IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Troy B. NORMAN Sergeant (E-5) U.S. Marine Corps, Appellant	REPLY TO APPELLEE'S BRIEF Crim. App. No. 201300152 USCA Dkt. No. 14-0524/MC

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

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Index

Table of Authorities iii

Appellant's Reply 2

a. Sgt Norman did not and does not concede any of the elements of child endangerment and nothing in his brief can be read to come to that conclusion. 2

b. The Government wrongly attempts to add a "reckless" standard in this analysis. 3

c. The military judge did not instruct the members to make an "independent fact determination regarding the terminal element." 4

d. The Government is mistaken that the evidence presented at trial supports a finding that Sgt Norman's behavior was of a nature to bring discredit to the armed forces. 5

1. It would violate Sgt Norman's due process right to a fair trial if the knowledge of first responders, medical personnel, and investigators constituted public knowledge to prove his conduct was service discrediting. 5

2. The Government wrongly claims United States v. Brisbane permits a finding that knowledge by active duty servicemembers can support a finding conduct is service discrediting..... 6

3. SSgt Moody's testimony regarding Sgt Norman's alleged untruthfulness is not credible and cannot form the basis of a determination that Sgt Norman's behavior was service discrediting..... 8

4. SSgt Moody's opinion on the service discrediting nature of Sgt Norman's conduct is inadmissible and the Government is estopped from arguing otherwise..... 10

Conclusion 17

Certificate of Filing and Service 18

Certificate of Compliance 18

Table of Authorities

Court of Appeals for the Armed Forces and Court of Military Appeals Cases

United States v. Benedict, 27 M.J. 253 (C.M.A. 1988) 16
United States v. Birdsall, 47 M.J. 404 (C.M.A. 1998) 16
United States v. Brisbane, 63 M.J. 106 (C.A.A.F. 2006) . 8, 9
United States v. Caplinger, 20 C.M.A. 306 (C.M.A. 1971) ... 5
United States v. Littlewood, 53 M.J. 349 (C.A.A.F. 2000) 14, 16

U.S. Circuit Courts of Appeals Cases

United States v. Ayala-Pizarro, 407 F.3d 25 (1st Cir. 2005) 18
United States v. Christian, 673 F.3d 702 (7th Cir. 2012) . 19
United States v. Cortez, 935 F.2d 135 (8th Cir. 1991) 15
United States v. Figueroa-Lopez, 125 F.3d 1241 (9th Cir. 1997) 15
United States v. Peoples, 250 F.3d 630 (8th Cir. 2001) .. 12, 15
United States v. Rea, 958 F.2d 1206 (2nd Cir. 1992) 16
United States v. Whitted, 11 F.3d 782 (8th Cir. 1993) 15

Military Courts of Appeals Cases

United States v. Johnson, No. 20011145, 2005 CCA LEXIS 534 (A. Ct. Crim. App. Apr. 12, 2005) 5

Rules and Regulations

M.R.E. 301(f)(1) 7
M.R.E. 602 13
MCM, App. 22-51 (2012) 13
MCM, Pt. IV, ¶ 68a.(c)(2-3) (2008). 6
MCM, Pt. IV, ¶ 68a.(c)(2-3) (2012). 6

Secondary Resources

1 McCormick on Evidence § 12 (5th ed. 1999) 16
Winbush, Kimberly J., Judicial Estoppel in Criminal Prosecution, 121 A.L.R.5th 551, 2a 12

Constitutional Provisions

U.S. Const. Amend. VI 7

Appellant's Reply

Sergeant Norman contests four assertions of the Government in its Brief. a) Sgt Norman did not and does not concede any element of the specification at issue. b) The Government falsely asserts that the military judge instructed the members to make an "independent fact determination regarding the terminal element." c) The Government wrongly creates a "reckless" standard into the culpable negligence analysis. And, d) the Government is mistaken in arguing this Court can find Sgt Norman's behavior to be of a nature to bring discredit on the armed forces based on various pieces of evidence offered at trial.

a. Sgt Norman did not and does not concede any of the elements of child endangerment and nothing in his brief can be read to come to that conclusion.

The Government falsely claimed Sgt Norman conceded all the elements of child endangerment except for the terminal element. (Govt. Br., 8-9 (citing Appellant's Br., 9-11); Govt. Br., 19.) Sgt Norman did not and does not concede any element of the charge. Nor can Sgt Norman's brief be interpreted in that way.

Sgt Norman most especially does not concede his actions were culpably negligent. See e.g., United States v. Johnson, No. 20011145, 2005 CCA LEXIS 534, *11 (A. Ct.

Crim. App. Apr. 12, 2005) (finding the evidence in a guilty plea did not support culpable negligence where the appellant lowered his child into hot water but did not know the water was scalding and the child did not react to the hot water).

In his brief, Sgt Norman merely addressed the issue presented by this Court, which only concerns the terminal element. He did not concede any other element of this offense.

b. The Government wrongly adds a "reckless" standard to this analysis.

The Government argues Sgt Norman's conduct was "reckless."[1] (Gov't Br., 14, 17, 19.) In order to find this standard the Government reached back to 1971 and this Court's predecessor's opinion in United States v. Caplinger, 20 C.M.A. 306 (C.M.A. 1971).

This approach is not commonly used--and rightfully so. This standard of "reckless and wanton" actually fails to distinguish between actions accomplished "by design" and through "culpable negligence." In the 2008 and 20012 Manuals for Courts-Martial, this distinction is very important as "by design" means that the accused actually knew of the risks involved but culpable negligence does

[1] Sgt Norman disagrees that his behavior was reckless or even culpably negligent.

not. MCM, Pt. IV, ¶ 68a.(c)(2-3) (2008); MCM, Pt. IV, ¶ 68a.(c)(2-3) (2012). The Government's attempt to insert a reckless standard would only serve to confuse the analysis in this case.

Further, it does not matter what additional labels the Government ascribes to Sgt Norman's behavior. The Government's evidence of Sgt Norman's actual behavior and actual knowledge of the risks involved are at issue--not the labels ascribed thereto.

c. The military judge did not instruct the members to make an "independent fact determination regarding the terminal element."

The Government stated in its Brief, ". . . the Military Judge instructed that the Members must make an *independent factual determination* that Appellant's misconduct was service discrediting." (Gov't Br., 24) (emphasis added). But the Government did not cite where in the record the military judge gave this instruction to the members.

It did not because it cannot. The military judge gave no such instruction.

d. The Government is mistaken that the evidence presented at trial supports a finding that Sgt Norman's behavior was of a nature to bring discredit to the armed forces.

Knowledge of Sgt Norman's actions by active duty personnel, emergency personnel, medical personnel, and investigators cannot support a finding that Sgt Norman's behavior was of a nature to bring discredit on the armed forces. Further, SSgt Moody's testimony that Sgt Norman was not truthful is not credible and also cannot support such a finding. Finally, SSgt Moody's opinion was inadmissible and the Government is estopped from arguing otherwise in this appeal.

1. <u>It would violate Sgt Norman's due process right to a fair trial if the knowledge of first responders, medical personnel, and investigators constituted public knowledge to prove his conduct was service discrediting.</u>

The Government claims civilian emergency personnel who responded to Sgt Norman's residence, civilian medical personnel who treated T.B.N., and a pediatric investigator assigned to this case establish actual public knowledge that could help establish the behavior was of a nature to bring discredit to the armed forces. (Gov't Br., 13.) No court has ever held this to be true.

Sgt Norman is entitled to a fair trial. U.S. Const. Amend. VI. A fair trial includes a thorough investigation.

Just as it is impermissible to offer evidence that an accused exercised his constitutional right to remain silent as evidence of an element, M.R.E. 301(f)(1), so too is it impermissible to find conduct to be service discrediting due to the investigation and emergency response process.

Such a conclusion is not just unconstitutional. It would also be a bad policy. It would create a chilling effect wherein servicemembers in need of medical or emergency services would fear calling for help and may ultimately decide to forgo calling for help because they could get into trouble.

2. The Government wrongly claims United States v. Brisbane permits a finding that knowledge by active duty servicemembers can support a finding conduct is service discrediting.

Relying on United States v. Brisbane,[2] 63 M.J. 106 (C.A.A.F. 2006), the Government claims the knowledge of active duty personnel involved in the investigation can establish Sgt Norman's behavior was service discrediting. (Gov't Br., 11-12.) This is a gross misinterpretation of Brisbane.

Brisbane was accused of possessing pictures of nude minors. 63 M.J. at 108. After he was charged and

[2] The Government also suggests indirectly that the publication of the NMCCA's decision in Sgt Norman's case could constitute public knowledge and satisfy the terminal element. (Gov't Br., 13-14, n.1.)

interviewed, Brisbane informed his active duty neighbor of the allegations. Id. at 110. This servicemember was disturbed and called investigators to find out if his children were depicted in Brisbane's photographs. Id.

The Government misrepresents this case saying, "Noting the neighbor's distress, this Court held that the evidence was legally sufficient to establish that the appellant's conduct was service-discrediting." (Gov't Br., 12.) This Court actually suggested that this evidence was sufficient to establish the conduct was *both* prejudicial to good order and discipline and service discrediting but offered no analysis. Brisbane, 63 M.J. at 116-17. The Government omitted the words "prejudicial to good order and discipline" entirely from its explanation of Brisbane. But that is the crucial piece to this holding. This Court determined that the servicemember was afraid for his children. This fear shook his trust in Sgt Norman and disrupted good order and discipline.

The Government wrongly interpreted this case to mean knowledge of fellow-servicemembers can support a finding of service discrediting.

3. SSgt Moody's testimony regarding Sgt Norman's alleged untruthfulness is not credible and cannot form the basis of a determination that Sgt Norman's behavior was service discrediting.

The Government also urges this Court to conclude Sgt Norman was dishonest after this tragic accident and that that dishonesty was sufficient to conclude his conduct was service discrediting. (Gov't Br., 15.) But SSgt Moody's testimony regarding Sgt Norman's statements was wholly unreliable. SSgt Moody testified he got a quick statement from Sgt Norman at the house just after the accident. (J.A. 82.) SSgt Moody testified:

> He picked his son up, carried him into the bathroom, and was cradling him with him laying (sic) on his arm with his head supported by his hand and set on the edge of the tub and turned the water on and was letting it run, and he tested the water and he realized it was hot, so he turned the knob to full cold, let it run for a few minutes, and then started to lower his son down into the tub. When water splashed up, his son screamed, and that was when he realized the water was still too hot and he went and called 911.

(J.A. 82.)

SSgt Moody then stated that at the hospital, "he related the same information to me again." (Id.) The Government offered no other who witness heard this version of events despite the presence of others at the time the alleged statements were made.

On cross-examination, it became clear that SSgt Moody invented this story. SSgt Moody admitted Sgt Norman never told him he lowered the child into tub. (J.A. at 87.) He admitted he never told NCIS that Sgt Norman was sitting on the edge of the tub when the burn occurred. (J.A. at 91.) SSgt Moody also stated he did not remember if Sgt Norman ever said he had been holding the child at the time of the burn. (J.A. at 88.) SSgt Moody further admitted that Sgt Norman may not have even said his son was burned when he was splashed by the water. (J.A. at 89.)

SSgt Moody explained that his testimony was based on his own deductions--not on statements made by Sgt Norman. (J.A. at 89.)

This evidence is incredibly unreliable and really makes no sense. SSgt Moody's assertions that a father would indicate that he "was cradling [a ten-month old child] with him laying (sic) on his arm with his head supported by his hand" is highly unlikely absent substantial developmental delays. (J.A. at 82.) That described "cradling" would be much more appropriate for a much younger baby. At ten months old some children are beginning to walk and speak. A father with daily interaction with his child would know that. But a first responder to the scene of an accident may not.

This evidence simply cannot be the basis for a finding that Sgt Norman's conduct was of a nature to bring discredit on the service.

4. SSgt Moody's opinion on the service discrediting nature of Sgt Norman's conduct is inadmissible and the Government is estopped from arguing otherwise.

Before the lower court, the Government conceded SSgt Moody's opinion regarding the service discrediting nature of Sgt Norman's actions was inadmissible. (J.A. 55-56.) The Government is now estopped from arguing before this Court that SSgt Moody's lay opinion was admissible:

> . . . having once affirmed under oath that a particular state of facts exists, a party may not later assert the contrary is true. People v. Hood, 265 Ill. App. 3d 232 [] (4th Dist. 1994). . . . The doctrine [] is motivated by a desire to prevent internal inconsistency, to preclude litigants from "playing fast and loose" with the courts, and to prohibit parties from deliberately changing positions according to the exigencies of the moment.

Winbush, Kimberly J., Judicial Estoppel in Criminal Prosecution, 121 A.L.R.5th 551, 2a.

Even if the Government could make this argument, the testimony is still inadmissible. M.R.E. 701 provides a three-part test for admissibility of an opinion:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences that are (a) rationally based on the perception of the witness, (b) helpful to a clear

> understanding of the witness' testimony or the determination of a fact in issue, and (c) not based in scientific, technical, or other specialized knowledge within the scope of Rule 702.

This testimony fails each prong of the three-part test outlined in M.R.E. 701.

A. SSgt Moody's testimony was not rationally based on his perception.

M.R.E. 602 provides that "[a] witness may not testify to a matter unless evidence is introduced to support a finding that the witness has personal knowledge of the matter." M.R.E. 602; see also United States v. Peoples, 250 F.3d 630, 641 (8th Cir. 2001) (observing the interplay of Rules 602 and 701 of the Federal Rules of Evidence). Lay opinion testimony typically centers on descriptions of events from witnesses who perceive them in real time. MCM, App. 22-51 (2012). The subject of service-discrediting conduct in this case, by contrast, is not something that was "rationally perceived" by SSgt Moody. Cf. Peoples, 250 F.3d at 641 (finding reversible error where law enforcement agent's "opinions were based on her investigation after the fact, not on her perception of the facts.").

To be sure, SSgt Moody did respond to the scene of the accident on the day that it happened. But he did not witness any member of the public lowering their opinion of

the armed services as a result of the accident. The majority of this Court in United States v. Littlewood, found such an opinion, given by the appellant's commanding officer, to be error. 53 M.J. 349, 353 (C.A.A.F. 2000). The commanding officer there opined that the behavior at issue was indecent, prejudicial to good order and discipline, and service discrediting. Id. at 350-352. This Court found error even where the opinion was offered only to a military judge sitting alone.[3] It reasoned that those opinions:

> consisted of bald assertions, unsupported by reasoning or particular facts showing the manner in which these charged offenses embarrassed the command. . . . Moreover, this opinion testimony was phrased in legal terms without explanation as to the lay witness' understanding of these terms.

Id. at 353.

The majority recognized that a commanding officer may be in a unique position to determine the actual impact to the command of a member's actions. Id. But this Court found that the testimony should be limited to facts relevant to the ultimate issue because the lay opinion on the ultimate issue itself is not helpful to the fact finder. Id.

[3] For this reason as well as the fact that sexual acts with a child are almost always service discrediting, this Court found no harm. Id. That analysis does not apply to the facts of this case.

In dicta the Judge Cox (concurring) and Judge Gierke (concurring in part and dissenting in part) suggested a servicemember may "be qualified to express an opinion regarding the service-discrediting nature of the misconduct." Id. at 354 (Cox, J.S. concurring). But those judges concluded the Government must still lay an appropriate foundation for *that* opinion. Id.

Here, as in Littlewood, SSgt Moody's opinions were "bald assertions, unsupported by reasoning or particular facts." Id. at 353. The Government explored SSgt Moody's impressions of a single Marine he met at the age of eight. (J.A. at 214.) That impression is irrelevant to the potential impact of Sgt Norman's behavior on the perceptions of current members of the public decades later.

Nor did the Government attempt to follow the Littlewood dissent's approach by establishing that SSgt Moody currently had substantial exposure to the public at large and was qualified to gauge public reaction to Sgt Norman's alleged conduct, the opinion may have been admissible. Id. at 354. SSgt Moody had neither the foundation nor the qualifications to gauge public reaction to Sgt Norman's actions. His opinion was wholly inappropriate.

Missing this point entirely, the military judge abused his discretion when he found the testimony satisfied the first prong under M.R.E. 701.

B. SSgt Moody's testimony was not helpful to the members in determining whether Sgt Norman's conduct tended to bring the armed services into disrepute or lower their esteem in the eyes of the public.

"Lay opinion testimony is admissible only to help the jury or the court to understand the facts about which the witness is testifying . . . ." Littlewood, 53 M.J. at 353, 354 (citing United States v. Birdsall, 47 M.J. 404 (C.M.A. 1998), United States v. Whitted, 11 F.3d 782, 785 (8th Cir. 1993)); Peoples, 250 F.3d at 641 (citing United States v. Cortez, 935 F.2d 135, 139-40 (8th Cir. 1991); United States v. Figueroa-Lopez, 125 F.3d 1241, 1244-45 (9th Cir. 1997)). It is generally held, however, that opinion testimony is not helpful where it does no more than instruct the fact finder as to what result it should reach. See United States v. Benedict, 27 M.J. 253, 259 (C.M.A. 1988) (although opinion testimony allowed on ultimate issue of fact, it is not allowed on the issue of guilt or innocence or to state legal conclusions); United States v. Rea, 958 F.2d 1206, 1215 (2nd Cir. 1992); 1 McCormick on Evidence § 12 at 51 (5th ed. 1999) (opinion testimony in terms of legal criterion not properly defined by questioner is not

usually permitted).

Here, the relevant fact in issue was whether Sgt Norman's conduct--accidentally failing to prevent T.B.N.'s injuries--tended to bring the armed forces into disrepute or lower its esteem in the eyes of the public. But this is a legal conclusion on the ultimate issue and a matter on which SSgt Moody is no more qualified than the members themselves. C.f. Littlewood, 53 M.J. at 353 (noting that lay opinions offered at court-martial should be "outside the ken of the average military judge or member").

The military judge misapplied the second prong of M.R.E. 701 by admitting this evidence.

C. SSgt Moody's lay opinion testimony was based on his specialized knowledge as a United States Marine.

Lay opinion testimony is inadmissible if it is "based in scientific, technical, *or other specialized knowledge* within the scope of Rule 702." M.R.E. 701 (emphasis added). Here, SSgt Moody's lay-opinion testimony should have been barred because it was based on his specialized knowledge as a Marine. Over objection SSgt Moody was discussing his view of the Marine Corps as a present-day Marine:

> Q: And now that you are a Marine, do you feel as Marines we are held to a higher standard?
>
> A: Yes, sir, I do.

> Q: Why do you think Marines are held to a higher standard of conduct?
>
> A: Because when we go into the difficult situations we do, day to day and in combat, if we allow our values to be eroded, it could damage the opinion of the American public, sir.
>
> Q: Why is the opinion of the American public important to a Marine?
>
> A: I believe that time has proven through countless battles that America -- it's been stated by some people recently -- America doesn't need a Marine Corps because the Army has units that can do it -- in Army and Air Force have units that can do it just as well as we can. The American public wants a Marine Corps.

(J.A. at 216-17.) SSgt Moody drew his opinion from his day-to-day work and combat experience. The military judge recognized as much when he made his ruling: "[C]learly it is not based on any scientific, technical, or other specialized knowledge *other than his performance as a United States Marine*." (J.A. at 218) (emphasis added). But experience is specialized enough according to M.R.E. 701 and M.R.E. 702.

The line between expert testimony and lay opinion testimony can be an especially fine one. See United States v. Ayala-Pizarro, 407 F.3d 25, 28 (1st Cir. 2005). As reasoned by the Seventh Circuit:

> [a] law-enforcement officer's testimony is a lay opinion if it is limited to what he observed . .

> . or to other facts derived exclusively from [a] particular investigation. On the other hand, an officer testifies as an expert when he brings the wealth of his experience as [an] officer to bear on those observations *and ma[kes] connections for the jury based on that specialized knowledge*.

United States v. Christian, 673 F.3d 702, 709 (7th Cir. 2012) (internal citations omitted) (emphasis added).

Here, SSgt Moody exceeded the limits of lay opinion testimony when he testified to his specialized knowledge as a Marine. SSgt Moody's lay opinion failed to satisfy any of the three prongs that govern admissibility under M.R.E. 701 and the Government failed to lay an appropriate foundation for such an opinion.

Conclusion

This Court should dismiss Specification 4 of Charge II with prejudice because the Government failed to prove Sgt Norman's behavior was of a nature to discredit the armed services.

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Appendix

United States v. Johnson, No. 20011145, 2005 CCA LEXIS 534 (A. Ct. Crim. App. Apr. 12, 2005).

Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on November 20, 2014.

Certificate of Compliance

This brief complies with the page limitations of Rule 21(b). Using Microsoft Word version 2010 with 12-point-Court-New font, this brief contains 3,260 words.

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UNITED STATES, Appellee v. Private First Class LOUIS F.M. JOHNSON, United States Army, Appellant

ARMY 20011145

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

2005 CCA LEXIS 534

April 12, 2005, Decided

NOTICE: NOT FOR PUBLICATION

PRIOR HISTORY: [*1]

V Corps. Kenneth H. Clevenger, Military Judge, Colonel James M. Coyne, Staff Judge Advocate.

COUNSEL: For Appellant: Captain Amy S. Fitzgibbons, JA (argued); Colonel Robert D. Teetsel, JA; Lieutenant Colonel Mark Tellitocci, JA; Major Allyson G. Lambert, JA; Captain Craig A. Harbaugh, JA (on brief).

For Appellee: Captain Eric H. Imperial, JA (argued); Lieutenant Colonel Mark L. Johnson, JA; Major Kerry E. Maloney, JA (on brief).

JUDGES: Before MERCK, CHAPMAN, and MOORE, Appellate Military Judges. Senior Judge CHAPMAN and Judge MOORE concur.

OPINION BY: MERCK

OPINION

MEMORANDUM OPINION

MERCK, Senior Judge:

Pursuant to his pleas, a military judge convicted appellant of murder by engaging in an act inherently dangerous to another and aggravated assault with a means or force likely to produce death or grievous bodily harm, in violation of Articles 118 and 128, Uniform Code of Military Justice, *10 U.S.C. §§ 918* and *928* [hereinafter UCMJ]. A general court-martial composed of officer members sentenced appellant to a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, and reduction to Private E1. The convening authority approved the adjudged sentence and credited appellant with 110 days of confinement [*2] credit against the approved sentence to confinement.

The case is before the court for review under *Article 66*, UCMJ. We have considered the record of trial, appellant's assignments of error, the matters personally raised by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, and the government's reply thereto. We heard oral argument on 23 March 2005. We have determined that appellant's assignment of error II is meritorious, and we will grant appropriate relief.

ASSIGNMENT OF ERROR II

THE MILITARY JUDGE ERRED BY ACCEPTING PFC JOHNSON'S IMPROVIDENT PLEA TO SPECIFI-CATION 1 OF CHARGE II (AGGRAVATED ASSAULT) BECAUSE PFC JOHNSON ONLY ESTABLISHED THAT HIS CONDUCT WAS NEGLIGENT. [1]

Specification 1 of Charge II reads as follows:

> In that Private First Class Louis F. M. Johnson, U.S. Army, did, at or near Hanau, Germany, on or about 20 July 2001, unlawfully commit an assault upon Marques Brown, a child under the age of 16 years, with a means of force likely to produce death or grievous bodily harm to wit: by lowering him into scalding hot water and did thereby cause second degree burns to the said Marques Brown['s] chest, legs, groin[,] and buttocks.

1 *The* [*3] *Manual for Courts-Martial*, United States (2000 edition), Part IV, para. 54(b)(4)(a)[hereinafter *MCM*, 2000] sets forth the elements of aggravated assault with a "means [or] force likely to produce death or grievous bodily harm[,]" as follows:

> (i) That the accused . . . did bodily harm to a certain person;
>
> (ii) That the accused did so with a certain . . . means, or force;
>
> (iii) That the . . . bodily harm was done with unlawful force or violence; and
>
> (iv) That the . . . means, or force was used in a manner likely to produce death or grievous bodily harm.

FACTS

During the providence inquiry, appellant testified under oath and by means of a stipulation of fact to the circumstances surrounding his plea to aggravated assault with a means likely to produce death or grievous bodily harm. *See United States v. Care, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969)*. That portion of the stipulation of fact describing this offense contains the following:

> At about 1800 on 20 July 2001, PFC Johnson was watching [his three-week-old son, Marques Brown] [2] at SPC Brown's quarters. SPC Brown was doing laundry in the basement of the building. Marques soiled his diaper, and PFC Johnson began to change him and took him to [*4] the bathroom to clean him. PFC Johnson held Marques in his left hand and turned on the water with his right hand. PFC Johnson tested the water temperature and then used the showerhead to clean Marques off while over the bathtub. Marques started crying when he got wet. PFC Johnson sprayed Marques off in the bathtub for about three minutes.
>
> After PFC Johnson cleaned Marques, he took Marques back to the nursery and put Marques on the bed. Marques was shivering, so PFC Johnson put him on the bed wrapped in a blanket instead of on the changing table. Marques defecated on the bed and blanket as PFC Johnson was preparing to put a new diaper on him. This irritated PFC Johnson, and the feces disgusted him. After Marques defecated a second time, PFC Johnson took him back to the bathroom. PFC Johnson took Marques to the sink. PFC Johnson then placed Marques in his right hand and turned on the faucet with his left hand. PFC Johnson turned on the hot and cold water. Without testing the water temperature, PFC Johnson then lowered Marques into the sink to clean him and held his feet and buttocks in the hot water while the water continued to run into the sink.
>
> . . . .
>
> Marques Brown suffered second degree [*5] burns to his chest, legs, groin, and buttocks. These burns were caused when PFC Johnson held Marques in the scalding hot water in the bathroom sink. . . . Lowering Marques into the scalding hot water was a means of unlawful force likely to produce grievous bodily harm. . . . Although the burns were not accidental, PFC Johnson did not intentionally assault

> Marques Brown. PFC Johnson was culpably negligent. . . . PFC Johnson lowered Marques into the hot water with a gross, reckless, wanton, and deliberate disregard for the foreseeable results to Marques.

2 Although appellant, in responding to the military judge's questions, told the judge that his son was two months old at the time of the offense, his son was actually only three weeks old.

During the providence inquiry, the military judge correctly explained the elements of aggravated assault and provided the following definitions to appellant:

> MJ: An assault in which bodily harm is actually inflicted is called a battery. A battery is an unlawful, and in this instance, culpably negligent application of force or violence to another person. This term bodily harm means any physical injury to or offensive touching of another person however slight. [*6] Do you understand this concept of what a battery is?
>
> ACC: Yes, sir.
>
> MJ: In this instance, the theory of why this or how this battery occurred, I should say is as a consequence of your culpable negligence. Culpable negligence is a degree of carelessness greater than simple negligence. Simple negligence is the absence of due care. The law requires everyone at all times to demonstrate the care for the safety of others that a reasonably careful person would demonstrate under the same or similar circumstances. [3] That would be taking a young child and immersing them [sic] in water that may be hot. That's what due care means.
>
> Culpable negligence, on the other hand, is a negligent act or a failure to act that could be the lowering of the child into the hot water or the failure to test the water in advance of that so you knew exactly how hot it was, that is accompanied by a gross, reckless, wanton or deliberate disregard for the foreseeable results to others, instead of merely a failure to use due care.

Appellant then agreed that his actions were culpably negligent.

3 *See* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 3-54-8. (1 April 2001).

The military judge questioned [*7] appellant about the aggravated assault. Appellant said that after he had cleaned Marques using the shower, he wrapped him in towels and placed him on the bed. When Marques began to defecate again, he became frustrated. Appellant further explained:

> [S]o I picked him back up under his under arms and rushed him back to the bathroom. . . . I had went to the sink instead of to the tub this time. I turned on the hot water and the cold. And, without thinking, or anything like that, I just dumped him in there. And, I somewhere around that time, I believe is where [Marques] got burned. Because the screaming and the crying didn't really escalate or anything, I didn't know if [Marques] was in shock or anything like that because [Marques] was normal as to what he did when we gave him a bath, both of us. That's why at that time I didn't know that I had burnt [Marques], but I did lower him without checking the water.
>
> MJ: Do you think putting [Marques] in the water without checking it was culpably negligent, as I've described that?
>
> ACC: Yes, sir.

LAW

The standard of review to determine whether a guilty plea is provident is if the record reveals a substantial basis in law or fact for questioning the plea. [*8] *United States v. Jordan, 57 M.J. 236, 238 (C.A.A.F. 2002)* (citing

United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991)). The military judge must make an inquiry of the accused to ensure "that there is a factual basis for the plea." Rule for Courts-Martial [hereinafter R.C.M.] 910(e); *see also* R.C.M. 910(e) discussion. The providence inquiry must "'make clear the basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty.'" *Jordan, 57 M.J. at 238* (quoting *United States v. Care, 18 U.S.C.M.A. 535, 541, 40 C.M.R. 247, 253 (1969))*.

Moreover, if the accused "set[s] up a matter inconsistent with the plea at any time during the proceeding, the military judge either must resolve the inconsistency or reject the guilty plea." *United States v. Rogers, 59 M.J. 584, 585-86 (Army Ct. Crim. App. 2003)*. "In deciding whether a plea is rendered improvident by statements inconsistent with his plea, the sole question is whether the statement was inconsistent, not whether it was credible or plausible." *United States v. Bullman, 56 M.J. 377, 381 (C.A.A.F. 2002)* (citing *United States v. Lee, 16 M.J. 278, 281 (C.M.A. 1983))*.

DISCUSSION

Appellant's [*9] reply of "Yes, sir" to the military judge's question of whether his conduct amounted to culpable negligence was a "legal conclusion[] with which appellant was asked to agree without any admissions from him to support [it]." *See Jordan, 57 M.J. at 239*. "It is not enough to elicit legal conclusions. The military judge must elicit facts to support the plea of guilty." *Jordan, 57 M.J. at 238* (citing *United States v. Outhier, 45 M.J. 326, 331 (C.A.A.F. 1996))*; *United States v. Duval, 31 M.J. 650, 651 (A.C.M.R. 1990)* (stating that appellant's "acknowledgement of guilt in terms of legal conclusion" is insufficient to support the guilty plea). Absent additional facts, appellant's affirmative response did not establish a sufficient factual predicate to support the guilty plea.

We have no doubt that, in a given situation, lowering an infant into scalding water would be classified at the very least as culpable negligence. However, the facts as described by appellant do not reveal such a scenario. [4] During the providence inquiry, the military judge elicited from appellant that appellant turned on both the hot and cold water before placing Marques in the sink; appellant failed to test the water [*10] to determine its temperature; Marques' crying did not escalate when appellant lowered him into the water; and in fact, Marques did not react any differently than he had on previous occasions when he was bathed. While these facts support a finding of simple negligence, they fail to describe a situation where appellant was culpably negligent as a matter of law. [5]

4 In our analysis of appellant's guilty plea, we are required to accept accused's version of the facts "at face value." *United States v. Jemmings, 24 C.M.A. 251, 1 M.J. 414, 418, 51 C.M.R. 630 (C.M.A. 1976)*.

5 Culpable negligence "is a degree of carelessness *greater than simple negligence*. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act of omission." MCM, 2000, para. 44(c)(2)(a)(i) (emphasis added). Simple negligence, on the other hand, is "the absence of due care, that is, an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care of the safety of others which a reasonably careful person would have exercised under the same or similar circumstances." MCM, 2000, para. 85(c)(2).

If appellant was on notice that the water was hot or the child [*11] had reacted to being lowered into the hot water and appellant had ignored his apparent distress, then obviously this would have constituted culpable negligence as correctly defined by the military judge, i.e., a negligent act "accompanied by a gross, reckless, wanton[,] or deliberate disregard for the foreseeable results to others . . . ." However, without such facts, appellant's comments at trial set up matters inconsistent with appellant's attempt to plead guilty to aggravated assault with a means likely to cause death or grievous bodily harm as a result of his culpable negligence. In the absence of further inquiry by the military judge, we hold that the record of trial raises a substantial, unresolved question of law and fact as to the providence of appellant's guilty plea to a violation of Specification 1 of Charge II.

In order to properly reassess the sentence for the remaining conviction of murder, we must "assure that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed." *United States v. Sales, 22 M.J. 305, 307 (C.M.A. 1986)*

(quoting *United States v. Suzuki, 20 M.J. 248, 249 (C.M.A. 1985))*. This means that we must [*12] determine, absent the military judge's erroneous acceptance of appellant's guilty plea to aggravated assault, that appellant would have received a sentence of at least a certain severity solely for the murder conviction. *Id. at 308*. Under the facts of this case, we "cannot reliably determine what sentence would have been imposed at the trial level" for the murder conviction, without the additional conviction for committing an aggravated assault on Marques prior to killing him. *See id. at 307*.

Accordingly, the finding of guilty of Specification 1 of Charge II is set aside. The remaining findings of guilty are affirmed. The sentence is set aside. A rehearing on Specification 1 of Charge II is authorized, as is a rehearing on the sentence, or both. After the convening authority has taken his action, the record will be resubmitted to this court for review consistent with our responsibilities under *Article 66*, UCMJ.

Senior Judge CHAPMAN * and Judge MOORE concur.

* Senior Judge Chapman took final action in this case prior to his retirement.