IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLEE**
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, 23–25 May 2023, by a general court-martial convened by Commander, United States Army Fires Center of Excellence and Fort Sill, Lieutenant Colonel Tiffany 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.

PANEL NO. 2

Statement of the Case

On 23 May 2023, a military judge sitting as a general court-martial convicted appellant, pursuant to his pleas of one specification of forgery, two specifications of false official statement, two specifications of sale of military property of the United States, and four specifications of larceny and wrongful appropriation, in violation of Articles 105, 107-08, 121, Uniform Code of Military Justice, 10 U.S.C. §§ 905, 907–08, and 921 [UCMJ], as well as one specification of transport of explosive materials, in violation of Article 134, UCMJ, 10 U.S.C. § 934 incorporating 18 U.S.C. § 842. (R. at 462–63; Statement of Trial Results [STR]). On 24 May 2023, the military judge convicted appellant, contrary to his pleas, of three specifications of domestic violence, in violation of Article 128b, UCMJ, 10 U.S.C. § 928b.[1] (R. at 571; STR). On 25 May 2023, the military judge sentenced appellant to reduction to the grade of E-1, confinement for 102 months, forfeiture of all pay and allowances, a fine of $35,000 to serve an additional confinement of 12 –months if the fine is not paid, and a dishonorable discharge. (R. at 653–56; STR). The military judge credited appellant with 521 days of pretrial confinement credit. (R. at 656; STR). The convening authority waived

[1] The military judge acquitted appellant of one specification of domestic violence. (R. at 571; STR).

automatic forfeitures and disapproved the adjudged forfeitures. (Action). On 27 June 2023, the military judge entered judgment. (Judgment).

Statement of Facts

Appellant was an active explosive ordnance disposal (EOD) technician with over fifteen years of experience. (R. at 320, 328; Pros. Ex. 31). On 13 April 2023, appellant entered into a pretrial agreement with the government to plead guilty to several offenses, including larceny and wrongful appropriation and transport of explosive materials. (App. Ex. XCIII). During the providence inquiry, appellant admitted to taking multiple U.S. Army-owned a M1-12 C-4 block between February and December 2016 for his own personal use while he was stationed at Joint Base Elmendorf-Richardson (JBER), Alaska. (R. at 320, 323, 27–29, 341). He further admitted to shipping M1-12 C4 blocks and blasting caps between December 2017 and February 2018 as a part of his permanent change of station move from JBER, Alaska to Fort Sill, Oklahoma. (R. at 368–70, 372).

After appellant's providence inquiry, a contested trial ensued regarding four specifications involving [redacted], appellant's spouse, from on or about 10 April 2019, 15 September 2021, and between on or about 15 August 2021 and 15 September 2021. (R. at 465; STR).

Additional facts are incorporated below.

Assignment 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.

Additional Facts

While stationed at JBER between March 2014 and November 2017, appellant participated in various emergency and EOD responses. (R. at 320–21). Safeguarding, collecting, and disposing explosives were a part of his regular duties. (R. at 322). During one mission, he recovered a M1-12 C4 block and secured it at his unit in preparation for disposal. (R. at 321–23). But between on or about February and December 2016, he took the M1-12 C4 block from the unit storage and put it into his personal storage. (R. at 323, 327). Due to marriage troubles, appellant was preparing to leave the Army and move to a cabin in the woods. (R. at 327–28). He planned to use the explosive to blast through rock and permafrost to lay down foundation for his cabin. (R. at 328–29).

On 7 March 2022, the Summary Court-Martial Convening Authority (SCMCA) received Specification 1 of Charge I against appellant for larceny of various M1-12 block C4 committed between on or about 25 August 2014 and 14 August 2017. (Charge Sheet). The military judge issued two Pretrial Orders,

addressing the way parties should raise certain issues, including the statute of limitations pursuant to Rule for Courts-Martial [R.C.M.] 907(b)(2)(B). (App. Ex. I, p. 4; App. Ex. VIII, p. 4). Defense did not raise the statute of limitations issue but moved to dismiss this specification for failure to state an offense, in part, due to its three-year range and the possibility of future Federal civilian prosecution. (App. Ex. XXXIX, LIII, LVI; R. at 157–82). The military judge denied defense's motion. (App. Ex. LX).

On 13 April 2023, appellant negotiated to plead guilty to Specification 1 of Charge I, excepting the words "blasting caps," elected to have the Military Justice Act of 2016 sentencing rules apply, and agreed to waive all waivable motions. (App. Ex. XCIII, p. 2–3). On 14 April 2023, the parties executed a Stipulation of Fact. (Pros. Ex. 31). Paragraph 1 of the Stipulation of Fact states, "All parties agree . . . that [appellant] had no lawful justification, excuse, or defense for his conduct." (Pros. Ex. 31 at 1). The Stipulation of Fact further provides:

> Between on or about 25 August 2014 and [on] or about 14 August 2017, [appellant] participated in more than 10 separate EOD incident responses in and around JBER with his unit. . . . One specific mission in 2015 required multiple trips by [appellant][.] During the course of the various incident responses that he participated in during that period, [appellant] . . . [stole] 11 blocks/sticks of C-4 explosives (Charge Demolition M112) for his own personal use and possession.

(Pros. Ex. 31 at 2).

Before appellant entered a plea of guilty, the parties discussed the "waive all waivable motions" clause in a R.C.M. 802 conference. (R. at 303–05). During the providence inquiry, the military judge discussed the "waive all waivable motions" clause with appellant and counsel. (R. at 439–40). Neither the military judge nor the parties specifically raised the issue of whether the statute of limitations barred prosecution of Specification 1 of Charge I in open court. However, the parties agreed the "waive all waivable motions" provision applies to "any future motions that have not yet been filed by the defense." (R. at 440). Thereafter, the military judge accepted his plea of guilty. (R. at 459).

Standard of Review

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Kim*, 83 M.J. 235, 238 (C.A.A.F. 2022) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)). The applicable statute of limitations is a question of law reviewed de novo. *United States v. Mangahas*, 77 M.J. 220, 222 (C.A.A.F. 2018) (citing *United States v. Lopez de Victori*a, 66 M.J. 67, 73 (C.A.A.F. 2008); *United States v. Falk*, 50 M.J. 385, 390 (C.A.A.F. 1999)).

Whether an appellant waived a right is reviewed de novo. *United States v. Day*, 83 M.J. 53 (C.A.A.F. 2022). A valid waiver leaves no error for this court to correct on appeal. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (quotation omitted).

Law and Argument

A. The statute of limitations for Specification 1 of Charge I ran before on or about 7 March 2017.

"An [appellant] is subject to the statute of limitations in force at the time of the offense." *Mangahas*, 77 M.J. at 222 (citing *Toussie v. United States*, 397 U.S. 112, 115, 90 S. Ct. 858, 25 L. Ed. 2d 156 (1970)).

Here, appellant committed larceny of the M1-12 C4 blocks between on or about February and December 2016 when he formed the intent to take this property for his own personal use. (R. at 326–27). The statute of limitations in effect at the time of appellant's offense was Article 43, UCMJ (2016 ed.). Article 43, UCMJ, provided, "[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." The SCMCA received the associated sworn Specification 1 of Charge I by MAJ AM on or about 7 March 2022. (Charge Sheet). Thus, the statute of limitations ran for an alleged larceny committed before

7 March 2017. *See* UCMJ art. 43. Accordingly, the statute of limitations for Specification 1 of Charge I ran before on or about 7 March 2017.

B. Appellant affirmatively waived his right to claim the statute of limitations bar in his plea agreement.

The right to raise the statute of limitations bar may be waived. *See* R.C.M. 907(b)(2)(B). In general, an unconditional guilty plea waives all defects which are "neither jurisdictional nor a deprivation of due process of law." *See Day*, 83 M.J. at 56. Although the statute of limitations defense is non-jurisdictional, the CAAF's predecessor has held that a guilty plea does not constitute a waiver of this right. *United States v. Tunnell*, 23 M.J. 110, 111 (C.M.A. 1986) (citing *United States v. Jackson*, 20 M.J. 83 (C.M.A. 1983). Instead, "[f]or there to be such a waiver, the record must disclose that – by reason of advice from the military judge *or otherwise* – the accused was aware of his right to assert the statute of limitations and nonetheless chose to plead guilty." *Id*. (emphasis added).

Here, the record demonstrates appellant voluntarily waived this right. First, he agreed to waive all waivable motions in his Plea Agreement.[2] (App. Ex. XCIII, p. 3; R. at 439–40). Pursuant to R.C.M. 907(b)(2)(B), the statute of limitations claim is a waivable motion. Additionally, after the military judge advised

[2] It is further reasonable to infer that this clause was intentional, as a prior Plea Agreement, dated 11 October 2022, contained the same clause. (App. Ex. LXXI, p. 3).

appellant that any motions to dismiss should be made before entry of pleas, his counsel asserted, "[T]he defense has no additional pretrial motions." (R. at 308. Both these assertions constitute affirmative waivers.

Second, the record demonstrates appellant's waiver was knowing. The parties discussed this clause in a R.C.M. 802 conference and during the providence inquiry. (R. at 303–05, 439–40). Although the parties did not specifically discuss the statute of limitations claim, the parties agreed the "waive all waivable motions" provision applies to "any future motions that have not yet been filed by the defense." (R. at 440). *Cf. United States v. Jesko*, ARMY 20160439, 2018 CCA LEXIS 328, *7 (Army Ct. Crim. App. 2018) (mem op.) (citing R.C.M. 907(b)(2)(B) and *United States v. Thompson*, 59 M.J. 432, 439 (C.A.A.F. 2004)) (declining to presume awareness based on defense counsel raising the defect during post-trial matters given that the record lacks any discussion or evidence regarding appellant's alleged waiver).

Third, the record demonstrates appellant was personally aware of his right by reason of advice from his counsel. *Tunnell*, 23 M.J. at 111. He affirmed that his counsel advised him of the meaning and effect of his guilty plea, including its material terms, and understood it in all respects. (App. Ex. XCIII, p. 8–9; R. at 432, 455). He expressed satisfaction with his counsel's advice. (R. at 455; App

Ex. XCIII ¶ 9). There is nothing in the record to suggest his counsel's advice was premised on an erroneous understanding of the law.[3] *Cf. United States v. Brown*, 30 M.J. 907, 909 (A.C.M.R. 1990) (finding defense counsel's erroneous assertion that the statute of limitations was tolled demonstrated appellant did not knowingly waive the right).

This court has held in a guilty plea context that "the appellant must be personally aware of that right and must knowingly and affirmatively waive it on the record." *United States v. Rivaschivas*, 74 M.J. 758 (Army Ct. Crim. App. 2015); *United States v. Colley*, 29 M.J. 519 (A.C.M.R. 1989) ("[T]he right to plead the statute of limitations in bar of trial will not be imposed when the record . . . does not disclose that the appellant was aware of that right); *see also United States v. Lee*, 29 M.J. 516 (A.C.M.R. 1989) (finding the time-barred period of a specification does not affect the provident portions of guilty pleas encompassing acts of misconduct within the statute limit).

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[3] The government acknowledges a paragraph in the Stipulation of Fact entitled "Disclaimer of Defenses" which provides: "[Appellant] expressly disclaims the existence of any defense to the charges and specifications to which he has pled guilty. Defense counsel and [appellant] have discussed possible defenses and agree that none apply." (Pros. Ex. 31 at 24). However, the government understands this paragraph to refer to the enumerated defenses under R.C.M. 916 or other special defenses that rebut an element of an offense, not to the statute of limitations prosecutorial bar. This understanding is further informed by the fact that appellant does not allege his counsel incorrectly advised him.

However, *Rivaschivas* is distinguishable because of the "waive all waivable" clause in this case. *See also* discussion about open-court advisement *infra* AE I para. C. As the CAAF reasoned in the context of a different right:

> This text of the [Plea Agreement] unambiguously agrees to waive any waivable motions and after the military judge conducted a detailed, careful, and searching examination of appellant to ensure he understood the effect of [this] provision, appellant explicitly indicated his understanding that he was giving up the right to make any motion which by law is given up when you plead guilty.

United States v. Gladue, 67 M.J. 311, 314 (C.A.A.F. 2009) (considering whether the "waive all waivable" provision was sufficient to waive multiplicity). Similarly, the Court should decline to presume that when appellant waived "any future motions," then told the military judge his counsel advised of the meaning of this provision and understood it "in all respects" that his counsel failed to advise him of the right to claim a statute of limitations bar.

Moreover, the "waive all waivable motions" clause demonstrates there was a strategic reason for trial defense counsel to waive this right on behalf of his client. *But see United States v. Sayers*, ACM 40142, 2023 CCA LEXIS 199, *13 (A.F. Ct. Crim. App. 2023) (mem op.) (citing *Thompson*, 59 M.J. 432). That reason was to receive the benefit of the plea deal with the knowledge there was Federal civilian prosecution interest in this case. (R. at 174–75; App. Ex. XXXIX at 3 ¶ 9, 10–11).

Now on appeal, appellant does not claim that his counsel failed to advise him nor does the record suggest his counsel sought to invite error. *See generally United States v. Martin*, 75 M.J. 321, 325 (C.A.A.F. 2016) (citations omitted) (invited error doctrine "prevents a party from creating error and then taking advantage of a situation of his own making on appeal."). Where an appellant does not allege ineffective assistance of counsel or similar objections and the record does not disclose otherwise, the court may presume (1) competence and (2) good faith by trial defense counsel. *See United States v. Williams*, __ M.J. ___, 2024 CAAF LEXIS 501, *9 (C.A.A.F. 2024) (noting appellant did not challenge the providence of his guilty plea or raise similar objections). Accordingly, the court may find appellant was personally aware of this right and nevertheless, affirmatively waived it and that affirmative waiver extinguished his right to raise this issue on appeal. *See Gladue,* 67 M.J. at 314.

To the extent this court finds "the record contains evidence which, if unrebutted, would overcome the presumption of competence," the government respectfully requests the court order trial defense counsel to respond to properly evaluate whether appellant unknowingly waived this right. *See United States v. Melson*, 66 M.J. 346, 350–51 (C.A.A.F. 2008).

C. There was no additional duty for the military judge to advise appellant of this right.

Rule for Courts-Martial 907(b)(2)(B) requires the military judge to inform the accused of the right to assert the statute of limitations in bar of trial "if it appears appellant is unaware of that right." Based on the above colloquy, the military judge's duty under this rule was not triggered because nothing indicated appellant was unaware of the right.

The government respectfully raises to the court's attention the CAAF and its predecessors' holdings in contested trial contexts that the military judge has an "affirmative obligation to advise" an accused of the right and "determine that any waiver of the statute is both knowing and voluntary." *Thompson*, 59 M.J. at 439 (involving prosecution of a time-barred lesser-included offense); *see United States v. Salter*, 20 M.J. 116 (C.M.A. 1985) (explaining the military judge's sua sponte duty to determine if the waiver was knowing and voluntary was a principle of open-court advisement recognized in the 1951 and 1969 Manuals for Courts-Martial); *see also United States v. Moore*, 32 M.J. 170, 173 (C.M.A. 1991) (finding no waiver where the accused "vigorously contested the charges clearly affected by the statute of limitations").

However, this court should apply the reasoning in *United States v. Tunnell*, not *Thompson,* in a guilty plea context. *But see Jesko*, ARMY 20160439, 2018

CCA LEXIS 328. In *Tunnell* and other guilty plea cases, the military judge's duty to advise was not automatic or irrespective of defense counsel's role, but rather conditioned on an appearance of a lack of awareness. *See, e.g.*, *Brown*, 30 M.J. 907 (considering whether the military judge advised appellant after determining his counsel incorrectly advised him); *United States v. Troxell*, 30 C.M.R. 6 (C.M.A. 1960) (finding a knowing waiver where he agreed not to raise the statute of limitations bar and both his counsel and the law officer advised him of the consequences). This reasoning properly considers the role of counsel in a non-contested context.

Here, the court should find the military judge's responsibility to advise was not triggered because the record provides no evidence that appellant was unaware of this right or did not knowingly and voluntarily waive the statute of limitations as part of his plea agreement. *See* R.C.M. 907(b)(2)(B). Of significance, he agreed to stipulate to conduct committed well before 7 March 2017, namely, to conduct committed between 25 August 2014 and 14 August 2017 as well as in 2015 generally. (Pros. Ex. 31 at 2). Given the express language in his plea agreement, stipulation of fact, and colloquy during his providence inquiry, appellant not only took actions indicating to the military judge that he was aware of his right, but also

personally participated in the waiver. Thus, there was nothing in the record that should have reasonably alerted the military judge.

Assignment of Error 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.

Additional Facts

Between on or about December 2017 and February 2018, appellant shipped multiple M1-12 C4 blocks along with blasting caps as a part of his permanent change of station move from JBER through the Port of Seattle, Washington, to his house in Elgin, Oklahoma. (R. at 368–70, 372; Pros. Ex. 31 at 3). This shipment utilized public roads, railways, and overseas shipping lanes. (Pros. Ex. 31 at 4). He did not have a license or permit to transport these items on public roads and knew the wrongfulness of doing so. (R. at 372–73; Pros. Ex. 31 at 4). He took advantage of weaknesses in the inspection process to circumvent Department of Transportation (DoT) regulations. (R. at 370–72). These explosives arrived in Oklahoma between March and November 2018. (R. at 370).

Standard of Review

This court reviews its subject matter jurisdiction and interpretation of a statute de novo. *United States v. Williams*, __ M.J. ___, 2024 CAAF LEXIS 501, at *8; *United States v. Harvey*, __ M.J. ___, 2024 CAAF LEXIS 502, *3 (C.A.A.F. 2024).

Law

"Article 134, UCMJ expressly permits charging military members for 'crimes and offenses not capital' that are 'not specifically mentioned' in the UCMJ, and which include, inter alia, crimes and offenses prohibited by the United States Code." *United States v. Wheeler*, 77 M.J. 289, 291 (C.A.A.F. 2018) (discussing MCM pt. IV, para. 60.c.(4) (2012 ed.)); *see generally* MCM pt. IV, para. 91.c.(1), (4), b.(6)(b) (2019 ed.). The noncapital Federal offense referenced in Specification 1 of Charge II is 18 U.S.C. § 842(a)(3)(A), which prohibits a person other than a licensee or permittee to knowingly transport or cause to be transported explosive materials. (R. at 366).

For purposes of 18 U.S.C. § 842(a)(3)(A): a "person" is defined, in relevant part, as any individual; "permittee" means any user of explosives for a lawful purpose, who has obtained either a user permit or a limited permit under the provisions of 18 U.S.C. §§ 841 et seq; and "licensee" means any importer,

manufacturer, or dealer licensed under the provisions of 18 U.S.C. §§ 841 et seq. 18 U.S.C. § 841(a), (j), (m).

Exceptions to 18 U.S.C. § 842(a) are provided in 18 U.S.C. § 845(a). Namely, this offense does not apply to "aspects of the transportation of explosive materials via railroad, water, highway, or air that pertain to safety, including security, and are regulated by the Department of Transportation[.]" 18 U.S.C. § 845(a)(1).

Argument

Appellant violated 18 U.S.C. § 842(a)(3)(A). Appellant was a person other than a licensee or permittee because he was an individual, not a licensed dealer or user of explosives for a lawful purpose with a user or limited permit. *See* 18 U.S.C. § 841(a), (j), (m). Furthermore, appellant placed M1-12 C4 blocks and blasting caps in his connex and then coordinated its transport by filling out paperwork in a manner intended to circumvent inspection. (R. at 372; Pros. Ex. 31 at 4). That connex utilized public roads, railways, and overseas shipping lanes from JBER through the Port of Seattle, Washington, to his house in Elgin, Oklahoma. (Pros. Ex. 31 at 3). Thus, appellant knowingly transported or caused these explosive materials to be transported.

Contrary to appellant's proposition, the exception under section 845(a)(1) does not apply merely because appellant filed paperwork, placarding, and shipping papers for this shipment. (Appellant's Br. 9–11). *Illingworth* and *Petrykievicz* are not binding on this court, and the court should not find their reasoning persuasive. *United States v. Illingworth*, 489 F.2d 264 (10th Cir. 1973); *United States v. Petrykievicz*, 809 F.Supp. 794 (W.D. Wash. 1992). First, both courts found that the 18 U.S.C. § 845 exclusion applied based on the explosive materials being regulated by the Department of Transportation (DoT), not the "aspects of transportation" that appellant proposes.

Second, Congress could not have meant to exempt an individual from criminal liability for shipping explosives without a license merely because the explosives themselves and/or filling out its paperwork are in some way regulated by DoT. "DoT, of course, regulates all, or nearly all, explosives in some fashion, for example, by regulating the explosives' 'labeling, packaging, mode of transportation, placarding and shipping papers.'" U.S. Attorney General Opinions, 2003 OLC LEXIS 13, *7–8, 21–22 (6 Feb. 2003) (citing *United States v. Fiorillo*, 186 F.3d 1136, 1153 (9th Cir. 1999)) (discussing the implications of *Illingworth*). Construing section 845(a)(1) in the manner appellant proposes would render the substantive criminal prohibition of section 842(a)(3)(A) meaningless. *See id.* at *7

(citing *United States v. Fiorillo*, 186 F.3d 1136, 1152–53 (9th Cir. 1999) ("One provision of a statute should not be interpreted in a manner that renders other sections of the same statute 'inconsistent, meaningless or superfluous.'")).

Instead, "it is the intent of 18 U.S.C. § 841 et seq. to prevent persons from conducting certain activities, i.e., storage, manufacturing, or transporting without a license." *United States v. Scharstein*, 531 F.Supp. 460, 466 (E.D. Ky. 1982). The section 845(a)(1) exception for any "aspect regulated by the Department of Transportation is how items may be transported once the transporter obtains a license." *Id.* Again, appellant was unlicensed when he coordinated a shipment of stolen M1-12 C4 blocks and blasting caps as part of his personal household goods shipment. Thus, this court should find the section 845(a) exception does not apply and affirm the finding of guilt for this offense.

Assignment of Error III

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

Additional Facts

Appellant and [redacted] married in 2014. (R. at 470, 503). In 2019, [redacted] began to consider ending their marriage. (R. at 472, 513). On or about 19 April 2019, appellant and [redacted] were in St. Louis, Missouri for a custody hearing with

appellant's ex-wife. (R. at 472). They were staying at the Homewood Suites at the St. Louis Galleria. (R. at 473). Appellant returned to the hotel from the hearing around 1900 or 2000 hours. (R. at 473). He had been drinking and eventually fell asleep in a chair before going to sleep in the bedroom. (R. at 474). While [redacted] was making the sofa-bed with her back turned to appellant, he suddenly came over, bear hugged her, and then shoved her under the sofa-bed. (R. at 474). She cried and asked him to get off, but he persisted. (R. at 474). After a few minutes, he got up and went back to the bedroom. (R. at 474). This was the first time appellant was violent towards her. (R. at 486).

After appellant returned to the bed, [redacted] messaged her brother, Mr. MH, dumped the remaining drinks, and found a room at the Country Inn and Suites in St. Charles, Missouri, to stay the night. (R. at 474–75; Pros. Ex. 41, 43). In her messages to her brother, [redacted] discussed the injuries she sustained, concerns for her safety, and photos that she took to document what had occurred. (R. at 478, 480, 499–501; 512; Pros. Ex. 41, 47). [redacted] sustained injuries to her knee. (R. at 516; Pros. Ex. 47).

Thereafter, the military judge found appellant guilty of committing a violent offense against [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." (R. at 571; STR).

Standard of Review

Questions of legal and factual sufficiency are reviewed de novo.[4] *Harvey*, __ M.J. ___, 2024 CAAF LEXIS 502, at *5; *United States v. Bright*, 66 M.J. 359, 363 (C.A.A.F. 2008); *United States v. Washington,* 57 M.J. 394, 399 (C.A.A.F. 2002). Further, this Court's assessment of factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

Law

A. Legal Sufficiency.

The standard 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 MJ 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *see United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). In

[4] The amended Article 66(d)(1), UCMJ (2021) does not apply in this case because some findings of guilty in the Entry of Judgment are for offenses that occurred before 1 January 2021. (STR; Judgment). *See United States v. Mendoza*, No. 23-0210, __ M.J. ___, n.6 (CA.A.F. 2024); *see generally* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(e)(2), 134 Stat. 3388, 3611–123.

resolving questions of legal sufficiency, the court is "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). During its legal sufficiency review, the court considers all available facts within the record and is "not limited to the appellant's narrow view of the record." *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996).

B. Factual Sufficiency.

This court reviews factual sufficiency of court-martial convictions and may only affirm findings of guilty that are correct in fact. UCMJ art. 66(d)(1) (2019). In considering the record, this court may weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses. *Id.*

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this] court are themselves convinced of appellant's guilt beyond reasonable doubt." *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011); *Turner*, 25 M.J. at 325). Factfinders "are expected to use their common sense in assessing the credibility of testimony as well as other evidence presented at trial."

United States v. Frey, 73 M.J. 245, 250 (C.A.A.F. 2014); *see also* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 7-7-1 (29 February 2020) [Benchbook]. This applies in a military judge alone case. *Frey*, 73 M.J. at 251.

"[T]o 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). "[T]he government is free to meet its burden of proof with circumstantial evidence." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (discussing *United States v. Kearns*, 73 M.J. 177 (C.A.A.F. 2014) and *United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007)).

This court takes "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). It makes its "own independent determination as to whether the evidence constitutes proof of each element beyond a reasonable doubt." *Id.* Proof beyond a reasonable doubt does not require that the evidence be free from all conflict. *United States v. Trigueros*, 69 M.J. 604, 612 (Army Ct. Crim. App. 2010) (quotation omitted).

C. UCMJ article 128b.

It is an offense under Article 128b(1), UCMJ, for a person to commit a violent offense against their spouse. UCMJ art. 128b(1). At the time of appellant's trial, the President had not promulgated definitions applicable to this offense. However, the Military Judge's Benchbook defined the term "violent offense" as a violation of any offense that has as an element that includes the use, attempted use, or threatened use of physical force against the person or property of another. *See* Benchbook, para. 3A-52B-1d (definitions); *see also* 18 U.S.C. § 16 (crime of violence).

Assault consummated by a battery under Article 128, UCMJ, is a violent offense. It requires proof of bodily harm done with unlawful force or violence. MCM, pt. IV ¶¶ b(2)(b)–(c). Assault as an offer-type assault is an unlawful demonstration of violence, either by intentional or by culpably negligent act or omission, which creates in the mind of another reasonable of receiving immediately bodily harm. MCM, pt. IV ¶ c(2)(b)(ii). Culpable negligence is a degree of carelessness greater than simple negligence. MCM, pt. IV ¶ 57c(2)(a). It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. MCM, pt. IV ¶ 57c(2)(a).

Argument

A. Legal Sufficiency.

Appellant contends the government failed to prove the *mens rea* and element of "unlawful force or violence." (Appellant's Br. 14–15). First, the *mens rea* may be satisfied through culpable negligence. MCM, pt. IV ¶ c(2)(b)(ii). Appellant shoved his wife under a hide-a-bed, resulting in an injury to her knee. (R. at 485; Pros. Ex. 41 at 12). His actions were more than careless and the consequences foreseeable. Even though he was drinking, the evidence demonstrates appellant's actions were knowing: he stood up out of bed, walked out of the bedroom to the couch area to the exact spot where his wife was standing, put his arms around her and prevented her from moving, shoved her under the couch, pinned her down for a period of time, then got up and walked back to the bedroom. (R. at 474).

Second, the evidence of "force or violence" was [redacted]'s testimony and the photos of the bed and her knee injury. Appellant did not merely hug his wife, he squeezed her so she could not move and pinned her face down under the bed, injuring her knee and causing her difficulty breathing. (R. at 474, 485; Pros. Ex. 41 at 11–13).

That the record is silent with respect to appellant's anger is less relevant than the text messages, hotel receipt of her stay that night, and [redacted] and Mr. MH's

testimonies explaining her decision to stay elsewhere that night was for her safety. (R. at 474, 523; Pros. Ex. 41, 43). Namely, the text messages convey Mr. MH's advice and [redacted]'s fear that night; the hotel receipt shows [redacted] did in fact resort to staying elsewhere that night; Mr. MH's testimony recalled his observations of [redacted] that night; and [redacted]'s testimony detailed the violence and fear she experienced that night. Moreover, evidence that it was "unlawful" was her testimony that she cried and told him to get off, signifying her lack of consent. There is no evidence, nor does appellant claim, that he had a legal justification or excuse to shove his wife under a bed. Thus, viewing the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found both the *mens rea* and element of "unlawful force or violence" beyond a reasonable doubt. *See Turner*, 25 MJ 324.

B. Factual Sufficiency.

Appellant contends the government failed to prove the specific acts of slamming, pressing appellant's body on top of [redacted], and squeezing her with his arms. (Appellant's Br. 15). But evidence of these acts included the testimonies of [redacted], Mr. MH, and photos and text messages [redacted] sent to Mr. MH. (R. at 472–87, 499–501, 512, 519, 549; Pros Ex. 41, 47). Recognizing that the trial court saw and heard the witnesses, this court should find these witnesses credible. Even

though [redacted]'s ex-husband believed she had a poor character for truthfulness, appellant's ex-wife, Mrs. MF, considered [redacted] to be a very truthful person. (R. at 523, 549; Def. Ex. B).

The evidence that appellant slammed [redacted] onto a hide-a-bed included (1) [redacted]'s testimony that appellant shoved her under the bed facedown;[5] (2) her testimony that she sustained an injury on her knee as a result; (3) screenshots of her text messages to her brother relaying the same immediately after the incident; (4) a photo of the bed and resulting injury on her knee showing the cause and location of injury; and (5) Mr. MH's testimony that he advised her to stay at a different hotel because she was potentially in danger. (R. at 474, 485, 523; Pros. Ex. 41). The evidence that appellant pressed his body on top of her included [redacted]'s testimony that while she was pinned down, she asked him to get off her, and he only did so after a few minutes. (R. at 474, 485; Pros. Ex. 41 at 1). Similarly, the

[5] The variance between "slamming" and "shoving" does not require overturning appellant's conviction because it is not a "material variance" and appellant has not demonstrated substantial prejudice. *See United States v. Williams*, ARMY 20140604, 2017 CCA LEXIS 178, at *4–5 (Army Ct. Crim. App. 21 Mar. 2017) (quoting *United States v. Marshall*, 67 M.J. 418, 420 (C.A.A.F. 2009)). A material variance is one that substantially changes the nature of the offense, increases the seriousness of the offense, or increases the punishment of the offense, and prejudice results from risk of future prosecution for the same conduct, depriving appellant of the ability to prepare adequately for trial, or denying appellant the opportunity to defend against the charged offense. *Id.*

evidence that appellant squeezed [redacted]'s arms so she could not move included [redacted]'s testimony that appellant "bear hugged" her. These facts circumstantially prove the specified acts beyond a reasonable doubt. *See King*, 78 M.J. at 221.

Conclusion

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

[redacted]
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CERTIFICATE OF SERVICE, U.S. v. ASKINS (20230303)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on the 22nd day of November, 2024.

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PANEL NO. 2