IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES	Appellee	**BRIEF ON BEHALF OF APPELLANT**
v.		Docket No. ARMY 20240073
Master Sergeant (E-8) **KELVIN R. CURRY,** United States Army,	Appellant	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 appointed by the Commander, U.S. Army Military District of Washington, Colonel Adam S. Kazin, military judge, presiding.

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

Assignment of Error

THE SPECIFICATION OF CHARGE II IS FACTUALLY INSUFFICIENT

Statement of the Case

On 15 February 2024, a panel with enlisted representation sitting as a general court-martial convicted appellant, Master Sergeant Kelvin R. Curry, contrary to his plea, of one specification of child endangerment through culpable negligence in violation of Article 119b, Uniform Code of Military Justice

[UCMJ].[1] (R. at 859; Statement of Trial Results [STR]). That same day, 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).

On 7 March 2024, the convening authority dismissed Specification 3 of Charge I without prejudice, approved the reprimand, and took no further action. (Convening Authority Action). On 14 March 2024, the military judge entered Judgment. (Judgment of the Court).[2] This court docketed appellant's case on 17 June 2024. (Referral and Designation of Counsel).

Statement of Facts

Appellant and his then-wife, [redacted], lived in a three-story townhouse in Lorton, Virginia at the time of the charged misconduct. (R. at 282). The couple lived with six of their children, to include their then thirteen-year-old daughter, [redacted]. (R. at 283, 407, 432). Also living in the home was [redacted] and her son. (R. at 561-63, 580).

[1] The panel acquitted appellant of two specifications of domestic violence in violation of Article 128b, UCMJ. Prior to trial, the government withdrew one specification of domestic violence.

[2] This Court should modify the Entry of Judgment (EOJ) to reflect the convening authority did take action on the adjudged sentence when he approved the reprimand.

A. Appellant and [redacted] discover [redacted] was "sexting" with adult men

On 15 May 2020, [redacted] discovered [redacted] was "sexting" men on her phone. (R. at 466, 587). Minutes later, a man called [redacted] to arrange a meeting. (R. at 589). The man also asked [redacted] if she had any sisters he could also meet. (R. at 588). Appellant told [redacted] her conduct was "unacceptable" and she was putting her siblings' safety at risk. (R. at 588).

Appellant, [redacted] and [redacted] met with [redacted] to discuss the consequences of her behavior. (R. at 592). The adults expressed their frustrations with [redacted] disobeying them, focusing on her phone, and ignoring her schoolwork. (R. at 592).

B. [redacted] designed [redacted] punishment

[redacted] told [redacted] to "[g]rab your stuff and go outside" and stay in the backyard shed with her brother.[3] (R. at 593). [redacted] indicated [redacted] would stay in the backyard until she "[came] up with a plan" regarding her attitude and apologize for her actions. (R. at 595). Appellant helped [redacted] clean out the shed. (R. at 438). Someone also gave the teenagers sleeping bags, coats, and food. (R. at 437).

[3] [redacted] brother volunteered to stay in the backyard instead of completing his homework. (R. at 593).

While all agreed [redacted] punishment began on or around 16 May 2020, witnesses testified she stayed in the shed between three days and approximately a month and a half. (R. at 409-10; 299-300).[4]

C. The adults gave [redacted] the basics.

The adults provided [redacted] three meals – via ziplock bags filled with nonperishable foods - a day. (R. at 387, 437-38, 442). At some point, appellant took [redacted] to Taco Bell to eat. (R. at 413, 444). KC did not testify to feeling hungry or malnourished.

Appellant and [redacted] provided [redacted] with toilet paper and a bucket to use as a latrine. (R. at 412, 441). At some point, [redacted] was allowed inside the house to shower and wash her clothes. (R. at 379, 385, 597). [redacted] noticed [redacted] had begun her period and encouraged [redacted] to provide her with feminine hygiene products. [redacted] replied that "[s]he should have thought about that. No, she don't get anything." (R. at 598).

Eventually, [redacted] was allowed to finish her punishment in appellant's furnished basement. (R. at 600).

[4] The panel sentenced appellant, in part, to perform hard labor without confinement for three days and to be confined for three days. (R. at 941; Statement of Trial Results).

D. The military judge instructed the panel on the defense of parental discipline

The military judge modified the Military Judge's Benchbook Instruction regarding parental discipline to apply to child endangerment when no physical force is involved and subsequently instructed the panel as such. (R. at 750, 777-78).

THE SPECIFICATION OF CHARGE II IS FACTUALLY INSUFFICIENT

Standard of Review

After appellant makes a specific showing of a deficiency in proof, the test for factual sufficiency is whether, after weighing the evidence in the record of trial and giving appropriate deference for not having personally observed the witnesses, the members of [this] court are themselves clearly convinced the finding of guilt was against the weight of the evidence. *Scott*, Army 20220450, *3 (quoting Pub. L. No. 116-283, § 542(b), 134 Stat. 3611-12); *Rosario*, 76 M.J. 114, 117. "[N]either a presumption of innocence nor a presumption of guilt" is applied, but the court "must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (emphasis added); *Scott*, Army 20220450, *3 (rejecting a rebuttable presumption of guilt). In conducting its

de novo review, the Court does not abandon logic and common sense. *See Washington*, 57 M.J. at 402–03 (Baker, J. concurring).

Law

A. Factual sufficiency

In weighing factual sufficiency, the service court takes "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt." *Id*. at 399; *Scott*, Army 20220450, *3. As the highest military court explained:

> Essentially, the Court of Military Review [now Court of Criminal Appeals] provides a *de novo* trial on the record at appellate level, with full authority to disbelieve the witnesses, determine issues of fact, approve or disapprove findings of guilty, and, within the limits set by the sentence approved below, to judge the appropriateness of the accused's punishment.

United States v. Crider, 46 C.M.R. 108, 111 (C.M.A. 1973) (cited in *United States v. Leak*, 61 M.J. 234, 244 (C.A.A.F. 2005)).

However, "reasonable doubt" means the same thing with respect to this Court's factual sufficiency determination under Article 66(c),[5] UCMJ, as it did at trial. "[B]eyond a reasonable doubt" means if "the record leaves [it] with a fair and rational hypothesis other than guilt," the Court is required to set aside the conviction for insufficient evidence. *United States v. Whisenhunt*, ARMY

[5] Now at Article 66(d)(1), UCMJ.

20170274, 2019 CCA Lexis 244 (Army Ct. Crim. App. 3 Jun. 2019) (summ. disp.) (reversing cadet's sexual assault conviction for factual insufficiency because the record also supported the appellant's scenario the alleged victim was a willing and active participant); *see also United States v. Gumbs*, ARMY 20220066, 2023 CCA Lexis 432 (Army Ct. Crim. App. 5 October 2023) (summ. Disp.) (reversing conviction for abusive sexual contact where government's evidence as to the actus reus was circumstantial and there was another explanation for how the event unfolded).

B. Child endangerment requires the charged act to lead to a reasonable probability of harm

Child endangerment through culpable negligence demands that: (1) the accused's act must endanger the child's safety; and (2) the accused's mental state must be that of "culpable negligence." *United States v. Plant*, 74 M.J. 297, 300, n.4 (C.A.A.F. 2015). The accused's acts must result in a reasonable probability – not possibility – that the child would be harmed. *Id*. at 300.

Whether an act constitutes culpable negligence depends on factors such as the child's age, proximity of available assistance, nature of the environment the child was left in, provisions made for the care of the child, and the location of a responsible parent or adult. MCM, pt. IV, para. 59.c.(2).

C. The government must show the likelihood and severity of the harm

Also, the government must show the likelihood and severity of the harm the act posed to the child. In *United States v. Pacheco*, this court overturned a child endangerment conviction because the government could not show "the likelihood and severity" of the harm that was alleged from the charged act. *United States v. Pacheco*, ARMY 20170177, 2019 CCA LEXIS 77, at*6 (Army Ct. Crim. App. 26 Feb. 2019) (mem.op).

In *Pacheco*, the accused was playing video games with his four-year-old son. *Id.* at *2. After his wife yelled at him, the accused pushed his wife to the ground, causing her to hit her head on the floor. *Id.* at *3. The accused then wrapped an extension cord around her hands. *Id*. After his wife and son pleaded with him to unravel the cord because "she's calm," the accused did so. *Id*. The son would later bring up this incident in conversations indicating its effect on his psyche. *Id*.

The government alleged the accused endangered his son's mental health by assaulting his wife in front of her son. *Id*. at *5. This court reasonably inferred – in the absence of the son's testimony – that he witnessed the abuse. *Id*. At *6. This court recognized that this abuse "might have cause[d] mental harm and anguish to [the son]." *Id*. But, without "testimony explaining the likelihood and severity of the mental harm that [the son] would suffer from watching his father abuse his

mother", this court was not convinced beyond a reasonable doubt. *Id*. (emphasis added).

D. Parental discipline

Parental discipline is an affirmative defense to exonerate an accused from assaultive conduct upon his or her children. *United States v. Robertson*, 36 M.J. 190, 191 (C.A.A.F. 1992).

Raising the defense imposes on the government ". . .the additional burden of refuting beyond a reasonable doubt appellant's defense of parental discipline." *United States v. Robinson*, ARMY 20220043, 2023 CCA LEXIS 235, *4 (Army Ct. Crim. App. June 2, 2023) (opinion) (citing *United States v. Rivera*, 54 M.J. 489, 490 (C.A.A.F. 2001).

Service courts have applied the Model Penal Code's standards to define parental discipline. *See Rivera*, 54 M.J. at 491 (cleaned up). "[T]he use of force by parents or guardians is justifiable if (a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of . . . misconduct; and (b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation . . . *United States v. Brown*, 26 M.J. 148, 150 (C.M.A. 1988).

In *Robinson*, this court determined the appellant was not entitled to the defense of parental discipline. *Robinson*, 2023 CCA LEXIS 235, *2-3 (Army Ct. Crim. App. 2023). After discovering her daughter had misbehaved at school, Robinson struck her fifteen times with a cellphone charging cord. *Id*. at *2.

At trial, the government's expert in pediatric abuse opined that "this kind of injury [requires] a significant amount of force, that . . . is not likely to occur in the course of . . . normal accepted parental discipline." *Id*. at *4.

In their factual sufficiency review, this court considered Robinson's use of force. *Id*. at *7. Though Robinson held a proper parental motive and did not intend to hurt her child, the court found she should have known her actions created a substantial risk of pain. *Id*. at *8-9. The court heavily relied on the expert's testimony to reach this conclusion. *Id*. at *8.

E. Legal Age of Consent

In Virginia, it is illegal to have sex with a thirteen-year-old. Va. Code Ann. § 18.2-63. As a result, [redacted] could not consent to have sex with anyone, much less older men.

Argument

A. The surrounding circumstances show appellant's purported conduct did not amount to culpable negligence

Appellant's purported actions did not lead to a reasonable probability of harm to [redacted].

First, [redacted] was a teenager and seemed intelligent. Second, she was living in proximity to three adults in the middle of a suburban neighborhood. If she needed help, she could ask for it. Third, the nature of her environment was safe and sufficiently hygienic. Fourt, provisions were made for her care. The adults provided her three meals a day, she was given a bathroom, she was taken out to eat, she was monitored, and she was given an opportunity to shower.

B. Appellant did not endanger [redacted] as there was no evidence as to the severity and/or likelihood of any harm from his alleged actions

Even if one reasoned appellant's purported actions led to a reasonable probability of harming [redacted], the government did not show the likelihood and severity of such harm. So similarly to *Pacheco*, this court is left with no basis to determine the extent of any harm [redacted] might have been exposed to and/or experienced.

Further, any such harm was minimal. Though the conditions were less-than-ideal, [redacted] was not living a spartan existence. Her basic needs were met. There was no evidence she was malnourished or suffered significant mental and/or physical harm.

C. Appellant's purported actions were an appropriate form of parental discipline

Moreover, appellant's actions were justified as a form of parental discipline. First, he held a proper parental motive. Appellant sent his daughter to the backyard

as a punishment for her "sexting" with adult men.[6] It was appropriate to punish [redacted] for such behavior as she could not legally consent to sex and might have engaged in a sexual encounter with lifelong consequences.

Second, appellant's actions were not designed to hurt [redacted]. If repeatedly hitting a five-year-old with a charging cord is not designed to cause a substantial risk of harm, then having a teenager live in the backyard of a house for a few days cannot either.

Third, appellant's actions were not known to create a substantial risk of such harms. There is a stark difference between hitting a child like in *Robinson* and sending a teenager to live in the backyard. As discussed above, eating bags of tuna and Taco Bell, using the bathroom in a bucket, and infrequent showering are not designed or known to cause a substantial risk of injury, extreme pain, mental distress, or gross degradation.

[6] Adult men who were not only seeking to have sex with her but inquiring about whether she had any sisters they could meet. (R. at 588).

Conclusion

Appellant asks this court to set aside the finding and sentence.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically filed with the Army Court and Government Appellate Division on August 16, 2024.

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