

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Docket No. ARMY 20230617

Captain (O-3)

LEONARD H. ALLEN III,

United States Army,

Appellant

Tried at Fort Cavazos, Texas, on 23 June, 23 October, 28–30 November, and 1 December 2023, before a general court-martial convened by Commander, First Cavalry Division, Colonel Maureen A. Kohn and Colonel Joseph K. Venghaus, Military Judge, presiding.

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

Assignment of Error¹

**WHETHER THE GOVERNMENT’S FAILURE TO
DISPROVE SELF-DEFENSE RENDERS
APPELLANT’S CONVICTION FOR ASSAULT
CONSUMATED BY A BATTERY AND CONDUCT
UNBECOMING FACTUALLY INSUFFICIENT.**

¹ The government has reviewed appellant’s *Grostefon* matter and respectfully submits that it lacks merit. The government recognizes this court’s authority to elevate *Grostefon* matters deserving of increased attention. *United States v. Grostefon*, 12 M.J. 431, 437 (C.M.A. 1982). Should this court exercise such authority, finding appellant’s *Grostefon* matter meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

Table of Contents

Statement of Case	1
Statement of Facts	1
a. Appellant stopped his vehicle in the middle of a roadway to confront another driver.	1
b. Mr. RR, the driver, appeared to be a teenager.	2
c. Mr. RR retreated from appellant.	4
d. Appellant attacked Mr. RR, injuring him.	4
e. Appellant admits “I am in the wrong” to law enforcement.	5
Standard of Review	6
Law and Argument	7
a. Appellant failed to make a specific showing of a deficiency in proof	8
b. Overwhelming evidence supports a finding of factual sufficiency.	9
1. Appellant was the aggressor.	10
2. Appellant did not have a reasonable apprehension of bodily harm.....	12
3. Appellant used force likely to cause grievous bodily injury.	14
4. This court should defer to the military judge.....	12
Conclusion	16

Statement of the Case

On 1 December 2023, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of three specifications of assault consummated by battery, and one specification of conduct unbecoming an officer in violation of Articles 128 and 133, Uniform Code of Military Justice, 10 U.S.C. §§ 928 and 933 (2018) [UCMJ]. (Charge Sheet; R. at 614–15). Upon government motion, the military judge merged the three specifications of assault into a single specification and dismissed the charge of conduct unbecoming.² (R. at 616–17). The military judge sentenced appellant to a reprimand. (R. at 649). The convening authority approved the adjudged sentence. (Action). On 7 March 2024, the military judge entered judgment. (Judgment).

Statement of Facts

a. Appellant stopped his vehicle in the middle of a roadway to confront another driver.

On 3 August 2022, appellant observed a minivan following him closely on the roadway as he drove home from work.³ He was driving under the speed limit but felt that the minivan was following him too closely. (R. at 137, 471). He brake

² All conditioned on the remaining specification surviving appeal. (R. at 617–20).

³ Appellant claimed that the minivan maintained a distance of 12–18 inches from his vehicle for the entirety of this ordeal. (R. at 471). This was disputed by the testimony of Mr. RR, who stated the minivan followed from a car length away. (R. at 53).

checked the minivan. (R. at 137–38). As the minivan continued to follow him in the roadway, he approached the top of a hill and again braked slowly, coming to a complete stop in the middle of a one-lane roadway. (R. at 54). A double yellow line divided the opposing lanes of travel, preventing the teenage driver of the minivan from passing. (R. at 58; Pros. Ex. 2). This maneuver left no room for the driver of the minivan to pass him, as a double yellow line divided the opposing lanes of travel. (R. at 58; Pros. Ex. 2). Appellant then parked his vehicle in the middle of the roadway, blocking the sole lane of travel. (R. at 485–86; Pros. Ex. 2).⁴ He then unbuckled his seat belt and stepped out of his vehicle⁵ to confront the young driver of the minivan, Mr. RR.⁶ (R. at 59, 486).

b. Mr. RR, the driver, appeared to be a teenager.

Appellant observed Mr. RR buckled into the driver’s seat as he approached the minivan. (R. at 58, 489). By appellant’s own approximation, Mr. RR appeared to be fifteen years-old or younger. (R. at 489). The minivan’s windows were

⁴ Appellant claims he did so in order to allow the minivan to pass him. (R. at 485–86; Appellant’s Br. at p. 4).

⁵ Appellant claims that he did not step out of his vehicle until after waiting “45–55 seconds” for the minivan to pass him. (R. at 486). This was contradicted by Mr. RR and Ms. ZB. (R. at 58; 139)(“[I]t was seconds.”).

⁶ In the trial transcript, RR changed his gender from female to male and preferred first name between the date of the incident, 3 August 2022, and the date of providing testimony, 28 November 2023. For the purposes of this brief, the victim is referred to as Mr. RR.

down to due to the heat of the Texas summer and the lack of functional air conditioning in Mr. RR's minivan. (R. at 58–59, 135). Appellant, an officer in his forties wearing the Army Combat Uniform, with an identification badge around his neck, leaned on the driver's side door and asked Mr. RR “[w]hat the fuck are you doing?” (R. at 59, 142, 452). He also asked Mr. RR if “he was a moron,” or “in high school.” (R. at 59).

Mr. RR asked appellant if he was a cop. (R. at 60). Appellant asked him, “what do you think?” and leaned 4–5 inches from Mr. RR's face, sternly telling him “[you] need to respect [me].” (R. at 59–60). Mr. RR unbuckled his seat belt and “bumps [appellant] with the door,” as he pushed it open. (R. at 61; 502; Pros. Ex. 4 at 02:06–10). Appellant protested, “you can't do that [t]hat's an assault,” before slamming the door back on Mr. RR's elbow. (R. at 61, 503).

Mr. RR responded by telling appellant to get “back in [his] car,” to “leave him alone,” and to “fuck off.” (R. at 62). Appellant responded, “[n]o, I'm not going anywhere. I'm staying right here.” (R. at 144). This exchange repeated a few times. (R. at 144). As the bickering continued, Mr. RR offered to record appellant, and retrieved his phone from the vehicle. (R. at 63). Appellant said “go for it,” and moved closer to Mr. RR, “towering over [him].” (R. at 64).

c. Mr. RR retreated from appellant.

As appellant continued to close the distance between them, Mr. RR retreated away until he was near the rear of his vehicle. (R. at 65–66, 146). Mr. RR began recording and asked “[c]an you explain to us why you’re here?” (R. at 143). Appellant appeared to grow frustrated, scrunched his nose and bore his teeth. (R. at 66; 143–44). Mr. RR held his phone in appellant’s face and said, “look at this faggot.” (R. at 66). In appellant’s own words, when Mr. RR held the phone in his face, he “[l]ost wherewithal with where his hands were, his quick motions,” and “so [he] neutralized him.” (Pros. Ex. 4 at 02:30–45; 03:05–08). Appellant neutralized Mr. RR by snatching the phone out of his hand, and using his left hand, pinning Mr. RR to the side of the minivan. (R. at 66).

d. Appellant attacked Mr. RR, injuring him.

Mr. RR “had no air” and could not breath. (R. at 66–67). Ms. ZB, Mr. RR’s girlfriend and a passenger in the minivan, watched as Mr. RR choked and gagged. (R. at 144; Pros. Ex. 3 at p. 4–6). Mr. RR retaliated, striking appellant in the face, but was quickly placed in a headlock. (R. at 68, 146). Appellant then swept Mr. RR’s legs, sending his head to the asphalt. (R. at 147; Pros. Ex. 1; Pros. Ex. 3 at p. 1–3). Mr. RR’s head was bruised and covered with road rash as a result. (Pros. Ex. 3 at p. 1–3). Passersby watched appellant struggle with Mr. RR in the roadway

and drag him by his leg. (Pros. Ex. 1 at 00:00–10). One of the passersby, a UPS driver Ms. JV, relayed the incident to her manager who called law enforcement. (R. at 234).

e. Appellant admits “I am in the wrong” to law enforcement.

Appellant also notified law enforcement of the incident and remained nearby to give his account of what occurred. (R. at 530). After telling SGT CW of Round Rock Police Department his side of the story, he concluded with, “but, I am wrong, I am wrong.” (R. at 198; Pros. Ex. 4 at 05:48–55). “I intimidated an eighteen-year-old kid.” (Pros. Ex. 4 at 06:02–05). Throughout his interview, appellant excitedly interrupted SGT CW, who had to ask him to “let me finish.” (Pros. Ex. 4 at 07:33–38).

Upon hearing SGT CW characterize his actions as pulling over in the middle of the parkway to start a fight with an eighteen-year-old kid “over a road rage incident” appellant responded, “you’re right.” (Pros. Ex. 4 at 07:50–08:55). Appellant also acknowledged that his actions put Mr. RR on the defensive. (Pros. Ex. 4 at 08:48–53). As the officers explained the risks appellant created with his decisions, he continued repeating, “I’m wrong, I’m very wrong.” (Pros. Ex. 4 at 09:08–09:10).

At trial, appellant explained that he only made these statements of admission

to SGT CW because he felt like he “wasn’t being heard.” (R. at 531).

Standard of Review

Questions of factual sufficiency are reviewed de novo. *United States v. Bailey*, 84 M.J. 754, 757–758 (Army Ct. Crim. App. 2024). This court “is precluded from conducting a factual sufficiency review absent ‘an assertion of error and a showing of a deficiency’ by appellant.” *Id.* at 758 (citing *United States v. Harvey*, __ M.J. __, 2024 CAAF LEXIS 502, at *5 (C.A.A.F. 2024)).

After a specific showing of a deficiency in proof is made, “the Court may weigh the evidence and determine controverted questions of fact subject to [] 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. [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.” William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542 (1 Jan. 2021) [FY21 NDAA].⁷

⁷ “The amendment to Article 66(D)(1)(B) applied only to courts-martial, as here, where every finding of guilty in the Entry of Judgment is for an offense that occurred on or after 1 January 2021.” *Scott*, __ M.J. __, 2024 CCA LEXIS 126 at *4–5.

Law and Argument

Appellant does not contest that he committed an assault consummated by a battery against Mr. RR. (*See* Appellant's Br.). Rather, appellant argues that he assaulted Mr. RR in defense of himself and that the military judge erred by finding otherwise. (Appellant's Br. at p. 11).

Rule for Courts-Martial [RCM] 916(e)(3) provides that self-defense applies to "other assaults" when an accused:

- (A) Apprehended, upon reasonable grounds, that bodily harm was to be inflicted wrongfully upon the accused; and
- (B) Believed that the force that [the] accused used was necessary for protection against bodily harm, provided that the force used by the accused was less than force reasonably likely to produce death or grievous bodily harm.

Further, "[t]he right to self-defense is lost . . . if the accused was an aggressor, engaged in mutual combat, or provoked the attack which gave rise to the apprehension" RCM 916(e)(4). Though "[a] person does not become an aggressor or provocateur merely because that person approaches another to seek an interview," that approach must be made "in a nonviolent manner," or the right to self-defense is lost. RCM 916(e)(4) discussion.

One last consideration is the opportunity to retreat. RCM 916(e)(4) discussion. While one does not lose the right to self-defense merely due to

available “avenues of retreat,” their presence may be “considered in addressing the reasonableness of the accused’s apprehension of bodily harm and the sincerity of the accused’s belief that the force used was necessary for self-protection.” RCM 916(e)(4) discussion.

Once self-defense is raised, the prosecution has the burden of proving beyond a reasonable doubt that the defense does not apply to the accused. RCM 916(b)(1).

a. Appellant failed to make a specific showing of a deficiency in proof.

Under Article 66(d)(1)(B)(i), UCMJ, appellant must first make “a specific showing of a deficiency in proof.” Appellant claims that he has accomplished this threshold requirement by arguing self-defense. (Appellant’s Br. at p. 10). In doing so, appellant merely relitigates his trial strategy while ignoring the trial evidence that disfavored his position. The Government disagrees that this qualifies as a “specific showing of a deficiency in proof.” *Harvey*, __ M.J. at __, 2024 CAAF LEXIS 502, at *5.

The defense did not request special findings pursuant to RCM 918(b).⁸

“[M]ilitary judges are presumed to know the law and follow it, absent clear

⁸ “In a trial by court-martial composed of military judge alone, the military judge shall make special findings upon request by any party. Special findings may be requested only as to matters of fact reasonably in issue as to an offense and need be made only as to offenses of which the accused was found guilty.”

evidence to the contrary.” *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997). “Based on the evidence and the law, the military judge made general findings of guilt, by exception and substitution. (R. at 614–15). Therefore, the military judge considered the trial evidence and determined that the prosecution had proven, beyond a reasonable doubt, that self-defense did not apply. If appellant had any legitimate concerns about the sufficiency of the military judge’s findings, he should have requested special findings to allow the military judge to specifically articulate his reasoning.

b. Overwhelming evidence supports a finding of factual sufficiency.

Assuming appellant meets the initial burden to establish a deficiency of proof, this court must “weigh the evidence and determine controverted questions of fact.” Article 66(d)(1)(B)(ii). Moreover, the court is required to give “appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence.” Article 66(d)(1)(B)(ii)(I); *Harvey*, __ M.J. __, at *7. If the conviction is “against the weight of the evidence,” then the court may “dismiss, set aside, or modify the finding.” Article 66(d)(1)(B)(iii). The Court of Appeals for the Armed Forces (CAAF) has interpreted this last section as requiring “proof beyond a reasonable doubt. *Harvey*, __ M.J. at __, 2024 CAAF LEXIS 502, at *10. “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).

Here, substantial evidence showed that appellant was the aggressor when he stopped his vehicle in the middle of the road to confront another driver. The prosecution introduced compelling evidence demonstrating that appellant did not have a reasonable apprehension of bodily harm when he grabbed Mr. RR with his hand against the minivan. (R. at 66). Further, appellant utilized force against Mr. RR likely to cause grievous bodily harm when he swept Mr. RR’s legs, sending his head to the asphalt. (Pros. Ex. 3 at p. 1–3).

1. Appellant was the aggressor.

Appellant did not “slow his car to a stop at a safe passing point on the parkway.” (*Compare* Appellant’s Br. at p. 4, *with* R. at 140 (“He was right in the middle of the road.”)). Appellant braked his vehicle to a stop in the middle of a one lane parkway, depriving Mr. RR of the ability to travel around him without crossing a double yellow line and driving into an opposing lane of traffic. (R. at 54–55, 140; Pros. Ex. 1 00:00–00:01; Pros. Ex. 2). If appellant wished to give Mr.

RR an opportunity to safely pass him, as he drove extremely slowly at approximately 15 mph, he would have utilized the shoulder of the parkway. (R. at 52; Pros. Ex. 2). The shoulder was wide enough to almost completely fit appellant's vehicle, as demonstrated by the body camera footage introduced by the prosecution. (Pros. Ex 4 at 03:58). So if appellant truly didn't want a roadside confrontation, he should have pulled onto the parkway shoulder to avoid one.

Once stopped, appellant hopped out of his vehicle and leaned on Mr. RR's door. (R. at 59). In doing so, appellant cut off all avenues of retreat for Mr. RR. Appellant acknowledged as much when he stated that his actions put Mr. RR "on the defensive." (Pros. Ex. 4 at 08:48–53). Appellant then asked Mr. RR if he was "in high school," or "a moron." (R. at 59).

When Mr. RR stepped out of his vehicle, appellant continued to escalate the situation. Appellant, complained, "you can't do that [t]hat's an assault," when Mr. RR's door came into contact with his leg. (R. at 61, 503). This was despite the fact that he was leaning on Mr. RR's door, making it impossible for him to exit his vehicle without coming into contact with appellant. Appellant then slammed Mr. RR's door, hitting Mr. RR's elbow. (R. at 61). Further, appellant told Mr. RR "[you] need to respect [me]," and "[n]o, I'm not going anywhere. I'm staying right here." (R. at 59–60; 144).

When Mr. RR began recording appellant, he closed the distance between

them, “towering over [him].” (R. at 64). As appellant continued to close the distance between them, Mr. RR retreated away until he was near the rear of his vehicle. (R. at 65–66, 146). Mr. RR extended his hand holding the phone up towards appellant’s face as appellant advanced further. (R. at 66). This was when appellant claims he “[l]ost wherewithal with where his hands were, his quick motions,” and grabbed Mr. RR with his hand, holding him against the van. (Pros. Ex. 4 at 02:30–45; 03:05–08).

Appellant, the aggressor, created this dangerous situation alone by aggressively approaching Mr. RR, cutting off all avenues of retreat, and pursuing Mr. RR. Appellant also had every opportunity to retreat from Mr. RR during this escalation but decided to attack.

The prosecution proved beyond a reasonable doubt through witness testimony and appellant’s own words that he was the aggressor. As such, he may not credibly claim self-defense. RCM 916(e)(4).

2. Appellant did not have a reasonable apprehension of bodily harm.

Appellant argues that he remained “very calm” throughout the entirety of the assault. (Appellant’s Br. at p. 13). Yet somehow, while maintaining a “very calm” demeanor, appellant, a 240 pound man, felt “completely threatened” by a 102 pound biological girl holding a phone in his face. (R. at 111, 511).

“Fear” and “concern” were emphasized heavily in appellant’s brief, going so far as to tally the appellant’s use of the words during his testimony. (Appellant’s Br. at p. 12). Appellant cannot credibly claim to simultaneously to have been the paragon of calm, reasoned “maritime law enforcement boarding officer”⁹ while also the fearful victim of a wrathful teenage girl.

The testimony of Mr. RR and Ms. ZB contradicted appellant’s portrayal of acting reasonably and calmly, describing him as scrunching his nose and bearing his teeth before he began his assault. (R. at 66; 143–44). Video evidence further undermines appellant’s claim—it shows appellant dragging Mr. RR around the road. (Pros. Ex. 1 at 00:00–10). Appellant’s face can also be clearly seen in the video as he continues to taunt Mr. RR. (Pros. Ex. 1 at 00:25–35).

The evidence shows that appellant was not cool, calm, collected, or in a state of fear. He was angry and his anger explains his actions. Whether Mr. RR’s testimony is believable or not, a fearful person does not continue to taunt a young girl after thrashing her about on the ground. (Pros. Ex. 1 at 00:25–35). Appellant did so to a girl less than half his size, on a public roadway, in his Army officer uniform. These are the actions of an angry individual bent on winning the obedience of another, by any means. Frankly, it is conduct unbecoming an officer.

⁹ Repeatedly, appellant described his actions throughout the road rage incident as products of his training as a maritime law enforcement boarding officer. (R. at 455, 498, 522, 537).

3. Appellant used force likely to cause grievous bodily injury.

“Grievous bodily harm,” is defined by the UCMJ as “bodily injury that involves: (i) substantial risk of death; (ii) extreme physical pain; (iii) protracted and obvious disfigurement; or (iv) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.” *Manual for Courts-Martial, United States* (2019 ed.), pt. IV, ¶ 77.c.(1)(c). Dropping someone on their head on asphalt meets all four criteria.

Appellant utilized force against Mr. RR likely to cause grievous bodily harm when he swept Mr. RR’s legs, sending his head to the asphalt. (Pros. Ex. 3 at p. 1–3). Though appellant did so after being punched in the face by Mr. RR, no punches were thrown until appellant pinned Mr. RR against a vehicle, causing Mr. RR to struggle for air. (R. at 67–68). It is worth noting that appellant refused medical attention at the scene of the assault. (Pros. Ex. 4 at 07:05–15). He refused medical attention because Mr. RR only inflicted superficial harm to appellant’s nose.

Appellant’s use of force likely to cause grievous bodily injury provided further ground for the military judge to find, beyond a reasonable doubt, that appellant’s assault did not qualify as self-defense. RCM] 916(e)(3)(B).

4. The court should defer to the military judge.

Appellant asks this court to substitute its judgment and credibility determinations for the military judge's.¹⁰ (Appellant's Br. at p. 13–14). If this court were solely considering the video recordings and accompanying photos this court “might determine that the appropriate deference required is low.” *Harvey*, __ M.J. at __, 2024 CAAF LEXIS 502, at *8. However, that is not the case. The findings required the military judge to consider the credibility of testimony in conjunction with the corroborating evidence, and this is the type of case where this court should give great deference to the military judge's findings. *United States v. Ryan*, 21 M.J. 627, 632 (A.C.M.R. 1985) (holding that a victim's testimony alone, when credible, can be sufficient to sustain a conviction beyond reasonable doubt).¹¹ The military judge observed all the witness during the court-martial,

¹⁰ Prior to the amendments, this court had express authority under Article 66(c) to “judge the credibility of witnesses.” Under the revised statute, Congress removed that language. FY21 NDAA. When a legislative body amends a statutory provision, as Congress did here, such “a significant change in language is presumed to entail a change in meaning.” Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 234 (2012). Therefore this revision should be interpreted to remove the authority of this court to judge the credibility of witnesses who testified at trial.

¹¹ See also *United States v. Coovert*, ACM 39848, 2021 CCA LEXIS 355, at *38 (A.F. Ct. Crim. App. 21 Jul. 2021) ([mem. op.](#)) (“At trial, [the victim's] testimony alone was sufficient to establish proof of the two elements necessary for the charge.”); *United States v. Leach*, ACM 39563, 2020 CCA LEXIS 230, at *74 (A.F. Ct. Crim. App. 8 Jul. 2020) ([mem. op.](#)) (“[Trial counsel] further correctly argued [the victim's] testimony alone could be sufficient to convict Appellant if

made determinations of fact based off their testimony and demeanor, and found appellant guilty. This court should not disturb that finding.

Conclusion

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



ALEX J. BERKUN
CPT, JA
Appellate Attorney, Government
Appellate Division



MARC B. SAWYER
MAJ, JA
Branch Chief, Government
Appellate Division



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

the members found her credible.”); *United States v. Long*, ARMY 20150160, 2018 CCA LEXIS 512, at *19 (Army Ct. Crim. App. 26 Oct. 2018) (*rev’d on other grounds*) ([mem. op.](#)) (“The strength of one witness’s testimony may, in some cases, be sufficient to sustain a conviction.”).

CERTIFICATE OF SERVICE, U.S. v. ALLEN (20230617)

I certify that a copy of the foregoing was sent via electronic submission to
the Defense Appellate Division at [REDACTED]

[REDACTED] on the 4th day of February, 2025.

[REDACTED]
DANIEL L. MANN
Senior Paralegal Specialist
Government Appellate Division
[REDACTED]