IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

ALAN J. KILLION, JR.
Airman First Class (E-3), USAF
Appellant.

Crim. App. No. S32193
USCA Dkt. No. 15-0425/AF

BRIEF IN SUPPORT OF PETITION GRANTED

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

Issues Presented

I.

WHETHER APPELLANT'S CONVICTION FOR PROVOKING SPEECH IS LEGALLY INSUFFICIENT BECAUSE "UNDER THE CIRCUMSTANCES" HIS WORDS WERE NOT REASONABLY LIKELY TO PROVOKE VIOLENCE.

II.

WHETHER THE MILITARY JUDGE'S INSTRUCTIONS REGARDING PROVOKING SPEECH WERE DEFICIENT UNDER THE FACTS AND CIRCUMSTANCES OF APPELLANT'S CASE.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals reviewed this case pursuant to Article 66(c), UCMJ, affirming the approved findings and sentence on 28 January 2015 (J.A. 11). This Court granted review, and has jurisdiction pursuant to Article 67, UCMJ.

Statement of the Case

At a special court-martial, Appellant pleaded guilty to charges of drunk and disorderly conduct and unlawful entry in violation of Article 134, UCMJ (J.A. 12). Subsequently, a panel

of officer and enlisted members found Appellant guilty of wrongfully using provoking speech in violation of Article 117, UCMJ (*Id.*). The panel acquitted him, however, of a charge and specification of resisting apprehension in violation of Article 95, UCMJ (*Id.*). The approved sentence included a reprimand, reduction to E-1, 14 days of confinement, and a bad-conduct discharge (J.A. 13).

Statement of Facts

After an evening of drinking, Appellant became intoxicated and found himself restrained on a gurney at Osan AB emergency room in the early hours of 20 July 2013 (J.A. 60). On either side of Appellant were two security forces members—SSgt Anthony Vick at his right and SSgt Rayford McKinley at his left (J.A. 207). They had apprehended Appellant earlier for drunk and disorderly conduct (J.A. 42-43, 60, 102). The medical staff at Osan AB began treating Appellant for minor injuries and a potential "altered mental status and possible drug and alcohol overdose or intoxication" (J.A. 72, 90). Appellant's extreme intoxication was confirmed when a blood sample tested at approximately three times the legal limit (J.A. 90, 100). A drug screen was negative (J.A. 73). As the two security forces members held Appellant down, he grunted and yelled at the medical personnel who were present (J.A. 60).

Additional relevant facts are set out in the argument sections, below.

Summary of the Argument

This Honorable Court should reverse Appellant's conviction for provoking speech for two reasons. First, Appellant's conviction is legally insufficient because his words were uttered to law enforcement and medical professionals with extensive training while he was under significant restraint. Accordingly, no rational trier of fact could have found that Appellant's words were reasonably likely to provoke his listeners to violence. Second, the military judge provided deficient instructions to the court-martial members by failing to adequately define the second element of provoking speech and rejecting a tailored defense instruction that accurately stated the law and was not substantially covered by the other instructions.

Argument

I.

Appellant's conviction for provoking speech is legally insufficient because "under the circumstances" his words were not reasonably likely to provoke violence.

Facts

The charging instrument identified the victims of Appellant's speech as Capt JK, Capt (then-1st Lt) MDS, and SSgt

KMB (J.A. 22). All of these individuals were medical staff at Osan AB hospital.

Testimony at trial indicated Appellant uttered certain offensive statements that were identified in the charging instrument.[1] SSgt Vick and Capt JK testified that Appellant referred to Capt JK as an "Asian douche bag" (J.A. 43, 92). Capt MDS testified that Appellant stated in a general manner when he was staring off into space that he was going to "kill you all" (J.A. 75, 77). SSgt KMB testified that Appellant said if he was not released "he would kill us all" and in the same breath said that "[s]he will come and kill us all" (J.A. 103). SSgt KMB said that he was "pretty sure" Appellant "called the nurse a cunt" (*Id.*). Likewise, SSgt Vick testified that Appellant made generalized statements that "he wanted to kill people, kill himself" or that "he would kill us," and referred to "the female captain" as "a cunt" (J.A. 43-44).

Capt JK is a physician who regularly worked in the emergency room (J.A. 89). He identified Appellant as a patient in his care at the emergency room on the night in question (*Id.*). When Capt JK first encountered Appellant, he was in the trauma bay where, inter alia, intoxicated and combative patients

[1] SSgt Vick, SSgt KMB, and Capt MDS also testified that Appellant made other uncharged statements to SSgt KMB and civilian Korean medical technicians (J.A. 43, 75, 104-05). Of course, the statements to Korean medical technicians could not violate Article 117, UCMJ because these individuals are not "subject to the code."

are brought in (J.A. 90). There were at least three or four individuals physically restraining Appellant (J.A. 91). Capt JK testified that later on, the staff placed Appellant in "four-point soft restraints" to keep him from leaving the hospital and removing intravenous fluids that were being pumped into him (*Id.*).

Capt JK testified that he received training in medical school during clinical rotations and residency on how to treat verbally abusive patients and specifically patients who make "racial comments" (J.A. 94-95). He also led training at Osan AB to nurses and medical technicians involving how to interact with drunk patients (J.A. 97). Capt JK testified that training on dealing with disorderly patients was "standard curriculum" during medical school, and that he personally received additional training as an emergency room and family practitioner (J.A. 96-97). Capt JK said he found Appellant's comments offensive, but responding violently never even crossed his mind due to his training and experience as both an officer and physician (J.A. 97). Capt JK testified that he had never seen a physician become violent with a verbally abusive patient, but that he had seen both nurses and medical technicians have to "get physical" to control patients before (J.A. 99).

Capt MDS, a clinical nurse in the emergency department, testified that she had five years of professional nursing

experience (J.A. 71). She treated Appellant at the Osan AB emergency room, and testified that he was "restrained" during her interaction with him, but "would try to physically remove the restraints, wiggle out of them" (J.A. 73). She indicated that during Appellant's entire time at the emergency room security forces personnel were present, and there were six individuals stationed at Appellant's head, arms, and legs to keep him restrained (J.A. 74). On two occasions prior to sedating Appellant, he would appear to calm down and the staff would start to loosen one of the restraints to see if Appellant could control himself, but "he would just go crazy again" and the staff would reapply any restraint that had been loosened (J.A. 74-76). Because the staff could not "get a good assessment" on Appellant, Capt JK ultimately decided to "put him down chemically" (J.A 74).

Capt MDS stated she was initially afraid for her safety when encountering Appellant, but that the "show of force" by security forces and staff made her feel better (J.A. 76). She was also initially offended by comments that Appellant made, but when he spoke gibberish such as referring to "the Queen of Zelba" she ultimately believed he was just "in and out" (J.A. 77).

Capt MDS noted that while Appellant's words were offensive,

> Q. … you were able to keep your professional bearing and execution of your duties as a nurse that night?

A. Yes.

Q. And you were able to keep your composure?

A. Yes.

Q. Did your training and professionalism play a part of that in your ability to maintain your composure?

A. Yes, in addition to the fact that I felt compassion for him. I felt really bad for him.

(J.A. 87).

Capt MDS had seen a doctor "brace" a patient to get their attention, but had otherwise never seen a medical professional retaliate in response to a patient's statements (*Id.*). Likewise, she testified that this would be outside her experience of "general medical practice" (*Id.*).

SSgt KB testified that he had been a medical laboratory technician for just under six years, five of which involved working in emergency medicine (J.A. 101, 107). SSgt KB indicated that every six months he received competency training involving patient interaction (J.A. 108). He was on call at the emergency room when Appellant was brought in by security forces as a patient (J.A. 102). SSgt KB described Appellant as "irrational, very loud" and "irate" (J.A. 102). SSgt KB testified that Appellant was "in cuffs" when he initially encountered him and eventually became "fully restrained" on the bed with the assistance of six individuals—which included two security forces members (J.A. 104). SSgt KB explained that the hospital had restraints built into the bed that "will clamp down

on each wrist and on each leg" that were used—with some difficulty—on Appellant (J.A. 105). In addition to the passive restraints, the two security forces members physically held Appellant down by the shoulders (J.A. 106). SSgt KB testified that there was not "any chance" he would react violently to Appellant's statements, and it would be unusual for other lab technicians to react violently to a disorderly patient (J.A. 109).

Standard of Review

Legal sufficiency is reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt." *United States v. Humphreys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))).

Legal sufficiency review is limited to whether the conduct charged is supported by the evidence, not whether some evidence in the record could hypothetically have supported a related charging scheme under the same statute. *See United States v. Plant*, ___ M.J. ___, No. 15-0011/AF, 2015 CAAF Lexis 609, *3 (C.A.A.F. 2015) (observing that the government's charging scheme

defines the field of evidence that can be considered on legal sufficiency review because of the accused's "substantial right to be tried only on charges presented in a specification") (internal alterations and citation omitted).

Law

Article 117, UCMJ provides: "Any person subject to this chapter who uses provoking or reproachful words or gestures towards any other person subject to this chapter shall be punished as a court-martial may direct." The Manual for Courts-Martial provides that the elements of the offense are as follows:

> (1) That the accused wrongfully used words or gestures toward a certain person;
> (2) That the words or gestures used were provoking or reproachful; and
> (3) That the person toward whom the words or gestures were used was a person subject to the code.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (MCM) pt. IV-61, ¶42.b (2012 ed.).

Article 117, UCMJ is not designed to punish all language that a decent society may find repugnant; instead, it is focused on maintaining peace and precluding violence. *See United States v. Davis*, 37 M.J. 152, 154 (C.M.A. 1993). The Court of Military Appeals noted this singular purpose by citing favorably to Col Winthrop's treatise, observing that the "rationale behind the prohibition was to serve as a check against 'manifestations of a hostile temper as, by inducing retaliation.'" *Id.* (quoting W.

Winthrop, *Military Law and Precedents* 590 (2d ed. 1920 Reprint)). This particular quotation was somewhat truncated, as Col Winthrop went on to emphasize in the same sentence that Article 117 was intended to prevent that violent retaliation that "might lead to duels or other disorders." W. Winthrop, *Military Law and Precedents* 590 (2d ed. 1920 Reprint).

The "design" of Article 117 is, thus, "to prevent retaliation by individuals who are the hearers of the words." *Davis*, 37 M.J. at 154; *see also United States v. Holiday*, 16 C.M.R. 28, 32 (C.M.A. 1954) ("This Article is designed to prevent the use of violence by the person to whom such speeches and gestures are directed, and to forestall the commission of an offense by an otherwise innocent party.").

Through the proper lens of violence prevention, the evidence in Appellant's case falls short. Here, based on the specialized, professional audience to Appellant's speech, *i.e.*, the "hearers," and the fact that he was restrained throughout the entire utterance of any offensive words, there was no reasonable likelihood of a violent reaction based on Appellant's speech.

A. Appellant's statements while intoxicated to medical professionals in the course of their duty to provide treatment to the Appellant—who was under constant restraint by law enforcement officers—were not of a nature to provoke violence.

Article 117, UCMJ requires, *inter alia*, "[t]hat the words or gestures used were provoking or reproachful." MCM, pt. IV-

62, ¶42.b.(2). For these purposes, "'provoking' and 'reproachful' describe those words or gestures which are used in the presence of the person to whom they are directed and which a reasonable person would expect to induce a breach of the peace under the circumstances." *Id*. at ¶42.c.(1).

As Appellant is charged with just words (not gestures), the key portion for this case is "words . . . which *a reasonable person* would expect to induce a breach of the peace *under the circumstances*." *Id*. (emphasis added).

For this analysis, what "a reasonable person would expect" invokes a term of art—the legal fiction of the reasonable person. The "reasonable person" standard is perhaps best known as a central component of tort law. *See, e.g.*, RESTATEMENT SECOND, TORTS § 302, Comment a ("In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act."); RESTATEMENT THIRD, TORTS § 3, Comment a ("[T]he 'reasonable care' standard for negligence is basically the same as a standard expressed in terms of the 'reasonably careful person' . . . .").

The MCM's explication of Article 117, UCMJ is not alone in incorporating the reasonable person standard into criminal law under the UCMJ. *See, e.g., United States v. Oxendine*, 55 M.J. 323, 326 (C.A.A.F. 2001) (discussing the "reasonable person" as

a “long-standing common-law concept,” but rejecting that the standard must adopt the young age of the service members participating in a dangerous enterprise); *United States v. Maxi*, 25 C.M.R. 418, 420-21 (C.M.A. 1958) (discussing the concept of the reasonable person in weighing the adequacy of provocation to mitigate murder to manslaughter under Article 119, UCMJ); reasonable person); *United States v. Baker*, 24 M.J. 354, 356 (C.M.A. 1987) (discussing the “reasonable person” standard in the context of a culpably negligent assault by offer).

The “reasonable person” standard has likewise been adopted in evaluating the availability of certain defenses. *See, e.g.*, Rule for Court-Martial (RCM) 916(e)(B) (Discussion) (noting “reasonable person” standard for self-defense and explaining what characteristics of the accused, victim, or circumstances are permissible to consider); *United States v. Lett*, 9 M.J. 602 (A.F.C.M.R. 1980) (observing that negligent self-defense deprives an accused of an accident defense under RCM 916(f)).

In *United States v. Adams*, 49 M.J. 182, 185 (C.A.A.F 1998), this Court endorsed a service court’s consideration of the status of a military policeman as a circumstance that should be considered in determining whether a reasonable person would have been provoked by certain speech. This Court declared that the reasonable person standard must be applied to “all the

circumstances of a case . . . in determining whether certain words are provoking." *Id.*

Although this Court has not explicitly endorsed the concept that the professional skills and training of the listener are an aspect of the "reasonable person" standard in evaluating the legal sufficiency of an Article 117, UCMJ conviction, such a conclusion is entirely consistent with a traditional understanding of that standard. *See* RESTATEMENT THIRD, TORTS § 12 ("If an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person.").

Here, Appellant's words were spoken in the presence of professionals with specialized training in the context of a treatment environment. Under these unique circumstances, where Appellants entire audience consisted of medical personnel and law enforcement, no rational trier of fact could have found that his words were likely to provoke violence.

1. Like police in the line of duty, medical providers performing their duties have thick skin and are not expected to react violently to offensive language.

In *United States v. Shropshire,* Judge Jack Rives observed that police are "trained to overlook verbal abuse . . . and to maintain a professional demeanor." *United States v. Shropshire,* 34 M.J. 757, 758 (A.F.C.M.R. 1992) (observing that it "is not

uncommon for a person under apprehension to hurl taunts at the police). The conclusion that police, as professionals with specialized training, are unlikely to breach the peace based on offensive language has been endorsed by several courts. *See Adams,* 49 M.J. at 184-85; *United States v. Gaston*, 2014 CCA Lexis 144 (Army Ct. Crim. App. 2014) (overturning a guilty plea under Article 117, UCMJ where the accused screamed obscenities at a military policeman) (Appendix A).

In *Davis*, the Court of Military Appeals upheld an Article 117, UCMJ conviction of an unrestrained accused who yelled obscenities at a military policeman in front of a crowded club. 37 M.J. at 153-54. The Court cited Judge Rives' analysis in *Shropshire* with approval, but distinguished the case on the ground that the accused in *Davis* was not "apprehended and handcuffed." The Court also cited the possibility that "other individuals who are part of the audience" may react to provoking words. *Id.* at 154.[2]

Here, unlike *Davis*, the "audience" was entirely composed of medical professionals and security forces members. Like police, medical professionals are unlikely to retaliate with violence against patients under their care. A "reasonable person," when evaluating "all of the circumstances" would not expect that

[2] The concurring opinion in *Davis* likewise noted the presence of other club members who heard the taunts of the accused as a basis to sustain the conviction. *See id*. at 156-57 (Wiss, J., concurring).

medical professionals engaged in caring for a drunk patient would breach the peace—even if they were subjected to opprobrious words.

While no one deserves to be called names, and especially not those whose duties are to care for Airmen in need, it is impossible to conclude that hearing insults or offensive language would be beyond expectation. Thus, like police in the line of duty, medical professionals in the line of duty and treating known drunk patients are expected to have thick skin. They are not an "average person" who may be sparked to violence at hearing offensive language. *See Shropshire*, 34 M.J. at 758 ("we find it appropriate to apply a separate standard to words directed at a policeman by a handcuffed suspect under apprehension, than to the same words said to an ordinary citizen.").

Moreover, in addition to the thick skin generally expected of medical professionals, the facts in this case further established that the affected medical professionals indeed did have such thick skin. All testified that they did not—and would not—react violently to a patient under the circumstances presented in this case.

2. Appellant was under constant restraint, making an expectation of a violent reaction even less reasonable.

Military courts have also looked to the physical circumstances to assess the reasonable likelihood of a violent

reaction, and have specifically explored situations with restrained Appellants. *See United States v. Thompson,* 46 C.M.R. 88, 90 (C.M.A. 1972) (overturning an Article 117 conviction because a trained confinement custodian would not open a cell door in response to the accused's words); *United States v. Shropshire*, 43 C.M.R. 214 (C.M.A. 1971) (assessing a conditional threat from someone under restraint); *Davis*, 37 M.J. at 155 (affirming conviction for provoking speech, yet noting that "[h]ere, appellant was neither apprehended and handcuffed nor confined in a prison cell.").

Here, several witnesses testified to the significant restraints imposed on Appellant at the Osan AB medical facility (J.A. 44, 51-52, 67, 74, 91, 93, 103-04). He was escorted by two Security Forces patrolmen, who stayed with him the entire time. Their presence was known to the medical providers. Moreover, Appellant had a "spit guard on his face" and physical bed restraints (J.A. 74, 91). Within an hour of arrival, the staff "just decided to put him down chemically" (J.A. 74, 93).

Given this situation, it is unreasonable to conclude that Appellant's words would cause a violent reaction in any of the medical professionals. Much like the prison guard in *Thompson* or the police in *Shropshire* (1971), the listener of the speech is not expected to be motivated to violence when the speaker is no real threat. As SSgt KMB stated:

> Q. Were you at all concerned for your safety, based on the comments that he was making?
>
> A. Well, our own safety, he was already restrained, so at that time -- so it wasn't a concern that he's going to actually physically do anything to us. But after the fact of restraining him, like, I don't think he could have did anything to us, even with everything he was doing.
>
> Q. When you first encountered him, was he already restrained?
>
> A. Yeah, he was - well, he wasn't fully restrained in the bed, but he was in cuffs, I believe. He was with security forces, so - I mean, we were - with the threat - we don't go - as medical technicians and everything, with all the threats we do not step near the patient until he's fully restrained, and after we restrain him.

(J.A. 103).

Overall, the Government failed to meet its burden with evidence that the words used by Appellant would be likely "to induce a breach of the peace under the circumstances." MCM, ¶42.c.(1). Instead, the trial counsel improperly called upon members to speculate as to the potential for violence and the possible reactions of an "average person" in his closing argument (J.A. 142-143, 164). This is not adequate evidence to affirm Appellant's conviction. *See United States v. Frey*, 73 M.J. 245, 249-50 (C.A.A.F. 2014) (confirming that "'knowledge of the ways of the world' conclusions" are not substitutes for actual evidence). Therefore, the finding of guilty to Charge III should be set aside.

B. Appellant's speech should be considered Constitutionally protected.

The First Amendment to the Constitution prohibits laws "abridging the freedom of speech." U.S. CONST., amend. I. It protects the expression of ideas, "even the expression of ideas the vast majority of society finds offensive or distasteful." *United States v. Wilcox*, 66 M.J. 442, 446 (C.A.A.F. 2008) (citing *Virginia v. Black,* 538 U.S. 343, 358 (2003); *R.A.V. v. City of St. Paul,* 505 U.S. 377, 395-96 (1992); *Texas v. Johnson,* 491 U.S. 397, 414 (1989)). The question to be considered, therefore, is whether Appellant's constitutional rights to free speech under the First Amendment extend to his intoxicated statements in the Osan AB hospital.

In the civilian context, the validity of legal restrictions on First Amendment rights regarding speech that incites or produces imminent lawless action or violence is whether "the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck v. United States*, 249 U.S. 47, 52 (1919); *Wilcox*, 66 M.J. at 448. This clear and present danger "extends to speech 'directed to inciting or producing imminent lawless action … likely to incite or produce such action.'" *Wilcox*, 66 M.J. at 448 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). The special circumstances of the military environment, however,

have been held to warrant additional burdens upon service members' First Amendment rights, allowing action that would otherwise violate the First Amendment, recognizing "the fundamental necessity for obedience, and the consequent necessity for imposition of discipline…." *Parker v. Levy,* 417 U.S. 733, 758 (1974). Yet, "[t]he proper balance must be struck between the essential needs of the armed services and the right to speak out as a free American. Necessarily, we must be sensitive to protection of 'the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.'" *Wilcox*, 66 M.J. at 447 (citations omitted).

Prior to application of the balancing of military interests and constitutional rights, the speech involved must first be found to be otherwise protected by the First Amendment. Fighting words are a category of well-defined and narrowly limited speech, the prevention and punishment of which is not protected by the First Amendment. *See Wilcox* 66 M.J. at 447 (noting that fighting words are "not protected by the First Amendment, regardless of the military or civilian status of the speaker."). The Supreme Court in *Chaplinsky* defined fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Wilcox*, 66 M.J. at 449 (quoting *Chaplinsky v. New Hampshire,* 315 U.S. 568,

572 (1942)). In *R.A.V. v. St. Paul*, the Supreme Court further explained "the reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey." 505 U.S. 377, 393 (1992) (emphasis in original).

Once past the threshold question of fighting words, the question of whether the Government can limit and criminalize Appellant's speech must be considered. Although the test for whether speech presents such a danger that it can be subject to criminal penalty, as applied to the Armed Forces, is lower than the "clear and present" danger applied in the civilian context, the burden remains on the Government to prove that the speech "interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to the loyalty, discipline, mission, or morale of the troops." *United States v. Brown,* 45 M.J. 389, 395 (C.A.A.F. 1996). The record of this case does not support a finding that the Government has met this burden.

In the context of criminalization of speech otherwise protected by the First Amendment, the Government is required to show a "'reasonably direct and palpable' connection between an appellant's statements and the military mission." *Wilcox,* 66 M.J. at 448 (citing *United States v. Priest*, 45 C.M.R. 338, 343

(C.M.A. 1972)). In this case, the record is devoid of any demonstration of harm resulting from Appellant's statements; in fact, quite the contrary is true—no one reacted, and the medical professionals were able to conduct their duties. The Government has, thus, failed to meet its burden to demonstrate that application of Article 117 to protected speech in this case is not vague and overly broad and prohibited by the First Amendment.[3]

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside the finding of guilty as to Charge III.

II.

The Military Judge's instructions regarding provoking speeches or gestures were deficient under the facts and circumstances of Appellant's case.

Facts

At trial, defense counsel moved for an instruction regarding the definition of "provoking and reproachful" words, in the context of the facts and circumstances of Appellant's case. *See* J.A. 114, 173. Specifically, defense counsel requested additional instruction on the effect of the "occupation, education, and training of the listener[s]" and consideration of "any unique circumstances in which the

[3] Appellant does not argue that Article 117 is facially unconstitutional, but rather that it violates his First Amendment rights as applied to his situation in this case.

statements were made" (J.A. 173). The Military Judge denied the defense request, noting "I do not believe the law is clear regarding the proposed language that the defense has requested" (J.A. 120).

In relevant part, the Military Judge instructed the members as follows:

> "Provoking and reproachful" describes only those words which are used in the presence of the person or persons to whom they are directed, and which by their very utterance have the tendency to cause that person to respond with acts of violence or turbulence. These words are sometimes referred to as fighting words.
> The test to apply is whether, under the facts and circumstances of this case, the words described in the specification would have caused an average person to react by immediately committing a violent or turbulent act in retaliation. Proof that a retaliatory act actually occurred is not required.

(J.A. 130).

In closing argument, trial counsel argued:

> We turn now -- that the words and gestures were provoking or reproachful. And those are words that have a tendency to cause the average person, not particularly Captain [JK], not particularly Sergeant [KMB], not particularly Captain [MDS], not any particular person, but the average person - the average person in the same circumstances -- to respond with immediate violence or turbulence.

(J.A. 142); *see also* J.A. 142-43 ("These are the circumstances in which you have to decide whether this is provoking words for the average person."); R. 334 (arguing to discount the unique circumstances of the case, stating "[n]one of that is relevant, because members, the standard is the average person.").

Standard of Review

This Court reviews the adequacy of a military judge's instruction *de novo*. *See United States v. Torres*, 74 M.J. 154, 157 (C.A.A.F. 2015); *United States v. Davis*, 73 M.J. 268, 271 (C.A.A.F. 2014). For prejudice, the Court "will consider the military judge's error by applying the harmless beyond a reasonable doubt standard—i.e., could a rational panel have found Appellant not guilty if they had been instructed properly?" *Id*. at 273 (citing *United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F.2006)).

Law

Rule for Courts-Martial (RCM) 920 requires a military judge to instruct the members on a "description of the elements of each offense charged." RCM 920(e)(1). The Rule likewise dictates that a military judge must give "[s]uch other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, sua sponte, should be given." RCM 920(e)(7).

"The military judge bears the primary responsibility for ensuring that mandatory instructions . . . are given and given accurately." *United States v. MacDonald*, 73 M.J. 426, 434 (C.A.A.F. 2014) (citing *United States v. Miller*, 58 M.J. 266, 270 (C.A.A.F. 2003)). Military judges must instruct the members

on the elements of each offense and explain available defenses. *United States v. Davis*, 73 M.J. 268, 272 (C.A.A.F. 2014).

When a party requests additional instructions beyond those required by RCM 920(e), this Court reviews the denial under a three pronged test: (1) is the requested instruction correct; (2) is it not substantially covered in the main instructions; and (3) is it on such a vital point in the case that the failure to give it deprived the accused of a defense or seriously impaired its effective presentation. *United States v. Carruthers*, 64 M.J. 340, 346 (C.A.A.F. 2007). Although military judges are given significant discretion in the form of these additional instructions, they give must be an accurate, complete, and intelligible statement of the law. *United States v. Behenna*, 71 M.J. 228, 232 (C.A.A.F. 2012).

Analysis

Here, the military judge's instructions were inadequate for at least two reasons.

First, the military judge failed to adequately instruct on a required element of Article 117. The second element of the offense of provoking speech is "[t]hat the words . . . were provoking or reproachful." MCM, pt. IV-62, ¶42.b.(2). "As used in the second element, 'provoking' and 'reproachful' describe those words . . . which a reasonable person would expect to induce a breach of the peace under the circumstances." *Davis*,

37 M.J. at 154 (citing MCM ¶42.c.(1)) (internal alterations omitted).

Particularly misleading was the military judge's assertion that "[t]he test to apply is whether . . . the words described in the specification would have caused an *average* person to react" (J.A. 130) (emphasis added). Conflating the "reasonable person" with the "average" person is a distortion of that legal standard. The "reasonable person" standard is not a democratic concept reduced to a mere "average." As Judge Learned Hand famously observed:

> There are yet, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves. Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission

The T.J. Hooper, 60 F. 2d 737, 740 (2d Cir. 1932).

The military judge, accordingly, failed to accurately instruct on the second element of the offense in question. In reducing the standard for provoking speech to that which might induce an "average person" to breach the peace, the military judge enabled the trial counsel's argument that the panel should disregard evidence that undermined the government's case. Trial counsel called upon the members to ignore the circumstances of

Appellant's case, and instead apply an "average person" standard to the utterances (J.A. 142, 163). The military judge's instructions permitted this sort of argument.

Second, the military judge failed to properly tailor instructions in response to the defense's request. Although it is permissible to instruct a panel to consider "all circumstances," *see Adams*, 49 M.J. at 185, the defense's requested instruction was appropriate and should have been given to the panel. As discussed above, Article 117 is intended to prevent violence "by individuals who are the hearers of the words." *Davis*, 37 M.J. at 154. It is, therefore, in keeping with the statutory purpose and text of Article 117 to instruct the members that they may consider the "occupation, education, and training of the listener" in determining whether the second element of provoking speech was met. Further, it was an accurate statement of the law under *Davis*, *Adams*, *Shropshire*, and *Thompson* to instruct the panel to consider "any unique circumstances in which the statements were made," such as the fact that the speaker was under restraint (J.A. 173).

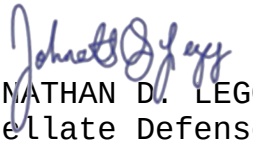
These areas were not substantially covered by the military judge's instructions, and enabled the trial counsel to divert the attention of the panel to a hypothetical "average person" rather than the specific facts and circumstances of the case.

The military judge's failure to give the requested instruction seriously impaired the defense's theory of the case. The defense never challenged that certain offensive words were uttered. Rather, the defense's trial strategy was to demonstrate that offensive words were not reasonably likely to incite a breach of the peace when made by an intoxicated patient under restraint by security forces members and the care of medical professionals. The success of this defense strategy depended on the military judge accurately instructing the members on the issues of restraint and professional status of the listeners. His refusal to do so torpedoed the defense's ability to successfully present this theory to the panel.

Enabled by the military judge, the trial counsel asked the members to consider Appellant's words, but requested that the members ignore that these words were spoken to professionals with specialized training in the context of a treatment environment. However, if the "reasonable person" standard from MCM, ¶42.c.(1) somehow negated the "under the circumstances" portion it would not only run afoul of the plain meaning of the Manual, but it would also invalidate the analysis employed by *Shropshire*, *Adams*, *Davis*, and *Thompson*—where courts examine the listeners and context of the words before determining whether language is provoking speech.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the finding of guilty as to Charge III.

Respectfully submitted,



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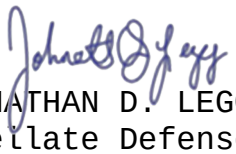
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 30 July 2015.



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Appendix A

United States v. *Gaston*

United States ***Army*** ***Court*** of ***Criminal Appeals***

February 28, ***2014***, Decided

ARMY 20111007

Reporter
2014 CCA LEXIS 144; 2014 WL 868554

UNITED STATES, Appellee v. Private E1 SEAN GASTON, United States ***Army***, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, I Corps (Rear) (Provisional). Gary Saladino, Military Judge, Lieutenant Colonel John T. Rothwell, Acting Staff Judge Advocate.

Core Terms

specification, provoking, military, confinement, sentence, guilty plea, words, days, bad-conduct, convictions, reproachful, drunk, violation of article, intoxicated person, military policeman, substantial basis, finding of guilt, assigned error, convening, arrested, colloquy, credited, gestures, assault, trained, abused

Counsel: For Appellant: Colonel Patricia A. Ham, JA; Lieutenant Colonel Imogene M. Jamison, JA; Major Richard E. Gorini, JA; Captain J. Fred Ingram, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Lieutenant Colonel James L. Varley, JA; Major Robert A. Rodrigues, JA; Captain Daniel H. Karna (on brief).

Judges: Before KERN, ALDYKIEWICZ, and MARTIN, Appellate Military Judges.

Opinion

SUMMARY DISPOSITION

Per Curiam:

A military judge sitting as a special ***court***-martial convicted appellant, pursuant to his pleas, of two specifications of absence without leave, one specification of wrongful use of marijuana, one specification of provoking speech, six specifications of assault, two specifications of drunk and disorderly conduct, and one specification of communicating a threat, in violation of *Articles 86*, *112a*, *117*, *128*, and *134*, Uniform Code of Military Justice, *10 U.S.C. 886*, *912a*, *917*, *928*, *934* [hereinafter UCMJ]. The military judge sentenced appellant to a bad-conduct discharge and five months confinement. The convening authority approved the bad-conduct discharge and [*2] 150 days of confinement. The convening authority also credited appellant with 104 days of confinement.[*]

This case is before this ***court*** for review under *Article 66, UCMJ*. One of appellant's assignments of error has merit. In particular, appellant contends that the military judge abused his discretion by accepting appellant's guilty pleas to Charge III and its Specification, provoking speech in violation of *Article 117, UCMJ*. The government concedes that the military judge abused his discretion, and, after reviewing the entire record, we accept that concession. Appellant's other assignments of error lack merit.

The parties do not appear to dispute the relevant facts. On 4 June 2011, appellant had been drinking heavily. He described himself as ″obviously drunk″ and ″really drunk.″ He had been screaming obscenities at females on Fort Lewis. Eventually, the police arrived and, after some struggle from appellant, apprehended him. While handcuffed and being led to a police car, appellant pulled away from a military policeman, Specialist (SPC) NS, and said, [*3] ″I eat little punk bitches like you.″ At his guilty plea, appellant said he did so ″to get a rise out of him.″

We review a military judge's decision to accept a guilty plea for an abuse of discretion. *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

[*] By our count, appellant should have been credited with 108 days of confinement credit. We take appropriate action in our decretal paragraph.

in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding appellant's guilty plea. *Id*.

An element of provoking speech is that the words "used were provoking or reproachful." *Manual for* ***Courts***-Martial, United States (2008 ed.), pt. IV, ¶ 42.b.(2). "As used in this article, 'provoking' and 'reproachful' describe those words or gestures . . . which a reasonable person would expect to induce a breach of peace under the circumstances." *Id*. at ¶ 42.c.(1). Military ***courts***, in addressing provoking speech or gestures made by intoxicated persons arrested by police, have noted the police are "trained to overlook verbal abuse in such situations and to maintain a professional demeanor." *United States v. Shropshire, 34 M.J. 757, 758 (A.F.C.M.R. 1992)*. Furthermore, our superior ***court*** has noted [*4] the unlikelihood that a trained custodian will open the restraints and retaliate against the speaker. *United States v. Thompson, 22 U.S.C.M.A. 88, 90, 46 C.M.R. 88, 90 (1972)*.

Here, appellant simply answered "Yes, Your Honor" when asked if his words were provoking or reproachful. There was no colloquy regarding whether a reasonable member of law enforcement would breach the peace upon hearing appellant's words. While we have no doubt that an arrested, intoxicated person can violate *Article 117* when interacting with law enforcement personnel, we simply do not believe the evidence is sufficient to demonstrate that occurred in this case. In the absence of a meaningful colloquy about this element, we are left with a substantial basis in law and fact to question whether a reasonable military policeman in SPC NS's position would have been provoked.

CONCLUSION

The findings of guilty of Charge III and its Specification are set aside. The remaining findings of guilty are AFFIRMED. In light of the error noted, we have applied the principles of *United States v. Winckelmann, 73 M.J. 11 (C.A.A.F. 2013)*. In particular, the sentencing landscape has not changed, the remaining convictions capture the [*5] gravamen of appellant's criminal conduct (including assaulting law enforcement officers and noncommissioned officers), appellant was sentenced by a military judge, and we have the experience and familiarity with the remaining convictions to reassess appellant's sentence. Accordingly, only so much of the sentence is affirmed that extends to a bad-conduct discharge and confinement for 146 days. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by this decision, are hereby ordered restored.