IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Master Sergeant (E-8)
KELVIN R. CURRY,
United States Army,
Appellant

BRIEF ON BEHALF OF APPELLEE

Docket No. ARMY 20240073

Tried at Fort Belvoir, Virginia, and Fort McNair, Washington, D.C., on 8 September 2023, 5 January 2024, 2 February 2024, and 12-15 February 2024, before a general court-martial convened by the Commander, U.S. Army Military District of Washington, Colonel Adam S. Kazin, military judge, presiding.

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

Assignment of Error

THE SPECIFICATION OF CHARGE II IS FACTUALLY INSUFFICIENT.

PANEL No. 4

Statement of the Case

On 15 February 2024, an enlisted panel, sitting as a general-court martial, convicted appellant, contrary to his pleas, of one specification of child endangerment by culpable negligence, in violation of Article 119b, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 919b (2019).[1] (R. at 858; Statement of Trial Results [STR]). The panel sentenced appellant to perform hard labor without confinement for three days, to be confined for three days, and to receive a reprimand. (R. at 941; STR). On 7 March 2024, the convening authority dismissed Specification 3 of Charge I without prejudice[2], issued a reprimand, and took no further action. (Action). On 14 March 2024, the military judge entered judgment. (Judgment).

Statement of Facts

At the time of the charged offenses, appellant was living in a townhouse with Sergeant First Class [redacted] (his then-wife with whom he shared two children), six of his children, [redacted] (an unrelated adult), and [redacted]'s son. (R. at 433; Pros. Ex. 2).

[1] Appellant was acquitted of two specifications of domestic violence (strangulation), in violation of Article 128b, UCMJ. (R. at 858; STR). The government withdrew Specification 3 of Charge I prior to trial. (R. at 125).
[2] The trial counsel withdrew this specification before the presentation of evidence. (R. At 125).

On 15 May 2020, the police arrived at appellant's home because he got into an "altercation" with his then sixteen-year-old son, [redacted]. (R. at 294, 408–09, 435). [redacted], his then thirteen-year-old daughter, uploaded a photo of the police at their home, with the caption, "Imagine having an abusive father," on social media and emailed her teachers about it. (R. at 294–95, 433–36). Subsequently, while appellant and SFC [redacted] were going through the children's phones, they discovered that [redacted] had created a dating profile, pretending to be an adult and "sexting with grown men." (R. at 587). While the adults were reviewing the phones, a man called [redacted]'s phone, asking [redacted] when they could meet and whether she had "any sisters, any ladies in the house." (R. at 588).

The next day, on 16 May 2020, appellant placed [redacted] and [redacted] in their backyard shed, which was being used as a storage space at that time. (R. at 294–95, 385, 410, 437, 466). [redacted] and [redacted] stayed in the shed for approximately one month. (R. at 384–85, 428, 448–49). During that time, appellant did not give them any toiletries, feminine hygiene products, utensils, access to laundry or new/clean clothes, or a way for the siblings to shower or bathe themselves. (R. at 417, 451–53). Initially, the siblings used the backyard as their toilet before appellant finally gave them a bucket to share. (R. at 451). While [redacted] and [redacted] were in the shed, they were given a one-gallon Ziploc bag of food every few days. (R. at 416, 442–43, 449). At one point, after appellant had [redacted] and [redacted] complete yardwork at

someone else's home, he bought them one "five-dollar boxes" from Taco Bell and allowed [redacted] to use the restroom in their house for the first time. (R. at 443–44). Then, on 22 June 2020, [redacted]'s fourteenth birthday, appellant allowed [redacted] and [redacted] into the house to shower and watch TV, before giving them a military Ready-to-Eat (MRE) meal and putting them back outside. (R. at 444).

A few days later, three of appellant's children and [redacted]'s son were sent out to the shed to join [redacted] and [redacted] because "one of them stole cookies or ate cookies." (R. at 378, 414, 425). After about a day, appellant brought all six children back into the house; however, he told [redacted] and [redacted] that they could not go to their rooms, but that they could "stay downstairs in the basement." (R. at 414–15). Once in the basement, [redacted] and [redacted] were allowed to use the restroom and "progressively gained [their] privileges back." (R. at 415). While she was in the basement, [redacted] "got caught taking food" from one of the vending machines in the house's garage and was sent back out to the shed again. (R. at 415, 450–51).

Assignment of Error

THE SPECIFICATION OF CHARGE II IS FACTUALLY INSUFFICIENT.

Standard of Review

Once an appellant makes a specific showing of a deficiency in proof, this court conducts "a de novo review of the controverted questions of fact." *United States v. Scott*, 84 M.J. 583, 585 (Army Ct. Crim. App. 2024). This "new burden

of persuasion with its required deference makes it more difficult for one to prevail on appeal." *Id.*

Law

A. Factual Sufficiency.

"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, the members of the [CCA] are themselves convinced of the accused's guilt beyond a reasonable doubt.'" *United States v. Thompson,* 83 M.J. 1, 4 (C.A.A.F. 2022) (quoting *United States v. Turner*, 25 M.J. 324 (C.A.A.F. 1987). This court "applies neither a presumption of innocence nor a presumption of guilt[,]" but "must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Once appellant meets the requirements of Article 66(1)(b), UCMJ, and makes an appropriate showing of deficiency of proof, this court "may weigh the evidence and determine controverted questions of fact" but must give "appropriate deference to the fact that the trial court saw and hear the witnesses and other evidence." Article 66(d)(1)(B)(i), (ii), UCMJ. To sustain the conviction, the 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. Gilchrist*, 61 M.J. 785, 793 (Army Ct. Crim. App. 2005). "Reasonable doubt, however, does not mean the evidence must be free from conflict." *United States v. Rankin*, 63 M.J. 552, 557 (N.M. Ct. Crim. App. 2006). "The degree to which [this court will] 'recognize' or give deference to the trial court's ability to see and hear witnesses will often depend on the degree to which the credibility of the witness is at issue." *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015). If 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." Article 66(d)(1)(B)(iii), UCMJ.

B. Child Endangerment.

To convict appellant of child endangerment by culpable negligence, the government was required to prove beyond a reasonable doubt that: (1) appellant had a duty of care for [redacted]; (2) [redacted] was then under the age of 16 years; and (3) appellant endangered [redacted]'s mental health, physical health, and welfare, through culpable negligence, by denying her adequate food, hygiene, enrichment, and not allowing her to use the indoor bathroom. (R. at 774); UCMJ art. 119b; *Manual for Courts-Martial*, *United States* (2019 ed.) [MCM], pt. IV, ¶ 59.b.

The third element has two requirements: (1) appellant's acts or omissions must endanger the child's safety; and (2) appellant'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). "Each aspect of the third element requires a different threshold of risk." *Id.* "[T]he threshold of risk for 'endanger' is conduct that subjects the child to a 'reasonable probability,' not merely a reasonable possibility, of harm." *Id.* (citing *MCM*, pt. IV, para. 68.a.c.(3) (2012 ed.)). "However, the threshold of risk for the mental state of culpable negligence is lower. The Government establishes culpable negligence if a reasonable person would be aware that the [appellant]'s conduct 'might foreseeably result in harm to a child . . . .'" *Id.* "Actual physical or mental harm to the child is not required." *MCM*, pt. IV, ¶ 59.c.(3).

C. Parental Discipline.

The parental discipline defense is unavailable to a parent who uses force that is either "designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain, extreme mental distress, or gross degradation." *United States v. Ruiz*, ARMY 20210541, 2023 CCA LEXIS 76 at *3 (Army Ct. Crim. App. 14 Feb. 2023) (summ. disp.) (citing Dep't of Army, 27-9, Legal Services: Military Judges' Benchbook, para. 5-16 (29 February 2020) [Benchbook]). "In other words, a parent loses protection of the law if he specifically intends those effects." *Id.* Furthermore, "the law also—and predictably—criminalizes a parent's use of force that an objective person would view as unreasonable." *Id.*

This "contextual reasonableness in determining when proper parental motive turns to criminal anger, or necessary force becomes a substantial risk of substantial bodily harm" was fleshed out by the Court of Appeals for the Armed Forces (CAAF) in *United States v. Rivera*, 54 M.J. 489, 491 (C.A.A.F. 2001). In *Rivera*, CAAF, eschewing a *per se* or bright-line rule, demonstrated that reasonableness is based on "the everyday common sense and their knowledge of human nature and of the ways of the world expected of triers of fact . . . ." *Id.*

Argument

Appellant's points of contention are that appellant's conduct did not amount to culpable negligence, that he did not endanger [redacted], and that the parental discipline defense should apply to appellant's conduct. (Appellant's Br. 10–12). However, appellant's arguments are without merit since he endangered [redacted]'s welfare and subjected her to conditions that could foreseeably result in harm to her. Furthermore, the parental discipline defense does not protect appellant's conduct because his conduct was unreasonable, designed to cause gross degradation, and arose from improper motives. This court, after rendering the appropriate deference to the panel that heard and saw the evidence first-hand, should likewise reject appellant's arguments and be convinced of his guilt beyond a reasonable doubt.

A. Appellant endangered [redacted]'s safety.

Appellant's actions endangered [redacted]'s mental health, physical health, and welfare when he forced [redacted] and her brother to live in deplorable conditions for a month. Here, there was more than just "reasonable probability" of harm; rather, the government demonstrated that [redacted] did suffer harm, especially mental harm.

[redacted] was just a thirteen-year-old girl[3] when she was put in the shed with her then-sixteen-year-old brother, [redacted].[4] (R. at 433). The shed, which was being used as a storage container, was not "that big." (R. at 547). It was approximately ten feet long, "give or take a foot or two," and already contained various items, such as gas tanks, tires, lawn equipment, storage containers/totes, and other "miscellaneous things." (R. at 295, 393, 547). The floor of the shed was covered in gas, so that [redacted]'s jacket "got covered in gas" and had to be thrown away, and her side of the shed that she was sleeping in "smelled like gas." (R. at 487).

[redacted] and [redacted] used the backyard as their restroom—they did not have access to any restrooms, toilet paper, or any other basic toiletries or hygiene items. (R. at 410, 413, 439–40). Once the backyard started smelling like feces, appellant handed [redacted] and her brother "blue poop bags, like for dogs" and told them to clean

[3] [redacted] testified that she was 17 years old at the time of trial on 13 February 2024, and that she was put in the shed in May of 2020 until her fourteenth birthday on June 22, 2020. (R. at 432–33, 444).

[4] [redacted]'s brother testified that he was 20 years old at the time of trial on 13 February 2024, and that his birthday is on June 29th. (R. at 423).

it up. (R. at 440). Subsequently, appellant provided them one "Home Depot orange bucket" for both siblings to defecate in. (R. at 412–13, 441).

These conditions clearly harmed [redacted]'s mental health. While in the shed, all [redacted] did was "read, sleep, lay there." (R. at 472). [redacted] testified that during that time, she also needed to use feminine hygiene products. (R. at 452). Since none were given to her, she did "[n]othing" about it because there was "nothing [she] could do." (R. at 453). When appellant gave them the bucket to use as a toilet, [redacted] thought, "[a]t least I wasn't going in the backyard anymore." (R. at 453). She also stated that staying in the shed made her feel "[l]ike nothing." (R. at 452). When "viewed in the light of human experience," these conditions could foreseeably result in harm to a child; here, [redacted], who was only a thirteen-year-old at the time, clearly did suffer mental harm to the point where she "was numb" and felt "[l]ike nothing," accompanied by a hopelessness that she could do "nothing" about her situation. *MCM*, pt. IV, ¶ 59.c.(2); (R. at 414, 452–53). This is in stark contrast to the situation in *United States v. Pacheco*, where there was no evidence that the appellant's four-year-old child suffered or evidenced any mental harm. ARMY 20170177, 2019 CCA LEXIS 77, at *6 (Army Ct. Crim. App. 26 Feb. 2019) (mem. op.), pet. denied, 79 M.J. 241 (C.A.A.F 2019); (Appellant's Br. 8).

Appellant characterizes the degradations that [redacted] suffered while in the shed as "less-than-ideal" and "spartan," while arguing that her "basic needs were met."

(Appellant's Br. 11). Appellant told [redacted] and [redacted] that they were going to be treated "like a prisoner" and that appellant would show them "how bad people get treated." (R. at 429–30). Yet, appellant actually treated the siblings like dogs, rather than human beings. (R. at 430). Aside from having to defecate in the yard and pick up their feces with "poop bags, like for dogs," appellant deprived the siblings of toothbrushes or toothpaste, soap, a way to wash themselves, clean clothes, or even regular meals to eat. (R. at 410, 416–17, 439–40, 449, 444, 451). Appellant gave the two growing children "a gallon-size Ziploc bag . . . that contained tuna, and crackers, and Ramen noodles." (R. at 645). The siblings did not have any utensils to eat the food, nor any way to prepare the food. (R. at 412). Worse, [redacted] testified that these food rations were given about every "couple of days," while [redacted] testified that he estimated it to be "like once every week." (R. at 416, 442). Regardless of the exact amount time between meals, both siblings made it clear that they did not receive food every day, much less for every meal. (R. at 416, 442, 646).

Aside from the mental harm that these conditions inflicted on [redacted], appellant clearly endangered [redacted]'s general welfare. Even [redacted], the defense's witness, testified that she was "concerned" for the children. (R. at 646). In addition to sharing unsanitary and unhygienic conditions that were doubled due to [redacted] also sharing a cramped space with her, [redacted] was ingesting gas fumes and laying on a

shed floor covered in gas. (R. at 487). At one point, even though the siblings had been living in these deplorable conditions with irregular meals, appellant forced them to haul yardwork tools from out of the shed and do "yardwork for some time" at a woman's home. (R. at 443–44).

Appellant defends himself by arguing that "any such harm" was minimal and that there was no evidence [redacted] suffered "significant mental and/or physical harm." (Appellant's Br. 11). Appellant clearly misses the point. First, [redacted]'s testimony that staying in the shed made her feel "[l]ike nothing" was direct evidence that she suffered harm. (R. at 452). Second, even if she had not testified to harm, it does not matter whether [redacted] suffered actual harm. Rather, what matters is that appellant's conduct subjected [redacted] to a "reasonable probability" of harm. *Plant*, 74 M.J. at 300 n.4.

Third, logically, that also means it does not matter whether the harm was minimal or significant. Thus, the fact that [redacted] suffered any harm at all, satisfies the first requirement of the third element in child endangerment—that appellant's acts or omissions endangered [redacted]'s safety. *Plant*, 74 M.J. at 300 n.4.

B. Appellant was culpably negligent.

As noted in *Plant*, "the threshold of risk for the mental state of culpable negligence is lower" than the first requirement of the third element in child endangerment. *Id.* "The Government establishes culpable negligence if a

reasonable person would be aware that the [appellant]'s conduct 'might foreseeably result in harm to a child . . . .'" *Id.* (citing *MCM*, pt. IV, para. 68.a.c.(3) (2012 ed.)). In *Plant*, the appellant had left his healthy thirteen-month-old child in his crib during normal bedtime hours while the appellant drank an "excessive amount of alcohol." *Id.* at 299–300. Despite finding that the facts of the case failed to establish the act of endangerment, the Court of Appeals for the Armed Forces noted that the facts may still have "satis[fied] the mental state of culpable negligence." *Id.* at n.4.

In the instant case, appellant's culpable negligence is even more easily satisfied. It was appellant who put [redacted] in the shed and controlled what items or food her and her brother were given, when they were allowed to eventually leave the shed, and basically "stipulated the rules for the children being outside." (R. at 294, 377–79, 412, 414, 430, 437, 446, 466, 499).

C. Appellant's actions far exceeded acceptable parental discipline.

Appellant attempts to justify his actions as a form of parental discipline. (Appellant's Br. 11–12). In doing so, he points to *United States v. Robinson*, where this court found that the appellant's use of force—striking her five-year-old daughter with a cellphone charging cord fifteen times—was "not *designed*" to cause "death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation." *United States v. Robinson*, ARMY 20220043, 2023 CCA

LEXIS 235 at *2–3, 8–9 (Army Ct. Crim. App. 2 June 2023) (summ. disp.), pet. denied, 84 M.J. 122 (C.A.A.F. 2023) (emphasis in original) (citing *United States v. Brown*, 26 M.J. 148, 150 (C.M.A. 1988)). Still, this court rejected the appellant's parental discipline defense, finding that "[f]ifteen such strikes on a five-year-old child creates a substantial risk of causing extreme pain." *Robinson*, 2023 CCA LEXIS 235, at *9.

In the present case, appellant's actions were designed to—and did—cause extreme mental distress and gross degradation. Furthermore, even if appellant's actions, when viewed in the most charitable light, were not designed to cause extreme mental distress and gross degradation, there was a "substantial risk" of doing so. *Robinson*, 2023 CCA LEXIS 235, at *9.

Appellant told [redacted] and her brother that he would show them "how bad people get treated" by treating them "like a prisoner." (R. at 429–30). Subsequently, appellant placed his then-thirteen and sixteen-year-old daughter and son, respectively, in a storage shed. (R. at 295). By barring [redacted] and her brother from entering the home, he forced them to use their small backyard as a restroom. (R. at 410–11, 439). Only when the smell of feces became offensive to him, did appellant deign to give his children an orange bucket to use as their restroom—after making them pick up their feces from the backyard using "poop bags, like for dogs." (R. at 440). And when the siblings were intermittently provided food, it

came in the form of a Ziploc bag, without any accompanying utensils or napkins. (R. at 412, 416, 442, 645). And in the case of [redacted] specifically, she was a growing girl who, aside from the indignities of sharing a bucket for a restroom with her older brother, needed feminine hygiene products; but because her father would not provide her with any, there was "nothing" she could do about her menstruation. (R. at 453). After being treated like this and suffering such gross degradations and extreme mental distress for almost a month, it is unsurprising that this treatment made [redacted] feel "[l]ike nothing." (R. at 428, 452); *see United States v. Worsham*, ACM 32615, 1998 CCA LEXIS 353, at *11 (A.F. Ct. Crim. App. 27 July 1998), pet. denied, 51 M.J. 356 (C.A.A.F. 1999) (finding that the appellant's action in whipping a fifteen-year-old female's bare buttocks for skipping class was "the kind of demeaning act which the Model Penal Code described as gross degradation.").

Appellant seems to believe that his actions were acceptable because [redacted] deserved to be punished for "sexting" with adult men. (Appellant's Br. 12). However, at one point, appellant placed four more children[5] in the shed with [redacted] and her brother "because someone was stealing cookies," even though one of the four children was "developmentally delayed" and another child was diagnosed with Downs Syndrome. (R. at 285, 378, 414, 425, 447).

[5] The four children he placed were those living with him at the time. (R. at 433). One of the children was [redacted]'s son, and the other three children were appellant's children. (R. at 433; Pros. Ex. 2).

Appellant's actions with his other children clearly demonstrate that [redacted]'s "sexting" was a pretextual reason for placing her in the shed. First, [redacted] was put in the shed, not because he was also "sexting," but because he missed work and "didn't respond to a question the proper way" during his conversation with appellant. (R. at 408). Second, the day prior to putting [redacted] in the shed, appellant had been "upset" with [redacted], to include "[l]ots of yelling," and appellant calling [redacted] a "bimbo" and saying "lots of berating things." (R. at 294–95). Appellant blamed [redacted] for putting their "business on blast" because she posted a photo of the police at their home, with the caption, "Imagine having an abusive father," on social media. (R. at 294–95, 433–35). After posting the photo online that day, [redacted] also emailed her teachers and counselor about it, causing appellant to "yell" at her that she "shouldn't have done" that, that "he doesn't know what to do with" her, and that he "disowns" her. (R. at 436). And third, at one point, when appellant allowed [redacted] and [redacted] in the basement, appellant put [redacted] back into the shed because she "got caught taking food" from a vending machine in their garage. (R. at 415, 450–51); *see Brown*, 26 M.J. 150–51 ("A reasonable factfinder could have rejected appellant's benign explanation for his conduct and inferred an improper motive for these [actions]."); *Rivera*, 54 M.J. at 491 (noting that *Brown* established a contextual reasonableness test to "determine[e] when proper parental motive turns to criminal anger").

Furthermore, the military judge instructed the panel on what constituted culpable negligence and when the parental discipline defense should apply. (R. at 774–78). Since the panel found appellant guilty of child endangerment by culpable negligence, the panel clearly rejected any notion that appellant's conduct qualified as parental discipline. (R. at 858). Therefore, after giving "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence," this court should be convinced of appellant's guilt beyond a reasonable doubt. Article 66(d)(1)(B)(i), (ii), UCMJ; *see also United States v. Coe*, 84 M.J. 537, 542 (Army Ct. Crim. App. 2024) (emphasizing that ACCA's role in a factual sufficiency review "is *not* to substitute ourselves for the factfinder and decide what verdict we would have rendered. To the contrary, Article 66(b)(ii) expressly cabins our discretion by requiring that we give deference to . . . the fact that the factfinder saw and heard the witnesses and other evidence. . ."') (emphasis in original); *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015), aff'd on other grounds, 76 M.J. 224 (C.A.A.F. 2017) (holding that "the degree to which we 'recognize' or give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witness is at issue"); *United States v. Crews*, ARMY 20130766, 2016 CCA LEXIS 127 at *11-12 (Army Ct. Crim. App. 29 Feb. 2019) (mem. op.), aff'd, 76 M.J. 350 (C.A.A.F. 2017) ("The deference given to the trial court's ability to see and hear

the witnesses and evidence—or 'recognition' as phrased in Article 66, UCMJ—reflects an appreciation that much is lost when the testimony of the live witnesses is converted into the plain text of a trial transcript . . . the panel hears not only a witness's answer, but may also *observe* the witness as he or she responds.") (emphasis in original).

Conclusion

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

LISA LIMB
MAJ, JA
Branch Chief, Government
Appellate Division

PATRICK S. BARR
MAJ, JA
Branch Chief, Government
Appellate Division

RICHARD E. GORINI
COL, JA
Chief, Government
Appellate Division

APPENDIX

United States v. Worsham

United States Air Force Court of Criminal Appeals

July 27, 1998, Decided

ACM 32615

Reporter
1998 CCA LEXIS 353 *

UNITED STATES v. Chief Master Sergeant DENNIS P. WORSHAM, United States Air Force

Notice: [*1] NOT FOR PUBLICATION

Prior History: Sentence adjudged 31 May 1996 by GCM convened at Maxwell Air Force Base, Alabama. Military Judge: Howard R. Altschwager.

Approved sentence: Dishonorable discharge, confinement for 6 years, and reduction to E-1.

Disposition: AFFIRMED.

Case Summary

Procedural Posture

Defendant appealed his conviction at the General Court-Martial, Maxwell Air Force Base, Alabama, for assault, indecent acts, indecent assault, indecent liberties, and communicating indecent language in violation of arts. 128 and 134, Unif. Code Mil. Justice, *10 U.S.C.S. §§ 928* and *934*. Defendant also appealed his sentence of a dishonorable discharge, six years confinement, and a rank reduction.

Overview

Defendant was convicted of violations of *§§ 928* and *934*. Defendant appealed his conviction and his sentence. On appeal, the court affirmed the judgment of the court-martial, holding that there was sufficient corroboration to admit defendant's confession. The court found that there was no plain error in the failure to instruct the members as to what the "community" was in assessing whether defendant's comments to his step-daughter's teenage friends were indecent. The court determined that there was insufficient evidence of an indecent assault because it was not shown that defendant whipped his step-daughter with a belt on her bare buttocks to gratify his lust. However, the court concluded that it was not a reasonable punishment for skipping class and that, therefore, defendant was guilty of battery upon a child. The court held that any collection of adjudged forfeitures or execution of a reduction in rank prior to the date of the convening authority's action and automatic collection of forfeitures not included in the sentence of a court-were without legal effect. The court determined that defendant's sentence was appropriate.

Outcome

The court affirmed the judgment of the court-martial, which had sentenced defendant to a dishonorable discharge, six years confinement, and rank reduction for assault, indecent acts, battery of a child, indecent liberties, and communicating indecent language.

Counsel: Appellate Counsel for Appellant: Colonel Douglas H. Kohrt, Lieutenant Colonel Kim L. Sheffield, and Major Carol L. Hubbard.

Appellate Counsel for the United States: Colonel Brenda J. Hollis, Lieutenant Colonel Michael J. Breslin, and Major J. Robert Cantrall.

Judges: Before ROTHENBURG, SENANDER, and SPISAK, Appellate Military Judges. Chief Judge ROTHENBURG and Judge SPISAK concur.

Opinion by: SENANDER

Opinion

OPINION OF THE COURT

SENANDER, Judge:

The appellant was convicted, contrary to his pleas, by a general court-martial composed of officer members, of assault, indecent acts, indecent assault, indecent liberties, and communicating indecent language. Articles 128 and 134, UCMJ, *10 U.S.C. §§ 928*, *934 (1994)*. His approved sentence is a dishonorable discharge, 6 years confinement, and reduction to E-1. The appellant asserts seven errors. We find application of automatic forfeitures under Article 57(a) and 58b violate the [*2] *Ex Post Facto* Clause of the Constitution and we will grant relief. In addition, we find the appellant not guilty of indecent assault as to Specification 4, Charge II. The appellant's other asserted errors are without merit.

I. BACKGROUND

The appellant married his wife in 1984 when they were both assigned to Keesler Air Force Base (AFB), Mississippi. The appellant's wife had one daughter who was four years old when they married. They were transferred to Hickam AFB, Hawaii, in 1988 and remained there until the fall of 1991. In August or September 1991, the appellant, for the first time, rubbed the vagina of his then 11-year-old step-daughter MW. She told him to stop and he did. The next sexual activity occurred in November 1991, in Montgomery, Alabama, when the appellant fondled MW's breasts and vagina while she was sitting in a recliner with him. MW described three other occasions the appellant fondled her, including inserting his finger in her vagina on one occasion. MW also testified that the appellant had a ritual of tucking her in bed, and two or three times a month, he would rub her vagina and breasts and kiss her on the mouth and breasts, as he tucked her in for the [*3] night. Each of these sexual acts occurred in Montgomery between November 1991 and May 1995.

MW also described another incident with the appellant. In March 1995, MW was suspended from school and the appellant told her to go to the bedroom, take off her pants and let him know when she was ready for her spanking. He then hit her ten times with a leather belt on her bare buttocks. MCP, a friend of MW, testified she was at the appellant's home when MW became upset with the appellant and pushed him slightly. MCP went to the kitchen so she would not see them argue. MCP heard the sound of a slap and, when MW entered the kitchen, she had a hand print on the side of her face and told MCP that the appellant hit her.

MCP, born September 9, 1980, described two statements made by the appellant to her on two separate occasions between August 1994 and June 1995. On one occasion, in the Spring of 1995, MW and MCP were going to another girl's house and the appellant said MW couldn't go. MW argued with the appellant and said that he had previously told her she could go. At that point the appellant said to MCP, "Do you give good blow jobs?", and she replied, "Not to old men like you." On another [*4] occasion MCP was having dinner with MW and the appellant. The appellant asked MCP to bring him a beer from the refrigerator. She got the beer and a wine cooler for herself. She said "I am going to drink this with my supper." The appellant responded, "Only if you sit on my couch in Indian style with just your panties on you can."

MSH testified that she was born on October 7, 1979. She was staying overnight at MW's house on January 1, 1993. The appellant was watching a football game and drinking, the appellant's wife had fallen asleep, and MW had gone to get ready for bed. MSH was sitting on a couch next to the appellant. He reached over and started rubbing her breast through her pajamas. He then started rubbing her breasts inside her clothes and progressed to rubbing her vagina through her clothes.

AEH, born June 16, 1980, described a telephone call she made to the appellant in June 1995. She called to beg the appellant to allow MW to go on a beach trip. She said, "Can M[] go to the beach with us." "I'll do anything: just please let her go." The appellant replied, "I'll let her go if you blow me."

HLJ, born July 17, 1980, frequently visited MW

when they were in ninth grade. MW's [*5] mother was on assignment in Iceland during that year. On May 28, 1995, the appellant joined a conversation between HLJ and MW and asked HLJ if her boyfriend, "had sucked my [] and licked my [], and if we were f__--g or had we f__-d lately."

LNM, born January 18, 1980, testified that, on one occasion when she was at MW's house, the appellant asked her if she gave good head. She also was present when the appellant asked HLJ if she had f__-d her boyfriend Steven lately.

II. ADMISSIBILITY OF CONFESSION

The appellant asserts the military judge erred in admitting his confession. He argues there was insufficient corroboration of his confession to show its trustworthiness. The appellant confessed to touching MW's breasts and crotch area after July 1994. MW said this did not happen after July 1994 while her mother was in Iceland, but on earlier occasions.

Corroboration is a factual evidentiary matter. A military judge's finding that there is sufficient corroboration to admit a confession is reviewed for abuse of discretion. *United States v. Cottrill, 45 M.J. 485 (1997)*. The appellant made an oral and written confession to indecent acts with minors, indecent [*6] liberties, and indecent language in the presence of minors. He not only admitted touching the breasts and crotch of MW, but also discussed trying to pull AH into his lap and sexual conversations with AH and other friends of MW. The appellant relies on the fact that he did not admit these acts occurred during the same time period as MW stated they occurred.

MILITARY RULE OF EVIDENCE 304(g)(1) provides:

The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the essential facts admitted. The amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.

There was sufficient evidence for the military judge to conclude the appellant's confession was corroborated. The appellant's confession to molesting AEH and his sexual conversations with the other girls is clearly corroborated. The only issue is the timing of the sexual abuse of MW. The similarity between the [*7] molestation described by MW and that confessed to by appellant, and the fact that MW was writing a letter to her mother in Iceland concerning the sexual abuse, is sufficient to find no abuse of discretion by the military judge in admitting the confession. The amount of corroboration needed to establish truthfulness or trustworthiness of a confession before it can be used as evidence is not great. *United States v. Melvin, 26 M.J. 145 (C.M.A. 1988)*. We reject the appellant's assertion of error.

III. FINDINGS INSTRUCTIONS

A.

The appellant asserts the military judge erred by failing to instruct the members as to what the "community" was in assessing whether appellant's comments to MW's teenage friends were, in fact, indecent. The appellant did not request such an instruction at trial and did not object to the judge's omission of an instruction concerning community standards.

When there is no defense objection at trial to the military judge's findings instruction, the post-trial challenge must be reviewed under the plain error doctrine. *United States v. Robinson, 38 M.J. 30 (C.M.A. 1993)*; R.C.M. 920(f). Plain error is an error that is obvious, substantial and had an unfair [*8] prejudicial impact on the accused. *United States v. Olano, 507 U.S. 725, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993)*; *United States v. Fisher, 21 M.J. 327 (C.M.A. 1986)*. We find no unfair prejudicial impact by failing to define for the members what community standards apply to the kind of language used by this 44-year-old appellant in his conversations with 14-year-old-girls. The appellant has failed to show what community would find this language to be decent and we can think of none. We find no plain error in the military

judge's findings instructions as to Specifications 6, 7, 8, and 9 of Charge II.

B.

The appellant next asserts the military judge failed to instruct the members that the prosecution must prove the act was indecent to constitute the offense of indecent assault. Our disposition of Charge II, Specification 4, below renders this asserted error moot.

IV. FACTUAL AND LEGAL SUFFICIENCY OF CHARGE II, SPECIFICATION 4

The appellant asserts the evidence is factually and legally insufficient to sustain his conviction for indecent assault. This Court has the duty to determine the legal and factual sufficiency of the evidence. Article 66(c), UCMJ, *10 U.S.C. § 866(c) (1994)*. The test for legal [*9] sufficiency is whether, "considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner, 25 M.J. 324 (C.M.A. 1987)* (citing *Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)*; *United States v. Ladell, 30 M.J. 672, 673 (A.F.C.M.R. 1990)*. The test for determining factual sufficiency is whether, after weighing the evidence in the record and making allowances for not having personally observed the witnesses, the members of this Court are convinced of the appellant's guilt beyond a reasonable doubt. *Turner, 25 M.J. at 325*.

The appellant has raised two issues in his challenge to the legal and factual sufficiency of this specification. He asserts the appellant was acting in his parental disciplinary role, that his actions did not constitute an assault, and that there was no evidence that he was trying to satisfy his sexual desires. The appellant ordered his then 15-year-old step-daughter to go to the bedroom, remove her pants, and inform him when she was ready to be spanked with a leather belt. The appellant then hit MW with a leather belt on her bare buttocks. [*10] This is the only time we have evidence of the appellant using this form of "discipline." The act was precipitated by notice to the appellant that MW had skipped class. It is pure speculation that the appellant had an intent to gratify his lust or sexual desires on this occasion. No admissions by the appellant or statements or actions at that time indicate this was anything other than a battery upon a child under the age of 16. We find the evidence is legally and factually insufficient to conclude that appellant's whipping of MW was done with the intent to gratify his lust or sexual desires.

We now turn to the question of permissible parental disciplinary measures as an affirmative defense. The Model Penal Code § 3.08(1) (A.L.I. 1985) states that the use of force by parents or guardians is justifiable if:

(a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and

(b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation.

ALI Model Penal Code [*11] *and Commentaines,* 136 (1985); *United States v. Robertson, 36 M.J. 190 (C.M.A. 1992); see also United States v. Brown, 26 M.J. 148 (C.M.A. 1988)*. Courts have identified the circumstances which the trier of fact should consider in determining reasonableness of the punishment: *e.g.*, the age, size, sex, and physical condition of both child and parent, the nature of the child's misconduct, the kind of marks or wounds inflicted on the child's body, the nature of the instrument used for punishment, etc. *See Harbaugh v. Commonwealth, 209 Va. 695*; *167 S.E.2d 329, 332 (1969)*.

We find the appellant did not use reasonable and moderate force to discipline MW. In fact, the force used was meant to cause both extreme pain and gross degradation of MW. The appellant's action in whipping a 15-year-old female's bare buttocks for skipping a class is the kind of demeaning act which the Model Penal Code described as gross degradation. We find no justification for the

appellant's battery of MW. As to Specification 4 of Charge II we find the appellant not guilty of indecent assault, but guilty of the lesser included offense of battery upon a child under the age of 16 in violation of Article [*12] 128, UCMJ.

V. FACTUAL AND LEGAL SUFFICIENCY OF CHARGE I, SPECIFICATION 1

The appellant next asserts the evidence is factually and legally insufficient to prove battery upon a child under the age of 16. According to the testimony of MCP, she was at the appellant's house playing on the computer with MW. The appellant returned from work and was showing MW a piece of paper that indicated they would have to move again. MW objected and told the appellant that he had previously told her they would not have to move again. He indicated he wanted to move and MW pushed him on the shoulder. The appellant became angry and told her never to push him again. At this time MCP left the living room and went to the kitchen where the computer was located. MCP heard a slap and then cries coming from MW. When MW entered the kitchen she had a hand print on the side of her face. MW told MCP that the appellant hit her and that her ear hurt and she couldn't hear out of it.

In reviewing this assertion of error, we apply the same Model Penal Code standard to determine whether the evidence of record is sufficient for a rational factfinder to find beyond a reasonable doubt that the slapping of MW's face constituted [*13] an assault. A reasonable fact finder could conclude the appellant's use of force was a reaction to MW's push and not used for the purpose of safeguarding or promoting the welfare of the minor. Equally significant, the appellant's use of force could under the circumstances be considered to have created a substantial risk of serious bodily injury. When a person is hit on the side of the face hard enough to cause a loss of hearing, the fact finder could reasonably conclude, beyond a reasonable doubt, that the appellant's use of force was not justified as parental discipline. There was sufficient evidence for the court members to find the appellant guilty of battery upon a child under the age of 16. We are also convinced of the appellant's guilt beyond a reasonable doubt.

VI. ADMISSIBILITY OF SENTENCING EVIDENCE

The appellant asserts the military judge erred in refusing to admit an Air Force Form 356, Findings and Recommended Disposition of USAF Physical Evaluation Board, and an AF Form 1180, Action on Physical Evaluation Board Findings and Recommended Disposition.

The standard of review on issues of admissibility of evidence is whether the military judge clearly abused his broad discretion. [*14] *United States v. Johnson, 46 M.J. 8 (1997)*; *United States v. Kelley, 45 M.J. 275 (1996)*; *United States v. Curtis, 44 M.J. 106, 141 (1996)*. The abuse of discretion standard is a strict one. It involves more than a difference of opinion. The challenged action must be found to be "arbitrary," "clearly unreasonable," or "clearly erroneous" to be invalidated on appeal. *United States v. Travers, 25 M.J. 61 (C.M.A. 1987)*.

The trial defense counsel offered the above two referenced forms during sentencing and the trial counsel objected because the two documents recommended the appellant be retired with a 30% disability rating. The military judge held the admission of the two forms would violate the rule against consideration of collateral consequences and thus excluded them. Trial defense counsel agreed that if the appellant received a punitive discharge and a medical retirement, the final decision regarding how the appellant would be separated would be made by the Secretary of the Air Force, Personnel Council. The trial defense counsel presented no evidence concerning the effect of a punitive discharge on the appellant.

The potential loss of retirement benefits was a proper [*15] matter for consideration by factfinders at appellant's courts-martial. R.C.M. 1001(c)(1)(B). The Court of Appeals for the Armed Forces has held that retirement-eligible servicemembers are entitled to place into evidence the fact that a punitive discharge would deny them retirement benefits and they may also present evidence of the potential dollar amount subject to loss. *See also United States v. Griffin, 25 M.J. 423 (1988)*; *United*

States v. Sumrall, 45 M.J. 207 (1996). The appellant was retirement eligible and that information was before the members in the form of a Personal Data Sheet which reflected over 22 years of service. Trial defense counsel's argument highlighted the fact a punitive discharge would result in loss of retirement benefits that the appellant had worked hard to obtain

We find no abuse of discretion by the military judge. In this case the appellant was retirement eligible as a result of serving more than 20 years. The additional fact that he had been recommended for medical retirement was not relevant to the court-martial proceedings. Once the appellant established he was retirement eligible by either length of years or for medical reasons he would [*16] have been permitted to show the potential loss of retirement benefits. Here the appellant was eligible as a result of serving more than 20 years, but failed to present any evidence as to the potential economic impact of the loss of retirement benefits. This asserted error is without merit.

VII. *EX POST FACTO*

Each of the offenses for which the appellant was convicted were committed prior to April 1, 1996. The appellant asserts the application of Article 57(a) and Article 58b, UCMJ, to his case violated the *Ex Post Facto* Clause of the United States Constitution. Appellant's *Ex Post Facto* arguments were resolved by the United States Court of Appeals for the Armed Forces in United States v. Gorski, 47 M.J. 370 (1997). Accordingly, collection of adjudged forfeitures or execution of a reduction in rank prior to the date of the convening authority's action pursuant to Article 57(a), UCMJ, and automatic collection of forfeitures not included in the sentence of a court-martial pursuant to Article 58b, UCMJ, are declared to be without legal effect. Any such forfeitures already collected from the appellant will be restored at the appropriate pay grade. The record of trial [*17] is returned to The Judge Advocate General for appropriate action.

VIII. SENTENCE REASSESSMENT

We have found the appellant not guilty of indecent assault, but guilty of the lesser included offense of battery upon a child under the age of 16 years. We must now reassess the sentence or return the case for a rehearing on sentence. United States v. Jones, 39 M.J. 315, 317 (C.M.A. 1994); United States v. Peoples, 29 M.J. 426 (C.M.A. 1990). We are confident we can determine the sentence, as the court members would have adjudged, and the convening authority would have approved. The maximum confinement for battery upon a child under the age of 16 years is three years confinement versus five years confinement for indecent assault. The maximum confinement the court could have imposed was 46 years for all of the offenses. Here the whipping of MW with a belt was not as significant as many of the other offenses. We believe the punishment adjudged by the court members and approved by the convening authority would be no less for assault upon a child under 16 years of age than it would be for indecent assault based on the facts of this case. We therefore reassess the appellant's sentence [*18] and find a dishonorable discharge, 6 years confinement, and reduction to E-1 is appropriate. We have given individualized consideration to the seriousness of the convictions, the character and military performance of the appellant and all circumstances documented in the record of trial. United States v. Snelling, 14 M.J. 267 (C.M.A. 1982). We believe that, by affirming the sentence as reassessed, justice has been done and the appellant has received the punishment he deserves. United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988).

VI. DECRETAL

The record is returned to The Judge Advocate General for appropriate administrative action regarding forfeitures. The approved finding of guilty to specification 4 of Charge II, indecent assault, is set aside and we find the appellant guilty of the lesser included offense of battery upon a child under 16 years of age in violation of Article 128, UCMJ. The remaining findings of guilty, and the sentence, as reassessed, are correct in law and fact. Accordingly, the findings and sentence, as modified, are

AFFIRMED.

Chief Judge ROTHENBURG and Judge SPISAK concur.

CERTIFICATE OF SERVICE, U.S. v. CURRY (20240073)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on the 13th day of September, 2024.

[redacted]

DANIEL L. MANN
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[redacted]