UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
PENLAND, MORRIS, and ARGUELLES[1]
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class LUIS A. MORALESSANCHEZ
United States Army, Appellant

ARMY 20210286

Headquarters, Fort Bliss
Michael S. Devine and Robert L. Shuck, Military Judges
Colonel Andrew M. McKee, Staff Judge Advocate

For Appellant: William E. Cassara, Esquire (argued); Captain Andrew R. Britt, JA; William E. Cassara, Esquire (on brief and reply brief).

For Appellee: Major Melissa A. Eisenberg, JA (argued); Colonel Christopher B. Burgess, JA; Major Kalin B, Schleuter, JA; Captain Melissa A. Eisenberg, JA (on brief).

31 August 2023

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

ARGUELLES, Judge:

A military judge sitting as a general court-martial convicted appellant, in accordance with his pleas, of six specifications of assault on an intimate partner, one specification of wrongful use of cocaine, two specifications of disobeying a lawful order, one specification of false official statement, and one specification of adultery, in violation of Articles 128, 112a, 90, 107, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 928, 912a, 890, 907, and 934 [UCMJ].

After the government withdrew several of the remaining charges and specifications, the military judge sitting as a general court martial convicted

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[1] Judge ARGUELLES decided this case while on active duty.

appellant, contrary to his pleas, of two specifications of murder charged in the alternative, and one specification of simple assault with an unloaded firearm, in violation of Articles 118 and 128, UCMJ. The military judge found appellant not guilty of one specification of wrongful use of cocaine, one specification of stalking, one specification of wrongful discharge of a firearm, and one specification of negligent discharge of a firearm, in violation of Articles 112a, 128, 130, 114, and 134, UCMJ.

The military judge sentenced appellant to a dishonorable discharge and confinement for forty years and ten months. The convening authority approved the findings and sentence and took no further action.

This case is before the court for review pursuant to Article 66, UCMJ. Appellant raises three assignments of error, two of which merit discussion, and one of which merits relief.[2]

DISCUSSION

A. Discovery of the Armed Forces Medical Examiner System Report

1. Additional Facts

At the heart of this assignment of error is the Case Consult generated by the Armed Forces Medical Examiner System (AFMES). Approximately six weeks before trial, a new Army Criminal Investigation Command agent ("agent") took over the case and unilaterally decided to request that AFMES review the El Paso

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[2] We have also given full and fair consideration to the matter personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find it likewise to be without merit. In addition, we note that the Statement of Trial Results ("STR") contains a litany of errors: the charging language for Specification 1 of Charge III should be "on or about 1 October 2018" and not "31 October 2018;" the plea for Specification 1 of Additional Charge VI should be "Not Guilty" instead of "Guilty; the plea for Specification 3 of Charge V, and The Specification of Additional Charge V should be "Not Guilty" instead of "Withdrawn and Dismissed;" the finding/disposition for Additional Charge I, Specifications 1 and 2, Additional Charge II, The Specification, and Additional Charge III, The Specification should all be "Withdrawn and Dismissed" instead of "Not Guilty." Aside from noting that both counsel and the trial judiciary should by now be aware of the need to carefully review the STR to avoid such errors, we will exercise our discretion to correct all of them. *See* Rule for Courts-Martial 1111(c)(2); *United States v. Pennington*, ARMY 20190605, 2021 CCA LEXIS 101, at *5 (Army Ct. Crim. App. 3 Mar. 2021) (summ. disp.) ("Exercising our authority under R.C.M. 1111(c)(2), we note and correct the following issues in appellant's post-trial documents . . . .").

Coroner's autopsy findings for the murder victim. Although there were multiple communications between AFMES, trial counsel, and the agent over the next month, the defense was not aware of AFMES's involvement until the second day of trial, when the government received and produced the Case Consult.

The Case Consult stated at the outset that the cause of death and manner of death were "undetermined." The report also documented that AFMES had requested, but had not received, original radiology studies and histology slides from the El Paso Coroner.[3] The "Opinion" section of the report, that "[t]he materials reviewed in this case show findings that are highly concerning for non-accidental trauma. The injuries described above are not consistent with the falls that the infant reportedly experienced several days before death." The report also noted that the radiology findings in the right humerus "are highly suggestive of a fracture, which was not described in either the primary autopsy report" or a secondary forensic consult report. The AFMES report concluded by noting,"[d]ue to the above mentioned findings, we cannot rule out homicide as a matter of death," and recommending that the victim's body be exhumed to perform a second autopsy "with appropriate postmortem imaging to fully document and appropriately assess for additional injuries in this case."

Immediately after receiving the Case Consult, the defense requested a dismissal with prejudice of the entire case, or at least the murder specifications. In the alternative, the defense asked at a minimum that the military judge preclude the government from calling its forensic experts. Defense counsel made clear, however, that she was not seeking a continuance:

> My client has been in PTC [pretrial confinement] for approximately 445 days. If we continue — if we add in his 12 days of credit for civilian confinement, for offenses for

[3] For the first time on appeal, appellant argues additional prejudice in that these materials not provided to AFMES comprised the same information that formed the basis for his expert's opinion that the cause of death was pneumonia due to an accidental fall. As appellant did not make this argument before the military judge below, we decline to consider it now. *See United States v. Lloyd*, 69 M.J. 95, 100 (C.A.A.F. 2010) ("We find that the military judge did not abuse her discretion by failing to adopt a theory that was not presented in the motion at the trial level."); *United States v. Carpenter,* 77 M.J. 285, 289 (C.A.A.F. 2018) ("[O]ur review for error is properly based on a military judge's disposition of the motion submitted to him or her—not on the motion that *appellate* defense counsel now wishes *trial* defense counsel had submitted.") (emphasis in original). In any event, for all of the reasons set forth below, even if we considered this new argument, we would not change our ruling.

> which he has pled guilty. A continuance in this case does not fix anything. It prejudices my client.

In response, the military judge recessed the trial to hear testimony from the agent and to allow the parties to submit additional written materials in the form of emails, the agent's report and notes, briefing, etc.

The agent testified that when he first reviewed the case file six weeks prior to trial, he made the unilateral decision to contact AFMES. The agent also stated that when he first informed trial counsel of his communications with AFMES, trial counsel suggested that review of the autopsy was unnecessary and redundant, and directed him to tell AFMES to cease their work. When the agent relayed this back to AFMES, they told him that both trial and defense counsel would need to agree that the consultation was no longer necessary. Although there was a notation in the agent's report from 6 April 2021 that he notified AFMES that defense counsel wanted the consultation to continue, there was also an email the same day in which the agent told AFMES that "Trial Counsel *and Trial Defense Counsel* are sufficiently satisfied with the reviews already conducted on this case and thus, we will not pursue a consultation with AFMES." (emphasis added). The agent did not copy trial counsel on this email. The agent testified that this omission resulted from an assumption on his part, as trial counsel never told him that the defense concurred in the request to terminate the work of AFMES. The agent testified that he did inform trial counsel, however, on multiple phone calls between 6-14 April that AFMES required the defense to approve any termination request.

Although the prosecution team appeared initially to waver as to whether they wanted AFMES to generate a report, on 15 April 2021, trial counsel directly emailed AFMES to say that because they did not want to use government resources for evidence they did not plan on using at trial, the government was not asking AFMES "for an independent evaluation or a review of [the victim's] autopsy at this time." In an emailed response, AFMES informed trial counsel that although there was some initial confusion about their involvement, because they had already reviewed a significant amount of material before the "withdraw" request, "we will be finishing the consult to completion, regardless of the close proximity of the trial." In the same email, AFMES also informed trial counsel that they were still tracking down additional information and did not anticipate having a report completed by the trial date. Even after this exchange of emails, trial counsel did not reach out to the defense team to inform them of his communications with AFMES.

On 3 May 2021, the first day of trial, AFMES emailed the agent to say that since they were still missing some requested information, and because a full consult would require them to exhume the body for a second autopsy, they were only submitting a brief report; AFMES also told the agent that they had uploaded the "final report" in the system and it would be available shortly. The agent

immediately passed all of this along to trial counsel. Trial counsel did not, however, share any of this information with defense counsel, who at this point was still unaware of AFMES's involvement. The next morning, AFMES emailed the Case Consult to the agent, who again forwarded it to trial counsel. When trial counsel saw this email at the first morning break, he immediately disclosed the Case Consult to the defense. At this point in trial the parties still had not presented any evidence pertaining to the murder charges, nor had any of the forensic experts relevant to those specifications testified.

2. Legal Standard

We review a military judge's discovery rulings and his remedy for discovery violations under an abuse of discretion standard. *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015) (citations omitted).

In *Brady v. Maryland*, the Supreme Court established that the suppression of evidence favorable to an accused "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). As the Court of Appeals for the Armed Forces (CAAF) explained in *United States v. Behenna*, in the context of *Brady*: (1) evidence is favorable if it is "exculpatory, substantive evidence or evidence capable of impeaching the government's case[;]" and (2) "material when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different[,]" meaning that it would have made "the likelihood of a different result . . . great enough to undermine[] confidence in the outcome of the trial." 71 M.J. 228, 238 (C.A.A.F. 2012) (internal quotation marks and citations omitted). Rule for Courts-Martial [R.C.M.] 701(a)(6) codifies the rule set forth in *Brady*. *See United States v. Williams*, 50 M.J. 436, 440 (C.A.A.F. 1999) (holding that R.C.M. 701(a)(6) implements the Supreme Court's decision in *Brady*).

In addition to the requirements of R.C.M. 701(a)(6) and *Brady*, Article 46 of the UCMJ more broadly mandates that "trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may proscribe." UCMJ art. 46(a). Along these lines, R.C.M. 703(a) mandates that the prosecution and the defense "shall have equal opportunity to obtain witnesses and evidence," and R.C.M. 703(e) affirms that "[e]ach party is entitled to the production of evidence which is relevant and necessary." *See also* R.C.M. 701(e) ("[e]ach party shall have . . . equal opportunity to interview witnesses and inspect evidence . . . .").

With respect to the remedy for a discovery violation, R.C.M. 701(g)(3) provides that if the military judge determines that a party has failed to comply with R.C.M. 701, he may order further discovery, grant a continuance, exclude evidence, or otherwise "[e]nter such other order as is just under the circumstances." *See*

United States v. Vargas, 83 M.J. 150, 156-57 (C.A.A.F. 2023) (holding that under R.C.M. 701(g)(3) "the military judge may impose dismissal with prejudice if, after considering whether less severe alternative remedies are available, she concludes that dismissal with prejudice is just under the circumstances"); *Stellato*, 74 M.J. at 488 ("We also underscore that if 'an error can be rendered harmless, dismissal is not an appropriate remedy.'") (citation omitted).

As this court explained in *United States v. Ellis*, 77 M.J. 671, 677-79 (Army Ct. Crim. App. 2018), we employ different tests for error based on the nature of the discovery violation. With respect to *Brady* violations, as noted above, the CAAF in *Behenna* reaffirmed that in order to obtain relief there must be a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. 71 M.J. at 238. The court in *Behenna* also held that once a *Brady* violation is established, there is no need to test for harmlessness. *Id.* (citing *Kyles v. Whitley*, 514 U.S. 419, 435-36 (1995)).

On the other hand, in *United States v. Claxton*, the CAAF held that where an appellant demonstrates that the government failed to disclose discoverable evidence in response to a specific request *or as a result of prosecutorial misconduct*, he is entitled to relief unless the government can show that the nondisclosure was harmless beyond a reasonable doubt, and that such failure to disclose "'is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial.'" 76 M.J. 356, 359 (C.A.A.F. 2017) (citing *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004)); (quoting *United States v. Coleman*, 72 M.J. 184, 187 (C.A.A.F. 2013)).

Finally, if the government violates any of the other multitude of discovery disclosure requirements that do not rise to the level of either a *Brady* violation or prosecutorial misconduct, we test for material prejudice in accordance with Article 59(a), UCMJ. *Ellis*, 77 M.J. at 679.

3. Analysis

In both their briefing and at oral argument, the government conceded that in failing to disclose the ongoing AFMES consultation prior to trial, there was a discovery violation. We agree. *See Stellato*, 74 M.J. at 484 ("No party may unreasonably impede the access of another party to a witness or evidence."). The parties dispute, however, whether that violation was intentional or negligent, and whether it constituted a *Brady* violation.

Turning first to the alleged *Brady* violation, we note at the outset that because the actual "evidence" at issue, the Case Consult, was in fact produced to the defense as soon as it was received by the government, it was not "suppressed." Appellant instead bases his *Brady* claim on the ground that the Case Consult was favorable to

him because AFMES found that the cause and manner of death were "undetermined," and concluded that "we cannot rule out homicide as a manner of death." But, at best, these are inconclusive findings that do not constitute "exculpatory or substantive evidence" capable of impeaching the government's case. Moreover, when taken as a whole, the Case Consult was actually more inculpatory than exculpatory. Specifically, AFMES further opined that "[t]he materials reviewed in this case show findings that are highly concerning for non-accidental trauma," the injuries were "not consistent with the falls that the infant reportedly experienced several days prior to death,... the radiology findings in the right humerus . . . are highly suggestive of a fracture," and that they were recommending exhumation "to fully document and appropriately assess for additional injuries in this case."

For the same reasons, it is not likely that the result of the proceeding would have been any different had the report been admitted into evidence. Indeed, given these findings, it is not surprising that defense counsel made the strategic decision to argue against a continuance, as they likely correctly surmised that any further investigation and/or potential findings from AFMES were not going to benefit the defense. Likewise, to the extent appellant is now claiming that the Case Consult was exculpatory, it is worth noting defense counsel did not seek to introduce the Case Consult into evidence at trial, nor did they call as a witness the doctor who signed it, notwithstanding that she was available to testify.

Finally, it follows that if the Case Consult itself was not favorable or material, the mere fact that trial counsel failed to disclose that AFMES was in the process of preparing such a report also cannot rise to the level of *Brady* violation. Accordingly, we find that the military judge did not abuse his discretion in ruling that the discovery violation "does not equate to a *Brady* violation."

With respect to whether the violation was negligent or the result of prosecutorial misconduct, we question the military judge's ruling that the failure to disclose was the result of trial counsel's negligence and inexperience. With respect to inexperience, we note that the trial team included a Lieutenant Colonel Special Victim Prosecutor, and in any event, we expect that even a junior prosecutor would recognize the need to share his AFMES communications with the defense. Likewise, given that the agent relayed to trial counsel that AFMES would not stop their review without hearing from the defense, and the fact AFMES directly emailed trial counsel that they would be generating a report, it is hard to see how the government's failure to disclose was "negligent."

Nevertheless, we need not ultimately answer this question, because even if we assume that the discovery violation was intentional, the government has still met its burden to show that the non-disclosure was harmless beyond a reasonable doubt. As noted above, in *Claxton* the CAAF held that when a government discovery violation is intentional, the test is whether the undisclosed evidence might have affected the

outcome of the trial. 76 M.J. at 359. For all of the reasons set forth above, including the fact that on balance the Case Consult was more inculpatory than exculpatory, there is simply no likelihood that it "might have" impacted the verdict if admitted at trial. Finally, it follows that if the government's failure to disclose was only negligent as found by the military judge, then for all of the same reasons the error did not materially prejudice appellant's substantial rights.

As he did in the trial court, appellant cites to *Stellato* to argue that dismissal of the entire case, or at a minimum the murder charges, are the appropriate remedies. Although the military judge chided the government for its sloppiness, he ultimately held that because "the defense is not disadvantaged," it was not entitled to any of the relief requested. We agree.

To the extent appellant is relying on *Stellato*, there are several key distinctions between that case and this one. First, central to *Stellato* and its holding was the fact that trial counsel was aware of, and failed to disclose to the defense, the existence of a box of evidence known to contain exculpatory evidence. 74 M.J. at 485-86. Moreover, trial counsel in *Stellato* made the conscious decision not to inspect or take possession of the box, going so far as to caution the owner of the box that "everything I get will go to the defense." 74 M.J. at 487. In this case, trial counsel did not know that the pending Case Consult was likely to be exculpatory, and indeed the report ultimately turned out to be more inculpatory than exculpatory. Likewise, in *Stellato*, trial counsel's discovery violations resulted in so many continuances that a key defense witness passed away before the trial. 74 M.J. at 480.

Unlike in *Stellato*, a continuance in this case would have almost certainly rendered the discovery violation harmless, as it would have allowed AFMES to complete their full report and would have afforded defense counsel the opportunity to make any changes to their strategy based on the involvement of AFMES. *See Stellato*, 74 M.J. at 488 ("We also underscore that if 'an error can be rendered harmless, dismissal is not an appropriate remedy."). This is especially true given that at this point in the trial the parties had not yet started the evidentiary presentation pertaining to the murder specifications.

Defense counsel, however, strenuously argued against any continuance, asserting that appellant had already been in pretrial confinement for 445 days. But, the fact that appellant had already pleaded guilty to multiple charges and specifications that resulted in a sentence of forty months, undermines any such argument. Put another way, given that appellant knew that he would likely be in custody for a significant period of time regardless of how the contested portion of his trial came out, if he and his counsel believed that the further involvement of AFMES might lead to exculpatory evidence, what was the downside in recessing this judge-alone trial to allow AFMES to complete their work? To the contrary, it is far

more likely that what was driving the defense opposition to any continuance was counsel's realization that any additional input from AFMES would most likely not be beneficial to their case. *See United States v. Trimper*, 28 M.J. 460, 469 (C.M.A. 1989) (rejecting appellant's claim that a continuance would have been prejudicial).

Indeed, other than his ill-founded claim at trial that a continuance would have been prejudicial and his bald assertion raised both below and on appeal that he "was disadvantaged in his ability to prepare for trial in a case with experts battling over the very cause and manner of death," (Appellant's Br. 51), appellant has not alleged, much less come close to demonstrating, the level of irreversible prejudice justifying the dismissal in *Stellato*. Accordingly, we find that the military judge did not abuse his discretion in denying the defense motion to dismiss either the case or the murder charges.

B. Lesser Included Offense Issue

1. Additional Facts

Specification 1 of Additional Charge VI charged appellant with aggravated assault with a loaded firearm, specifically alleging that he "did . . . with intent to inflict bodily harm, commit an assault upon [victim], by shooting at her with a dangerous weapon to wit: a loaded firearm." The victim testified that after appellant approached her car while brandishing a firearm, she heard a gunshot from behind as she accelerated away. The victim further stated that she had heard gunshots before "plenty of times" and "that was a very much clearly a gunshot [sic]." On cross-examination, the victim again reiterated that she had previously heard gunshots in Puerto Rico and at the range.

Although law enforcement recovered a spent shell casing from the street, they were not able to determine how long it had been there or match it to any recovered weapon. In addition, a military police investigator testified that after receiving the shell casing from the agent who collected it, he kept it in a filing cabinet in his office for over a year in violation of standard operating procedure. On cross-examination, this investigator also admitted that he was counseled for leaving the shell casing in his desk, and that on a separate occasion he was also disciplined for leaving his weapon in his desk.

At the conclusion of the trial, the military judge found appellant "Guilty, except the words 'with intent to inflict bodily harm,' except the word 'shooting' substituting, therefore the word 'pointing;' except the words 'a dangerous weapon, to wit:,' except the words 'a loaded,' substituting therefore, the words 'an unloaded.'" After accounting for the exceptions and substitutions, the military judge convicted appellant of assault with an unloaded firearm, finding that he "did commit an assault upon [the victim], by pointing at her with an unloaded firearm." In his

segmented sentence, the military judge imposed a sentence of thirty months for this specification.

Appellant now argues that because simple assault with an unloaded firearm is not a lesser included offense of aggravated assault with a loaded firearm, we must set aside this finding. For the reasons set forth below, we agree with appellant and further find that the lesser included offense as found by the military judge is also factually insufficient.

2. Law

"Whether one offense is a lesser included offense of another offense is a question of law." *United States v. Gonzalez*, 78 M.J. 480, 483 (C.A.A.F. 2019) (citing *United States v. Girouard*, 70 M.J. 5, 9 (C.A.A.F. 2011)). "When an appellant has preserved an objection to a finding of guilty to a lesser included offense, we review the objection de novo." *Id.* "But when an appellant has forfeited such an objection, and raises it for the first time on appeal, we review the issue only for plain error." *Gonzalez*, 78 M.J. at 483 (citing *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018)). Both sides agree that since there was no objection at trial, our review in this case is for plain error, which requires appellant to demonstrate that: (1) there was error; (2) the error was plain and obvious; and (3) the error materially prejudiced appellant. *United States v. Jones*, 78 M.J. 37, 44 (C.A.A.F. 2018) (citations omitted).

In *Armstrong*, the CAAF explained that the "'elements test' determines whether an offense is 'necessarily included in the offense charged[,]'" such that it is a lesser included offense under Article 79, UCMJ. 77 M.J. at 469 (quoting *United States v. Jones*, 68 M.J. 465, 472 (C.A.A.F. 2010)). This test is applied in two different ways: (1) by comparing the statutory elements of the two offenses, such that an offense is a lesser included offense if each of its elements is also an element of charged greater offense; or (2) by examining the specification of the greater charged offense, such that an offense can also be a lesser included offense of the charged offense if the specification of the charged offense is drafted in such a manner that it alleges facts that necessarily satisfy all the elements of each offense. *Id.* at 469-70 (citing *United States v. Gaskins*, 72 M.J. 225, 235 (C.A.A.F. 2013); *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011)). *See also United States v. Hanks*, 74 M.J. 556, 558 (C.A.A.F. 2014) ("To determine whether a charged offense provides sufficient notice of some other offense, both the Supreme Court and the Court of Appeals for the Armed Forces apply an elements test which analyzes whether the elements of the lesser offense are a subset of the charged offense . . . .").

With respect to factual sufficiency, the version of Article 66(d)(1), UCMJ, governing this appeal provides that we may "weigh the evidence, judge the

credibility of witnesses, and determine controverted questions of fact. . . ." In doing so, we are required to undertake a de novo "fresh, impartial look at the evidence" and need not give deference to the findings of the trial court. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). On the other hand, our ability to conduct such a "factual sufficiency" review is not completely unfettered. Rather, Article 66(d)(1), UCMJ, mandates that in conducting such an assessment, we must recognize "that the trial court saw and heard the witnesses." As such, the test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," we are "convinced of appellant's guilt beyond a reasonable doubt." *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (cleaned up).

3. Analysis

a. Lesser Included Offense

The elements of aggravated assault with a loaded firearm as initially charged (hereinafter referred to as "greater offense") are as follows:

> (1) That the accused offered to do bodily harm to a certain person;
> (2) The offer was made with the intent to do bodily harm;
> (3) That the accused did so with a dangerous weapon; and
> (4) That the dangerous weapon was a loaded firearm.

Manual for Courts-Martial, United States (2019 ed.) [*MCM*], Pt. IV, ¶ 77.b.(4)(a)(i – iv).

In addition, under the elements test, aggravated assault with a dangerous weapon is a lesser included offense of aggravated assault with a loaded firearm. Specifically, the elements of aggravated assault with a dangerous weapon are as follows:

> (1) That the accused offered to do bodily harm to a certain person;
> (2) The offer was made with the intent to do bodily harm; and
> (3) That the accused did so with a dangerous weapon.

Id. at Pt. IV, ¶ 77.b.4(a)(i-iii). The *MCM* defines a "dangerous weapon" as one that is "used in a manner capable of inflicting death or grievous bodily harm," and notes that "[w]hat constitutes a dangerous weapon depends not on the nature of the object itself but on its capacity, given the manner of its use, to kill or inflict grievous bodily harm." *Id.* at Pt. 4, ¶ 77.c.5(a)(iii). Likewise, in order to be guilty of assault with a dangerous weapon, "[i]t must be proved that the accused specifically intended to do bodily harm." *Id.* at Pt. 4, ¶ 77.c.5(a)(i)

In contrast, the elements of the simple assault with an unloaded firearm offense as found by the military judge (hereinafter referred to as the "lesser offense") are as follows:

> (1) That the accused attempted to do or offered to do bodily harm to a certain person;
> (2) That the attempt or offer was done unlawfully;
> (3) That the attempt or offer was done with force or violence; and,
> (4) The attempt or offer was done with an unloaded firearm.

Id. at Part IV, ¶¶ 77.b.(2)(a)-(c), 77.d.(1)(b). We note the *MCM* does not list assault with a firearm as a lesser included offense of aggravated assault with a loaded weapon. *Id.* at App'x 12A, p. 12A-8.

With respect to the two tests set forth in *Armstrong*, the government concedes that a strict statutory definition elements test is not appropriate in this case, and instead argues that as drafted the specification alleged sufficient facts to satisfy all of the elements of the lesser offense. While we agree that the statutory definition test is not applicable here, we disagree that the language in the specification gave appellant sufficient notice that he could, in the alternative, suffer a conviction for assault by pointing an *unloaded* firearm at the victim.

The government relies on *United States v. Bousman*, a recent unpublished case in which the Air Force Criminal Court of Appeals (AFCCA) held that it was permissible to find appellant guilty of the lesser included offense of simple assault with a firearm by excepting the words "dangerous" and "loaded" from the specification of the charged greater offense of aggravated assault with a loaded firearm. No. ACM 40174, 2023 CCA LEXIS 66, at *29 (A.F. Ct. Crim. App. 8 Feb. 2023). In support of its holding, the AFCCA found that because appellant unlawfully offered to do bodily harm to the victim with force or violence using a firearm, the language of the specification as charged alleged each of the elements of the lesser offense "either expressly or by necessary implication." *Id.* Devoid of any analysis, the AFCCA failed to explain its rationale or purported justification for finding appellant guilty of a lesser included offense that required the use of an *unloaded* firearm, notwithstanding the fact that it never made such a finding. On the other hand, given that the appellant in *Bausman* actually touched the victim with the firearm, it is quite possible that the AFCCA confused the lesser included offense of aggravated assault with a dangerous weapon (which was likely applicable) with the lesser included offense of simple assault with an unloaded firearm.

In any event, in this case we reject the government's assertion that the language of the charged specification, alleging that appellant *shot* at the victim with

a *loaded* firearm, put him on sufficient notice that he also needed to defend against a possible conviction for *pointing* an *unloaded* firearm at the same victim. In short, this is a leap of logic that is well outside the bounds of the CAAF's "specification as drafted test" for finding applicable lesser included offenses.

We are not, however, finding that as a matter of law simple assault with an unloaded firearm may *never* be a lesser included offense of aggravated assault with a loaded firearm. As the CAAF held in *Armstrong*, such a scenario would be plausible if the charging language of the specification puts the accused on sufficient notice that he could suffer a conviction for both offenses. Rather, because the specification as drafted in this case did not provide such notice, the military judge erred in finding appellant guilty of simple assault with an unloaded firearm. In light of the CAAF's holding in *Armstrong*, not only was this error both plain and obvious, but given that the military judge sentenced appellant to an additional thirty months for this conviction, he was obviously "materially prejudiced."

Finally, to the extent we were to conclude that the firearm was in fact unloaded, we are cognizant of our authority to affirm the lesser included offense of aggravated assault with dangerous weapon. *See* Article 59(b), UCMJ (service level appellate court may "affirm, instead, so much of a finding as includes a lesser included offense"); *United States v. English*, 79 M.J. 116, 121 (C.A.A.F. 2019) (same). Given the facts of this case, however, we decline to do so. First, as noted below, there is no basis to conclude that the firearm was not loaded. Moreover, given that appellant was standing in the roadway as the victim was driving away, in that context, an unloaded firearm is not a "dangerous weapon." Nor can we say that the government met its burden to prove that appellant "specifically intended to do bodily harm" by pointing an unloaded weapon at a car racing away from the scene.

b. Factual Sufficiency

Alternatively, we hold that the military judge's finding that appellant pointed an unloaded firearm at the victim is also factually insufficient. Simply put, even if the military judge chose to disregard the evidence of the spent shell casing in the street given the evidentiary collection issues, the victim testified both on direct and cross-examination that appellant not only pointed the gun at her, but fired a shot. Because there is no other evidence about whether appellant shot the firearm other than the victim's testimony, we are hard-pressed to see how the military judge could have believed her testimony that appellant pointed the gun at her, but did not actually shoot it. Along the same lines, there is no other evidence in the record disputing the victim's testimony that she heard a gunshot. Therefore, even after giving due consideration to the fact that the military judge saw and heard the witnesses testify, after weighing all of the evidence in the record, we are not convinced of appellant's guilt beyond a reasonable doubt.

As such, appellant's conviction for Specification 1 of Additional Charge VI must be set aside and dismissed.

CONCLUSION

The findings of guilty to Specification 1 of Additional Charge VI and Additional Charge VI are SET ASIDE and that Specification and Charge are DISMISSED. The remaining findings of guilty are AFFIRMED. The sentence to thirty months confinement for Specification 1 of Additional Charge VI is SET ASIDE. The remainder of the sentence to confinement, and remainder of the sentence are AFFIRMED.[4]

Senior Judge PENLAND and Judge MORRIS concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court

[4] Having considered the entire record, including the fact that the military judge imposed a segmented sentence of thirty months for Specification 1 of Additional Charge VI, we are able to reassess the sentence in accordance with the principles articulated by our superior court in *United States v. Sales*, 22 M.J. 305, 307-308 (C.M.A. 1986) and *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013), and will grant thirty months of relief. As such, only so much of the sentence as provides for thirty-eight years and four months of confinement and a dishonorable discharge is affirmed. All rights, privileges, and property, of which appellant has been deprived by virtue of the findings and sentence set aside by this decision are ordered restored. *See* UCMJ arts. 58b(c) and 75(a).