23 February 2015

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	USCA Dkt. No. 15-0011/AF
Staff Sergeant (E-5) JOSHUA K. PLANT, USAF *Appellant.*	)	Crim. App. No. 38274

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOSHUA K. PLANT, USAF, *Appellant.*	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES USCA Dkt. No. 15-0011/AF Crim. App. No. 38274

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

ISSUE PRESENTED

WHETHER THE EVIDENCE IS LEGALLY SUFFICIENT TO SUPPORT THE FINDING OF GUILTY TO CHARGE V AND ITS SPECIFICATION (CHILD ENDANGERMENT) BECAUSE THE EVIDENCE FAILED TO PROVE APPELLANT'S ALCOHOL USE ALONE AMOUNTED TO CULPABLE NEGLIGENCE THAT ENDANGERED THE WELFARE OF L.P.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

STATEMENT OF THE CASE

Appellant's Statement of the Case is accepted.

STATEMENT OF THE FACTS

On the night of 30 April 2011, Appellant hosted a party at his off-base home. (J.A. at 90.) It was a night of heavy rain in Eastern Arkansas that caused severe flooding on the road to

Appellant's house. (J.A. at 99, 119-21, 220.) Six people were present during the party including Appellant, his male friend, MJ, and four young women: JM (age 17), EH (age 18), SO (age 16), and SS (age 15). (J.A. at 161, 221, 364.) Importantly, Appellant's 13-month-old son, LP, who was entrusted to Appellant's sole custody that night, was also present in the home the entire night. (J.A. at 397-400, 435.) According to all witnesses, the child was asleep in the computer room, which was located close to a hall bathroom. (J.A. at 97, 138, 267-68.) LP did not wake the entire night. (Id.)

During the course of the night, Appellant, his friend MJ, and three of the young females (EM, SO, and SS) consumed large quantities of alcohol. (J.A. at 47, 223-27, 314-16, 319.) Appellant himself described to the investigators how much alcohol he drank that night: "I was inebriated myself . . . Um, probably two to three – two to three drinks an hour, throughout the night . . . I'd get a rum and coke occasionally [and] I'd have a shot with – with [MJ]." (J.A. at 443.) In addition, MJ, EH, SO, and SS snorted cocaine in the hall bathroom. (J.A. at 313.) Appellant admitted he knew the cocaine use was occurring and even provided a straw to SS and SO. (J.A. at 374-376.) It is undisputed that JM did not consume any alcohol or cocaine that night. (J.A. at 224.)

The alcohol, consisting mostly of hard liquor, was either brought to the party by MJ or already present in Appellant's home. (J.A. at 47, 443-47.) Throughout the night, the partygoers, including Appellant, would travel outside to the garage to smoke cigarettes. (J.A. at 251.) Appellant did not check on his son throughout the night. (J.A. at 63, 237.) Appellant also failed to arrange for anyone sober to care for his son during the party that night. (J.A. at 282.)

SO, the 16-year-old young woman, became particularly intoxicated, consuming a high quantity of alcohol by all accounts, including her own. (J.A. at 314-16.) At some point in the night, SO began to slur her speech, stumble when she walked, and appear visibly intoxicated. (J.A. at 230.) Late in the evening, after attempting to leave Appellant's house, only to return because of the rain and flooding, the entire group decided to stay overnight. (J.A. at 230-31.)

Upon returning to Appellant's house, SS, SO, and JM grouped into a bedroom (identified as the Master Bedroom in Prosecution Exhibit 3) to sleep. (J.A. at 232, 493.) Appellant's room was across the house next to the computer room where his son was sleeping. (J.A. at 493.) MJ and EH chose to sleep in the living room. (J.A. at 100.) Shortly after SS, SO, and JM went into the master bedroom, JM heard Appellant enter into the room and walk into its attached bathroom. JM was awake when this

occurred, SO had passed out, and SS had fallen asleep. (J.A. 233-236.)

When he exited the bathroom, Appellant got into bed on SS's (the 15-year-old) side and began talking with her. According to JM and SS, Appellant engaged in sexual activity with SS at this time. (J.A. at 237-40.) JM left the room after hearing and seeing movement near SS's pelvic area. (Id.) After 20 to 30 minutes, SS got up from the bed as JM was coming back into the room and took JM to the garage. (J.A. at 269-270.) In the garage, SS disclosed Appellant had digitally penetrated her. (Id.)

After SS and JM left the bedroom, Appellant told investigators that he turned to SO, who was now awake, and began to kiss her. (J.A. at 448-50.) He admitted that they engaged in sexual intercourse. (Id.) During this time, SS realized that she left SO in the bedroom with Appellant, returned to the bedroom door, which had since been locked. According to SS and JM, they began knocking loudly for several minutes. (J.A. at 272-74.) According to JM, who was the only sober person at the party, they knocked for 10 minutes. (Id.) As the two were knocking, they woke up MJ and EH, and the two began screaming at MJ and EH that SO was alone in bedroom with Appellant. (J.A. at 273.) When EH woke up, she "freaked out" according to JM and her own testimony, grabbing a knife and fork from the kitchen.

(J.A. at 273, 578-79.) After waking up, MJ also knocked loudly on the master bedroom door for approximately 20 minutes until Appellant ultimately answered. (Id.) While MJ was knocking on the door, SS and JM went into Appellant's bedroom, shutting and locking the door. (J.A. at 273-75.) After Appellant opened the master bedroom door, SS and JM entered the room, where they found SO still in bed and asleep. After several minutes, they were able to wake up SO, who still appeared heavily intoxicated. (J.A. at 276-77.) SO did not understand what the two were talking about when they asked about something sexual happening with Appellant. (Id.)

Additional facts necessary to the disposition of the case are set forth in the argument below.

SUMMARY OF THE ARGUMENT

Appellant's conviction for child endangerment by his use of alcohol is legally sufficient. The evidence introduced at trial, when viewed in the light most favorable to the prosecution, easily provided the factfinder with sufficient evidence to conclude that Appellant was culpably negligent by using alcohol excessively. This alcohol use thereby impaired Appellant's judgment so substantially that it was reasonably foreseeable his son, also present in the residence, could suffer mental or physical harm.

Appellant admitted to drinking excessively throughout the night. Fueled by this alcohol consumption, Appellant demonstrated severely impaired judgment: He allowed minors to become severely intoxicated in his home, he facilitated their use of cocaine, he sexually assaulted two of the minors, and he refused to answer his bedroom door while others knocked loudly for up to 30 minutes. All of these events occurred while Appellant's 13-month-old son lay sleeping a few feet away. Appellant was unavailable if a need should arise for his son, permissive of others (who were under the influence of drugs and alcohol) accessing his son, the cause of screaming and loud knocking that could have easily woken his son to the chaos outside his room, and seemingly oblivious to his son's presence. Most importantly, he was committing crimes that foreseeably could have resulted in his immediate arrest. If Appellant had been arrested, his son would have been awoken by strangers and removed from the residence by the police. The factfinder thus had ample facts to conclude that the child's health and welfare was at risk and he could have suffered mental or physical harm.

Similarly, the evidence was legally sufficient to conclude Appellant's conduct was service discrediting. Appellant's invitation to this Court to reverse its 2011 precedent in United States v. Phillips, 70 M.J. 161 (C.A.A.F. 2011) is unavailing. Not only would this Court have to overturn its precedent in

Phillips for Appellant to prevail, the evidence presented at trial clearly revealed that the nature of the conduct itself was service discrediting. Additionally, the circumstances of the conduct, including the multiple civilian minors who were present to witness firsthand Appellant's conduct and the fact that knowledge of Appellant's conduct extended much farther into the civilian community when the minors disclosed his abuse, all proved that the conduct was service discrediting beyond a reasonable doubt.

For these reasons, it is unsurprising Appellant spends little time arguing whether the evidence is legally sufficient. Instead, he takes a lengthy and impermissible detour to make a "fair notice" due process argument, stating that the plain language of Article 134, as it pertains to child endangerment, should incorporate the word "substantial" to further define both the risk and type of the resulting harm to the child necessary for the offense to apply. Appellant attempts to advance this position by wildly irrelevant comparisons to several state statutes covering, under their respective language and case law, child endangerment. Appellant's argument, which closely resembles the argument advanced and rejected by this Court in United States v. Vaughn, 58 M.J. 29 (C.A.A.F. 2003), is meritless and also falls outside the scope of the granted issue under review.

ARGUMENT

APPELLANT'S CONVICTION UNDER CHARGE V FOR CHILD ENDANGERMENT IS LEGALLY SUFFICIENT WHERE HIS EXCESSIVE ALCOHOL USE OCCURRED AT A PARTY AT HIS OFF-BASE RESIDENCE WITH MULTIPLE UNDERAGE FEMALES IN ATTENDANCE, WHO WERE USING ALCOHOL AND COCAINE, AND WHERE APPELLANT SEXUALLY ASSAULTED TWO OF THOSE UNDERAGE FEMALES WITHIN ONLY A FEW FEET OF HIS SLEEPING 13-MONTH-OLD SON.

Standard of Review

This Court reviews legal sufficiency *de novo*. United States v. Washington, 57 M.J. 394, 403 (C.A.A.F. 2002) (citing United States v. Cole, 31 M.J. 270, 272 (C.M.A. 1990)). The test for legal sufficiency[1] is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)); *see also* United States v. Paul, 73 M.J. 274 (C.A.A.F. 2014).

[1] It is well-settled that the evidence to be considered in a legal sufficiency determination is "limited to the evidence presented at trial." United States v. Beatty, 64 M.J. 456, 458 (C.A.A.F. 2007)(citing United States v. Duffy, 11 C.M.R. 20, 23 (C.M.A. 1953)); *see also* United States v. Whiteman, 11 C.M.R. 179, 180 (C.M.A. 1953); United States v. Lanford, 20 C.M.R. 87, 95 (C.M.A. 1955); United States v. Bethea, 46 C.M.R. 223, 224-25 (C.M.A. 1973); United States v. Holt, 58 M.J. 227, 232 (C.A.A.F. 2003). Despite this clear principle, Appellant has referred to facts in his brief that were not offered during trial. Notably, Appellant argues that the government's "failure to act" when it learned of Appellant's conduct, which was not introduced as evidence at trial, demonstrated that Appellant's child was not in danger, that the government did not actually believe the child was in danger, and that the conduct was thus not service discrediting. These statements are highly speculative, were not explored during trial (likely because they were similarly irrelevant then), and should not be considered by this Court on appeal.

Law and Analysis

A. Under the elements and instructions for Article 134 (Child Endangerment), Appellant's conviction under Charge V is legally sufficient.

Appellant was properly convicted of the offense of child endangerment. In reviewing the entire record of trial, a reasonable factfinder could have found that Appellant endangered his child through culpable negligence. The elements of the offense of child endangerment are as follows:

1) That Appellant had a duty for the care of LP;

2) That LP was under the age of 16;

3) That Appellant endangered LP's mental and physical health, safety, or welfare through culpable negligence by using alcohol;

4) That under such circumstances, the conduct of the accused was of a nature to bring discredit upon the armed forces.

(R. at 951.) The Manual for Courts-Martial provides important guidance for the factfinder entrusted with determining if an accused's conduct constitutes "culpable negligence":

> 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 or omission. In the context of this offense, culpable negligence may include acts that, when viewed in the light of human experience, might foreseeably result in harm to a child, even though such harm would not necessarily be the natural and probable consequence of such acts.

Manual for Courts-Martial, United States (MCM), Part IV, ¶ 68a.b.(3)(2012 ed.). The Manual further provides a framework for considering the nature and severity of the potentially culpable conduct:

> In this regard, the age and maturity of the child, the conditions surrounding the neglectful conduct, the proximity of assistance available, the nature of the environment in which the child may have been left, the provisions made for care of the child, and the location of the parent or adult responsible for the child relative to the location of the child, among others, may be considered in determining whether the conduct constituted culpable negligence.

Id. Importantly, actual physical or mental harm to the child is not required. MCM, Part IV, ¶ 68a.c.(4).

1. Sufficient evidence was presented to find Appellant's use of alcohol and the circumstances surrounding that alcohol use constituted culpable negligence that foreseeably could endanger a child.

In looking to the framework outlined by the Manual, the nature and severity of Appellant's culpable conduct comes into sharp focus. First, this Court should consider the age of the child. Appellant's son was extremely young, only 13 months old. The child's mother testified regarding the maturity of the child, indicating that the child was totally dependent on his care provider and was not yet walking. (J.A. at 435.) Certainly, a reasonable inference for a factfinder, from just the age of the child, is that many scenarios (diaper change,

illness, or choking) existed for harm to the child's mental or physical health, welfare, and safety.

The conditions surrounding Appellant's conduct signal serious problems with Appellant's decision-making abilities. Appellant himself admits he was "inebriated." (J.A. at 443). Moreover, Appellant was not merely drinking to excess alone; he permitted six individuals, mostly strangers, to come to his home to drink large quantities of alcohol. (J.A. at 437-40). Further, at least four individuals, including several teenagers, used cocaine in his home, and he admitted to providing two of the teenagers a straw to do so. (J.A. at 444-46).

Appellant lived in a relatively isolated home that, on the night in question, experienced severe flooding that prevented the departure of MJ, EH, SS, SO, and JM. (J.A. at 99, 119-21, 220.) Appellant was in no condition to drive the child. Though JM, a 17-year-old female, was sober and testified she was capable of caring for the child, Appellant made no arrangements for her to do so. (J.A. at 257.) Finally, JM was unknown to the child. (Id.) Therefore, though JM may have been armed with the best of intentions, her presence does not counter the culpable negligence demonstrated by Appellant, who was the only individual who possessed a duty to the child.

Appellant, fueled by his alcohol ingestion and intoxication, sexually assaulted two of the teenagers in a room

a close distance from where his son slept. (J.A. at 237-40, 448-50.) Appellant had only spoken to one of the minors (SO) two times that night, he said he did not find her "good looking," and she had not previously indicated any sexual interest in him. (J.A. at 447, 454.) Further, several extremely intoxicated individuals (some of whom were also using cocaine), including one female who at one point in the night "freaked out" (grabbing a knife and fork from the kitchen), had access to the child. (J.A. at 117.)

Additionally, Appellant made no provisions for care of the child. Rather, he proceeded to engage in his criminal conduct with the hope that the child would sleep through the night and not require any care. And, although Appellant was present in the home (despite periodically going to the garage to smoke cigarettes), his physical presence does not reflect an awareness or ability to care for his child should the need have arisen. SS and MJ testified that Appellant was in no condition to care for his child. (J.A. at 64, 109.) In fact, individuals knocked loudly on the master bedroom door for as much as 30 minutes before Appellant answered. (J.A. at 117, 242.) Further, Appellant rarely, if ever, checked on the child as the night progressed. (J.A. at 98.)

Viewing the totality of these circumstances, a factfinder certainly and reasonably could conclude that Appellant's conduct

rose to a level of culpable negligence that foreseeably could endanger his 13-month-old son.[2] There is no doubt that Appellant's judgment was impaired. Appellant's decisions that evening--permitting minors to drink excessively and use cocaine in his home during a severe storm, facilitating the illegal use of cocaine by minors, not checking or infrequently checking on his son, climbing into bed with three teenage girls and sexually assaulting two of them, and not answering the door to the master bedroom for up to 30 minutes--illustrate why his conduct, fueled primarily by his alcohol use, was culpably negligent and why it could foreseeably result in harm to his child.

Contrary to Appellant's assertions, this case does not set a standard where "parents are now liable for child neglect or endangerment if they drink alcohol at home, off-base, and off-duty, and have guests – some who are new to them – at their house – in other words have a party at their house." (App. Br. at 13.) Appellant's conduct went far beyond having a simple party and consuming alcohol with his guests. Article 134's instructions regarding child endangerment, coupled with its requirement that the conduct be service discrediting, ensures that parents are not prosecuted for having responsible parties where they consume alcohol. The circumstances surrounding the

[2] And this is true even though Appellant was acquitted of the charge relating to cocaine.

alcohol consumption--including the age of the child, the care available for the child, and degree to which the child's care provider is impaired--are critical to concluding the conduct constitutes culpable negligence or that mental or physical harm was foreseeable as a result. Here, when weighing the testimony of the witnesses in a light most favorable to the government, it was reasonable to conclude Appellant crossed the permissible threshold and was culpably negligent in his use of alcohol. This Court should affirm the Air Force Court's conclusion that Appellant's culpable negligence could have foreseeably resulted in mental or physical harm to Appellant's child.

Notably, the offense of child endangerment was added as an enumerated offense under Article 134 in 2007. The offense was modeled after this Court's holding in United States v. Vaughn, 58 M.J. 29 (C.A.A.F. 2003), which upheld a general Article 134, Clause 2, charge for child neglect. In Vaughn, the appellant pled guilty conditionally (preserving her "fair notice" appeal) to leaving her two-month-old baby alone at home for six hours while she went out to a club over an hour away. While the appellant had arranged for the baby's father to care for the child, when he did not arrive, she nonetheless left the home. The child slept the entire time the appellant was away and did not suffer any actual harm.

The Vaughn opinion is helpful in two respects. First, the military judge crafted a definition for child neglect that ultimately became the template for the definitions at issue in the present case. These definitions, reviewed by this Court as it considered and rejected a "fair notice" argument nearly identical to the impermissible argument made by Appellant, discussed below, were deemed sufficient. Second, and relevant to the question of legal sufficiency, Vaughn's facts provide some analogous insight into whether the evidence against Appellant is legally sufficient. In both cases, a baby slept through the culpably negligent period without suffering any harm. Despite suffering no harm, the facts supported the conclusion that harm to the sleeping child was foreseeable due to the absence of the parent. Here, though Appellant was physically present, it was reasonable for the factfinder to conclude that his excessive alcohol use sufficiently impaired his mental ability to care for and focus on his child's needs. Thus, Appellant was culpably negligent in his use of alcohol and it was foreseeable that that child could suffer physical or mental harm.

Similarly, in recent military cases where individuals have been convicted of child endangerment, a broad spectrum of harms, including mental harm, have supported the convictions. For example, in United States v. Ellington, 2012 CCA LEXIS 35

(A. Ct. Crim. App. 2012), *rev. denied*, 2012 CAAF LEXIS 547 (C.A.A.F. 2012)(unpub. op.), the appellant was convicted of child endangerment for assaulting a two-year-old child's mother within hearing-distance of the child. Though the child in Ellington heard the assault, the case is instructive of the type and degree of harm that falls within a child endangerment charge where no actual harm is suffered. *See also*, *e.g.*, United States v. Mitchell, 2014 CCA LEXIS 348 (A.F. Ct. Crim. App. 2014)(unpub. op.)(Appellant convicted of inflicting actual mental harm to two children, but court held that even if actual harm were missing, it would still affirm for endangering the two children).

In United States v. Groomes, 2014 CCA LEXIS 752 (A.F. Ct. Crim. App. 2014), *rev. denied*, 2015 CAAF LEXIS 123 (C.A.A.F. 2015)(unpub. op.), an appellant was found guilty of child endangerment pursuant to his pleas for discharging a firearm within his residence where his 8-month-old and 4-year-old children were sleeping. The children were both asleep in a separate room from where the firearm was discharged. Nonetheless, the trial judge and Air Force Court had little difficulty in finding the evidence supported a finding that the appellant was culpably negligent and that a foreseeable harm existed for the children.

In addition to shifting his argument impermissibly beyond the scope of the granted issue to attacking the plain language in the charge as a lack of "fair notice," Appellant argues that this Court should focus its attention on the absence of certain types of evidence at trial. Appellant points to the absence of evidence detailing the following: The child crying, a pattern of behavior or prior complaints, or what the government did not do when it learned of Appellant's conduct. Not only does this argument discuss facts and issues not introduced at trial, which is impermissible on appeal, it spins all inferences from that lack of evidence in the way most favorable to Appellant, which inaccurately represents the legal standard before this Court. Notably, most of the "missing pieces of evidence" are hand-picked by Appellant from the state case law he selectively chose to cite to make his "fair notice" argument that is not before the Court. Ultimately, it is the evidence presented (not absent) that should be considered in the light most favorable to the government by this Court to determine legal sufficiency.

Moreover, it is impossible to guess at the meaning or significance of what the government did or did not do after the night at issue, particularly when the facts were not discussed or developed at trial, or considered by the fact finder. Appellant's attempts at speculation at this late stage are inappropriate and should be disregarded by this Court.

2. Sufficient evidence existed to find Appellant's conduct was service discrediting.

Appellant's "service discrediting" claim here (App. Br. at 5, 16-21), is also beyond the scope of the granted issue and should not be entertained by this Court. In making this impermissible claim, Appellant attempts to attack the legal sufficiency of the evidence by focusing on whether trial counsel's closing argument sufficiently tied together the evidence proving the conduct was of a nature to be service discrediting. To advance his position, Appellant invites this Court to reverse its holding in United States v. Phillips, 70 M.J. 161 (C.A.A.F. 2011), where this Court stated that the government is not required to specifically articulate how the conduct is service discrediting. Id. at 166. Phillips, a bench trial, involved an Article 134, Clause 2 charge, where the question on appeal centered on whether the possession of child pornography could be *per se* service discrediting.

This Court answered this question in the negative by holding 1) evidence that the public was aware of the conduct is not required for the conduct to be service discrediting, and 2) proof of the conduct itself may (but may not necessarily always) be sufficient for a trier of fact to conclude beyond a reasonable doubt that the conduct was service discrediting. Id. Importantly, contrary to Appellant's representation, the

Phillips dissent did not focus on the lack of an effective argument. Philips, 70 M.J. at 167-68 (Ryan, J., dissenting). Instead, the dissent focused on the complete lack of evidence and argument with respect to the service discrediting nature of the conduct.[3]

As applied to the current case, Appellant's argument is meritless. Even if one were to apply the dissent's view in Phillips, the trial counsel did present ample evidence of, and outlined the facts supporting, the service discrediting nature of Appellant's conduct. It is perhaps Appellant's characterization of his conduct--mere "drinking alcohol while his son slept in his own house" or "a service member drinks in his private home"--that is the cause of his confusion. If these were the facts of the case, the legal sufficiency of the terminal element might be called into question. However, consistent with the holding in Phillips, the factfinder could consider the full circumstances of Appellant's conduct, outlined above, and argued at trial by trial counsel. In doing so, the factfinder easily and reasonably could conclude beyond a reasonable doubt that Appellant's conduct, if known to the public, would tend to discredit the Armed Forces.

[3] "But the Government presented no such theory, either through evidence or through argument. In fact, the record of trial contains no discussion whatsoever of whether and how Appellant's conduct was service discrediting." Phillips, 70 M.J. at 167 (Ryan, J., dissenting).

B. Appellant's "fair notice" due process argument is impermissible and meritless.

Though Appellant has fashioned his issue before the Court as one of legal sufficiency, his arguments reveal a different purpose. Operating under the guise of a legal sufficiency heading, Appellant attempts to "move the goal post" by arguing instead that the clear language contained in Article 134 for child endangerment is inadequate, as it does not define the risk or degree of harm the child might suffer. In making this beyond-the-scope argument, Appellant clearly shifts to a "fair notice" due process challenge. Specifically, Appellant asserts:

> The definition of "endanger" in the Manual uses the standard, "reasonable probability of harm." . . . This phrase, broadly construed, could lead to absurd results, such as holding a caregiver criminally liable for a child's paper cut while working on a school project. This Court must give a reasonable construction of the statute that serves to adequately notify service members of what conduct for which they may be criminally liable.

(App. Br. at 9.)

To convince this Court of the better path, Appellant attempts to compare the language in the MCM to that of several state and federal statutes, including Arkansas. *See* Annotated Code of Arkansas (A.C.A.) § 5-27-207 (requiring a substantial risk of serious harm); New Mexico Statute Annotated (N.M. Stat. Ann.) § 30-6-1(D)(1)(classifying criminal child abuse as a

third-degree felony, and, hence, requiring the substantial probability of harm to a child); Federal Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. § 5106g (2012)(defining child neglect as an act or failure to act that presents an imminent risk of serious harm). Appellant further argues that the cases interpreting these statutes, notably those in New Mexico, should provide valuable guidance to this Court in fashioning an appropriate definition, which includes "substantial," for the risk and degree of harm. *See* State v. Garcia, 315 P.3d 331 (N.M. Ct. App. 2013); State v. Chavez, 211 P.3d 891 (N.M. 2009).

The central problem with Appellant's argument, in addition to being outside the scope of the granted issue on appeal, is that it ignores the unique nature of the military and, in particular, charges that exist under Article 134. Appellant's comparison to various state statutes that require a greater threshold of culpability or harm is simply not helpful when examining an Article 134 charge. An offense under Article 134 can criminalize any act or failure to act so long as it is of a nature to bring discredit upon the armed forces.[4] It is the existence of this second element--the service discrediting element even discussed by Appellant when he cited to the

[4] This was shown true in the first child neglect case with no actual harm reviewed by this Court. United States v. Vaughn, 58 M.J. 29 (C.A.A.F. 2003).

Phillips case--that sufficiently distinguishes the Uniform Code of Military Justice from that of its civilian counterparts, thereby making them largely irrelevant.

More importantly, this Court addressed in Vaughn a nearly identical "fair notice" argument and rejected the same argument. First, the Vaughn Court, citing to the Supreme Court, stated "that as a matter of due process, a service member must 'have fair notice that his conduct [is] punishable' before he can be charged under Article 134 with a service discrediting offense. This Court has found such notice in the MCM, federal law, state law, military case law, military custom and usage, and military regulations." Vaughn, 58 M.J. at 31 (citing United States v. Bivens, 49 M.J. 328, 330 (C.A.A.F. 1998)).

In the current case, this prong of the analysis is easily satisfied as the offense is now enumerated and located squarely in the Manual. Second, lest there be any doubt that the child endangerment language in the MCM is adequate as written, this Court responded specifically to Vaughn's argument that several state statutes require a finding of substantial harm in order to sustain a child neglect conviction. This Court stated: "In our view, the preponderance of states laws . . . criminalize child neglect in the context of a protected relationship, regardless of actual harm to the child, when the conduct violates a duty of care and places the child at risk of harm." Vaughn, 58 M.J. at

32. Appellant's argument is both outside of the granted issue and meritless. He is, thus, entitled to no relief.

CONCLUSION

The United States respectfully requests this Honorable Court uphold AFCCA's ruling affirming the findings and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to civilian defense counsel, and to the Air Force Appellate Defense Division on 23 February 2015 via electronic filing.

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UNITED STATES, Appellee v. Specialist ANTHONY R. ELLINGTON United States Army, Appellant

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UNITED STATES ARMY COURT OF CRIMINAL APPEALS

2012 CCA LEXIS 35

January 31, 2012, Decided

NOTICE: NOT FOR PUBLICATION

SUBSEQUENT HISTORY: Review denied by *United States v. Ellington, 2012 CAAF LEXIS 547 (C.A.A.F., May 1, 2012)*

PRIOR HISTORY: [*1]

Headquarters, Fort Stewart. Tara A. Osborn and Tiernan P. Dolan, Military Judges, Lieutenant Colonel Shane E. Bartee, Staff Judge Advocate (trial), Colonel Randall J. Bagwell, Staff Judge Advocate (new recommendation and action).
United States v. Ellington, 2011 CCA LEXIS 125 (A.C.C.A., June 30, 2011)

COUNSEL: For Appellant: Major Richard E. Gorini, JA; Captain Richard M. Gallagher, JA.

For Appellee: Pursuant to A.C.C.A. Rule 15.2, no response filed.

JUDGES: Before KERN, YOB, and ALDYKIEWICZ Appellate Military Judges. Senior Judge KERN and Judge YOB concur.

OPINION BY: ALDYKIEWICZ

OPINION

SUMMARY DISPOSITION ON FURTHER REVIEW

ALDYKIEWICZ, Judge:

On 14 August 2010, a military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of assault consummated by a battery (two specifications), aggravated assault, and child endangerment in violation of Articles 128 and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 928* and *934* [hereinafter UCMJ]. On 29 October 2010, the convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for thirty-two months, forfeiture of all pay and allowances, and reduction to Private E1.

On 30 June 2011, this court set aside the convening authority's action, returning the record of trial to The Judge Advocate General [*2] for remand to the same convening authority for a new staff judge advocate recommendation and action.[1] *United States v. Ellington, ARMY 20100667, 2011 CCA LEXIS 125 (Army Ct. Crim. App. 30 June 2011)*(unpub.).

1 The case was returned because twelve days after trial, the appellant, a Soldier with a dependent daughter, submitted a timely request to defer adjudged forfeitures and defer and waive automatic forfeitures in his case, a request that was never acted on by the convening authority.

On 18 October 2011, the convening authority again acted in appellant's case, this time approving only the bad-conduct discharge, confinement for thirty-two months, and reduction to Private E1. The convening authority granted a six-month waiver of the automatic forfeitures, directing payment of the funds "to the mother of the [appellant's] child, in support of the [appellant's] [f]amily [m]ember."[2]

> 2 The Court notes that both the report of result of trial and promulgating order have errors requiring correction. The former incorrectly describes Charge IV and its specification; the latter, General Court-Martial Order Number 18, dated 18 October 2011, is incomplete and fails to comply with Appendix 17 of the *MCM*, 2008, noting only [*3] the convening authority's action and omitting information such as the time and place of arraignment, the offenses for which the appellant was arraigned, the pleas and findings, the adjudged sentence, and the requirement for DNA processing IAW *10 U.S.C. § 1565*.

A review of the record reveals one issue that merits discussion but no relief; that is, the failure of the child endangerment specification, a violation of Article 134, UCMJ to allege the terminal element for a clause 1 or clause 2 violation.[3]

> 3 The terminal element for a clause 1 and clause 2, Article 134, UCMJ violation is that the alleged conduct was "to the prejudice of good order and discipline" or "conduct of a nature to bring discredit upon the armed forces" respectively. *See Manual for Courts-Martial, United States*, (2005 ed.) [hereinafter *MCM*, 2005], Part IV, para. 60.c.

***Fosler* Issue**

Whether a charge and specification states an offense is a question of law that is reviewed de novo. *United States v. Roberts, 70 M.J. 550, 552 (Army Ct. Crim. App. 2011)* (citing *United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006))*.

As noted by our superior court:

> The military is a notice pleading jurisdiction. *United States v. Sell, 3 C.M.A. 202, 206, 11 C.M.R. 202, 206 (1953)*. [*4] A charge and specification will be found sufficient if they, "first, contain[ ] the elements of the offense charged and fairly inform[ ] a defendant of the charge against which he must defend, and, second, enable[ ] him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States, 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974)*; *see also United States v. Resendiz--Ponce, 549 U.S. 102, 108, 127 S. Ct. 782, 166 L. Ed. 2d 591, 549 U.S. 102, 127 S.Ct. 782, 166 L.Ed.2d 591 (2007)* (citations and quotation marks omitted); *United States v. Sutton, 68 M.J. 455, 455 (C.A.A.F. 2010)*; *United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006)*; *Sell, 3 C.M.A. at 206, 11 C.M.R. at 206*. The rules governing court-martial procedure encompass the notice requirement: "A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." R.C.M. 307(c)(3).

Fosler, 70 M.J. at 229 (holding an adultery charge failed to state an offense where it neither expressly nor impliedly alleged the terminal elements for a clause 1 or clause 2 Article 134, UCMJ offense, appellant objected at trial to the pleading, and appellant contested the charge and specification [*5] at issue). *See also, Roberts, 70 M.J. at 553*; *United States v. Dear, 40 M.J. 196, 197 (C.M.A. 1994)*.

Charges and specifications first challenged on appeal, even where an appellant pleaded not guilty, are liberally construed. *Roberts, 70 M.J. at 553* (citing *United States v. Watkins, 21 M.J. 208, 209-10 (C.M.A. 1986)*; *see also, United States v. Fox, 34 M.J. 99, 102 (C.M.A. 1992)*; *United States v. Berner, 32 M.J. 570, 572 (A.C.M.R. 1991)*. Additionally, an appellant's "standing" to challenge the pleading following a knowing and voluntary guilty plea thereto is diminished. *Roberts, 70 M.J. at 553*. Absent an objection at trial, we will not set aside a specification unless it is "'so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had.'" *Id* (citing *United States v. Watkins, 21 M.J. 208, 209-210)* (quoting *United States v. Thompson, 356 F.2d 216, 226 (2d Cir.1965)*, cert. denied, *384 U.S. 964, 86 S.Ct. 1591, 16*

L.Ed.2d 675 (1966)) (internal quotation marks omitted).

Unlike *Fosler*, the procedural posture and facts of appellant's case are notably different, resulting in a different outcome. The pleading itself alleged a violation [*6] of Article 134, UCMJ "Child endangerment," a title that necessarily implies service discrediting behavior. The text of the specification stated, in part, that appellant "did endanger the mental health of [KW], by assaulting Ms. [AP], the mother of [KW], while [KW] was in [the] home and able to hear such acts take place." The appellant did not object to the pleading.[4] The action taken by appellant and made criminal by Article 134 was the endangerment of a two-year old child's mental health, through culpable negligence, as he physically assaulted the child's mother within the hearing of the child. The stipulation of fact, dated 19 July 2010, almost one month before trial and signed by appellant and counsel noted: appellant assaulted the child's mother within hearing of the child; the child awoke during the assault and heard the "noise from the assault and the pleas of her mother;" appellant knew or should have known that his actions endangered the mental health of the child; appellant had a duty of care towards the child; and appellant's actions "would lower the reputation and public esteem towards the military and would also cause a good order and discipline issue." Additionally, the [*7] colloquy between the military judge and appellant during the providence inquiry addressed how his actions were both prejudicial to good order and discipline and service discrediting, elements clearly defined by the military judge and understood by appellant.

> 4 Appellant did not object to the pleading at trial, during the post-trial processing of his case, or on appeal before this court.

The pleading was sufficient to place the appellant on notice of the offense charged and the specification as written, and pleaded to, necessarily implies conduct that, at a minimum, is service discrediting, the terminal element for a "clause 2" Article 134, UCMJ offense. *See United States v. Hoskins, 17 M.J. 134, 136 (C.M.A. 1984)* (listing factors that directly impact the ultimate decision of whether a charge and specification necessarily imply an element); *see also, United States v. Berner, 32 M.J. 570 (A.C.M.R. 1991)*; *United States v. Watkins, 21 M.J. 208 (C.M.A. 1986)*. Finally, the pleading and the record of trial sufficiently protect the appellant from a double jeopardy perspective.

Conclusion

On consideration of the entire record, we hold the findings of guilty and the sentence as approved by the convening [*8] authority correct in law and fact. Accordingly, the findings of guilty and the sentence are affirmed.

Senior Judge KERN and Judge YOB concur.

UNITED STATES v. Staff Sergeant MICHAEL L. MITCHELL, United States Air Force

ACM 38254

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

2014 CCA LEXIS 348

June 5, 2014, Decided

NOTICE:

THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL RELEASE.

SUBSEQUENT HISTORY: Motion granted by *United States v. Mitchell, 2014 CAAF LEXIS 835 (C.A.A.F., Aug. 12, 2014)*
Review denied by *United States v. Mitchell, 2014 CAAF LEXIS 1168 (C.A.A.F., Dec. 8, 2014)*

PRIOR HISTORY: [*1]

Sentence adjudged 14 September 2012 by GCM convened at Little Rock Air Force Base, Arkansas. Military Judge: Natalie D. Richardson. Approved Sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

COUNSEL: For the Appellant: Major Matthew T. King and Major Grover H. Baxley.

For the United States: Colonel Don M. Christensen; Lieutenant Colonel Nurit Anderson; and Gerald R. Bruce, Esquire.

JUDGES: Before MARKSTEINER, HECKER, and WEBER, Appellate Military Judges.

OPINION BY: HECKER

OPINION

OPINION OF THE COURT

HECKER, Senior Judge:

Consistent with his pleas, the appellant was convicted at a general court-martial of six specifications of child endangerment by culpable negligence, in violation of Article 134, UCMJ, *10 U.S.C. § 934*. A panel of officer and enlisted members sentenced him to a bad-conduct discharge, confinement for 6 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

The appellant raises one issue on appeal: whether his guilty plea to four of the specifications of child endangerment was improvident because there was an insufficient factual predicate to demonstrate that those children suffered "actual harm." Finding no error that materially prejudices a substantial [*2] right of the appellant, we affirm.

"[W]e review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo." *United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008)*. In doing so, "we apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea."

Id.; United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991) (holding that a guilty plea should not be overturned as improvident unless the record reveals a substantial basis in law or fact to question the plea). "An accused must know to what offenses he is pleading guilty." *United States v. Medina, 66 M.J. 21, 28 (C.A.A.F. 2008)*. A military judge's failure to explain the elements of a charged offense is error. *United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247, 253 (C.M.A. 1969)*. Accordingly, "a military judge must explain the elements of the offense and ensure that a factual basis for each element exists." *United States v. Barton, 60 M.J. 62, 64 (C.A.A.F. 2004)* (citing *United States v. Faircloth, 45 M.J. 172, 174 (C.A.A.F. 1996))*. [*3] If an accused makes statements during trial that are inconsistent with the elements required for the charged offense, the military judge must resolve those inconsistencies before accepting the plea. *United States v. Bullman, 56 M.J. 377, 382-83 (C.A.A.F. 2002)*.

The offense of child endangerment under Article 134, UCMJ, includes the requirement that a child's "mental or physical health, safety, or welfare" be endangered by the appellant's culpable negligence. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 68a.b.(3) (2012 ed.). "'Endanger' means to subject one to a reasonable probability of harm." *MCM*, Part IV, ¶ 68a.c.(5). Culpable negligence "may include acts that, when viewed in the light of human experience, might foreseeably result in harm to a child, even though such harm would not necessarily be the natural and probable consequences of such acts." *MCM*, Part IV, ¶ 68a.c.(3). For this offense, actual harm to the child need not occur as the offense only requires that the appellant's actions reasonably could have caused physical or mental harm or suffering. *MCM*, Part IV, ¶ 68a.c.(4). If the appellant's conduct *did* result in harm, the potential maximum sentence to confinement [*4] increases from 1 year to 2 years. *MCM*, Part IV, ¶ 68a.e.(5)-(6). Here, the Government charged the appellant with causing actual harm ("mental injury") to the children, and the maximum sentence the appellant faced reflected his conviction for that offense.

On appeal, the appellant now contends that his guilty plea to endangering two of the children must be set aside because the guilty plea inquiry failed to elicit sufficient evidence that the children suffered actual harm as a result of his behavior. We disagree. During the providency inquiry, the military judge explained the elements of this offense, including the requirement that the children must have experienced actual mental injury as a result of his conduct. During specific questioning by the military judge and through a stipulation of fact, the appellant admitted on multiple occasions that his actions had caused the two children to suffer mental injury, and we do not find a substantial basis in law or fact to question the providency of his guilty plea. The stipulation of fact itself demonstrates that the elements of this offense are all met. Furthermore, even if his plea was improvident as to the "actual harm" element, we would [*5] still affirm the appellant's convictions for endangering these two children and would reassess the sentence to the adjudged and approved sentence: a bad-conduct discharge, confinement for 6 months, and reduction to E-1. *See United States v. Winckelmann, 73 M.J. 11, 12 (C.A.A.F. 2013)*; *United States v. Peoples, 29 M.J. 426, 427-28 (C.M.A. 1990)*.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, *10 U.S.C. §§ 859(a), 866(c)*. Accordingly, the approved findings and sentence are AFFIRMED.

UNITED STATES v. Staff Sergeant CHRISTOPHER T. GROOMES, United States Air Force

ACM 38360

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

2014 CCA LEXIS 752

October 2, 2014, Decided

NOTICE:

THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL RELEASE.

SUBSEQUENT HISTORY: Review denied by *United States v. Groomes, 2015 CAAF LEXIS 123 (C.A.A.F., Feb. 10, 2015)*

PRIOR HISTORY: [*1] Sentence adjudged 10 April 2013 by GCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Natalie B. Richardson. Approved Sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-4.

COUNSEL: For the Appellant: Captain Jeffrey A. Davis.

For the United States: Major Roberto Ramírez and Gerald R. Bruce, Esquire.

JUDGES: Before ALLRED, HECKER, and TELLER, Appellate Military Judges. ALLRED, Chief Judge, concurs. HECKER, Senior Judge, concurring in part and dissenting in part.

OPINION BY: TELLER

OPINION

OPINION OF THE COURT

TELLER, Judge:

Consistent with his pleas, the appellant was convicted at a general court-martial of conspiracy to malinger; aggravated assault with a weapon likely to produce death or grievous bodily harm; child endangerment by culpable negligence; and obstructing justice, in violation of *Articles 81*, *128*, and *134*, UCMJ, *10 U.S.C. §§ 881*, *928*, *934*. A panel of officer members sentenced him to a bad-conduct discharge, confinement for 6 months, and reduction to E-4. The convening authority approved the sentence as adjudged.

The appellant contends his pleas of guilty to child endangerment and obstructing justice are improvident. Additionally, pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, the appellant alleges (1) he received ineffective [*2] assistance of counsel when trial defense counsel failed to inform him that he was pleading guilty to a charge (or charges) that would result in a conviction for a crime of domestic violence; (2) the military judge abused her discretion in accepting the appellant's guilty plea without inquiring whether the appellant understood he was pleading guilty to a charge that would be reported as a crime of domestic violence; and (3) his sentence to a bad-conduct discharge was overly harsh in light of his co-conspirator's sentence.

Background

On 13 September 2013, the appellant and his wife, then-Staff Sergeant (SSgt) JG, devised a plan to shoot the appellant in the leg to avoid the appellant's impending physical fitness assessment and blame the incident on an intruder. The appellant feared the assessment would result in his second failure and administrative sanctions. At the time, the appellant lived in an off-base home in Bossier City, Louisiana, with his wife, four-year-old daughter, and eight-month-old son. Although the appellant and SSgt JG followed the plan up to the point where she pointed a weapon at him, in the end, the appellant could not go through with it.

SSgt JG, facing a deployment [*3] she wanted to avoid, then suggested the appellant shoot her in the leg so she would not have to deploy. The appellant agreed, and they carried out their plan. The shooting took place in the living room of the home, approximately three feet from the wall separating the appellant from the bedroom where his children were sleeping.

As part of their revised plan, the couple agreed to tell police that someone had broken into their home and shot SSgt JG. After shooting his wife, the appellant called 911 and reported that an unknown male had entered their home and shot her. He then called his first sergeant and told him the same story and asked the first sergeant to come to his residence. When civilian police officers and detectives responded to the 911 call, the couple again relayed the false story about an intruder.

After rights advisement at the civilian police station, the appellant initially told a civilian detective the same false story about an intruder. When investigators asked to swab his hands for gunpowder, the appellant asserted his right to counsel and refused to answer further questions. Meanwhile, when confronted with the inconsistent physical evidence while at the hospital, SSgt [*4] JG admitted she and the appellant had fabricated the intruder story.

After SSgt JG called her husband and told him to "tell them everything," the appellant waived his rights and told a second civilian detective the truth about the incident. Military investigators from the Security Forces Squadron then arrived and interviewed the appellant under rights advisement. The appellant again confessed about the plan he and his wife entered into and his role in injuring her.

Providency of the Plea to Article 134, UCMJ, Specifications

The appellant contends his guilty plea to two specifications of child endangerment and one specification of obstructing justice charged under *Article 134*, UCMJ, are improvident because an insufficient factual basis exists to sustain the convictions. Specifically, he argues there were no facts developed or evidence presented to show that his conduct caused a reasonably direct and palpable injury to good order and discipline in the armed forces.

During a guilty plea inquiry, the military judge is responsible for determining whether there is an adequate basis in law and fact to support the plea before accepting it. *United States v. Inabinette, 66 M.J. 320, 321-22 (C.A.A.F. 2008)*. In order to ensure a provident plea, the military judge must "accurately inform [the [*5] accused] of the nature of his offense and elicit from him a factual basis to support his plea." *United States v. Negron, 60 M.J. 136, 141 (C.A.A.F. 2004)*; *United States v. Whitaker, 72 M.J. 292, 293 (C.A.A.F. 2013)* (the military judge may consider the facts contained in the stipulation of fact along with the appellant's inquiry on the record). Before accepting a guilty plea, the military judge must conduct an inquiry to determine whether there is factual basis for the plea, the accused understands the plea and is entering it voluntarily, and the accused admits each element of the offense. *United States v. Mitchell, 66 M.J. 176, 177-78 (C.A.A.F. 2008)*.

We review a military judge's acceptance of a guilty plea for an abuse of discretion, and questions of law arising from the plea are reviewed de novo. *Inabinette, 66 M.J. at 322*. We afford significant deference to the military judge's determination that a factual basis exists to support the plea. *Id*. (citing *United States v. Jordan, 57 M.J. 236, 238 (C.A.A.F. 2002)*; *see also United States v. Barton, 60 M.J. 62 (C.A.A.F. 2004)*. If, during the plea or at any time during the court-martial, the accused presents a matter inconsistent with the plea, the military judge has an obligation to settle the inconsistency, or if that is untenable, to reject the plea. *United States v. Hines, 73 M.J. 119, 124 (C.A.A.F. 2014)* (quoting *United States v. Goodman, 70 M.J. 396, 399 (C.A.A.F. 2011)*). "This court must find a substantial conflict between the plea and the accused's statements or other evidence in order to set aside a guilty plea. The mere possibility of a conflict [*6] is not sufficient." *Id*. (internal quotation marks omitted) (quoting *United States v. Watson, 71 M.J. 54, 58*

(C.A.A.F. 2012)). "The providence of a plea is based not only on the accused's understanding and recitation of the factual history of the crime, but also on an understanding of how the law relates to those facts." *United States v. Medina, 66 M.J. 21, 26 (C.A.A.F. 2008)* (citing *United States v. Care, 18 C.M.A. 535, 538-39, 40 C.M.R. 247 (1969))*.

The appellant was charged with two specifications of child endangerment by culpable negligence for discharging a loaded firearm within a residence in which his children were present; the specifications were identical except for the identity of the child. He was also charged with obstructing justice by falsely telling a civilian detective that an intruder had shot his wife. All three specifications allege a violation under clause 1 of Article 134, UCMJ.

As such, prior to acceptance of a guilty plea, the military judge must elicit sufficient facts, through inquiry or the stipulation of fact, to establish the appellant's conduct under the circumstances caused a reasonably direct and obvious injury to good order and discipline. *Cf. United States v. Cendejas, 62 M.J. 334, 340 (C.A.A.F. 2006)*. The act in question must be "directly prejudicial to good order and discipline" and not "prejudicial only in a remote or indirect sense." *Manual for Courts-Martial, United States*, Part [*7] IV, ¶ 60.c.(2)(a) (2012 ed.). "Determining whether those factual circumstances establish conduct that is or is not prejudicial to good order and discipline is a legal conclusion that remains within the discretion of the military judge in guilty plea cases." *United States v. Nance, 67 M.J. 362, 366 (C.A.A.F. 2009)*.

1. Child endangerment specifications

In the guilty plea inquiry for the child endangerment specifications, the appellant acknowledged that his conduct created the risk his children could be seriously injured. He also told the military judge his conduct was prejudicial to good order and discipline because it caused his active duty wife to be absent from her military duty while meeting with child protective services personnel who were investigating the child endangerment issue. We do not find a substantial basis in law or fact for questioning the providence of the appellant's plea.

The military judge correctly explained the elements and definitions of the offenses, including the applicable terminal element. After acknowledging his understanding of the elements and definitions, the appellant admitted a reasonably direct and obvious injury to good order and discipline occurred when his wife did not perform her military duties because [*8] she was involved at certain times in the child protective services investigation that began due to his misconduct.[1] After considering the entire inquiry, we find no substantial basis to question his guilty plea to the child endangerment specifications. *See United States v. Erickson, 61 M.J. 230, 232-33 (C.A.A.F. 2005)* (conduct that affects a military member's capability to perform military duties has a direct and palpable effect on good order and discipline).

1 The stipulation of fact, which was not discussed or referenced during the guilty plea inquiry, simply stated that the appellant's "conduct was prejudicial to good order and discipline in the armed forces."

2. Obstruction of justice specification

The appellant was also charged with "wrongfully endeavor[ing] to impede an investigation by making a false statement to Bossier City . . . Detective Kevin Jones, to wit, 'my wife was shot by an intruder,' or words to that effect, which conduct was prejudicial to good order and discipline in the armed forces." When the military judge asked the appellant why he thought he was guilty of the offense, the appellant stated:

> On 14 September 2012, . . . I made a statement to Detective Kevin Jones which was false and I knew that the statement was false. I knew that when I [*9] called 911 to falsify the report of an intruder had [sic] shot my wife. I figured there would be an investigation into the shooting. The reason I did this, was to disrupt the investigation.
>
> . . . .
>
> It is prejudicial to good order and discipline in the armed forces because of the extra investigation that took place in order to find out the truth.[2]

2 The stipulation of fact, which was not discussed or referenced during the guilty plea

> inquiry, simply stated "making false statements to an investigator to perpetuate a crime was to the prejudice of good order and discipline in the armed forces."

When the military judge followed up on the "extra investigation" issue, the appellant noted two Air Force security forces investigators "came over to do an investigation also" after the civilian authorities began investigating the intruder story. After the military judge expressed doubts about how that created a direct and obvious injury to good order and discipline, the appellant consulted with trial defense counsel. He then told the judge:

> [T]he lie I told was a perpetuating plan for my wife to avoid deployment. I believe if I would have told [civilian] Detective Jones the truth, the military would have been [*10] less involved in investigating the alleged malingering.
>
> . . . .
>
> [If] I would have, you know, had already told the truth to Detective Jones, and the military would have, I believe, would have been involved in less.

The military judge again followed up, asking if the appellant believed the civilian authorities may not have bothered contacting the military if they had quickly learned the appellant had shot his wife, even if they also learned he did it so she could avoid her military deployment. The appellant indicated he did. The military judge then found his plea to be provident. The appellant now contends his guilty plea is improvident because there were no facts developed or evidence presented to show that his lie to civilian detectives caused a reasonably direct and palpable injury to good order and discipline in the armed forces.

The military judge found a factual basis for the conclusion that the false statement to Detective [Det.] Jones was directly prejudicial to good order and discipline, as indicated by her acceptance of the guilty plea. The military judge elicited two potential bases for that conclusion. First, the appellant admitted that he made the false statement with the intent [*11] of disrupting the investigation, believing that the military would be involved. Second, the appellant asserted that the false statement created extra work for military investigators. The military judge, with good reason, expressed grave doubts about this second theory of liability. However, she never discussed the first basis for liability with the accused, so the record is unclear as to which basis she relied upon in accepting the plea.

In order to establish a factual basis for the appellant's guilty plea, the inquiry and stipulation of fact must contain circumstances elicited from the appellant that objectively support a finding of guilt as to each element of the offense. *United States v. Davenport, 9 M.J. 364, 367 (C.M.A. 1980)*. If those underlying facts exist in the record, "[f]ailure to explain each and every element of the charged offense to the accused in a clear and precise manner . . . is not reversible error." *United States v. Fisher, 58 M.J. 300, 304 (C.A.A.F. 2003)* (military judge's incorrect reference to falsity by omission in a false swearing inquiry did not invalidate a guilty plea when the record demonstrated other elements of the statement were knowingly false).

If one of the two potential bases contained in the record objectively support the plea, then the military judge did not abuse her [*12] discretion in accepting the plea, even if she did not explain why she accepted the plea on the record. We find that the assertion that the appellant's false statement created more work for military investigators was so implausible that it cannot form a legitimate basis for accepting the plea. If, however, lying to a civilian investigator with the intent of disrupting the investigation constitutes a direct injury to good order and discipline, then the plea is still provident.

Several courts have addressed whether lying to investigators about one's own misconduct constitutes an offense under *Article 134*, UCMJ. In *United States v. Arriaga, 49 M.J. 9, 12 (C.A.A.F. 1998)*, the Court of Appeals for the Armed Forces upheld a soldier's guilty plea to obstruction of justice for lying to Army Criminal Investigation Division investigators about the location where he had disposed of stolen property. The court held that the scope of obstruction of justice under *Article 134*, UCMJ, was broader than the scope of the federal obstruction of justice statute. Although the court did not expressly rule on which clause of *Article 134*, UCMJ, was violated,[3] the facts in the case centered around Arriaga's impact on the military investigation into his misconduct. In [*13] deciding *Arriaga*, the court cited to

its opinion in *United States v. Jones, 20 M.J. 38, 40 (C.M.A. 1985)*, where that court held that willful destruction of evidence in a military investigation was prejudicial to good order and discipline because it "harms the orderly administration of justice."

> 3 *United States v. Arriaga, 49 M.J. 9, 12 (C.A.A.F. 1998)*, was decided before *United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011)*, and the specification at issue did not allege a terminal element. *See Arriaga, 49 M.J. at 10*.

While courts have also upheld obstruction of justice charges for interference with a foreign investigation, they have typically relied on the service discrediting aspect of the conduct. *See United States v. Ashby, 68 M.J. 108, 118-19 (C.A.A.F. 2009)* (discussing obstruction of justice in the context of *Article 133*, UCMJ, *10 U.S.C. § 933*); *United States v. Bailey, 28 M.J. 1004, 1006-07 (A.C.M.R. 1989)*.

The Army Court of Criminal Appeals addressed a fact pattern similar to the instant case in *United States v. Jenkins, 48 M.J. 594 (Army Ct. Crim. App. 1998)*. Private First Class Jenkins had engaged in sustained abuse of his wife, including sexual assault. After one such assault, Jenkins' wife reported the abuse to his company commander, but the subsequent investigation was handled by Colorado Springs police. *See Id. at 596*. In a verbal statement to a Colorado Springs investigator, Jenkins denied assaulting his wife and said the sex was consensual. The court found that "[e]ven though appellant was being interrogated by a civilian police officer, the allegations were first [*14] reported to military authorities and [the] appellant must have known that at least a possible disposition of the allegations would occur within the administration of military justice." *Id. at 601*. *See also United States v. Smith, 34 M.J. 319, 324 (C.M.A. 1992)* (the impact of charged misconduct "on a later, but nonetheless probable, military investigation" brings it within the intended scope of *Article 134*, UCMJ, where military authorities were already aware of the underlying situation at the time of the alleged obstruction activity), *rev'd on other grounds, 39 M.J. 448 (CMA 1994)*.

In light of this, the question before us in this case is whether the military judge elicited sufficient facts during her inquiry, combined with the stipulation of fact, to find that the appellant's false statement to Det. Jones harmed the orderly administration of military justice in the same manner as if it had been made to a military investigator. We find that she did.

As in *Jenkins*, the military was aware of the incident before the false statement was made to the civilian investigator because the appellant told his first sergeant that an intruder had shot his wife before the questioning by detectives even began. While Bossier City police took the lead in the questioning, the appellant expected [*15] there to be some military involvement, and military investigators did, in fact, join the investigation. His false statement to Det. Jones was intended to allow him to escape accountability from either civilian or military authorities. Therefore, under these circumstances, at the moment he lied, the appellant caused a reasonably direct and palpable injury to good order and discipline in the armed forces. In this case, the duration of the injury was curtailed by the physical evidence and probable existence of gunpowder residue on the appellant's hands. But even a short-lived diversion of accountability for misconduct constitutes prejudice to good order and discipline. Accordingly, we find no substantial basis to question his guilty plea to the obstruction of justice specification.

The dissent cites *United States v. Medina, 66 M.J. 21, 26 (C.A.A.F 2008)*, but we find that case distinguishable. In *Medina*, the court held that as a matter of fair notice, an accused had a right to know which clause of *Article 134*, UCMJ, formed the basis for the charge. *Id. at 26-27*. The court explicitly noted "[i]t bears emphasis that this is a question about the knowing and voluntary nature of the plea and not the adequacy of the factual basis supporting the plea." *Id. at 27*. The [*16] appellant in this case had no doubt that the charge alleged a violation of only clause 1 of *Article 134*, UCMJ, and the military judge adequately explained that basis in the inquiry. We find no basis on this record to doubt the knowing and voluntary nature of the appellant's plea.

Domestic Violence Conviction

In a declaration submitted on appeal, the appellant says he was served with paperwork shortly after his trial that indicated at least one of his convictions was a "Crime of Domestic Violence and would be reported as such." He contends this was the first time he became aware of this fact, that his attorneys never advised him that pleading guilty would result in a reportable conviction, and that he would not have pled guilty if he had known this requirement. The appellant also states this reported domestic violence conviction "has caused [him] hardship,

to include not being able to find jobs [and] not being able to pick [his] daughter up from school." Pursuant to *Grostefon*, he now contends the military judge erred in failing to inquire into his understanding on this matter and that his defense counsel were ineffective for not advising him of this consequence before he pled guilty.

[*17] Although the appellant does not personally complain about the impact of his conviction on his ability to possess firearms, his appellate brief focuses almost exclusively on this consequence of his conviction. In making this argument, the brief references the Lautenberg Amendment, *18 U.S.C. § 922(g)(9)*, which makes it unlawful for a person convicted "in any court of a misdemeanor crime of domestic violence" to possess or receive any firearm or ammunition that has been shipped or transported in interstate or foreign commerce.[4]

> 4 Congress enacted this provision in order to ensure that perpetrators of domestic violence who are only convicted of misdemeanors are subject to the same gun control restrictions in place for convicted felons. *United States v. Castleman, 134 S. Ct. 1405, 1409, 188 L. Ed. 2d 426 (2014)*. Under Department of Defense (DoD) policy, a qualifying conviction for this provision includes a conviction at a general or special court-martial of "an offense that has as its factual basis, the use . . . of physical force . . . committed by a current or former spouse." DoD Instruction 6400.06, *Domestic Abuse Involving DoD Military and Certain Affiliated Peronnel*, E2.8, ¶ 6.1.4.3 (21 August 2007, incorporating Change 1, 20 September 2011).

The appellant invites us to find a military judge's failure to inquire into an accused's knowledge of the ramifications of a "domestic violence" conviction to be comparable to a failure to inquire into his knowledge of sex offender registration requirements. *Cf. United States v. Riley, 72 M.J. 115, 122 (2013)* (failure to inquire into [*18] the accused's knowledge of sex offender registration requirements results in a substantial basis to question the providence of a guilty plea). We decline to do so.

It is important to note that, under the facts of this case, the appellant's conviction for a "domestic violence" offense created no consequences for him beyond those he already faced. Federal law has long prohibited firearm possession by someone convicted "in any court of a crime punishable by imprisonment for a term exceeding one year." *18 U.S.C. § 922(g)(1)*. Because the appellant was convicted of multiple crimes punishable by over one year of confinement, his "domestic violence" conviction had no effect on his ability to possess a firearm. Furthermore, there is no evidence this "domestic violence" conviction is negatively affecting his ability to find a job or pick his daughter up from school, as opposed to his other convictions.

Extending *Riley* to cover the scenario in this case would extend those requirements to every court-martial in which the accused is pleading guilty to an offense with a potential term of confinement over one year. Although the restriction on gun ownership by such individuals has been in place for years, no military appellate [*19] court has ever required an accused to be advised of those restrictions during his guilty plea inquiry. We decline to undertake such a dramatic step in a case where the appellant has not personally indicated any concern about his ability to possess a firearm.

For similar reasons, we do not find his trial defense counsel were ineffective even if they failed to advise him of these ramifications that would follow from his guilty plea to a crime of domestic violence. When an appellant asserts that his counsel provided ineffective assistance "[i]n the context of a guilty plea, the prejudice question is whether 'there is a reasonable probability that, but for counsel's errors, [the appellant] would not have pleaded guilty and would have insisted on going to trial.'" *United States v. Rose, 71 M.J. 138, 144 (C.A.A.F. 2012)* (quoting *Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985))*. We find no such reasonable probability here.

Based on the charges in the case, the appellant faced a maximum punishment of 20 years of confinement and a dishonorable discharge. Prior to trial, the appellant submitted an offer for a pretrial agreement in which he would plead guilty if the convening authority would limit confinement to no more than 24 months if a punitive discharge was adjudged, and 30 months if no punitive [*20] discharge was adjudged. The convening authority declined the offer. The appellant then successfully modified the offer, and the convening authority agreed to disapprove any confinement in excess of three years. In light of the appellant's willingness to concede up to an additional year of confinement in order to gain some certainty prior to trial, we find unpersuasive his

contention now on appeal that he would have plead not guilty and litigated the case simply to avoid the comparatively less onerous consequences of a conviction for a crime of domestic violence.

Sentence Appropriateness

The appellant's final contention is that his punishment was overly harsh, particularly in light of his co-conspirator's sentence. This court "may affirm only . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." *Article 66(c)*, UCMJ, *10 U.S.C. § 866(c)*. We review sentence appropriateness de novo, employing "a sweeping congressional mandate" to ensure "a fair and just punishment for every accused." *United States v. Baier, 60 M.J. 382, 384-85 (C.A.A.F. 2005)* (citations omitted).

The appropriateness of a sentence generally should be determined without reference or comparison [*21] to sentences in other cases. *United States v. Ballard, 20 M.J. 282, 283 (C.M.A. 1985)*. We are not required to engage in comparison of specific cases "except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases." *United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999)* (quoting *Ballard, 20 M.J. at 283*). The "appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.'" *Id*. If the appellant satisfies his burden, the Government must then establish a rational basis for the disparity. *Id*.

We find that the appellant's case and that of SSgt JG are closely related. *See United States v. Kelly, 40 M.J. 558, 570 (N.M.C.M.R. 1994)* (closely related cases "involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design"); see also *Lacy, 50 M.J. at 288* (examples of closely related cases include co-actors in a common crime, service members involved in a common or parallel scheme, or "some other direct nexus between the service members whose sentences are sought to be compared"). The appellant's conduct arose from a common scheme with SSgt JG: they shared a common goal of getting SSgt JG excused from her upcoming deployment; they jointly planned the stories they would [*22] tell law enforcement after the shooting; and SSgt JG even encouraged the appellant to go through with the plan after he could not initially pull the trigger.

We do not find, however, that the sentences are highly disparate. While both the appellant and SSgt JG received approximately 6 months of confinement, other aspects of the sentence were distinct. SSgt JG received--in addition to 179 days confinement--3 months of hard labor without confinement, forfeiture of $994.00 pay per month for 6 months, reduction to E-1, and a reprimand. The appellant received--in addition to 6 months confinement----a bad-conduct discharge and a reduction of one grade to E-4. Accordingly, this case requires us to compare the bad-conduct discharge the appellant received to 6 months of two-thirds forfeiture of pay, 3 months of hard labor without confinement, and a reduction of an additional three grades which his co-conspirator received. While the bad-conduct discharge may have longer-lasting consequences, the distinct aspects of SSgt JG's punishment would be considered severe in their own right. As our superior court noted, "[t]he test in such a case is not limited to a narrow comparison of the numerical values of the [*23] sentences at issue." *Lacy, 50 M.J. at 289*. While the punishments are different, the differences are not of such a magnitude as to render the appellant's sentence unfair or unjust.

Even if we found that the sentences were highly disparate, we would still find that a rational basis for the disparity exists. Although they participated in a common scheme, the appellant is the one who actually pulled the trigger and shot his co-conspirator. This distinction alone provides a sufficient basis for the difference between the two sentences. Furthermore, SSgt JG was only convicted of malingering, whereas the appellant was convicted of aggravated assault, child endangerment, obstructing justice, and conspiracy to commit malingering.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. *Articles 59(a)* and *66(c)*, UCMJ, *10 U.S.C. §§ 859(a)*, *866(c)*. Accordingly, the approved findings and sentence are

AFFIRMED.

ALLRED, Chief Judge, concurs.

CONCUR BY: HECKER (In Part)

DISSENT BY: HECKER (In Part)

DISSENT

HECKER, Senior Judge, concurring in part and dissenting in part:

I concur with the majority opinion other than its conclusion that the appellant's plea to obstruction of justice [*24] was provident, and I respectfully dissent from that portion of the opinion. Although I agree that false statements to civilian investigators could, under certain circumstances, result in a reasonably direct and palpable injury to good order and discipline in the armed forces by harming the orderly administration of military justice, I find the factual and legal predicate for such a conclusion to be lacking in this case.

To the extent the appellant's lie to a civilian detective harmed the orderly administration of military justice, I find the plea cannot be sustained on the factual admissions made by the appellant as the military judge did not explain that theory or how it related to the facts relayed by the appellant, who only referenced how his lie impeded the civilian detective's investigation into the intruder story and into him for discharging the weapon. An accused has a right to know under what legal theory he is pleading guilty, and "this fair notice resides at the heart of the plea inquiry." *United States v. Medina, 66 M.J. 21, 26 (C.A.A.F 2008)*. "The providence of a plea is based not only on the accused's understanding and recitation of the factual history of the crime, but also on an understanding of how the law relates to those [*25] facts." *Id*. (citing *Care, 40 C.M.R. at 250-51*).

Instead, the military judge focused on whether the military would have become involved and, once involved, how extensive its involvement would be. When asked how his lie to the civilian detective caused an injury to good order and discipline, the appellant first referenced the "extra investigation [by military investigators] that took place in order to find out the truth." This cannot serve as the basis for the guilty plea, however, because he had already told the truth by the time military investigators arrived to conduct their interview, and there is no indication in the record that any "extra investigation" occurred. The military judge's reaction to this explanation indicated that she too found this statement insufficient to support this element of the guilty plea, as does the majority here.

The appellant then stated his belief the military investigators would have been "less involved" if he had not lied to the detective and that the civilians would not have contacted the military if he had outright admitted to shooting his wife to help her avoid a deployment. After hearing this, the military judge then found the plea provident. I disagree.

The first basis cited [*26] by the appellant is simply a restatement of his inadequate "extra investigation" point. As to his second point, as revealed during the guilty plea inquiry, the military was already involved in the situation before he lied to the detective, based on a phone call made by the appellant to his first sergeant. Thus, once this call was made, it would not matter whether the appellant told the civilian detective the truth or a lie--the military was already involved. This apparent inconsistency between the appellant's statement and other facts in the record was not resolved, and therefore, I find that the appellant's plea improvident and that the military judge erred in accepting it.

Despite this conclusion, I would not provide the appellant with any sentence relief nor order a sentence rehearing. At his court-martial, the appellant was sentenced using a maximum period of confinement of 20 years, 5 years of which come from the obstruction of justice specification. I do not find this to be a "dramatic change in the penalty landscape. *See United States v. Riley, 58 M.J. 305, 312 (C.A.A.F. 2003)* (a "dramatic change in the 'penalty landscape'" lessens an appellate court's ability to reassess a sentence). Additionally, the evidence of the appellant's lie [*27] to civilian detectives would have been before the sentencing authority even in the absence of an obstruction charge. *See* Rule for Courts-Marital 1001(b)(4). It was part of the facts and circumstances surrounding the appellant's conspiracy with, and aggravated assault of, his wife and was an aggravating circumstance directly relating to those charges. *See id*.

Given this, I am confident that, absent this error, the panel would have adjudged a sentence no less severe than that approved by the convening authority and therefore would reassess the sentence to the one adjudged by the panel--a bad-conduct discharge, confinement for 6 months, and reduction to E-4. *See United States v. Doss, 57 M.J. 182, 185-86 (C.A.A.F. 2002)* (citing *United States v. Sales, 22 M.J. 305, 308 (C.M.A. 1986)*; *United States v. Reed, 33 M.J. 98, 99 (C.M.A. 1991)*.