of exigent circumstances. The military police arrived at appellant’s home on 15 July 2022 in response to a 911 call indicating that appellant’s children had been left unattended in unsanitary conditions. Detective PT saw one of the children in a window, viewed this as confirmation of the 911 caller’s report, and immediately determined that EMS should be summoned to the house. Finally, appellant arrived at the home,

confirming to Detective PT that the 911 caller was correct—the three young children had been left unattended. Although appellant may not agree that these facts constituted an emergency sufficient to justify warrantless entry, they form an objectively reasonable basis for reaching the opposite conclusion, and the military judge did not abuse his discretion in reaching it.

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and the sentence.



JONATHAN P. ROBELL
LTC, JA
Appellate Counsel, Government
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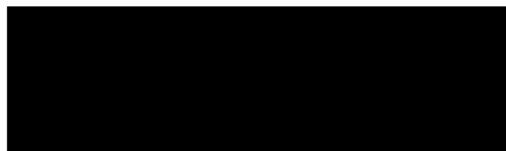
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CERTIFICATE OF SERVICE, U.S. v. MYERS (20230100)

I hereby certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at *usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@army.mil* on the 4th day of April, 2024.



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