

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**REPLY BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20230100

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

Appellant

Tried at Fort Moore, Georgia, on
6 October 2022, 9 December 2022,
27-28 February 2023, 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

Assignments 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**

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 8 December 2023, appellant filed an initial brief. On 4 April 2024, the government responded. This is appellant's reply.

Law and Argument

A. The government cannot escape the obvious – it does not know what happened inside appellant's home.

It is the journey – not the destination – that is at issue for the first assignment of error. The evidence is unambiguous: on 15 July 2020, law enforcement found appellant's children locked in their bedrooms. But what the government cannot answer is who locked them up, when they were locked up, or how frequently they were locked up – nor can they show appellant knew they were locked up prior to 15 July 2020 when he also discovered them.

Based on the evidence presented at trial, the government could not explain where appellant was prior to law enforcement's discovery.

While circumstantial evidence can prove guilt, here, the government presented weak circumstantial evidence and did not and cannot exclude the possibility that ■■■ locked their children up. In fact, it seems more probable in light of the government witnesses' (the neighbors) testimony. The evidence showed that ■■■ directed ■■■ to keep the children locked in their rooms and was the parent who spent more time at the home.

B. To get around the lack of evidence, the government asks this court to uphold appellant's conviction under a broader scope of liability in violation of *United States v. English*.

At trial, the government drafted the specifications of child endangerment alleging that appellant committed a particular act – locking his children in their rooms. This was an intentional deviation from the model specification.

On appeal, the government now asks this court to salvage the conviction for appellant's "acts or omissions" that "caused the doors to be locked." (Gov't Br. at 18- 20). Even further, the government argues that appellant was liable as he left his entire home in a state of disarray or was just generally negligent in raising his children – a completely new theory of liability that fails the basic notions of fair notice. (Gov't Br. at 20-21).

It is left to this court's imagination – rather than evidence presented at trial – exactly what other "act" appellant performed or what he failed to do.

In *United States v. English*, the Court of Appeals for the Armed Forces wrote that an appellate court does not have the authority to except language from a specification in such a way that it creates a broader or different offense charged at trial. *English*, 79 M.J. 116, 121 (C.A.A.F. 2019).

Therefore, this court should reject the government's request to broaden the scope of liability – that appellant should be convicted for doing something or not doing something.

C. If the government argues that some other act or omission will suffice to uphold appellant's conviction, this court cannot conduct its sufficiency review.

In *United States v. Richard*, the Coast Guard Court of Criminal Appeals found the government failed to provide adequate notice of the act(s) or omission(s) on which the accused's involuntary manslaughter conviction was based. *Richard*, 2024 CCA LEXIS 92, *1 (C.G. Ct. Crim. App. 2024) ([opinion](#)).

In *Richard*, the government argued that the accused performed some act or omission that caused her infant daughter to die by asphyxia. *Id.* at *7. Our sister court ruled that without identifying the act or omission leading the infant to die by asphyxia, the accused was not sufficiently apprised of what specific misconduct she was to defend herself against. *Id.* at *14.

Similarly to the trial counsel in *Richard*, the government on appeal points to a wide array of actions or circumstances that could be the basis for appellant's conviction. *Id.* at *9. And just as in *Richard*, this court cannot perform its statutory duty if the government fails to state what act or omission by appellant constituted culpable negligence.

D. This court should reject the government's request that appellant's conviction be upheld on a vicarious liability argument that was not presented at trial.

The government suggests that even if the evidence was insufficient to establish appellant as the perpetrator, the conviction could be upheld as he "acted

in concert” with his wife and thus vicariously liable for her misconduct. (Gov’t Brief at 18-19, n. 11).¹

Setting aside that the government supports this assertion by citing to 1) [REDACTED] observations of the entirety of appellant’s home and 2) evidence not presented at trial, this court should not uphold appellant’s convictions based on an argument and theory of liability that is raised for the first time on appeal. *Id.*

To convict appellant as an accessory, aider, or abettor pursuant to Article 77, the government had to establish that he had “the specific intent to facilitate the commission of a crime by another.” *United States v. Gosselin*, 62 M.J. 349, 351 (C.A.A.F. 2006)(citations omitted).

The government declined the opportunity to prove appellant had any specific intent to commit an offense. That is, it charged him under a “culpable negligence” theory rather than prove that he endangered his children by “design,” which required proof that he acted “on purpose, intentionally, or according to plan and requir[ing] specific intent to endanger the child.” *MCM*, pt. IV, para. 59.c.(1).

¹ Contrary to the government’s assertion, appellant would be materially prejudiced by any variance. Under the charged theory of child endangerment, appellant merely needed to cite the lack of any evidence placing him inside the home and performing the requisite act. Although the government does not suggest what the variance would entail, any other theory would have required appellant to put on a more robust defense.

Additionally, liability as an “other party” requires the government to prove some act that constituted assistance or participation in the commission of the offense. *Gosselin*, 62 M.J. at 351-52. The government faces the same dilemma, it cannot show what appellant did.

To the extent the government relies on appellant’s failure to act as sufficient, Article 77 states that inaction can only make one liable as a party where there is a duty to act. *MCM*, pt. IV, para. 1.b.(2).ii. However, there is an additional requirement: that inaction must be *intended* to and does operate as an aid or encouragement to the actual perpetrator. *Id*; see also *United States v. Concepcion*, 983 F.2d 369, 383 (2d. Cir 1992) (a defendant needed to act in a way “with the specific purpose of bringing about the underlying crime.”). There is no evidence that the purpose of any act was intended to neglect the children, especially as presented and argued here.

But, given the notice of the charge as being culpably negligent, it then becomes a situation where the government is attempting to argue that appellant had the specific purpose to be culpably negligent, a novel concept in caselaw. Again, the government did not seek to prove appellant’s intent and did not charge him with child endangerment under a specific intent theory. It cannot and should not be allowed to salvage a conviction by embracing a heightened mens rea on appeal that it purposefully disavowed at trial.

E. The government seeks to expand a narrow exception to the Fourth Amendment.

In the foundational cases on the emergency search exception, the Supreme Court pointed to law enforcement's direct observations of injuries or a soon-to-be injury to justify the warrantless entry into someone's home. *Brigham City v. Stuart*, 547 U.S. 398, 401 (2006); *Michigan v. Fisher*, 558 U.S. 45-46 (2009).

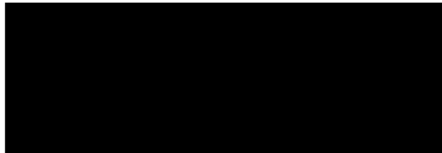
Here, law enforcement witnessed neither an injury nor some unraveling event wherein an injury would soon follow. Rather, they imagined the prospect of an injury as the detective theorized while testifying.

If this court were to uphold the validity of the warrantless search here, there would be a danger that law enforcement could justify an emergency search by fitting their own personal experiences and subjective fears into the void left by a lackluster investigation or a deficient pool of facts.

Conclusion

Appellant reaffirms his request for this court to set aside and dismiss Charge

I and its Specifications.



Stephen R. Millwood
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division



Robert D. Luyties
Major, Judge Advocate
Branch Chief
Defense Appellate Division



Autumn R. Porter
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division



Philip M. Staten
Colonel, Judge Advocate
Chief
Defense Appellate Division

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army
Court and Government Appellate Division on April 17, 2024.



MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division