

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20230303

Staff Sergeant (E-6)
ZACKERY J. ASKINS,
United States Army,

Appellant

Tried at Fort Sill, Oklahoma, on 11 April 2022, 3 August 2022, 25 October 2022, 28 November 2022, and 23-25 May 2023, before a general court-martial appointed by the Commander, Headquarters, Fires Center of Excellence and Fort Sill, Lieutenant Colonel Tiffany D. Pond, Military Judge, presiding.

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

Assignments of Error

I. WHETHER APPELLANT’S PLEA TO SPECIFICATION 1 OF CHARGE I WAS IMPROVIDENT WHEN THE MILITARY JUDGE FAILED TO SECURE AN AFFIRMATIVE WAIVER OF THE STATUTE OF LIMITATIONS.

II. WHETHER APPELLANT COULD BE FOUND GUILTY UNDER 18 U.S.C. SECTION 842 IN THE FACE OF THE SECTION 845 EXCEPTION THAT APPLY TO ASPECTS OF TRANSPORTATION OF EXPLOSIVE MATERIAL REGULATED BY DEPARTMENT OF TRANSPORTATION.

III. WHETHER THE EVIDENCE FOR SPECIFICATION 3 OF CHARGE V WAS LEGALLY AND FACTUALLY SUFFICIENT.

Statement of the Case

On 23 May 2023, a military judge sitting as a general court-martial convicted appellant, Staff Sergeant Zackery J. Askins, in accordance with his pleas, of one specification of larceny, three specifications of wrongful appropriation, one specification of violation of federal law, two specifications of sale of military property, two specifications of false official statement, and one specification of forgery in violation of Articles 121, 134, 108, 107, and 105, Uniform Code of Military Justice, 10 U.S.C. §§ 921, 934, 908, and 907 [UCMJ]. (R. at 462; Charge Sheet). On 24 May 2023, a military judge found appellant guilty, contrary to his pleas, of three specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice, 10 U.S.C. § 928b [UCMJ].¹ (R. at 571; Charge Sheet).

On 25 May 2023, the military judge sentenced appellant to a dishonorable discharge, one hundred and two months of confinement, total forfeitures, a \$35,000

¹ The military judge found appellant not guilty of one specification of domestic violence. The government withdrew and dismissed one specification of wrongful appropriation, one specification of animal abuse, one specification of attempted sale of military property, four specifications of willfully disobeying a superior commissioned officer, and two specifications of failure to obey order or regulation in violation of Articles 121, 134, 80, 90, and 92, UCMJ, 10 U.S.C. §§ 921, 934, 880, 890, and 892.

fine for twelve months, and reduction to E-1.² (R. at 653). The military judge credited appellant with 521 days of confinement credit against the sentence to confinement. (Statement of Trial Results; R. at 656).

On 15 June 2023, the convening authority disapproved the adjudged forfeitures , and waived automatic forfeitures for six months for the benefit of appellant's son. (Convening Authority Action). On 27 June 2023, the military judge entered Judgment. (Modified Judgment of the Court). This court docketed appellant's case on 1 December 2023. (Referral).

Statement of Facts

See below for relevant facts for each Assignment of Error.

² The military judge sentenced appellant to three consecutive confinement sentences (with concurrent ranges within each) based on the plea agreement and the fact that appellant was found guilty of at least one specification of Article 128b, UCMJ. (Plea Agreement; R. 653-656). The military judge adjudged a \$5,000 fine for the Specification of Charge III and to serve additional confinement of five months if the fine is not paid, and a \$30,000 fine for the Specification of Additional Charge I and to serve additional confinement of twelve months if the fine is not paid. The additional confinement if the fine is not paid for both specifications will be served concurrently (R. at 656).

I. WHETHER APPELLANT’S PLEA TO SPECIFICATION 1 CHARGE I WAS IMPROVIDENT WHEN THE MILITARY JUDGE FAILED TO SECURE AN AFFIRMATIVE WAIVER OF THE STATUTE OF LIMITATIONS.

Facts Relevant to Assignment of Error

The original charges were received by the summary court-martial convening authority on 7 March 2022. Among these charges, the government alleged that appellant stole multiple blocks of Charge Demolition M112(C-4) and blasting caps between on or about “25 August 2014 and on or about 14 August 2017.” (Charge Sheet). On 23 May 2023, the military judge conducted the guilty plea proceeding, but never informed appellant of his right to assert the statute of limitations bar for these periods. (R. at 300-329).

Appellant, who moved to Joint Base Elmendorf-Richardson, Alaska, in 2014, testified he was an active explosive ordnance disposal (EOD) technician there. (R. at 320). He was called to retrieve lost or stolen explosives during an off-post incident report. (R. at 322).

After storing the explosives for some time, appellant decided to keep them for personal use after forming an intent stay in Alaska following the dissolution of his marriage. (R. at 327). Subsequently, he transferred the explosives to his personal storage between February and December 2016. (R. at 328). His initial intention was to use the explosives to clear rocks and permafrost on a property he was considering purchasing in Alaska. (R. at 328).

Standard of Review

Courts review questions of law arising from the guilty plea *de novo*. *United States v. Inabinette*, 66 M.J. 320, 323 (C.A.A.F. 2008); *See also United States v. McElhaney*, 54 M.J. 120, 125(C.A.A.F. 2000) (“As a question of law, this issue [statute of limitations] is subject to *de novo* review.”).

Law

The Congress directed that generally a “person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.” 10 USC § 843. During a guilty plea inquiry, the military judge is charged with determining whether there is an adequate basis in law and fact to support the plea before accepting it. *Inabinette*, 66 M.J. at 322 (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991); *See also United States v. Prater*, 28 M.J. 818 (A.C.M.R. 1989), *aff’d*, 32 M.J. 433 (C.M.A. 1991)(“We cannot find from the record that the appellant was aware of the correct statute of limitations and, certainly, he was not advised of such by the military judge.”); *See R.C.M. 907(b)(2)(B)* (“if it appears that the accused is unaware of the right to assert the statute of limitations in bar of trial, the military shall inform the accused of this right.”); *See also R.C.M. 910(e)Discussion* (“If the statute of limitations would otherwise bar trial for the

offense, the military judge should not accept a plea of guilty to it without an affirmative waiver by the accused.”).

Argument

In this case, the original charges were submitted to the summary court-martial convening authority on 7 March 2022. (Original Charge Sheet).

Therefore, any of the alleged acts committed before 7 March 2017 was subject to five-years statute of limitations bar. *See* 10 U.S.C. § 843; *See also Prater*, 28 M.J. at 821. Although it was clear based on the evidence admitted in the guilty plea that the alleged acts took place prior to 7 March 2017, the military judge did not inform the defendant of this right. (R. at 300-329). Just as in *Prater*, there is no record showing that appellant was aware of the statute of limitations and that he was “advised of such by the military judge.” *Prater*, at 821.

This case bears resemblance to *Prater*, in which the government also alleged ongoing larceny. *Id.* However, unlike this case, there were two years of ongoing actions after the barred date. *Id.* Consequently, the *Prater* court set aside only part of the guilty findings because the record showed that some of the alleged acts were committed during a period that was not barred by the statute of limitations. *Id.*

In contrast, there is no record in this case demonstrating that appellant was committing ongoing larceny after the expiration of the statute of limitations.³

Appellant testified that he relocated the collected explosives to his house between February and December 2016. (R. at 327-28). There is no evidence of additional activities afterwards, in the record. Therefore, the government's allegation of this specification was wholly barred by the statute of limitations.

Due to the military judge's failure to obtain an affirmative waiver, appellant's plea for this offense was improvident. As such, this court should set aside this specification.

II. WHETHER APPELLANT COULD BE FOUND GUILTY UNDER 18 U.S.C. SECTION 842 IN THE FACE OF THE SECTION 845 EXCEPTION THAT APPLY TO ASPECTS OF TRANSPORTATION OF EXPLOSIVE MATERIAL REGULATED BY DEPARTMENT OF TRANSPORTATION.

Facts Relevant to Assignment of Error

Appellant was convicted of unlawfully transporting or causing the transport of explosive materials when he was not a licensee or permittee under federal law,

³ Even beyond the four corners of the transcript, the government has alleged in their motion that this specification was based on appellant's participation in "particular draws" of C4 explosives on following dates: "25 August through 4 September 2014, 31 May 2016, 19-29 September 2016, 13 October 2016, and 14 August through 6 September 2017." (App. Ex. LIII, pg. 2). The dates covered by the specification are barred by the statute of limitations.. (Charge Sheet, Statement of Trial Result). Therefore, the latest date for the government's evidence supporting the specification was 13 October 2016. This also matches the dates in appellant's testimony. (R. at 327-28).

in violation of 18 USC § 842, as incorporated under Article 134. (Charge Sheet; App. Ex. XCVI). During the military judge’s inquiry, appellant testified that he did not know whether the individuals responsible for shipping his container held a license or permit. (R. at 372). The colloquy does not include a description of the transportation method used to ship these materials. At sentencing, the government focused their argument on the method of shipment, (R. at 637-38), but did not comment on the absence of a license or permit.

Standard of Review

The courts review issue of jurisdiction as “a legal question we review de novo.” *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006)(quoting *United States v. Henderson*, 59 M.J. 350, 352 (C.A.A.F. 2004)).⁴

Law

Generally, there are three prerequisites that must be met for courts-martial jurisdiction to vest: (1) jurisdiction over the offense, (2) personal jurisdiction over the accused, and (3) a properly convened and composed court-martial. *See* Rule for Courts-Martial (R.C.M.) 201(b). Article 134, UCMJ, proscribes three categories of conduct that can confer jurisdiction over unenumerated offenses: conduct which

⁴ Rule 907(b)(1) states, “[a] charge or specification shall be dismissed at any stage of the proceedings if the court-martial lacks jurisdiction to try the accused for the offense[.]” (emphasis added); this is a nonwaivable issue.

is prejudicial to good order and discipline, conduct which is service discrediting, and conduct which constitutes a “crime or offense not capital.” *See* Federal Assimilative Crimes Act (ACA), 18 U.S.C. § 13.

Title 18, United States Code, Chapter 40, contains statutes relating to the Importation, Manufacture, Distribution, and Storage of Explosive Materials. 18 U.S.C. §§ 841-848. Section 842(a)(3)(A) provides in pertinent part that:

(a) It shall be unlawful for any person. . . .

(3) other than a licensee or permittee knowingly. . . .

(A) to transport, ship, cause to be transported, or receive in interstate or foreign commerce any explosive materials

18 U.S.C. § 842(a)(3)(A). However, courts can set aside a conviction under 18 U.S.C. § 842(a)(3), unlawful transportation of explosive material without a permit required by law, based on the exclusions contained in 18 U.S.C. § 845(a). *United States v. Illingworth*, 489 F.2d 264 (10th Cir. 1973) (“Explosives are regulated by the Administrator of the Federal Aviation Administration, an agency of the Department of Transportation (DoT), in regard to the transportation by air.”); *United States v. Petrykievicz*, 809 F. Supp. 794 (W.D. Wash. 1992) (dismissing transporting explosives without a license charges because it was an *aspect* regulated by DoT); *Cf. United States v. Scharstein*, 531 F. Supp. 460 (E.D. Ky. 1982) (finding that § 845(a)(1) exception was inapplicable to a defendant who illegally manufactured, stored, and transported explosives.).

When interpreting these statutes, the courts have concluded that “the ‘aspect’ regulated by the Secretary of Treasury under 18 U.S.C. § 841 et seq. is *who* may transport, manufacture etc.,” while DoT regulates “*how* items maybe transported.” *Petrykievicz*, at 797. Section 845(a)(1) states:

(a) Except in the case of subsections [not at issue in this case], this chapter shall not apply to:

(1) any aspect of the transportation of explosive materials via railroad, water, highway, or air which are regulated by the United States Department of Transportation and agencies thereof[.]

18 U.S.C. § 845(a)(1). In addition to air transportation regulations addressed in the *Petrykievicz* and *Illingworth*, DoT regulations contained in 49 CFR parts 171-179, Highways and Railways; 49 CFR part 195, Pipelines; and 49 CFR parts 387-397, Motor Carriers, also regulate how explosives should be transported. 49 C.F.R. §§ 171-170;195;387-397.

Argument

The government charged appellant under the 18 U.S.C. § 842(a)(3)(A) statute relating to the importation, manufacturing, distribution, and storage of explosive materials.⁵ (Original Charge Sheet). As the case law had clarified, the focus on this provision is the licensing of manufacturers, importers, and

⁵ Although the record does not specify under which provision of the statute the government charge appellant under, the language seems to match this provision.

distributors or explosive materials. *See Petrykievicz*, 809 F. Supp. At 797. In *Scharstein*, the court also held that the aspect of licensing the transportation was covered by 19 U.S.C. 842, while “labeling, packaging, mode of transportation, placarding and shipping papers” was regulated by DoT regulations. *Scharstein*, 531 F. supp. at 466; *See also* 449 C.F.R. §§ 171-170;195;387-397.

As a matter of fact, the fact that the shipment was sent without a license was not the focus at this proceeding. In fact, appellant admitted that he did not know whether the people who were transporting the items had a license or permit. (R. at 372). Instead, appellant testified mostly about paperwork, placarding, and shipping papers he filled. (R. at 369-71). In other words, this prosecution was about the “manner” of shipment, an “aspect” regulated by DoT. Therefore, appellant’s offense was not prosecutable under 18 U.S.C. § 842, because his act was excepted by § 845 that excludes aspects regulated by DoT. Just as in *Petrykievicz* and *Illingworth*, the aspect they prosecuted appellant did not match the aspect regulated by this statute. Therefore, this court must set aside Specification 1 of Charge II.

III. WHETHER THE EVIDENCE FOR SPECIFICATION 3 OF CHARGE V WAS LEGALLY AND FACTUALLY SUFFICIENT.

Facts Relevant to Assignment of Error

The government alleged appellant committed a violent offense against his spouse [REDACTED] by “slamming her onto a hide-a-bed, pressing his body on top of

her and squeezing her with his arms so that she could not move.” (Original Charge Sheet). The alleged victim testified that appellant was drunk and asleep before the alleged assault. (R. at 474). When she attempted to wake him up appellant did not answer him but fell on the bed. (R. at 474). Afterwards, he got up and “bear hugged” her and “shoved her under the bed.” (R. at 474). Later, Mrs. [REDACTED] brother [REDACTED] testified that “[REDACTED] was either drunk or sleepwalking and pinned her down...” (R. at 519). The victim did not testify that appellant slammed her or pressed his body on top of her while squeezing her arms.

Standard of Review

This court reviews factual and legal sufficiency issues de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Scott*, 84 M.J. 583, 584 (Army Ct. Crim. App. 14 March 2024). The court’s assessment of legal and factual sufficiency is limited to evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

Law

The test for legal sufficiency is “whether, considering the evidence in a light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.” *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003). This court must conduct a de novo review and may

“affirm only such findings of guilty” as we find are “correct in law and fact.”

Article 66(c), UCMJ; *Washington*, 57 M.J. at 399.

Under the new Article 66, “[i]n an appeal of a finding of guilty... the Court of Criminal Appeals may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.” Art. 66(d)(1)(B)(i), UCMJ; *See also Scott*, 84 M.J. at 584.

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, [this court is] convinced of [appellant’s] guilt beyond a reasonable doubt.” *Walters*, 58 M.J. at 395. Beyond those allowances, there is no deference to the trial court for a factual sufficiency review. *United States v. Billings*, 58 M.J. 861, 867–68 (Army Ct. Crim. App. 2003). Rather, the evidence is given a “fresh, impartial look.” *Id.* at 867. “In sum, to sustain appellant’s conviction, [this 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). “[I]t is axiomatic that the Government has the

burden of proving each and every element of the offense ‘beyond a reasonable doubt.’” *United States v. Berri*, 33 M.J. 337, 342 (C.M.A. 1991).⁶

To convict appellant of the charged offense of domestic violence by assault consummated by a battery in violation of Article 128b, UCMJ, the Government is required to prove that appellant committed violent offense against an intimate partner or a family member by (1) doing bodily harm to the alleged victim; and (2) that the bodily harm was done with unlawful force or violence. Exec. Order No. 14062, 87 Fed. Reg. 4763, 4777 (Jan. 31, 2022).

Regarding assault consummated by battery cases, this court held that “the proof of a general intent offense requires ‘that the defendant possessed knowledge with respect to the actus reus of the crime,’ i.e., knowingly engaged in the criminal act.” *United States v. Axelson*, 65 M.J. 501, 512 (Army Ct. Crim. App. 2007) (quoting *United States v. Carter*, 530 U.S. 244 (2000)). The CAAF also noted,

In order to be criminal, the offending conduct must generally be accompanied by “some sort of bad state of mind.” (*mens rea*).⁷ [...] As always, the factfinder determines whether *mens rea* has been proven. If admissible evidence suggests that the accused, for whatever reason, including mental abnormality,

⁶ Citing that “RCM 920(e)(5) provides: (A) The accused must be presumed to be innocent until the accused’s guilt is established by legal and competent evidence beyond reasonable doubt; (B) In the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted.”

⁷ W. LaFare and A. Scott, 1 *Substantive Criminal Law* § 3.1(c) at 270 (1986)).

lacked *mens rea*, the factfinder must weigh it along with any evidence to the contrary.

Berri, 33 M.J. at 342 n. 11.

Argument

The government was unable to substantiate the element of unlawful force or violence, as well as specific acts of slamming, pressing his body on top, and squeezing her with his arms as they alleged.

First, the alleged victim's account and the specified charge have significant discrepancies. According to the witness, appellant did not slam her onto the bed; instead, she described being "bear hugged" and "shoved" under the bed. (R. at 474); *Cf.* (Original Charge Sheet). Likewise, there is no record of appellant "pressing his body on top and squeezing her with his arms so that she could not move." (Original Charge Sheet). Although it is unclear from the record, [REDACTED] testimony indicates that because of her position under the bed, she was unable to move. [REDACTED] testified that after appellant got up, she "decided to get [herself] *out of there* and out of that situation." (R. at 474)(emphasis added). Therefore, the government failed to present evidence of specific acts they alleged. *See Walters*, 58 M.J. at 395.

In addition, [REDACTED] testimony implies that appellant's actions were devoid of violence or illegal force. At no point did she mention him exhibiting anger or

violence prior to, during, or following the purported actions. Instead, she described the act as “bear hugging.” (R. at 474).

She testified, “He had a few drinks, He fell asleep in the chair.” (R. at 473). When she tried to wake him to ask if he would like to sleep in the bedroom, appellant “didn’t say anything.” (R. at 474). Wordlessly, “he went into the bedroom and fell on the bed.” (R. at 474). Notably, even during the alleged incident, [REDACTED] did not recall appellant saying anything. (R. at 474). When the government asked, “Do you have any idea why he was doing it?” the witness answered, “None, whatsoever.” (R. at 474).

There is not only an absence of any evidence supporting the claim that the appellant acted with violence and malice, but there is also evidence suggesting that he may have been unaware of his actions. In addition to [REDACTED] testimony, her brother also testified that [REDACTED] “reached out to [him] because [appellant] was either drunk or sleepwalking and had pinned her down....” (R. at 519). Therefore, appellant’s actions do not meet the element of violent or unlawful force. *See Berri* at 342; *Axelson* at 514.

Based on foregoing, after weighing the evidence in the record of trial and even having made allowances for not having personally observed the witnesses, this court cannot be convinced of appellant’s guilt beyond a reasonable doubt. *See Walters*, 58 M.J. at 395. Additionally, even after drawing every reasonable

inference from the evidence of record in favor the government, this court cannot conclude the evidence was legally sufficient to support appellant's conviction for assault consummated by battery beyond a reasonable doubt. *Id.* Therefore, this court must set aside Specification 3 of Charge V.

Conclusion

Wherefore, appellant respectfully asks this Honorable Court to set aside the findings and sentence of Specification 1 of Charge I, Specification 2 of Charge I, and Specification 3 of Charge V, and affirm only such much of the remaining sentence that is reduction to E-1, confinement for 65 months, and a dishonorable discharge.



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was electronically submitted to the
Army Court and Government Appellate Division on 25 July 2024.



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