

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

U N I T E D S T A T E S,)	FINAL BRIEF ON BEHALF OF
Appellee)	APPELLANT
)	
v.)	
)	Army Misc. Dkt. No. 20140425
)	
Sergeant First Class (E-7))	USCA Dkt. No. 16-0091/AR
DJOULOU K. CALDWELL,)	
United States Army,)	
Appellant)	

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

Issue Presented

WHETHER THE MILITARY JUDGE COMMITTED PLAIN
ERROR WHEN HE INSTRUCTED THE PANEL USING A
NEGLIGENCE STANDARD FOR MALTREATMENT OF A
SUBORDINATE IN VIOLATION OF ARTICLE 93.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On April 17 and May 20 - 22, 2014, Sergeant First Class (SFC) Djoulou K. Caldwell, was tried at Joint Base Lewis-McChord, Washington, before a panel composed of officer and enlisted members sitting as a general court-martial. Contrary to his pleas, the panel convicted SFC Caldwell of maltreatment

of a subordinate and abusive sexual contact, in violation of Articles 93 and 120, UCMJ, 10 U.S.C. §§ 893 and 920 (2006). The panel sentenced SFC Caldwell to reduction to Private (E-1) and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

On August 25, 2015, the Army Court affirmed the findings and the sentence. (JA 1). Sergeant First Class Caldwell was notified of the Army Court's decision and petitioned this Court for review on October 26, 2015. On November 9, 2015, this Honorable Court granted appellant's petition for review.

Statement of Facts

The military judge instructed the panel members that:

"Maltreatment" refers to treatment, when viewed objectively under all the circumstances, is abusive or otherwise unwarranted, unjustified, and unnecessary for any lawful purpose and that results in physical or mental harm or suffering, or reasonably could have caused, physical or mental harm or suffering.

(JA 144).

Summary of Argument

The panel convicted SFC Caldwell of maltreatment after being instructed to apply a negligence standard. Article 93, UCMJ, is silent with respect to *mens rea*. When a criminal statute is silent, courts must utilize a standard greater than negligence. See, *United States v. Elonis*, 135 S. Ct. 2001 (2015). Although *Elonis* was decided subsequent to SFC Caldwell's

trial, the error is now apparent on direct appeal and is therefore plain. Because SFC Caldwell was convicted under an erroneous theory of guilt, the error was not harmless. Affirming his conviction under an alternate theory of guilt would materially prejudice SFC Caldwell's substantial right to defend himself.

Argument

WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR WHEN HE INSTRUCTED THE PANEL USING A NEGLIGENCE STANDARD FOR MALTREATMENT OF A SUBORDINATE IN VIOLATION OF ARTICLE 93.

Standard of Review

Whether the members were properly instructed is a question of law reviewed *de novo*. When there is no objection to an instruction at trial, this Court reviews for plain error. *United States v. Payne*, 73 M.J. 19, 22 (C.A.A.F. 2014).

Law and Argument

Plain error requires the appellant to show that (1) there was error, (2) the error was plain or obvious, and (3) the error materially prejudiced a substantial right of the accused. *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011).

a. Instructing the panel on a negligence standard was erroneous in light of *Elonis*.

The statutory text of Article 93, UCMJ, is silent as to *mens rea*. Its explanatory text elaborates that maltreatment "must be measured by an objective standard." *Manual for Courts-*

Martial, United States, pt. IV ¶ 17.c.(2) (2012) [hereinafter MCM]. The instructions in the Military Judges' Benchbook utilize that objective standard. (JA 171). And that objective standard was instructed to the panel in this case. (JA 144).

A statute failing to specify a required mental state does not mean that none exists. The Supreme Court has repeatedly held that mere omission from a criminal enactment of any mention of criminal intent should not be read as dispensing with it.

Elonis, 135 S. Ct. at 2009 (internal quotations and citations omitted). This rule of construction reflects the basic principle that wrongdoing must be conscious to the criminal. *Id.*

To that end, "[w]hen interpreting federal criminal statutes that are silent on the required mental state," courts should "read in" a *mens rea* sufficient to separate wrongful conduct from innocent conduct. *Id.* at 2010. Sometimes knowledge is sufficient. In other cases, a showing of intent is required. *Id.*

A reasonable person standard, on the other hand, "is a familiar feature of civil liability in tort law, but is inconsistent with the conventional requirement for criminal conduct - awareness of some wrongdoing." *Id.* at 2011 (emphasis in the original) (quoting *Staples v. United States*, 511 U.S. 255, 606-607 (1994)).

In *Elonis*, the appellant made various communications using Facebook. He posted a photo holding a toy knife to a co-worker's

throat with the caption "I wish." *Id.* at 2005. After being fired, he alluded to a "sinister plan" at work. *Id.* He referenced killing his wife. *Id.* He asked whether his wife's restraining order against him was thick enough to stop a bullet. *Id.* at 2006. He stated he would commit a heinous school shooting. *Id.* And, after being visited by the FBI, he discussed slitting the agent's throat with a knife. *Id.*

At trial, Elonis requested the judge instruct the jury that the government must prove he intended to communicate a threat. The judge rejected that request. As was done here, where the military judge instructed the panel to use an objective standard to decide whether SFC Caldwell's conduct amounted to maltreatment, the judge in *Elonis* instructed the jury to apply an objective standard in determining whether Elonis's communications amounted to threats. *Id.* at 2007.

The Court recognized this as a negligence standard and concluded that negligence is not sufficient to support a conviction for communicating a threat. *Id.* at 2013. The Court held that the mental state requirement must apply to "the crucial element separating legal innocence from wrongful conduct." It was not enough that Elonis knew he was communicating something. Wrongfulness turned on whether that *something* contained a threat. Thus, the mental state must apply

to the fact that the communication contained a threat. *Id.* at 2011.

Here, it is not enough that SFC Caldwell acted in a certain way toward a subordinate. What separates legal innocence from wrongfulness is whether the conduct amounts to maltreatment. The military judge committed error, therefore, by instructing the panel that they could convict if they found SFC Caldwell's behavior objectively amounted to maltreatment without any regard to SFC Caldwell's knowledge or intent.

b. The error is plain because it is plain while on direct appeal.

Instructions are tested for plain error based on the law at the time of appeal. *United States v. Girouard*, 75 M.J. 5, 11 (C.A.A.F. 2011). This case was tried prior to the decision in *Elonis*. Now on appeal, however, it is clear that when a criminal statute is silent as to the required mental state, courts may not read in a mental state of negligence. Accordingly, the error is clear.

c. Sergeant First Class Caldwell was materially prejudiced when he was convicted under an insufficient theory of criminal liability. Affirming his conviction under an alternative theory would deprive him of his right to defend himself.

Sergeant First Class Caldwell stands convicted of negligently maltreating a subordinate based on the instructions provided to the panel. This creates material prejudice to SFC

Caldwell's substantial rights - specifically, the right to not be convicted under a now defunct theory of criminal liability.

This conclusion ended the Supreme Court's analysis in *Elonis*. The court simply held:

Elonis's conviction cannot stand. The jury was instructed that the Government need prove only that a reasonable person would regard Elonis's communications as threats, and that was error.

Elonis, 135 S. Ct. at 2014. Thus, the court appears to have concluded either that under these circumstances testing for harmlessness was unwarranted or that the application of the analysis was so straightforward that the court omitted it altogether, despite calls from the dissent to remand for a harmless error analysis. *Elonis*, 135 S. Ct. at 2018 (Alito, J. concurring in part and dissenting in part).

In support of his proposition, Justice Alito cited *United States v. Neder*, 527 U.S. 1 (1999). This Court followed *Neder*'s reasoning in *Payne*. Specifically, this Court held that when an element is "uncontested and supported by overwhelming evidence," failing to instruct on that element can be harmless. *Payne*, 73 M.J. at 26; see also *United States v. Upham*, 66 M.J. 83, 86-87 (C.A.A.F. 2008) (where an erroneous instruction raises constitutional error regarding an element, the proper analysis is whether the element was contested, and if not, whether the element was supported by overwhelming evidence).

Payne was tried for an attempt. The military judge failed to instruct that the accused must take a "substantial step" which "tended to effect the commission of the intended offense." *Payne*, 73 M.J. at 24-25. At trial, overwhelming evidence supported those elements and the accused did not contest them, instead relying upon an entrapment defense. *Id.* at 25. Under those circumstances, this Court found the error harmless.

Payne is markedly different from this case. *Payne* and his counsel were able to mount a defense and select a strategy based on a fixed state of law. The error in *Payne* prevented the panel from rendering a verdict on the omitted elements, but it did not deprive *Payne* of the opportunity to challenge those elements at trial or shape his defense strategy based on the elements.

Here, a negligence standard is not sufficient to sustain a conviction under Article 93, UCMJ. However, based upon the interpretation of Article 93 applicable at his trial, SFC Caldwell shaped his defense with the understanding that a negligence standard was at issue. Whatever standard of *mens rea* this Court ultimately adopts, be it recklessness, knowledge, or intent, SFC Caldwell was not tried under that standard. If, for example, this Court were to adopt a reckless standard, it makes little sense to ask whether recklessness was contested or controverted when none of the parties at trial believed

litigating the question of recklessness was relevant to the outcome of the case.

For this Court to affirm SFC Caldwell's conviction, it would have to find he acted with a *mens rea* greater than negligence. But, unlike *Payne*, that would mean affirming an offense based on a theory not presented to the trier of fact, something which this Court may not do. *United States v. Riley*, 50 M.J. 410, 415 (citing *Chiarella v. United States*, 445 U.S. 222, 236 (1980)). "To do so [would] offend[] the most basic notions of due process, because it violates an accused's right to be heard on the specific charges of which he [or she] is accused." *Riley*, 50 M.J. at 415 (quoting *Dunn v. United States*, 442 U.S. 100, 106 (1979)).

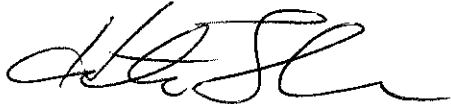
"Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." *Dunn*, 442 U.S. at 106. Affirming SFC Caldwell's conviction under whatever new standard this Court adopts pursuant to *Elonis* would materially prejudice SFC Caldwell by depriving him of his substantial right to do so.

Conclusion

Wherefore, SFC Caldwell requests that this Honorable Court set aside and dismiss Specification 1 of Charge III.



SCOTT A. MARTIN
Captain, Judge Advocate Appellate
Defense Counsel
Defense Appellate Division
US Army Legal Services Agency
9275 Gunston Road, Suite 3200
Fort Belvoir, Virginia 22060
(703) 693-0725
USCAAF No. 36570



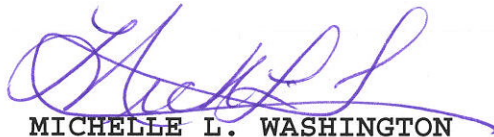
HEATHER L. TREGLE
Captain, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar Number 36329



JONATHAN F. POTTER
Lieutenant Colonel, Judge Advocate
Chief, Complex Litigation
Defense Appellate Division
USCAAF Bar Number 26450

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of
United States v. Caldwell, Army Dkt. No. 20140425, USCA Dkt. No.
_____/AR, was electronically filed with the Court and
Government Appellate Division on December 9, 2015.



MICHELLE L. WASHINGTON
Paralegal Specialist
Defense Appellate Division
(703) 693-0737