IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

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

APPELLEE SPECIFIED ISSUE BRIEF

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

Specified Question (a)

In light of the fact that our superior court precedent addresses the parental discipline defense in the context of the use of force and/or the amount of force used (*see e.g. United States v. Brown*, 26 M.J. 148 (C.M.A. 1988); *United States v. Robertson*, 36 M.J. 190 (C.M.A. 1992); *United States v. Rivera*, 54 M.J. 489 (C.A.A.F. 2001)), can such a defense apply in a case where the use of physical force is not alleged?

Specified Question (b)

Does the fact that the child endangerment offense requires a specific mens rea of either design or culpable negligence, as opposed to an assault offense which requires only general intent, preclude the application of the parental discipline defense to the offense of child endangerment?

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).

On 16 August 2024, appellant filed a brief alleging one assignment of error with this court. On 13 September 2024, appellee filed a brief in response. On 16 September 2024, appellant requested a four-day extension of time until 27 September 2024 to file his reply brief; the court granted appellant's motion on 17 September 2024. Appellant did not file a reply brief.

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[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 28 February 2025, this court ordered appellee to file a brief responsive to the two questions answered below by 7 March 2025.

Specified Question (a)

> **In light of the fact that our superior court precedent addresses the parental discipline defense in the context of the use of force and/or the amount of force used (*see e.g. United States v. Brown*, 26 M.J. 148 (C.M.A. 1988); *United States v. Robertson*, 36 M.J. 190 (C.M.A. 1992); *United States v. Rivera*, 54 M.J. 489 (C.A.A.F. 2001)), can such a defense apply in a case where the use of physical force is not alleged?**

It is an open question in the military justice system whether a parental discipline defense would apply where physical force is not alleged. However, if this court determines that the defense could apply, appellant cannot claim error in his case because the military judge instructed the panel on parental discipline.

Under current case law, the parental discipline defense only applies to instances where a parent uses force. In *United States v. Brown*, 26 M.J. 148, 150 (C.M.A. 1988), the appellant in the case argued that his conviction for assault consummated by a battery upon a child under the age of sixteen was legally insufficient. According to the appellant, "the evidence of record showed that his actions toward [his stepson] were justified by his parental duty to administer discipline to his stepson." *Id.* at 150. In assessing the appellant's defense, the Court of Military Appeals (CMA) adopted a test derived from the Model Penal Code to delineate between acceptable force and unlawful force in assessing

whether the appellant's use of force as a parent was justified. *Id.* (citing Model Penal Code § 3.08(1) (A.L.I. 1985). In concluding that the appellant's whipping of his stepson was unreasonable and arose out of an improper motive, the court asked whether "*the force* is used for the purpose of safeguarding or promoting the welfare of the minor" and whether "*the force* is not designed to cause or known to create a substantial risk of death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation . . . ." *Id.* (emphasis added).

Similarly, in *United States v. Robertson*, 36 M.J. 190, 191 (C.M.A. 1992), the appellant in that case also challenged the legal sufficiency of his conviction for assault on a child under the age of 16. In rejecting the appellant's argument, the CMA cited to *Brown* as the standard for determining whether the appellant's spanking of his child's buttocks was protected under the parental discipline defense. Again, the court reiterated that "[i]n applying the Model Penal Code test to the evidence, we must first determine whether the parent's purpose for *using force* was shown not to be proper . . . . The second prong of the test is one of reasonable *force*." *Id.* at 191–92 (emphasis added).

And most recently, in *United States v. Rivera*, 54 M.J. 489 (C.A.A.F. 2001), the Court of Appeals for the Armed Forces (CAAF) again addressed the parental discipline defense in the context of legal sufficiency. In *Rivera*, the appellant argued that "based on the Government's proof, no reasonable factfinder could find

beyond a reasonable doubt that the purpose and degree of force used by appellant moved on a continuum from reasonable parental discipline to criminal conduct." *Id.* at 490. In finding appellant's conviction for assault consummated by a battery on a child legally sufficient, the CAAF yet again cited to *Brown*, *Robertson*, and the Model Penal Code in determining whether the appellant's conduct constituted reasonable parental discipline. *Id.* at 491.

In each of these cases where the appellants asserted the parental discipline defense, the appellants were convicted of an assault where there was some use of force. And as the court in *Rivera* aptly noted, "One need not look to the Bible, Dickens, or Twain to understand that parental discipline is as necessary as it is varied and that parental discipline has always had a *physical component*." 54 M.J. at 491 (emphasis added). *But see id.* at 491, n.2 ("The Government has not relied on mental distress as the predicate for the prosecution. As a result we need not determine here what degree of mental distress is so unreasonable or extreme as to overcome an affirmative defense of parental discipline, and we decline to do so in the abstract."). This is especially true where the framework to assess a parental discipline defense specifically requires asking the parent's purpose for "using force" and whether that "force" was reasonable. *Brown*, 26 M.J. at 150; *Robertson*, 36 M.J. at 191–92; *Rivera*, 54 M.J. at 491.

Aside from case law, the model instructions for the parental discipline defense also contemplates a use of force requirement. "The evidence has raised an issue of whether the accused was imposing *corporal punishment* . . . ." Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 5-16 (29 Feb. 2020) [Benchbook]. The instruction then continues by discussing the definition of "[u]nreasonable or excessive force," along with instructions if an issue was raised as to "whether the accused was one who was authorized to use *force* to discipline . . . ." *Id.* (emphasis added).

In the instant case and under the case law the court cited in the specified question, appellant cannot avail himself of the parental discipline defense. Although his treatment of his children clearly constituted child endangerment in violation of Article 119b, UCMJ, he did not use any force towards them. And without the use of force, the parental discipline defense cannot apply since there is no "force" to assess as reasonable or unreasonable.

Specified Question (b)

> **Does the fact that the child endangerment offense requires a specific mens rea of either design or culpable negligence, as opposed to an assault offense which requires only general intent, preclude the application of the parental discipline defense to the offense of child endangerment?**

Because child endangerment by design requires a specific mens rea, it precludes the application of the parental discipline defense to the offense.

However, child endangerment by culpable negligence is a general intent offense, which would not preclude application of the parental discipline defense.

An appellant could not claim the parental discipline defense for child endangerment by design. Simply put, an appellant could not specifically intend to put a child in danger and then claim it was for the proper and reasonable purpose of parental discipline. The military judge here also recognized this when he discussed the parental discipline instruction with the parties. (R. at 736). According to the military judge, since child endangerment requires a specific mens rea, "the elements if found beyond a reasonable doubt" would "preclude" the application of the parental discipline defense. (R. at 736). The military judge further noted that "[t]he parental discipline is usually designed around an assault consummated by a battery-type offenses, which are typically a general intent crime as opposed to a specific intent offense like Article 119b." (R. at 736). However, the military judge said he would "leave the position to the parties." (R. at 736). And after conferring with the parties, he ultimately provided the panel with a parental discipline defense-like instruction, which was something that the military judge had to "craft" since there was no "exact one-for-one match" between child endangerment and the parental discipline defense in the Benchbook. (R. at 736, 750).

On the other hand, this court has recognized that "[c]hild endangerment, like other offenses by culpable negligence, is a general-intent offense reviewed under an objective test." *United States v. Myers*, ARMY 20230100, 2024 CCA LEXIS 535, at *13 (Army Ct. Crim. App. 2024) (pet. pending) (citing *United States v. Koth*, ARMY 20150179, 2017 CCA LEXIS 145, at *3–4 (Army Ct. Crim. App. 2017), aff'd, 76 M.J. 401 (C.A.A.F. 2017)). Therefore, child endangerment by culpable negligence would not per se preclude the application of the parental discipline defense. *Cf. United States v. Moore*, 12 U.S.C.M.A. 696, 703 (Quinn, C.J., dissenting) (implying that parental discipline defense could apply to culpable negligence where the majority found that the appellant's killing of his child could have been a result of culpable negligence rather than intent to kill).

Yet, as discussed above, the panel considered the parental discipline defense and rejected it. Furthermore, if this court were to "craft" a parental discipline defense for child endangerment by culpable negligence, the court should affirm the panel's finding that it does not apply to appellant's case: appellant's conduct was unreasonable, designed to cause gross degradation, and arose from improper motives. (Appellee's Br. 8–18).

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

ANTHONY SCARPATI
CPT, JA
Branch Chief, Government
Appellate Division

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

APPENDIX

United States v. Myers

United States Army Court of Criminal Appeals

December 16, 2024, Decided

ARMY 20230100

Reporter
2024 CCA LEXIS 535 *; 2024 WL 5134879

UNITED STATES, Appellee v. Staff Sergeant DAVID K. MYERS, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by *United States v. Myers., 2025 CAAF LEXIS 69 (C.A.A.F., Jan. 30, 2025)*

Prior History: [*1] Headquarters, U.S. Army Maneuver Center of Excellence. Trevor I. Barna, Military Judge. Colonel Javier E. Rivera, Staff Judge Advocate.

Case Summary

Overview
Key Legal Holdings

- The evidence was legally and factually sufficient to sustain appellant's convictions for child endangerment.
- The military judge did not err in finding law enforcement's warrantless entry into appellant's home objectively reasonable under the emergency aid exception to the *Fourth Amendment*.

Material Facts

- Appellant was convicted of three specifications of child endangerment involving his three children, ages 2, 3, and 5, for locking them in rooms with no adult present while exposed to animal and human feces and other unsanitary conditions on multiple occasions between May 5 and July 15, 2022.
- On July 15, 2022, law enforcement responded to a 911 call about unattended children at appellant's home. After observing a naked, dirty toddler through a window, they entered the home and found the three children locked in filthy rooms covered in feces.

Controlling Law

- Article 119b of the Uniform Code of Military Justice (child endangerment).
- *Fourth Amendment to the U.S. Constitution*(emergency aid exception to warrant requirement).

Court Rationale

Regarding legal and factual sufficiency, the court found sufficient circumstantial evidence that appellant left the children unattended with no adult present, even if they were not technically "locked" in the rooms. The filthy, hazardous conditions alone constituted child endangerment. Regarding the warrantless entry, the court found it was objectively reasonable for law enforcement to enter the home under the emergency aid exception after observing the child through the window and being unable to confirm the safety of the other children.

Outcome
Procedural Outcome

The U.S. Army Court of Criminal Appeals affirmed

the findings of guilty and the sentence.

Counsel: For Appellant: Captain Stephen R. Millwood, JA (argued); Colonel Philip M. Staten, JA; Lieutenant Colonel Autumn R. Porter, JA; Major Robert D. Luyties, JA; Captain Stephen R. Millwood, JA (on brief and reply brief).

For Appellee: Captain Stewart A. Miller, JA (argued); Colonel Christopher B. Burgess, JA; Major Justin L. Talley, JA; Lieutenant Colonel Jonathan P. Robell, JA (on brief).

Judges: Before FLEMING, PENLAND, and COOPER, Appellate Military Judges. Judge COOPER concurs. PENLAND, Judge, concurring in part and in the result.

Opinion by: FLEMING

Opinion

MEMORANDUM OPINION

FLEMING, Senior Judge:

Appellant contends his convictions of three specifications of child endangerment of his own children, ages 2, 3, and 5, are legally and factually insufficient and the military judge erred by finding law enforcement's warrantless entry into appellant's home objectively reasonable under the emergency aid exception to the *Fourth Amendment*. As to both contentions, we disagree.[1]

BACKGROUND

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of three specifications of child [*2] endangerment in violation of *Article 119b, Uniform Code of Military Justice, 10 U.S.C. § 919b* [UCMJ]. The military judge sentenced appellant to a bad-conduct discharge, two-hundred and seventy days of confinement, and reduction to the grade of E-1.[2]

On 15 July 2022, military police (MPs), including Detectives [TEXT REDACTED BY THE COURT] were dispatched to appellant's on-post home for a welfare check after an anonymous 911 caller claimed appellant's young children were left unattended. Upon arriving at the home, Detective [TEXT REDACTED BY THE COURT] was briefed by the on-scene MPs regarding their unsuccessful attempts to contact anyone within appellant's home. The MPs explained that their acts of ringing the doorbell and knocking on the door were met with no response.[3] After receipt of this MP briefing and seeing no vehicles in the driveway or lights on in the home, Detective [TEXT REDACTED BY THE COURT] called the anonymous caller's number, previously registered with the 911 dispatcher, to confirm the validity of the allegation that young children were unattended in appellant's home.

During this call, Detective [TEXT REDACTED BY THE COURT] testified the 911 caller was "assertive about the timeframe that [he and his wife] observed [appellant and his [*3] spouse] leave the residence without the children in tow. And they were pretty adamant that the children were at home unattended, and [provided] specific [details] about the items in the home, such as the doors, the condition of the home and the children definitely being inside of the residence."

At trial, the anonymous 911 caller, Sergeant First Class (SFC) [TEXT REDACTED BY THE COURT], now identified as appellant's next-door neighbor, testified to the events leading up to his and his wife's decision to call 911. Sergeant First Class [TEXT REDACTED BY THE COURT]'s wife, [TEXT REDACTED BY THE COURT], testified to babysitting appellant's children in early May 2022. Upon arrival at the home, [TEXT REDACTED BY

[1] We have also given full and fair consideration to the matter personally raised by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, and determine it merits neither discussion nor relief.

[2] Appellant was sentenced to ninety days of confinement for each specification, to be served consecutively.

[3] The MPs noted the doorbell on appellant's home included a "ring" video camera. Accordingly, the MPs made repeated attempts to indicate their presence outside the home via the "ring" camera so any inhabitant of the home would receive notifications regarding their presence.

THE COURT] was instructed by appellant's wife, in the presence of appellant, to not leave the first floor of the home. Appellant and his wife then departed their home.

After their departure, [TEXT REDACTED BY THE COURT] could hear the children playing upstairs. [TEXT REDACTED BY THE COURT], a mother of young children, became concerned about the children's welfare. Eventually, she decided to ignore the instruction to not leave the first floor so she could check on the children's welfare. [*4]

Traveling upstairs, [TEXT REDACTED BY THE COURT] found [TEXT REDACTED BY THE COURT] locked in his room, with the doorknob's lock inverted and outside the room.[4] Inside the room, [TEXT REDACTED BY THE COURT] saw broken thin glass ornaments on the floor and that [TEXT REDACTED BY THE COURT]'s diaper was filled with feces. No clean diapers were readily available. She next found the girls locked in their room, with the doorknob lock also inverted and outside the room. Like [TEXT REDACTED BY THE COURT], the girls were "not kept up." [TEXT REDACTED BY THE COURT] described being very concerned by: (1) the girls' inability to talk at all at the age of 3 (almost 4) and 5; (2) that it appeared normal for the three children to be locked in their rooms; and (3) the home's overall lack of cleanliness and the "pretty bad migraine [she received] from the smell and filth" within the home. [TEXT REDACTED BY THE COURT] and SFC [TEXT REDACTED BY THE COURT] testified [TEXT REDACTED BY THE COURT] was stressed, distraught, and uneasy about the conditions in appellant's home and the welfare of his children.

Sergeant First Class [TEXT REDACTED BY THE COURT] testified "it's okay to have different views of parenting [*5] and cleanliness and things like that. Everyone's different in this world . . . [but] we began to recognize that these kids were probably living in a pretty rough situation and . . . it start[ed] to question our moral compass of what do we do." After [TEXT REDACTED BY THE COURT]'s evening of babysitting, she and SFC [TEXT REDACTED BY THE COURT] observed the activities at appellant's home over the course of the late spring and early summer and particularly the two days prior to making the 911 call on 15 July 2022, when it appeared appellant and his wife had been leaving the children unattended on several occasions. SFC [TEXT REDACTED BY THE COURT] testified he made the "huge decision" based on his moral compass, status of being a parent and a senior non-commissioned officer, and being "bound to do the right thing," to call 911 regarding appellant and his wife leaving their young children unattended.

After receiving the initial 911 call, talking with the MPs on scene, and then calling and speaking with SFC [TEXT REDACTED BY THE COURT] Detective PT circled appellant's home, banging on doors and walls to elicit a response from within. After a few minutes, Detective [TEXT REDACTED BY THE [*6] COURT] saw a male toddler, approximately two years of age, emerge in the rear upstairs window of the home. As it was now dark outside, Detective [TEXT REDACTED BY THE COURT] used his flashlight to see more clearly. The boy was completely naked and dirty and the window appeared smeared with feces or dirt.

With the appearance of an apparently unattended young child, Detective [TEXT REDACTED BY THE COURT] became very concerned and decided to call emergency services to gain entry into appellant's home. Detective [TEXT REDACTED BY THE COURT] testified he was concerned about the whereabouts and well-being of the other two young children, as the presence of the young boy further corroborated the 911 caller's allegations. About this time, however, appellant pulled into his driveway.

Detective [TEXT REDACTED BY THE COURT] advised appellant it was against post regulation to leave young children unattended in the home and that Detective [TEXT REDACTED BY THE COURT] wanted to immediately enter the home to aid the children and ensure their well-being. In

[4] A housing inspector from the on-post's Directorate of Public Works testified the doorknobs were not inverted in any room when he inspected appellant's home in July of 2021, just prior to appellant's move-in date, as inverted doors are a safety hazard the inspector was required to annotate.

response, appellant unlocked his front door and entered the home. Detective [TEXT REDACTED BY THE COURT] and MP Sergeant (SGT) [TEXT REDACTED BY [*7] THE COURT] followed appellant from behind.

Appellant immediately led Detective [TEXT REDACTED BY THE COURT] up the stairs to the second level of the home and unlocked the door to the room of his son, [TEXT REDACTED BY THE COURT] The doorknob to [TEXT REDACTED BY THE COURT]'s room was inverted, as it had been when [TEXT REDACTED BY THE COURT] babysat in early May 2022, so the locking mechanism faced away from the room's interior and was unreachable by Once appellant unlocked the door, [TEXT REDACTED BY THE COURT] emerged from the room naked and covered in feces. Detective [TEXT REDACTED BY THE COURT] described [TEXT REDACTED BY THE COURT]'s room:

> ". . . 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 [[TEXT REDACTED BY THE COURT]] 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."

Next, appellant led Detective [TEXT REDACTED BY THE COURT] and SGT [TEXT REDACTED BY THE COURT] the room of his young daughters, [TEXT REDACTED BY THE COURT] and [TEXT REDACTED BY [*8] THE COURT], which was further down the upstairs hallway. This hallway contained more feces. The lock on [TEXT REDACTED BY THE COURT] and [TEXT REDACTED BY THE COURT]'s door was inverted, like [TEXT REDACTED BY THE COURT]'s door and the same as when [TEXT REDACTED BY THE COURT] had babysat in May 2022, trapping the young girls inside. When appellant opened the door, Detective [TEXT REDACTED BY THE COURT] observed the girls wearing diapers heavy with feces and urine. Describing the condition of the girls' room, Detective [TEXT REDACTED BY THE COURT] testified, "they had . . . 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." Detective [TEXT REDACTED BY THE COURT] also noted [TEXT REDACTED BY THE COURT] and [TEXT REDACTED BY THE COURT] appeared to be emaciated and both were non-verbal, only communicating in grunts.

Detective [TEXT REDACTED BY THE COURT] called appellant's First Sergeant (1SG), [TEXT REDACTED BY THE COURT], and instructed him to immediately come to appellant's home to see its condition. First Sergeant [TEXT REDACTED [*9] BY THE COURT] testified at trial to his observations of the children's rooms as follows: (1) the doorknobs were inverted and facing the hallway; (2) "copious amounts or" feces were smeared all over the children's room walls, beds, and toys; (3) the dressers were turned and facing the walls as a "safety measure so they could not open the drawers;" and (4) a very strong smell of urine and feces emanated from the rooms.[5]

Military Police Sergeant [TEXT REDACTED BY THE COURT] testified, corroborating Detective [TEXT REDACTED BY THE COURT] and 1SG [TEXT REDACTED BY THE COURT]'s observations, regarding the utter filth and chaos of the children's bedrooms. Additionally, the government admitted photographs taken by SGT [TEXT REDACTED BY THE COURT] depicting the children's bedrooms covered in feces and other unsanitary contaminants on 15 July.

After being released from their rooms, all three children were brought downstairs where they were examined by Emergency Medical Services and, subsequently, transported to the hospital for further examination. Later that evening, appellant called Staff Sergeant (SSG) [TEXT REDACTED BY THE

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[5] First Sergeant [TEXT REDACTED BY THE COURT] also testified there was a "clear difference" between the children's rooms and appellant's master bedroom. The master bedroom was also located on the second floor and was connected to the children's rooms by a hallway containing a pile of old dirty diapers with "what looked like mold coming out of them." The master bedroom did not have any remnants of urine or feces, the dressers were turned the right way, and the doorknob locking mechanism faced into the room.

COURT], a fellow drill sergeant. Appellant said to SSG [TEXT REDACTED [*10] BY THE COURT]. "I f***** up. I can't tell you exactly what happened right now, but I need you to tell me you can watch my kids."

Ultimately, SSG [TEXT REDACTED BY THE COURT]'s wife, [TEXT REDACTED BY THE COURT], picked appellant's children up from the hospital. [TEXT REDACTED BY THE COURT] observed the children's hair to be matted and their "hands and faces [to be] brown" as if covered in feces. While later bathing the children, [TEXT REDACTED BY THE COURT] noted [TEXT REDACTED BY THE COURT] was covered in feces, had a hair tie stuck in her matted hair, and had clumps of head lice on her reddened scalp. [TEXT REDACTED BY THE COURT] had a hair tie stuck in her hair, head lice on her scalp, and open sores on her buttocks. While [TEXT REDACTED BY THE COURT] did not observe head lice on [TEXT REDACTED BY THE COURT], [TEXT REDACTED BY THE COURT] noticed his penis and buttocks were extremely red. Regarding the timeline it took to create the children's unhygienic, unkempt, and infested physical state, [TEXT REDACTED BY THE COURT] testified, "that doesn't just happen."

[TEXT REDACTED BY THE COURT], a military spouse from appellant's unit and a former emergency room nurse with a forensic nursing [*11] degree, testified she observed headlice on all three children the next day when she visited SSG [TEXT REDACTED BY THE COURT]'s home. [TEXT REDACTED BY THE COURT] testified the children never spoke, instead communicating with gestures and grunting.

Doctor [TEXT REDACTED BY THE COURT], a government expert, testified the children's living conditions constituted trauma and likely contributed to developmental delays. Doctor [TEXT REDACTED BY THE COURT], another government expert, testified the pervasive head lice identified on the girls' scalps was indicative of a long-term presence of lice.

LAW AND DISCUSSION

Legal and Factual Sufficiency

In accordance with the newly amended *Article 66, UCMJ*, this court "may consider whether the finding[s] [are] correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof." *Article 66(d)(1)(B), [UCMJ]*. Once appellant shows a factual deficiency, this court may evaluate the evidence while giving ". . . (1) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and (2) appropriate deference to findings of fact entered into the record by the military judge." *Id.* If clearly convinced the finding of guilty was [*12] not supported by the evidence, ". . . the [c]ourt may dismiss, set aside, or modify the finding, or affirm a lesser finding." *Id.* The Court of Appeals for the Armed Forces [CAAF] notes the level of deference afforded to the trial court ". . . will depend on the nature of the evidence at issue." *United States v. Harvey, M.J. , 2024 CAAF LEXIS 502 (C.A.A.F. 6 Sep. 2024*). "For example, a [Court of Criminal Appeals] might determine that the appropriate deference required for a court-martial's assessment of testimony of a fact witness, whose credibility was at issue, is high because the CCA judges could not see the witness testify." *Id.*

As a general matter, direct evidence is not required to prove guilt beyond a reasonable doubt. Rule for Courts-Martial [R.C.M.] 918(c). Instead, "[c]ircumstantial 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, 2017 CCA LEXIS 145, at *3-4 (Army Ct. Crim. App. 2017)* (citations omitted). *See also* R.C.M. 918(c).

Child endangerment consists of three elements:

1) the accused had a duty for the care of a certain child;
2) the child was under the age of 16;

3) the accused endangered the child's mental or physical health, safety, or welfare through design or culpable negligence.

*Manual [*13] for Courts-Martial, United States*

(2019 ed.) [*MCM*], pt. IV, ¶ 59b.

"Child endangerment, like other offenses by culpable negligence, is a general-intent offense reviewed under an objective test." *Koth, 2017 CCA LEXIS 145, at *4*. (citing *United States v. Gibson, 43 M.J. 343, 346 (C.A.A.F. 1995)*). Accordingly, a fact-finder can properly find guilt where ". . . appellant's negligent omission was accompanied by a *culpable* disregard for the foreseeable consequences . . ." *Id.* at 4-5. *See also United States v. Stradtmann, 84 M.J. 378 (C.A.A.F. 2024)*. "Actual physical or mental harm to the child is not required." *Koth, 2017 CCA LEXIS at 7* (see also *MCM*, pt. IV, ¶ 59c.(3)).

Appellant contends the military judge's findings of guilty were legally and factually insufficient for two reasons. First, appellant contends the government failed to establish beyond a reasonable doubt that he committed the charged actus reus and, even assuming he did, the alleged actus reus did not endanger his children. We disagree with appellant's assertions.

We first turn to analyze the actus reus alleged in each of the three specifications (one specification per child). The government charged appellant with child endangerment by culpable negligence "by locking [each said child in a room] with no adult present in the home while exposed to animal and human feces and other unsanitary conditions" "on divers occasions [*14] between on or about 5 May 2022 and on or about 15 July 2022." Appellant asserts the government failed to prove beyond a reasonable doubt the language "locking" and "no adult [being] present in the home." Appellant was on notice to defend against this language; he heavily contested the language at trial and continues now on appeal. We first discuss below the language of "no adult [being] present in the home."

As to this language, we find appellant has failed to make a specific showing of a deficiency in proof as required by *Harvey*. In his brief, appellant concedes it was "indisputable that the children were exposed to feces and left unsupervised for some period of time on 15 July 2022."

On that day, appellant's neighbors, SFC [TEXT REDACTED BY THE COURT] and [TEXT REDACTED BY THE COURT] testified to seeing appellant and his wife's vehicles leaving the home with no children inside. SFC [TEXT REDACTED BY THE COURT] and [TEXT REDACTED BY THE COURT] noted that no other vehicle arrived or parked at appellant's home after the vehicles departed. Sergeant First Class [TEXT REDACTED BY THE COURT] called the MPs, and the MPs arrived "about 30 minutes or so" later. After the MPs and Detective [TEXT [*15] REDACTED BY THE COURT] attempted to get a response from anyone inside the home for approximately 15 minutes, appellant pulled into his driveway. As soon as appellant unlocked his front door and walked inside, Detective [TEXT REDACTED BY THE COURT] and the MPs confirmed that "no adult [was] present" in the home.

As to "no adult [being] present" on another day between 5 May and 14 July 2022, 1SG [TEXT REDACTED BY THE COURT] testified in-depth regarding appellant's military work schedule. The government admitted four exhibits clearly documenting appellant's military work schedule during May, June, and July 2022. First Sergeant [TEXT REDACTED BY THE COURT] also testified appellant devoted "a lot of time going to the VFW [Veterans of Foreign Wars]" during his off-duty hours and seeing appellant and his wife (but not the children) at an event at the VFW in late June or early July 2022.

Sometime in March 2022, SSG [TEXT REDACTED BY THE COURT] testified appellant said he had "a job at the VFW." Appellant also told SSG [TEXT REDACTED BY THE COURT] at appellant was "[m]ore often than not" working at the VFW when he was off duty from his military work schedule. Staff Sergeant [TEXT REDACTED BY [*16] THE COURT] also saw appellant and his wife (again without the children) at the VFW for a July 4th celebration.

In approximately May 2022, appellant's wife started working at the VFW, the exact location appellant "devoted" hours of his time while off duty from his military work schedule. The government admitted appellant's wife's VFW time cards from mid-June

through 15 July 2022. There are several instances where appellant's military work schedule and his wife's VFW work schedule overlapped. Both parents were at work.

After appellant's wife started her VFW job, [TEXT REDACTED BY THE COURT] testified appellant and his wife's vehicles were both not at the home "[a]ll days of the week." [TEXT REDACTED BY THE COURT] never observed the children getting into either vehicle. Appellant's vehicle usually departed the home first, but not always. [TEXT REDACTED BY THE COURT] testified when appellant and his wife "were first gone a lot, there was another vehicle" that would be at appellant's home but after two to three weeks "it stopped coming." [TEXT REDACTED BY THE COURT] estimated she stopped seeing the other vehicle at appellant's home sometime in early June 2022. On 13 and 14 July 2022, in particular, [*17] [TEXT REDACTED BY THE COURT] and SFC [TEXT REDACTED BY THE COURT] testified to watching appellant's home closely and noticing appellant's and his wife's vehicles had both departed and no other vehicle was at the home. On 13 July 2022, appellant had military duty and his wife was working at the VFW.

Given the direct evidence that "no adult [was] present" in the home on 15 July 2022 and the circumstantial evidence as to "no adult [being] present" on another occasion between on or about 5 May to 14 July 2022, presented in the form of multiple government witnesses and exhibits, appellant has not met his burden of demonstrating a specific showing of a deficiency in proof as to this language.[6]

Having found no deficiency in proof as to this language, we now turn to the word "locking," and whether it is required to sustain appellant's conviction. We determine in this case it is not.

Our sister court determined that leaving a young child exposed amid unsanitary conditions, such as feces and urine, open trash bags, and dirty diapers constitutes culpable negligence and exposure to these hazards can create a "reasonable probability" a child will be harmed. *United States v. Lafontaine, 2017 CCA LEXIS 523, at *9-10 (A.F. Ct. Crim. App. 2017)* (citing *United States v. Plant, 74 M.J. 297, 300 (C.A.A.F. 2015)*). In *Lafontaine*, appellant left her infant [*18] son exposed to soiled diapers and food waste in places in the home he could access and "[s]he admitted she did not have visual contact with him all of the time." *Id.* at *8. He was also left in soiled diapers for hours at a time. *Id.* It was immaterial whether she was present in the home, or not, as her son's exposure to hazardous conditions, out of his mother's eyesight, was sufficient to constitute child endangerment.

Likewise, in this case, it is immaterial whether the children were, or were not, locked in their rooms. "[N]o adult [was] present in the home" and each young child was exposed to "copious amounts of feces" and "other unsanitary conditions" within their rooms. When discovered on 15 July 2022, DM was covered in feces and his two sisters, ELM and CEM, were wearing diapers heavy with feces and urine.

Multiple witnesses testified to the voluminous amount of feces and the "other unsanitary conditions" of the children's rooms. The government also admitted pictures depicting the feces and "other unsanitary conditions" in the children's rooms which serve to establish a *res ipsa loquitur* as to the hazardous conditions existing in their rooms on diverse occasions well before the children [*19] were discovered by law enforcement on 15 July 2022.[7]

We determine the word "locking" is not necessary to establish beyond a reasonable doubt that appellant committed the offense of child

[6] For these same reasons, we find appellant's conviction to the language "no adult present" was also legally sufficient. During our factual sufficiency review we considered, as required, all the evidence in the record. Our determination that appellant failed to establish a specific showing of deficiency in the proof forestalls any further analysis by us as to the issue of factual sufficiency.

[7] *Res ipsa loquitur* is a Latin phrase meaning "the thing speaks for itself." *Res ipsa loquitur*, Black's Law Dictionary (9th ed. 2009). In English, the phrase constitutes ". . . [t]he doctrine providing that, in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence that establishes a prima facie case. . . ." *Id.*

endangerment regarding his three children. Even if the word was deleted, it would not serve to broaden appellant's scope of liability, as the government established beyond a reasonable doubt that appellant committed the specific language of "no adult [being] present in the home."[8]

Additionally, appellant has not met his burden to establish that a specific deficiency in proof as to the word "locking" exists as discussed below.

On 15 July 2022, Detective [TEXT REDACTED BY THE COURT] and SGT [TEXT REDACTED BY THE COURT], testified all three children were locked in their rooms. As to appellant's culpability, upon entering his home, appellant knew the exact location of his three young children as demonstrated by appellant immediately walking upstairs to unlock the children from their bedrooms. Appellant expressed no surprise at finding his children locked in their rooms in utter filth nor at their unkept and unsanitary conditions. After the children were discovered [*20] locked in their rooms, appellant called a fellow drill sergeant, SSG [TEXT REDACTED BY THE COURT], to request he watch the children. During the call, appellant stated "I f***** up." Appellant made no reference to his "wife," or "we," instead using only the word "I" to describe the situation to a fellow soldier.

On 15 July 2022, the locks to the children's rooms were inverted, however, the lock to the master bedroom door was not inverted. An on-post housing inspector testified none of the home's rooms had inverted locks when he inspected appellant's home just prior to appellant's move-in the previous summer. Accordingly, it stands to reason between the summer of 2021 and early May 2022, the children's doorknobs had been changed.

In early May 2022, appellant's wife, in appellant's presence, told [TEXT REDACTED BY THE COURT] not to go upstairs where the children were located while [TEXT REDACTED BY THE COURT] was in appellant's home to babysit the children. [TEXT REDACTED BY THE COURT] later found all three children locked in their rooms with their doorknobs inverted and testified the children were "not kept up." [TEXT REDACTED BY THE COURT] further testified ". . . it seemed just from [*21] observations that it was normal for them to be in their rooms by themselves."

On 15 July 2022, law enforcement emphasized the children's rooms were "completely trashed" and littered with feces. Detective [TEXT REDACTED BY THE COURT] also noted the furniture in [TEXT REDACTED BY THE COURT]'s room was all turned backwards so the drawers were facing the walls.

Given the facts as outlined above and giving appropriate deference to the trial court, we do not find appellant has demonstrated a specific deficiency in proof as to the word "locking."[9]

Judicial Error in Applying the Emergency Aid Exception

A military judge's ruling on a motion to suppress evidence is reviewed for an abuse of discretion. *United States v. Shields, 83 M.J. 226, 230-31 (C.A.A.F. 2023)*(citations omitted). In conducting this review, the corresponding evidence is considered in the light most favorable to the party prevailing at trial. *Id.* An abuse of discretion occurs when:

(1) The military judge predicated a ruling on

[8] We distinguish this case from *United States v. English, 79 M.J. 116 (C.A.A.F. 2019)* (holding an appellate court's deletion of the language "to wit, grabbing her head with his hands" and inserting the language "unlawful force" was an impermissible broadening of appellant's offense and offended due process). In *English*, our superior court recognized "[w]here the CCA narrows the charging language rather than broadening it, such a change does not run afoul of . . . due process concerns." *Id. at 122, n.5*. In the case before us, appellant was on notice to defend against the charged language, which he zealously did at trial and now on appeal. Even if we deleted "locking" from the specification that would only serve to narrow the language, as opposed to broaden, of what "appellant was convicted of, at trial" in accordance with *English. Id. at 122*.

[9] Accordingly, we also find appellant's conviction to the language "locking" was legally sufficient.

findings of fact that are not supported by the evidence of record; (2) the military judge uses incorrect legal principles; (3) the military judge applies correct legal principles to the facts in a way that is clearly unreasonable; or (4) the military judge fails to consider [*22] important facts.

United States v. Lattin, 83 M.J. 192, 198 (C.A.A.F. 2023) (citations omitted).

Warrantless searches are presumptively unreasonable unless they fall into one of several specific exceptions to the warrant requirement. *Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)*. One such exception is when officers enter ". . . a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Brigham City v. Stuart, 547 U.S. 398, 403, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006)* (citations omitted). This exception has been generally coined as the "emergency aid" exception. *Id.*

Among other circumstances, the emergency aid exception applies to situations where law enforcement has an "'. . . objectively reasonable basis for believing' . . . that a 'person within the house is in need of immediate aid.'" *Michigan v. Fisher, 558 U.S. 45, 47, 130 S. Ct. 546, 175 L. Ed. 2d 410 (2006)* (citations omitted). Put another way, ". . . warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the *Fourth Amendment*." *Mincey v. Arizona, 437 U.S. 385, 393-94, 98 S. Ct. 2408, 57 L. Ed. 2d 290*.

"An action is 'reasonable' under the *Fourth Amendment*, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action:" *Brigham City, 547 U.S. at 404*. (Citing *Scott v. United States, 436 U.S. 128, 138, 98 S. Ct. 1717, 56 L. Ed. 2d 168 (1978)*). "The officer's subjective motivation is irrelevant." *Id.* (citation [*23] omitted).

Here, the military police attempted for fifteen minutes to make contact with anyone within appellant's home after receiving a 911 call reporting unattended young children existed in the home. After unsuccessful attempts to receive a response from anyone within appellant's home, Detective [TEXT REDACTED BY THE COURT] called the 911 caller to confirm the validity of the initial report. During that call, Detective [TEXT REDACTED BY THE COURT] received specific details from the 911 caller, appellant's next door neighbor, substantiating the validity of the report. Detective [TEXT REDACTED BY THE COURT] and the MPs, however, still did not enter appellant's home.

It was not until Detective [TEXT REDACTED BY THE COURT] and the MPs observed a two-year-old boy appear alone, naked, and apparently covered in feces or dirt in a second floor window of appellant's home that the situation became an emergency. The spotting of this young boy further corroborated the underlying 911 report that three young children, aged two, three, and five, were unattended in the home. Despite previous repeated efforts, Detective [TEXT REDACTED BY THE COURT] and the MPs had been unable to visually observe or [*24] make contact with the other two young children to provide immediate aid and confirm their safety and wellbeing. Given the information Detective [TEXT REDACTED BY THE COURT] knew at the time, Detective [TEXT REDACTED BY THE COURT]'s insistence that appellant let Detective [TEXT REDACTED BY THE COURT] into appellant's home immediately to aid his young children and verify their safety and wellbeing, absent a search warrant, was objectively reasonable.[10]

CONCLUSION

The findings of guilty and sentence are AFFIRMED.

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[10] Detective [TEXT REDACTED BY THE COURT] testified that had appellant not pulled into his driveway at the exact time he did, Detective [TEXT REDACTED BY THE COURT] was in the process of calling emergency services to gain entrance to the home to immediately aid and ensure the safety of the young children inside.

Judge COOPER concurs.

Concur by: PENLAND (In Part)

Concur

PENLAND, Judge, concurring in part and in the result;

I join my colleagues' treatment of the military judge's search ruling, for his decision was well within the bounds of reasonable judicial discretion. I also concur with their decree, though taking a slightly different path.

In *United States v. Harvey, M.J. , 2024 CAAF LEXIS 502 (C.A.A.F. 6 Sep. 2024)*, our superior court explained an appellant must meet two "trigger" conditions, before we may review for factual sufficiency: assertion of error; and, a showing of deficiency in proof. If they fail either, our factual sufficiency review ends. My colleagues hold that appellant has failed the second trigger condition. [*25] They also divide the *actus reus* into two components, and they determine that "locking" is not necessary to prove appellant's guilt; this is our point of departure. I would not (and for purposes of this concurrence do not) organize the actus reus in that way, for it is not necessary. Appellant has not shown a deficiency of proof — in whole or in any part. I would summarily affirm.

United States v. Koth

United States Army Court of Criminal Appeals

March 16, 2017, Decided

ARMY 20150179

Reporter
2017 CCA LEXIS 145 *

UNITED STATES, Appellee v. Sergeant BIANCA L. KOTH United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by *United States v. Koth, 76 M.J. 270, 2017 CAAF LEXIS 314 (C.A.A.F., Apr. 28, 2017)*

Affirmed without opinion by *United States v. Koth, 2017 CAAF LEXIS 693 (C.A.A.F., June 8, 2017)*

Prior History: [*1] Headquarters, 25th Infantry Division. Gregory A. Gross, Military Judge. Colonel William D. Smoot, Staff Judge Advocate.

Case Summary

Overview

HOLDINGS: [1]-Evidence that a servicemember knew her son had been punished for eating a popsicle but did not take him to the hospital even though he had injuries on 8% of his body was sufficient to sustain her conviction for child endangerment by culpable negligence, in violation of UCMJ art. 134, *10 U.S.C.S. § 934*; [2]-Child endangerment by culpable negligence was a general intent crime that could be proved by circumstantial evidence, and evidence that the servicemember's son lived with the servicemember, that the servicemember was familiar with her son's extracurricular activities and the types of injuries he sustained, and that her son's injuries were visible enough to school staff to prompt them to seek immediate medical attention for her son was sufficient to affirm her conviction.

Outcome

The court amended the specification charging the servicemember with child endangerment by removing language which alleged that her conduct was prejudicial to good order and discipline in the armed forces, affirmed the servicemember's conviction under the amended specification, affirmed the remaining findings, reassessed the servicemember's sentence, and affirmed the sentence.

Counsel: For Appellant: Lieutenant Colonel Melissa R. Covolesky, JA; Captain Ryan T. Yoder, JA (on reply brief); Colonel Mary J. Bradley, JA; Captain Ryan T. Yoder, JA on brief).

For Appellee: Colonel Mark H. Sydenham, JA; Lieutenant Colonel A.G. Courie III, JA; Major Anne C. Hsieh, JA; Captain Jonathan S. Reiner, JA (on brief).

Judges: Before TOZZI, CELTNIEKS, and BURTON Appellate Military Judges. Senior Judge TOZZI and Judge CELTNIEKS concur.

Opinion by: BURTON

Opinion

SUMMARY DISPOSITION

BURTON, Judge:

On appeal, appellant alleges her conviction of child endangerment is legally and factually insufficient because the government failed to prove she was culpably negligent and subjected her child to a reasonable probability of harm. We disagree.

A panel of officers and enlisted members sitting as a general court-martial convicted appellant, contrary to her pleas, of one specification of assault consummated by a battery upon a child under the age of 16 years and one specification of child endangerment, in violation of *Articles 128* and *134*, Uniform Code of Military Justice, *10 U.S.C. §§ 928*, *934 (2006 & Supp. IV 2011; 2012 & Supp. I 2014)* [hereinafter UCMJ]. The panel [*2] sentenced appellant to a bad-conduct discharge, confinement for three months, and forfeiture of all pay and allowances. The convening authority approved the adjudged sentence.

This case is before us for review pursuant to *Article 66, UCMJ*. Appellate defense counsel assigns one error to this court: whether the evidence supporting the conviction of child endangerment for failure to seek medical treatment is legally and factually sufficient, where the government failed to present any evidence that appellant should have known of her son's injuries or that there was a reasonable probability of harm. After due consideration, we find the assigned error in this case warrants discussion and partial relief on other grounds. Those matters personally raised by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, are without merit.

LAW AND DISCUSSION

In accordance with *Article 66(c), UCMJ*, we review issues of legal and factual sufficiency de novo. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*. The test for legal 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, 324 (C.M.A. 1987)* (citing *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*); *see also United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002)*. In resolving questions of legal sufficiency, we [*3] are "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001)*. 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, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner, 25 M.J. at 325*.

Mens Rea: Culpable Negligence

On appeal, appellant alleges the government offered "no direct evidence" that she "was aware of any injuries sustained by [her son,] TK," and thereby failed to establish her culpable negligence. On this point, appellant overlooked two important issues—direct evidence is not required and child endangerment by culpable negligence is a general-intent offense. Considering first the nature of the evidence, while direct evidence can establish an appellant's state of mind, direct evidence is not required to establish proof beyond a reasonable doubt. Rule for Courts-Martial [hereinafter R.C.M.] 918(c) ("Findings may be based on direct or circumstantial evidence."). 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. [*4] R.C.M. 918(c) discussion; *see also United States v. Roberts, 59 M.J. 323, 327 (C.A.A.F. 2004)*; *United States v. Caballero, 37 M.J. 422, 425 (C.M.A. 1993)*; *United States v. Hurt, 9 U.S.C.M.A. 735, 763, 27 C.M.R. 3, 31 (1958)*. Accordingly, a reasonable panel could have been convinced of appellant's culpable negligence based on the circumstantial evidence in this case.

We next consider the nature of the offense. Appellant was found guilty of child endangerment by culpable negligence, not by design. Child endangerment, like other offenses by culpable negligence, is a general-intent offense reviewed under an objective test. *See, e.g., United States v. Gibson, 43 M.J. 343, 346 (C.A.A.F. 1995)* (rejecting a subjective test regarding the appellant's knowledge of the risk of harm, and applying an objective test whether a reasonable person would have known of the risk); *United States v. Redding, 14 U.S.C.M.A. 242, 245, 34 C.M.R. 22, 25 (1963)* (finding aggravated assault

by culpable negligence even where the government and defense both agreed the appellant never intended to harm the victim). Therefore, it is sufficient if, "when viewed in the light of human experience," a reasonable person in appellant's circumstances would have known her negligent omission "might foreseeably result in harm to [her son.]" *Manual for Courts-Martial* (2012 ed.) [hereinafter *MCM*], pt. IV, ¶ 68a.c.(3)). The panel could have been convinced appellant was sincerely unaware of the potential harm to her son, while at the same time concluding [*5] her lack of awareness was unreasonable and criminally negligent. Essentially, the panel could have found appellant's negligent omission was accompanied by a *culpable* disregard for the foreseeable consequences, even if not a *conscious and deliberate* disregard.

Among the available facts and circumstances in evidence for the panel to consider were the following: TK was only ten years old at the time of the offense; TK was living at the same address listed on appellant's military records as her residence; TK had bruises and other injuries covering approximately 8% of his body's surface area; TK's injuries were visible enough to the school staff to prompt them to seek immediate medical attention for TK; and the panel had photographic evidence of TK's injuries from which they could determine whether appellant's lack of awareness amounted to a culpable disregard for TK's health, safety, and welfare. Appellant also made several admissions to a special agent from which the panel could judge her credibility and the reasonableness of her professed lack of awareness. Specifically, she was aware her son had been punished the day before the injuries were discovered for eating a popsicle, and was [*6] familiar enough with her son's extracurricular activities to exclude other potential causes of injury, but claimed to be unaware of visible physical injuries to her son that were consistent with assault.

Essentially—when considering "the conditions surrounding the neglectful conduct" (e.g., the readily apparent nature of TK's bruises and self-protective body posture), "the provisions made for care of the child" (which proved to be insufficient to make her aware of injuries covering 8% of TK's body), and "location of the parent . . . responsible for the child relative to the location of the child (e.g., appellant was not deployed to a foreign location, but apparently living in the same house)—a reasonable panel could have concluded appellant's negligent omission was accompanied by a culpable disregard for the foreseeable consequences to TK. *Id.*

Moreover, after careful review of the evidence presented at trial, we are convinced beyond a reasonable doubt appellant endangered TK's physical health, safety, and welfare through culpable negligence. Our finding of culpable negligence is not a reflexive indictment of any parent that fails "to be omnisciently aware of a child's well-being at all [*7] times[,]" as appellant cautions. Instead, it is a conclusion borne of the circumstantial evidence concerning appellant's negligent omission when ensuring TK received timely medical care for serious and visible injuries.

Actus Reus: Endanger by Subjecting to a Reasonable Probability of Harm

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. Within the context of this offense, "the threshold of risk for 'endanger' is conduct that subjects the child to a 'reasonable probability,' not merely a reasonable possibility, of harm." *United States v. Plant, 74 M.J. 297, 300 n.4 (C.A.A.F. 2015)*. *See also MCM*, pt. IV, ¶ 68a.c.(5) (defining "endanger" as subjecting a child to a "reasonable probability of harm."). "Actual physical or mental harm to the child is not required." *Id.* ¶ 68a.c.(4). Instead, the offense requires that an appellant's "actions reasonably could have caused physical or mental harm or suffering." *Id.* We note, as did our superior court, the "threshold of risk" for proving endangerment (i.e., reasonable probability) is higher [*8] than the threshold for proving culpable negligence (i.e., foreseeability although

not necessarily the natural and probable consequence). *Plant, 74 M.J. at 300 n.4*.

Based on the facts in this case, a reasonable panel could have found appellant subjected her son to a reasonable probability of additional physical harm and suffering by *failing to notice or put into place a mechanism for providing her notice* of serious and readily apparent injuries to her son (i.e., a negligent omission). First, as previously mentioned, the panel had photographic evidence of the extensive bruising on TK's body, from which they could assess the risk of additional harm and suffering from delayed medical care. Second, the panel heard testimony from the attending pediatrician, who spoke specifically about the continued pain and suffering from TK's injuries. The pediatrician testified she immediately noticed the visible bruising on TK's body. When she examined TK, he pulled his arm away and made "a gasping sound" when she touched his arm. She also noticed a loss of mobility in TK's arm "because it was too painful" when he tried to rotate it. Third, the pediatrician also testified about the risks of additional harm from delayed medical [*9] care for TK's particular injuries.

In our analysis, we find some, but not all, of the risks described by the attending pediatrician constituted a reasonable probability of harm. For example, there may have been a reasonable possibility the risks associated with TK's injuries could have resulted in death or permanent brain injury, but these risks were likely not a reasonable probability. In contrast, the extensive bruising across TK's body and the hard tissue in his arm muscle presented a reasonable probability of internal bleeding, muscle breakdown, and rhabdomyolysis. Consequently, we are also convinced beyond a reasonable doubt appellant's culpable negligence endangered TK's physical health, safety, and welfare by subjecting him to a reasonable probability of additional physical harm and suffering.

Prejudice to Good Order and Discipline

As required pursuant to *United States v. Fosler, 70 M.J. 225, 226 (C.A.A.F. 2011)*, the Specification of Additional Charge II alleged the terminal element of an *Article 134, UCMJ*, offense as follows: "such conduct being to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces." There is insufficient evidence in the record establishing the terminal [*10] element beyond a reasonable doubt as it relates to the effect on good order and discipline. Therefore, we except the unsupported language from the Specification of Additional Charge II.

CONCLUSION

On consideration of the entire record, we AFFIRM only so much of the Specification of Additional Charge II as finds:

> In that [appellant], U.S. Army, at or near Schofield Barracks, Hawaii, on or about 22 April 2014, had a duty for the care of [TK], a child under the age of 16 years, and did endanger the welfare of said [TK], by failing to seek medical care for injuries to his arms, legs, buttocks, and head, and that such conduct constituted culpable negligence, such conduct being of a nature to bring discredit upon the armed forces.

The remaining findings of guilty are AFFIRMED.

In evaluating the factors for potential sentence reassessment pursuant to *United States v. Winckelmann, 73 M.J. 11, 15-16 (C.A.A.F. 2013)*, and *United States v. Sales, 22 M.J. 305, 308 (C.M.A. 1986)*, we find there is no change to the sentencing landscape. The gravamen of misconduct has not changed, and the charges before us are commonly reviewed by this court. Accordingly, the sentence approved by the convening authority is AFFIRMED. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of [*11] the findings set aside by this decision, are ordered restored. *See UCMJ arts. 58a(b)*, *58b(c)*, *75(a)*.

Senior Judge TOZZI and Judge CELTNIEKS concur.

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

I hereby certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] on the 7th day of March, 2025.

[redacted]

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