UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLEMING, HAYES, and MORRIS
Appellate Military Judges

UNITED STATES, Appellant
v.
Sergeant First Class JOSEPH A. SANTIAGO
United States Army, Appellee

ARMY MISC 20230094

Headquarters, Fort Campbell
Travis L. Rogers, Military Judge
Lieutenant Colonel Ryan Leary, Staff Judge Advocate

For Appellant: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline J. DeGaine, JA; Captain Melissa Eisenberg, JA; Major Jennifer A. Sundook, JA (on brief); Lieutenant Colonel Jacqueline J. DeGaine, JA; Captain Melissa Eisenberg, JA; Major Jennifer A. Sundook, JA (on reply brief).

For Appellee: Colonel Michael C. Friess, JA; Jonathan F. Potter, Esquire; Major Bryan A. Osterhage, JA; Captain Andrew R. Britt, JA (on brief).

3 May 2023

SUMMARY DISPOSITION AND ACTION ON APPEAL
BY THE UNITED STATES FILED PURSUANT TO
ARTICLE 62, UNIFORM CODE OF MILITARY JUSTICE

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

HAYES, Judge:

This case is before this court pursuant to a government appeal of the military judge's ruling in accordance with Article 62, UCMJ. The military judge sustained appellee's objection to the admission of his decedent wife's statements under the forfeiture by wrongdoing exception to the hearsay rule.

The government appeal alleges the military judge failed to make essential findings of fact, misapplied the law, and abused his discretion by sustaining appellee's objection. The government requests this court vacate the ruling and order additional findings of fact. Upon review of the record pursuant to Article 62,

UCMJ, and as specified in the discussion below, we conclude the military judge erred in his application of the law and direct action in our decretal paragraph.

BACKGROUND

Appellee is charged at a general court-martial with one specification of murder, one specification of injury of an unborn child, and two specifications of assault, in violation of Articles 118, 119a, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 918, 919a, and 928 [UCMJ].

In late September 2021, appellee's wife, then in her third trimester of pregnancy, was in her home with appellee and their children. In the late afternoon or early evening, she sustained blunt force trauma rendering her unconscious. Prior to emergency responders being notified of her injuries, internet queries were made from the home searching for ways to awaken someone rendered unresponsive due to a blow to the chest. Appellee allegedly made several attempts to revive his wife, to include burning her. Six days later, having never regained consciousness, appellee's wife died from multiple blunt force injuries, including a fractured sternum. The baby was delivered by emergency cesarean section and survived.

On the eve of trial, appellee provided notice to the military judge that he would object if the government moved to admit statements of his deceased wife. These statements allege: (1) appellee's prior abuse, to include the charged assaults, and (2) appellee's threats of additional abuse. Most relevant to the forfeiture by wrongdoing analysis and representative of similar statements, four days prior to sustaining the injuries resulting in her death, the alleged victim sent her friend a text message alleging that appellee "told he [sic] if the cops show up he'd kill me."

During voir dire, the government filed a bench brief seeking a ruling on the admissibility of her statements under the forfeiture by wrongdoing hearsay exception. Finding the government failed to prove appellee's alleged murder of his wife was undertaken, at least in part, with the intent to make her unavailable as a witness, the military judge sustained the defense objection.

On appeal, the government argues, *inter alia,* the military judge misapplied the law by limiting his consideration of the possible theories by which appellee may have intended to make his wife unavailable. Specifically, even though appellee's futile attempts to revive his wife might indicate he did not intend to kill her at the time of the alleged assault, he may have intended to discourage her from testifying. The government argues either the alleged victim's death, or her refusal to testify had she lived, would have resulted in her unavailability, and appellee's intent to cause either scenario would satisfy the requirements for admission of her statements under the forfeiture by wrongdoing hearsay exception. For the reasons set forth below, we agree with the government that the military judge erred by failing to consider and rule on both theories of admissibility.

LAW AND DISCUSSION

Jurisdiction

The government may appeal "[a]n order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding." UCMJ art. 62(a)(1)(B). Such a ruling is subject to the court's jurisdiction when it has "directly limited the pool of potential evidence that would be admissible at the court-martial." *United States v. Wuterich*, 67 M.J. 63, 75 (C.A.A.F. 2008).

When deciding appeals brought under Article 62, UCMJ, this court "may act only with respect to matters of law." *United States v. Baker*, 70 M.J. 283, 287-88 (C.A.A.F. 2011). "On questions of fact, [this] court is limited to determining whether the military judge's findings are clearly erroneous or unsupported by the record." *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995). A failure to consider important facts may constitute an abuse of discretion. *United States v. Becker*, 81 M.J. 483, 489 (C.A.A.F. 2021). We review matters of law de novo. *Lincoln*, 52 M.J. at 323.

The court has jurisdiction over this appeal. If admitted, some of appellee's wife's statements affected by the military judge's ruling would be direct evidence in support of the charged assaults. These statements would also provide proof regarding appellee's motive and intent to kill his wife. These statements are substantial proof of material facts for the government, and their exclusion would limit the pool of potential evidence. As the decision to exclude appellee's wife's statements resulted from the military judge's conclusions of law, we may act on the appeal.

Forfeiture by Wrongdoing

An out-of-court statement offered for the truth of the matter asserted is inadmissible hearsay. Military Rule of Evidence [Mil. R. Evid.] 801, 802. However, there are numerous exceptions to the hearsay rule. *See generally*, Mil. R. Evid. 803, 804. Military Rule of Evidence 804(a)(4) provides for the possible admission of a hearsay statement when a witness is deemed unavailable to testify because of their death. The cause of the witness' death is immaterial to determining their unavailability to testify at trial for the purposes of Mil. R. Evid. 804(a). Mil. R. Evid. 804(a)(4).

Once a witness is deemed unavailable under Mil. R. Evid. 804(a), the party offering the hearsay statement must establish a further exception exists under Mil. R. Evid. 804(b) to warrant its admission. One such exception is forfeiture by wrongdoing, which allows for the admission of an unavailable witness' statement when "offered against a party that wrongfully caused or acquiesced in wrongfully

causing the declarant's unavailability as a witness, and did so intending that result." Mil. R. Evid. 804(b)(6).

The standard for admitting evidence under Mil. R. Evid. 804(b)(6) is a preponderance of the evidence. *United States v. Marchesano*, 67 M.J. 535, 544 (Army Ct. Crim. App. 2008). To establish that a declarant's statements qualify for the exception, "(1) the party against whom the statement is offered must have wrongfully caused the declarant's unavailability as a witness, and (2) the party caused the witness's unavailability with the intent to make that witness unavailable, i.e., that the accused intended their conduct to prevent the witness from testifying against them in court." *Becker*, 81 M.J. at 489.

Federal courts "have sought to effect the purpose of the forfeiture-by wrongdoing exception by construing broadly the elements required for its application." *United States v. Gray*, 405 F.3d 227, 242 (4th Cir. 2005), *cert. denied*, 546 U.S. 912 (2005). An intent to cause a declarant to be unavailable "need not be motivated solely by the desire to prevent the declarant's would-be testimony, rather, only that it was a motivating factor in [his] decision to take such an action." *Becker*, 81 M.J. at 489 (citing *United States v. Jackson*, 706 F.3d 264, 269 (4th Cir. 2013)). Furthermore, the forfeiture by wrongdoing exception applies even to situations where there was no "ongoing proceeding in which the declarant was scheduled to testify." *United States v. Miller*, 116 F.3d 641, 668 (2nd Cir. 1997).

In *Giles v. California*, the Supreme Court found a defendant's right to confrontation is satisfied by the forfeiture by wrongdoing hearsay exception only when the defendant made the victim unavailable with an intent to prevent the witness's testimony. *Giles v. California*, 554 U.S. 353, 359-362 (2008). Giles was convicted of murdering his ex-girlfriend. *Id.* at 356-57. At trial, the government admitted the victim's prior statements to police responding to a domestic violence report three weeks before the murder. *Id.* The statements allege Giles threatened to kill the victim if he found her cheating on him. *Id.* at 357. Since there was no evidence that either the murder or prior assault were committed with the intent to prevent the victim's testimony, the admission of the victim's prior statements against Giles violated his Sixth Amendment right to confront the witnesses against him. *Id.* at 377. The Court held the forfeiture by wrongdoing exception only applies to situations where the defendant causes the witness' absence with the intention of preventing that witness from testifying at trial. *Id.* at 359-362, 377.

In determining whether there is evidence of an intent to prevent the witness' testimony, the *Giles* court recognized the distinct nature of domestic violence relationships:

> Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct

> designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution -- rendering her prior statements admissible under the forfeiture doctrine.

Id. at 377.

The Supreme Court went on to specifically invite the lower court to consider evidence of the defendant's intent on remand. *Id.*

In the present case, in contrast to *Giles*, appellee allegedly threatened to kill his wife in conjunction with a previous assault if police were notified of the abuse. This indicates an intent to prevent her from providing a statement against him, which the *Giles* court said may support a finding of a similar intent at the time of the alleged murder.

The military judge placed significant weight on the fact appellee tried to revive his wife, finding it evinced a lack of intent to make her unavailable to testify. Appellee's alleged efforts to revive his wife may be evidence that he did not intend to kill her and render her unavailable under Mil. R. Evid. 804(a)(4). While that is a logical conclusion, further analysis in accordance with *Giles* is required.

As the government argued to the military judge, appellee may have committed the alleged fatal assault not with the intent to kill her *but instead* with the intent to isolate, intimidate, or threaten her to discourage her from testifying, and her refusal to do so would result in her unavailability under Mil. R. Evid 804(a)(2).*

The government argues, consistent with the alleged victim's statements they seek to introduce, that appellee previously assaulted and threatened his wife with the intent of making her unavailable to testify against him out of fear. Following *Giles'* analysis, prior incidents of similar abuse would be highly relevant in determining if this was also appellee's intent at the time of the assault resulting in his wife's death. Put simply, if appellee's wife had survived and refused to testify out of fear, and

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* Military Rule of Evidence 804(a)(2) states a witness is considered unavailable if they refuse "to testify about the subject matter despite the military judge's order to do so." Statements made by a witness deemed to be unavailable under Mil. R. Evid. 804(a)(2) are not excluded by the rules against hearsay if the statement is "offered against a party that wrongfully caus[ed] the declarant's unavailability as a witness and did so intending that result." Mil. R. Evid. 804(b)(6).

that was appellee's intent when he assaulted her, her statements would be admissible under Mil. R. Evid. 804(a)(2) and (b)(6). Appellee should not benefit from his wife's death by the exclusion of her statements if the preponderance of the evidence suggests he intended to silence her through fear, but ultimately—perhaps inadvertently—instead silenced her through her death.

Accordingly, it was an abuse of his discretion for the military judge not to consider or issue a ruling regarding the government's additional proffered theory of admissibility, and the evidence supporting it, when determining if appellee intended to render his wife unavailable to testify at the time of the alleged fatal assault. As the Supreme Court in *Giles* emphasized, in domestic violence cases, if there is an intent to prevent witness' testimony through prior acts of abuse, the prior acts may support a finding that an accused harbored a similar intent at the time of the ultimate act of abuse.

CONCLUSION

The government's appeal under Article 62, UCMJ is GRANTED. The military judge's ruling is VACATED. The record of trial is returned for further action consistent with this opinion.

Senior Judge FLEMING and Judge MORRIS concur.

FOR THE COURT:

JAMES W. HERRING, JR.
Clerk of Court