21 November 2016

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee* v. Senior Airman (E-4), CHRISTOPHER L. OLIVER, USAF, *Appellant.*	) FINAL BRIEF ON BEHALF OF) THE UNITED STATES)) USCA Dkt. No. 16-0484/AF)) Crim. App. No. 38481))

FINAL BRIEF ON BEHALF OF THE UNITED STATES

MEREDITH L. STEER, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd. Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34301

GERALD R. BRUCE
Associate Chief, Government Trial
and Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd. Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 27428

KATHERINE E. OLER, Col, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
1500 W. Perimeter Rd. Ste. 1190
Joint Base Andrews, MD 20762
United States Air Force
(240) 612-4800
Court Bar No. 30753

INDEX

TABLE OF AUTHORITIES iv

ISSUES PRESENTED 1

STATEMENT OF STATUTORY JURISDICTION 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

APPELLANT WAIVED THIS ISSUE FOR APPEAL WHEN DEFENSE DID NOT OBJECT AT ANY TIME TO THE MILITARY JUDGE'S CONSIDERATION OF WRONGFUL SEXUAL CONTACT AS A LESSER INCLUDED OFFENSE OF ABUSIVE SEXUAL CONTACT. EVEN IF NOT WAIVED, APPELLANT HAS NOT CARRIED HIS BURDEN OF DEMONSTRATING PREJUDICE.

CONCLUSION 11

CERTIFICATE OF FILING 13

CERTIFICATE OF COMPLIANCE 14

APPENDIX:

United States v. Crews 2016 CCA LEXIS 127 (A. Ct. Crim. App. 29 February 2016)

TABLE OF AUTHORITIES

CASES

SUPREME COURT OF THE UNITED STATES

United States v. Olano,
507 U.S. 725 (1993).....3

COURT OF APPEALS FOR THE ARMED FORCES

United States v. Alston,
69 M.J. 214 (C.A.A.F. 2010).....4

United States v. Crews,
2016 CCA LEXIS 552 (C.A.A.F. 9 June 2016).....5, 7

United States v. Girouard,
70 M.J. 10 (C.A.A.F. 2011).....5, 6, 7

United States v. Gladue,
67 M.J. 311 (C.A.A.F. 2009).....3

United States v. Goings,
72 M.J. 202 (C.A.A.F. 2012).....7

United States v. Harcrow,
66 M.J. 154 (C.A.A.F. 2008).....3

United States v. Humphries,
71 M.J. 209 (C.A.A.F. 2012).....4

United States v. Johnson,
54 M.J. 67 (C.A.A.F. 2000).....4

United States v. Jones,
68 M.J. 465 (C.A.A.F. 2010).....2, 4, 6, 7

United States v. Riggins,
75 M.J. 72 (C.A.A.F. 2016 .....passim

United States v. Turnstall,
72 M.J. 191 (C.A.A.F. 2013) 2, 3, 7

United States v. Wilkins,
71 M.J. 410 (C.A.A.F. 2012) 2, 3, 7, 9

COURTS OF CRIMINAL APPEALS

United States v. Barlow,
2014 CCA LEXIS 166 (A.F. Ct. Crim. App. 13 March 2014) 4, 7, 11

United States v. Crews,
2016 CCA LEXIS 127 (A. Ct. Crim. App. 29 February 2016) 5, 7

STATUTES

Article 66, UCMJ 1

Article 67(a)(3), UCMJ 1

OTHER AUTHORITIES

Rule for Courts-Martial (R.C.M.) 918 6

21 November 2016

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. 16-0484/AF
Senior Airman (E-4), CHRISTOPHER L. OLIVER, USAF, *Appellant.*	)	Crim. App. No. 38481

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

ISSUE PRESENTED

WHETHER WRONGFUL SEXUAL CONTACT WAS A LESSER-INCLUDED OFFENSE OF ABUSIVE SEXUAL CONTACT.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's statement of the case is generally accepted.

STATEMENT OF FACTS

Appellant's statement of facts is generally accepted. Additional facts necessary for the discussion of this case are included below.

SUMMARY OF THE ARGUMENT

Appellant was provided at least two opportunities to object to the military judge's consideration of wrongful sexual contact as a lesser included offense of abusive sexual contact, and Appellant did not object. Informing the intentional relinquishment of the issue, Appellant did object to the military judge's consideration of non-forcible sodomy as a lesser included offense of forcible sodomy on the basis of notice. As the elements test announced in United States v. Jones, 68 M.J. 465, 470 (C.A.A.F. 2010) is well-settled and was clearly identified, Appellant waived this issue for appeal.

Even assuming that the failure to object under the particular facts of this case did not affirmatively waive the issue, Appellant's failure to object to the consideration of wrongful sexual contact as a lesser included offense forfeited the objection, absent plain error. United States v. Tunstall, 72 M.J. 191, 193 (C.A.A.F. 2013). Appellant must demonstrate that the error resulted in material prejudice to his right to notice. United States v. Wilkins, 71 M.J. 410, 413 (C.A.A.F. 2012). Indicative of the fact that Appellant was on notice of all of the elements he had to defend against is the fact that trial defense counsel objected to lack of notice for a different Charge and lesser included offense. Additionally, the issue of whether the alleged activity was consensual was raised from the beginning of the trial, and the defense's theory and strategy was that Trainee LMS consented to the sexual

activity alleged in the Charges. Appellant cannot demonstrate "prejudice to his ability to defend against the charge he was convicted of or his right to notice." Wilkins, 71 M.J. at 414. Even if Appellant can meet all prongs of his plain error burden, a point the United States does not concede, remand to AFCCA for sentence reassessment would be the appropriate remedy.

ARGUMENT

APPELLANT WAIVED THIS ISSUE FOR APPEAL WHEN DEFENSE DID NOT OBJECT AT ANY TIME TO THE MILITARY JUDGE'S CONSIDERATION OF WRONGFUL SEXUAL CONTACT AS A LESSER INCLUDED OFFENSE OF ABUSIVE SEXUAL CONTACT. EVEN IF NOT WAIVED, APPELLANT HAS NOT CARRIED HIS BURDEN OF DEMONSTRATING PREJUDICE.

Standard of Review

Whether one offense is a lesser included offense of another is a question of law reviewed *de novo*. United States v. Riggins, 75 M.J. 78, 82 (C.A.AF. 2016), *citing* Tunstall, 72 M.J. at 193. Waiver is the "intentional relinquishment of a known right." United States v. Harcrow, 66 M.J. 154, 156 (C.A.A.F. 2008.) The standard of review for forfeited issues is plain error. United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). To constitute plain error, Appellant must demonstrate that a clear or obvious error had an unfairly prejudicial impact on the case. United States v. Olano, 507 U.S. 725, 733-34 (1993). In the context of a plain error analysis, Appellant has the burden of demonstrating 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. Humphries, 71 M.J. 209 (C.A.A.F. 2012).

Law and Analysis

Given the holding in Riggins and the particular facts of this case, it would be difficult to argue that wrongful sexual contact is a lesser included offense (LIO) of abusive sexual contact by placing another person in fear of an impact on her military career through the use and abuse of military rank, position, and authority.[1] (App. Br. at 11-13.) Specifically, wrongful sexual contact appears to contain as an element that the sexual contact occurred without consent of the victim. As held by this Court in Riggins, abusive sexual contact by fear does not, although consent and mistake of fact as to consent are still available as affirmative defenses. Riggins 75 M.J. at 83.

[1] *But See* United States v. Barlow, 2014 CCA LEXIS 166 at *47-48 (A.F. Ct. Crim. Ap. 13 March 2014) (unpub. op.) (Roan, J., dissenting) (Applying the reasoning of United States v. Alston, 69 M.J. 214 (C.A.A.F. 2010) and determining that a "victim who submits to sexual conduct out of fear has not, by definition, consented to it.") The elements test is really an indictment elements test that requires the appellate courts to apply the common and ordinary meaning of words when conducting the analysis. When Jones is applied literally, it can lead to absurd results. For example, aggravated assault in which there is the intentional infliction of grievous bodily harm does not contain an element that the victim did not consent to the harm. Under this Court's reasoning in United States v. Johnson, 54 M.J.67, 69 n. 3 (C.A.A.F. 2000), though, assault consummated by a battery does. *See also* Riggins, 75 M.J. at 83. Therefore, it would seem that assault consummated by a battery is not a lesser included offense of aggravated assault in which grievous bodily harm is intentionally inflicted.

Failure to object to the determination of what offenses qualify as LIOs at the time of trial, particularly when invited to by the military judge as is the case here, however, waives the issue for appeal. (J.A. at 233-34, 240.) In United States v. Girouard, this Court considered whether an appellant could waive a challenge to a conviction of an offense that was later determined not to be an LIO of the charged offense. United States v. Girouard, 70 M.J. 10 (C.A.A.F. 2011). Noting that such a situation could impact Constitutional considerations, the Court found that "for a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege." Girouard, 70 M.J. at 10. In Girouard, the appellant had not knowingly waived the right to challenge his conviction because the law, at the time of his court-martial, was settled that the offense of which he was convicted was an LIO of the greater charged offense. Id. It was not until after the appellant's court-martial that this Court reached a different decision. Id. Girouard made clear that such an issue is waivable, just not under the facts of that case. *See also* United States v. Crews 2016 CCA LEXIS 127 (A. Ct. Crim. App. 29 February 2016) (unpub. op.) (citing to Girouard, and using this same reasoning for the proposition that an appellant can waive his right on appeal by failing to object at trial to whether an LIO is proper) (pet. denied United States v. Crews 2016 CAAF LEXIS 552 (C.A.A.F. 9 June 2016) .

Here, trial defense counsel was keenly aware of preserving an objection for lack of notice as he objected to the military judge considering non-forcible sodomy as an LIO of forcible sodomy, arguing that the government did not put Appellant on notice of this theory. (J.A. at 233-43.) Twice, the military judge provided Appellant with the opportunity to object to considering wrongful sexual contact as an LIO of abusive sexual contact.[2] (J.A. at 233, 240.) The first time, trial defense counsel only objected to the non-forcible sodomy. (J.A. at 233.) The second time, the military judge clarified "Defense, you don't object to the LIOs of wrongful sexual contact and assault consummated by a battery…?" (J.A. at 240.) Trial defense responded "No, Your Honor." (J.A. at 240.) Moreover, Appellant expressly asserted a defense of consent, which is a clear and strong case of an intentional relinquishment of a known right or privilege. (S.J.A. at 1.) This is waiver.

Riggins did not change the landscape of the law as in Girouard. Riggins, 75 M.J. at 82. Riggins employed the well-established, settled elements test adopted in Jones, 68 M.J. at 470. Id. *See also*, R.C.M. 918, Discussion (citing Jones and

[2] Arguably, there was a third opportunity for Appellant to object prior to the announcement of findings. (J.A. at 286.) At that time, the military judge stated that "the court considered the request of trial counsel, and with the consent of the defense, the lesser included offenses of wrongful sexual contact…In conducting analysis of the elements of the charged offenses and the requested lesser included offenses, the court was satisfied that the elements, while not precisely aligned by language, were aligned sufficiently that it was appropriate to consider them as lesser included offenses." (J.A. at 286.) At that time, Appellant could have objected and stated that the elements of the lesser included offense of wrongful sexual contact were not actually contained within the greater offense, but did not.

noting "'named' lesser included offenses in the Manual are not binding and must be analyzed on a case-by-case basis in conformity with Jones.") As cited by Appellant, AFCCA also previously determined in United States v. Barlow that wrongful sexual contact was not an LIO of abusive sexual contact by placing in fear. Barlow, 2014 CCA LEXIS 166 at *14-15; (App. Br. at 13.)

Even if this Court finds that Appellant did not affirmatively waive his objection, the failure to object to the military judge's ruling and contemplation of the LIO was at the least forfeited, absent plain error. Crews, 2016 CCA LEXIS 127 (*citing* Tunstall, 72 M.J. at 193). "Under a plain error analysis, [an appellant] has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." Tunstall, 72 M.J. at 193-94 (quoting Girouard, 70 M.J. at 11) (internal quotations omitted). In examining prejudice in this context, this Court looks at whether Appellant was "on notice of all of the elements he had to defend against," and whether the LIO would have changed the defense's strategy at trial. Wilkins, 71 M.J. at 414; *see also* United States v. Goings, 72 M.J. 202, 215-16 (C.A.A.F. 2012) (government failed to allege an element of the offense, but appellant was on notice through evidence presented.)

Additionally, if this Court does not find waiver or forfeiture, this Court still tests for the harmlessness of the error. Riggins, 75 M.J. at 85. Whether testing for

prejudice under a plain error analysis or reviewing for harmlessness of the error, the outcome is still the same – the error was harmless beyond a reasonable doubt and there was no prejudice to Appellant. Appellant never complained that the LIO was improper, nor that he was not on notice to defend against it. Informing that Appellant was on notice of the elements that he would have to defend against for wrongful sexual contact is the fact that he did object to lack of notice for non-forcible sodomy. (J.A. at 233-40.)

Whether abusive sexual contact or wrongful sexual contact, Appellant knew what part of the body he was alleged to have wrongfully touched, and his theory from the beginning of the trial until the end was that Trainee LMS consented to engaging in sexual activity with Appellant.[3] (S.J.A. at 1, 22-23; J.A. at 263-80.) Moreover, Appellant conceded at trial that it was a proper LIO. (J.A. at 233, 240.)

Appellant argues that the defense did not put on "evidence of consent at trial," but rather the defense just "intended to raise 'consent' as an affirmative defense." (App. Br. at 15.) First, while it is certainly circumstantial evidence of the defense's theory to point to direct evidence of consent presented by defense,

[3] Trial defense counsel did not individually address each Charge and specification in his closing argument and show that Trainee LMS consented to each alleged violation of Article 120. The defense's overall theory was that all of Trainee LMS' behavior throughout the course of the alleged time period, which was the same for Charge II, Specification 1 and 2, and Charge III, showed that she was consenting to the various alleged sexual acts with Appellant, to include groping her groin whether as an abusive sexual contact, wrongful sexual contact, or assault consummated by a battery. (J.A. at 27-31.)

the prejudice test does not look to whether the defense actually put on evidence. It is the defense's trial strategy that matters. *See* Wilkins, 71 M.J. at 414.

The United States also disagrees with the assertion that the defense did not put on evidence of consent. In fact, the defense provided notice under M.R.E. 412 of a set of sexually suggestive photographs that Trainee LMS sent to Appellant via text message.[4] In his closing argument the trial defense counsel specifically pointed to the photographs and argued that the photographs and accompanying text messages were evidence of consent. (J.A. at 277-78.) During cross-examination of SrA DG, the defense elicited testimony that SrA DG often saw Trainee LMS joke and laugh with Appellant. (J.A. at 73.) Similarly, during cross-examination, A1C MK testified that she often saw Trainee LMS smiling when she was around Appellant. (J.A. at 104.) The trial defense counsel also cross-examined Trainee LMS on whether she had engaged in flirtatious behavior with Appellant. (J.A. at 161, 178-79). Then, trial defense counsel inquired why Trainee LMS did not tell another trainee who alleged she had been sexually assaulted by a different training instructor about Appellant's actions. (J.A. at 180-81.) Trial defense counsel asserted to Trainee LMS that she did not tell about her interactions with Appellant "[b]ecause it was **consensual**, what you were doing with [Appellant]." (J.A. at 181.) (emphasis added.)

[4] The trial counsel did not object under M.R.E. 412 to the photographs and introduced the photographs as part of its case as they also pertained to Charge I, Specifications 5 and 6.

The defense then called A1C KRK in the defense case-in-chief; A1C KRK was a close friend of Trainee LMS during basic military training. (J.A.at 214, 216.) A1C KRK stated that when Trainee LMS left Appellant's private office, "she would seem like happy, kind of giddish." (J.A. at 217.) A1C KRK also testified that Trainee LMS told A1C KRK that she had "a lot of respect for [Appellant] and that he reminded [Trainee LMS] of her fiancé." (J.A. at 218-19.) A1C KRK stated Trainee LMS told A1C KRK that she thought Appellant was attractive. (J.A. at 219.) While all of this evidence necessarily implied that Trainee LMS was not afraid of Appellant and what he could do to her career, it also explained that if she was not in fear, she was consenting to sexual activity. Riggins, 75 M.J. at 84, n. 6.

Further, unlike Riggins, where "the [g]overnment's theory at the court-martial never mentioned the consent of the victim," 75 M.J. at 84, n. 6, the government addressed the issue of consent throughout the course of this trial: during direct examination of Trainee LMS (J.A. at 133-39); during re-direct examination of Trainee LMS (J.A. at 193); during closing argument (J.A. at 258); and during rebuttal argument. (J.A. at 282). The military judge further clarified that Appellant never asked Trainee LMS if it was okay to touch her. (J.A. at 210.) Certainly, the government did not abandon its primary theory of constructive force, but the government did clarify with Trainee LMS that she was not consenting to

Appellant during any of the sexual activity that she testified about. In particular, the government assumed the burden of proof that Appellant touched Trainee LMS' groin without her permission, and the military judge held the government to that burden. (J.A. at 258, 286-87.)

In sum, Appellant has failed to demonstrate prejudice to his right of notice, and Appellant's conviction as to Charge II, Specification 2 should be affirmed and this Court should uphold the findings and sentence in this case. Assuming arguendo Appellant was able to meet all requirements of his plain error burden, which the United States does not concede, the appropriate remedy would be remand to AFCCA for sentence reassessment as seen in Barlow and not a rehearing as requested by Appellant.

CONCLUSION

WHEREFORE the Government respectfully requests that this Honorable Court affirm the findings and sentence in this case.

MEREDITH L. STEER, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd. Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34301

GERALD R. BRUCE
Associate Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800
Court Bar No. 27428

KATHERINE E. OLER, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4815
Court Bar No. 30753

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 21 November 2016.

MEREDITH L. STEER, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd. Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34301

COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because:

☒ This brief contains 2,713 words,

2. This brief complies with the typeface and type style requirements of Rule 37 because:

☒ This brief has been prepared in a monospaced typeface using Microsoft Word Version 2013 with 14 characters per inch using Times New Roman.

/s/_____

MEREDITH L. STEER, Major, USAF
Attorney for USAF, Government Trial and Appellate Counsel Division

Date: 21 November 2016

APPENDIX

United States v. Crews

United States Army Court of Criminal Appeals

February 29, 2016, Decided

ARMY 20130766

Reporter
2016 CCA LEXIS 127 *

UNITED STATES, Appellee v. Sergeant JASON R. CREWS, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by *United States v. Crews, 2016 CAAF LEXIS 552 (C.A.A.F., June 9, 2016)*

Prior History: **[*1]** Headquarters, 1st Infantry Division and Fort Riley. Gregory A. Gross, Military Judge, Lieutenant Colonel John A. Hamner, Staff Judge Advocate (pretrial), Colonel Craig E. Merutka, Staff Judge Advocate (post-trial).

Core Terms

video, witnesses, indecent exposure, lesser-included, touched, specification, deference, trial court, military, assault, penis, indecent act, instructions, daughter, exposure, sitting, notice, played, sexual abuse of child, factual sufficiency, plain error, credibility, hearsay, sexual, guilt, hear, reasonable doubt, appellate court, court-martial, jacket

Case Summary

Overview

HOLDINGS: [1]-Testimony provided by two children and a child's mother during a servicemember's trial on a charge alleging that he committed rape of a child, in violation of UCMJ art. 120b, *10 U.S.C.S. § 920b*, that was based on a conversation the mother had with her six-year-old daughter after she viewed a video of the servicemember interacting with the child, was inclusive and not sufficient as a matter of law to sustain the servicemember's conviction for the lesser-included offense of sexual abuse of a child; [2]-The servicemember waived his right to appeal the military judge's decision to instruct the panel that indecent exposure was a lesser-included offense of committing an indecent act, in violation of UCMJ art. 120, *10 U.S.C.S. § 920*, when he did not object to the instruction, and the judge did not commit plain error when he instructed the panel on indecent exposure.

Outcome

The court set aside the servicemember's conviction for sexual abuse of a child and dismissed that charge, affirmed the servicemember's conviction for indecent exposure, set aside the servicemember's sentence, and authorized a rehearing to determine a sentence on the servicemember's conviction for indecent exposure.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1 The United States Army Court of Criminal Appeals ("ACCA") has the independent duty to review the record to determine whether it is correct in law and fact. Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*. The test for legal sufficiency 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. The test for factual sufficiency, on the other hand, involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c) to take into account the fact that the trial court saw and heard the witnesses. In exercising this authority, the ACCA gives no deference to the decisions of the trial court (such as a finding of guilty), but does recognize the trial court's superior ability to see and hear the witnesses. In reviewing for factual sufficiency, the ACCA is limited to the facts introduced at trial and considered by the court-martial. The ACCA may affirm a conviction only if it concludes, as a matter of factual

sufficiency, that the evidence proves an appellant's guilt beyond a reasonable doubt.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > US Court of Appeals for the Armed Forces

HN2 The United States Court of Appeals for the Armed Forces ("CAAF") does not share either the United States Army Court of Criminal Appeals' ("ACCA's") factual review authority or responsibility. Nonetheless, ACCA decisions are subject to review by the CAAF.

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN3 The deference given to a trial court's ability to see and hear the witnesses and evidence—or "recognition" as phrased in Unif. Code Mil. Justice art. 66, *10 U.S.C.S. § 866*—reflects an appreciation that much is lost when the testimony of live witnesses is converted into the plain text of a trial transcript. While court-reporter notes may sometimes reflect a witness's gesture, laugh, or tearful response, they do not attempt to reflect the pauses, intonation, defensiveness, surprise, calm reflection, or deception that is often apparent to those present at a court-martial. A panel hears not only a witness's answer, but may also observe the witness as he or she responds. To say that an appellate court is at a relative disadvantage in determining questions of fact as compared to a trial court is to state the obvious. In New York State —where the intermediate appellate court conducts a review for factual sufficiency—the intermediate appellate court gives great deference to the fact-finder's opportunity to view the witnesses, hear the testimony, and observe demeanor. However, neither the United States Army Court of Criminal Appeals nor the United States Court of Appeals for the Armed Forces has quite so clearly delineated the amount of deference due a trial court when conducting a factual sufficiency review.

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN4 In United States v. Johnson, the United States Army Court of Military Review distinguished between evidence whose weight depended on the factfinder's assessment of credibility, and evidence where the appellate court was at little or no disadvantage in reviewing the evidence. Similarly, in United States v. Davis, the United States Army Court of Criminal Appeals noted that the degree to which it recognizes or gives deference to a trial court's ability to see and hear the witnesses will often depend upon the degree to which the credibility of the witnesses is at issue.

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN5 In United States v. Johnson, the United States Army Court of Military Review (now the United States Army Court of Criminal Appeals ("ACCA")) stated that Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*, cautioned the court to bear in mind that a trial court saw and heard the witnesses, and that in cases where witness credibility played a critical role in the outcome of the trial, it hesitated to second-guess the court's findings. This was inartfully stated as it is the ACCA's duty to "second-guess" a court-martial's findings and the ACCA does not hesitate in that duty. However, the underlying concept—that more deference is due when credibility is key to determining the weight of the evidence—remains sound. The court of military review went on to say in Johnson that when the evidence does not depend on credibility determinations, its independence as a fact-finder should only be constrained by the evidence of record and the logical inferences emanating therefrom.

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN6 The admonition that the United States Army Court of Criminal Appeals recognizes a court-martial panel's ability to see and hear the witnesses applies not only to credibility determinations, but also to weighing the evidence. Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*.

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Witnesses

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN7 Children sometimes testify with shocking candor, but may also be easily manipulated on the stand. A dry transcript will contain some of these elements, but a trial court is far better positioned to determine the appropriate weight such testimony should be given.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Military & Veterans Law > ... > Courts Martial > Sentences > Maximum Limits

Military & Veterans Law > ... > Courts Martial > Sentences > Confinement

HN8 The maximum authorized punishment for committing an indecent act in violation of Unif. Code Mil. Justice ("UCMJ") art. 120, *10 U.S.C.S. § 920*, includes up to five years of confinement. Manual Courts-Martial ("MCM") pt. IV, para. 45.f.(6) (2008). The maximum authorized punishment for indecent exposure in violation of art. 120, *10 U.S.C.S. § 920*, includes up to one year of confinement. MCM pt. IV, para. 45.f.(7) (2008). That is, a conviction on indecent exposure reduces the possible confinement that could be adjudged for that offense by 80 percent.

Criminal Law & Procedure > Appeals > Reviewability > Waiver

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN9 Deviation from a legal rule is error unless the rule has been waived. Waiver is the intentional relinquishment or abandonment of a known right. Whether a particular right is waivable, whether a defendant must participate personally in the waiver, whether certain procedures are required for waiver, and whether a defendant's choice must be particularly informed or voluntary, all depend on the right at stake.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN10 Under a plain error analysis, an appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the appellant.

Military & Veterans Law > Military Offenses

HN11 The element of indecent exposure, in violation of Unif. Code Mil. Justice art. 120, *10 U.S.C.S. § 920*, that requires the conduct to occur somewhere other than in front of his own family or household serves as a limitation on what conduct is indecent. That is, being seen naked by your own family—while an "exposure"—is not an indecent exposure.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Burdens of Proof

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN12 When it comes to unpreserved error, the burden is on an appellant to establish prejudice. An appellant bears the burden of proving prejudice because he did not object at trial, and must show that under the totality of the circumstances, the Government's error resulted in material prejudice to his substantial, constitutional right to notice.

Military & Veterans Law > Military Offenses

HN13 One commits indecent exposure, in violation of Unif. Code Mil. Justice art. 120, *10 U.S.C.S. § 920*, when one intentionally exposes, in an indecent manner, the genitalia. Manual Courts-Martial pt. IV, para. 45.a.(n) (2008).

Counsel: For Appellant: Captain Matthew L. Jalandoni, JA (argued); Colonel Kevin Boyle, JA; Major Yolanda McCray Jones, JA; Captain Patrick J. Scudieri, JA (on brief); Colonel Mary J. Bradley, JA; Major Christopher D. Coleman, JA; Captain Patrick J. Scudieri, JA (on brief on specified issue).

For Appellee: Captain Timothy C. Donahue, JA (argued); Major Daniel D. Derner, JA; Captain James P. Curtin, JA (on brief); Colonel Mark H. Sydenham, JA; Major Daniel D. Derner, JA; Captain Timothy C. Donahue, JA (on brief on specified issue).

Judges: Before HAIGHT, PENLAND, and WOLFE, Appellate Military Judges. Senior Judge HAIGHT and Judge PENLAND concur.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION

WOLFE, Judge:

A panel composed of officer and enlisted members sitting as a general court-martial convicted appellant, contrary to his pleas, of indecent exposure (as a lesser-included offense of indecent acts) and sexual abuse of a child (as a lesser-included offense of rape of a child), in violation of Articles 120 and

120b, Uniform **[*2]** Code of Military Justice, *10 U.S.C. §§ 920* and *920b (2006 & Supp. IV; 2012)* [hereinafter UCMJ]. Appellant was arraigned on charges that included one specification of rape of a child (KG) under the age of 12 years, and one specification of indecent acts in the presence of Mrs. SG.[1] The convening authority approved the adjudged sentence of a dishonorable discharge, confinement for one year, forfeiture of all pay and allowances, and reduction to the grade of E-1.

Appellant's case is now before this court for review pursuant to *Article 66(c)*, UCMJ. Appellant assigns two errors, both of which merit discussion, and one of which merits relief. Specifically, we find the evidence supporting appellant's conviction for sexual abuse of a child to be factually insufficient.

BACKGROUND

The facts surrounding this case all took place in 2012 in a neighborhood of family housing at Fort Riley, Kansas. While not strictly neighbors, appellant, KG, and Mrs. SG all lived within a few minutes' drive of each other. KG is the five-year-old daughter of an Army specialist who served in the same company as appellant. Appellant, however, did not have any supervisory relationship or **[*3]** responsibilities over KG's father. Mrs. SG was the wife of an Army soldier. Mrs. SG and KG are not related and lived in separate homes in the neighborhood.

DISCUSSION

A. Factual Sufficiency of Sexual Abuse of a Child

Appellant visited KG's house often. KG's mother testified that appellant stopped by nearly every workday during his lunch break for a brief visit, and often on weekends. During these visits, KG would ask appellant for piggyback rides, and crawl over him while he was on the floor. KG's mother testified that several times appellant volunteered to babysit KG, which she and her husband declined. Appellant was also very gracious with helping around the house, to include changing the brakes and oil on the family car, fixing the dryer, and assisting with an intra-post move to a one-story house necessitated by a back injury to KG's father.

KG had an electronic toy which in addition to playing math and reading games allowed the user to take short 30-second videos. In October of 2012, KG's mother was looking at the toy when she saw a video of appellant and KG that she found disturbing. She asked KG if anyone had ever done anything inappropriate with her. KG answered yes, and indicated **[*4]** that appellant had touched her genitals. During a subsequent child forensic interview, KG stated that appellant had touched her genitals and penetrated her vagina.

At trial, the government attempted to prove their case that appellant raped KG through the admission of the video and the testimony of KG, KG's mother, and the boy who filmed the video, DH. We will discuss each at length.

1. Facts

a) Testimony of KG's Mother

KG's mother was the government's first witness. She provided background information and the history of interactions between appellant and KG. Most crucially, she also testified to her daughter's statement that appellant had inappropriately touched KG's genitals. Her key testimony was as follows:

> Q [TC]: Has anything between your family and Sergeant Crews changed that relationship?
>
> A: The instant [sic] that happened with our daughter.
>
> Q: Can you tell the panel members a little bit about that?
>
> A: It was one September evening, my friend has just gotten back from her grandmother's funeral. So we had a little barbeque and [appellant] was also over there with us, and we were just -- all the adults were outside and the kids were playing in [KG's] bedroom. And my daughter had one of **[*5]** those Leap Frogs that records videos and stuff. And I actually didn't notice it until October, but I was watching the video and it was actually recorded with [appellant] sitting on the edge of my daughter's bed with her completely covered underneath the jacket sitting on his lap, and that is when I discovered it. And I went and told my husband about it because he was in the bathroom -- and our daughter was in the living room when I discussed it with him; and I had walked back into the living room to ask her if anybody had done anything that she thought was wrong, and she shook her head yes; and I asked her, "Who?" I never said any name, but she said, "Sergeant Crews," and I asked her, "What did he do?" and she doesn't know the term names for her body parts because she is only six, but I asked her can -- I said, "Can you show me where he touched you?" and she proceeded to move the blanket and pointed down to her vaginal area, and that is how I discovered what had happened in her bedroom.

KG's mother further clarified that she discovered the video

[1] A third charge of indecent language was dismissed after arraignment.

about a month and a half after it was taken. The defense did not object to KG's mother's testimony as hearsay or otherwise. The record provides **[*6]** no basis to believe that a plausible hearsay exception would have applied.[2]

b) The Video

The video, which was admitted over defense objection, is somewhat grainy.[3] Additionally, the video's camerawork reflects the fact that the video was taken by KG's friend, DH, a six-year-old neighborhood boy.

At the outset of the 30-second video, appellant is seen sitting on the edge of KG's bed. KG is sitting on appellant's lap and has a large adult jacket wrapped around her midsection and waist. Approximately halfway through the video, KG pulls the jacket over her head while appellant embraces KG by the waist with his left arm, **[*7]** which remains above the jacket. However, appellant then places his hand beneath the jacket, although his upper arm, elbow, and parts of his forearm remain visible. The angle of his forearm makes it possible that appellant has placed his hand near either KG's stomach or pelvic area. The video ends a few seconds later.

c) Testimony of KG

At trial KG's mother generally testified consistently with her initial statement to investigators and her testimony at the *Article 32*, UCMJ, investigation. KG, however, did not. While KG answered some initial background questions, such as the name of her dog, her answer to every question of substance on direct exam was "I don't know."[4]

d) Testimony of DH

Finally, the government called DH, the boy who recorded the video. DH's direct testimony, at least when reduced to a written transcript, could generously be described as muddled. It appears that DH, who the government **[*8]** relied on in authenticating the video, hadn't seen the video at any time between when it was first filmed and when it was played in court. DH at times appears to testify about videos he made which were not admitted into evidence. When recounting a conversation he had with his mother (where he told his mother that KG "got touched in the private") he appears to confuse counsel's questions about where he was when he was talking to his mother, and where he was when KG was touched. DH testified he saw KG get touched, and immediately thereafter said he did not see it. In short, it is not possible to make any sense of DH's testimony one way or the other with respect to the charged misconduct he was called to testify about.

e) The Defense Case

The defense case-in-chief consisted of several witnesses. The first, a child psychologist, testified as an expert witness about child memories. The defense also called several character witnesses who had daughters the same age as KG. After laying the foundation that appellant also spent a lot of time playing with their kids, they testified that they had high opinions of appellant's "character towards children"[5] and that he was helpful.

2. Law

On appeal, appellant claims that the evidence of child sexual abuse is factually insufficient to support the conviction. In response, the government argues that KG's hearsay statement to her mother, in light of the video, is sufficient.[6]

Nonetheless, ***HN1*** we have the independent duty to review the record to determine whether it is correct in law *and* fact. *UCMJ art. 66(c)*. The test for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact **[*10]** could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct.*

---

[2] We note of course that as there was no objection, the government did not attempt to lay down a foundation for a hearsay exception. Our review of the record, to include the criminal investigation, ***Article 32***, UCMJ, investigation, and other allied papers attached to the record under Rule for Courts-Martial [hereinafter R.C.M.] 1103, does not reveal any indication of an applicable exception, such as an excited utterance.

[3] Testimony at trial revealed that a technician was unable to digitally copy the video. Instead the copy presented at trial was made by filming the screen of the video player.

[4] The record does not indicate any request for remote live testimony under R.C.M. 914A, or any other accommodation to assist a six-year-old testifying about a difficult subject. Nor was there any attempt by the trial counsel to declare KG unavailable and admit her testimony at the ***Article 32*** investigation. *See* Mil. R. Evid. 804(a)(3).

[5] The testimony was **[*9]** admitted without objection and it is not necessary for us to address whether this was testimony about the appellant's *behavior* around children, or whether it was a pertinent character trait and admissible under Mil. R. Evid. 404(a)(1).

[6] The government's brief argued only that the evidence was legally sufficient. That is, the government argued that "[w]hen viewed in a light most favorable to the government, there was sufficient evidence for a rational fact finder to find beyond a reasonable doubt that appellant sexually abused a child under the age of twelve." At oral argument, the government made clear that the position of the United States was that the evidence was both legally and factually sufficient.

2781, 61 L. Ed. 2d 560, (1979); *see also* United States v. Phillips, 70 M.J. 161, 166 (C.A.A.F. 2011). The test for factual sufficiency, on the other hand, "involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in *Article 66(c)*, UCMJ, to take into account the fact that the trial court saw and heard the witnesses." United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002). In exercising this authority this court gives no deference to the *decisions* of the trial court (such as a finding of guilty), but does recognize the trial court's superior ability to see and hear the witnesses. *Id.* (A court of criminal appeals gives "no deference to the decision of the trial court" but is required to adhere to the admonition to take into account the fact that the trial court saw and heard the witnesses).

In reviewing for factual sufficiency we are limited to the facts introduced at trial and considered by the court-martial. United States v. Beatty, 64 M.J. 456 (C.A.A.F. 2007). Thus, for example, we do not consider KG's unadmitted pretrial statements, no matter how compelling, in determining whether there was sufficient evidence to support the findings. We may affirm a conviction only if we conclude, as a matter of factual **[*11]** sufficiency, that the evidence proves appellant's guilt beyond a reasonable doubt. United States v. Sills, 56 M.J. 239, 240-41 (C.A.A.F. 2002); United States v. Turner, 25 M.J. 324, 324-25 (C.M.A. 1987).

HN2 Our superior court does not share either our factual review authority or responsibility. *Compare Article 66 with Article 67*, UCMJ. Nonetheless, our decisions are subject to review by the United States Court of Appeals for the Armed Forces (C.A.A.F.). United States v. Nerad, 69 M.J. 138, 140 (C.A.A.F. 2010) ("[W]hile CCAs have broad authority under *Article 66(c)*, UCMJ, to disapprove a finding, that authority is not unfettered. It must be exercised in the context of legal—not equitable—standards, subject to appellate review.").

3. Analysis

This case, somewhat uniquely, raises the degree to which we recognize the trial court's superior position in seeing and hearing the evidence. Accordingly, and as we find the evidence factually insufficient, we believe it wise to discuss how we arrive at our conclusion in light of these considerations.

HN3 The deference given to the trial court's ability to see and hear the witnesses and evidence—or "recogni[tion]" as phrased in *Article 66*, UCMJ—reflects an appreciation that much is lost when the testimony of live witnesses is converted into the plain text of a trial transcript. While court-reporter notes may sometimes reflect a witness's gesture, laugh, or tearful response, **[*12]** they do not attempt to reflect the pauses, intonation, defensiveness, surprise, calm reflection, or deception that is often apparent to those present at the court-martial. A panel hears not only a witness's answer, but may also *observe* the witness as he or she responds. For instance, a transcript may state "I am showing the witness prosecution exhibit 13 for identification" but will leave unstated the witness's demeanor—whether surprise, recognition, or dread, when reviewing or confronted with evidence.

To say that an appellate court is at a relative disadvantage in determining questions of fact as compared to a trial court is to state the obvious. In New York State—the only other jurisdiction we are aware of where the intermediate appellate court conducts a review for factual sufficiency—the intermediate appellate court gives "[*g*]*reat deference* . . . to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor." People v. Romero, 7 N.Y.3d 633, 644, 859 N.E.2d 902, 826 N.Y.S.2d 163 (2006) (emphasis added) (quoting People v. Bleakley, 69 N.Y.2d 490, 495, 508 N.E.2d 672, 515 N.Y.S.2d 761 (1987)). However, neither this court, nor our superior court, has quite so clearly delineated the amount of deference due the trial court when conducting a factual sufficiency review.

HN4 In United States v. Johnson, 30 M.J. 930, 934 (A.C.M.R. 1990), **[*13]** we distinguished between evidence whose weight depended on the factfinder's assessment of credibility, and evidence where the appellate court was at little or no disadvantage in reviewing the evidence.[7] Similarly, and more recently, in United States v. Davis, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015) (en banc), we noted that "the degree to which we 'recognize' or give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witnesses is at issue."

As related above, the government sought to introduce four substantive components of evidence to support the conviction involving KG: First, KG's mother testified that KG had told

---

[7] ***HN5*** In *Johnson* we stated that ***Article 66(c)***, UCMJ, "cautions us to bear in mind that 'the trial court saw and heard the witnesses.' Thus, in cases where witness credibility plays a critical role in the outcome of the trial, we hesitate to second-guess the court's findings." *30 M.J. at 934* (citation omitted). This was inartfully stated as it is our duty to "second-guess" a court-martial's findings and we do not hesitate in this duty. However, the underlying concept—that more deference is due when credibility is key to determining the weight of evidence—remains sound. We went on to say in *Johnson*, for example, that when the evidence does not depend on credibility determinations, "our independence as a fact-finder should only **[*14]** be constrained by the evidence of record and the logical inferences emanating therefrom." *Id.*

her that appellant had touched her sexually; second, a video, that while certainly concerning, does not explicitly depict any sexual touching; third, the government's attempt to present testimony by the alleged victim, KG; and fourth, the testimony of DH, who stated both that he saw and didn't see appellant touch KG's "privates."

With regards to the video, our ability to review the evidence and assign it proper weight is nearly identical to that of the panel members.[8] The record of trial contains the same digital copy of the video that was played for the members. It is what it is. While the video was relevant evidence that explains how the allegations came to light, as well as demonstrating opportunity, the video does not explicitly depict a sexual assault.

While we give little or no deference to the trial court's weighing of a video, the testimony of the two child witnesses falls on the other side of the spectrum. ***HN7*** Children sometimes testify with shocking candor, but may also be easily manipulated on the stand. A dry transcript will contain some of these elements, but the trial court is *far* better positioned to determine the appropriate weight such testimony should be given.

Nonetheless, the testimony of the two child eyewitnesses does not support the court-martial's findings. KG's testimony of "I don't know" can be interpreted in two ways: first, as some evidence that the assault did not happen; or second, that she was essentially refusing to answer any questions. Neither interpretation provides evidence of appellant's guilt. Similarly, it is hard to draw any inferences, one way or the other, from DH's internally contradictory testimony. Even applying the "great deference" standard employed by New York intermediate appellate courts, *see, e.g.* *Romero, 7 N.Y.3d at 644*, the testimony of the **[*16]** two children in this case does not weigh in favor of appellant's guilt.[9]

Accordingly, the only evidence of weight of appellant's guilt is the testimony of KG's mother. As discussed above, KG's mother had no firsthand evidence of the offense. Rather, the inculpatory evidence consisted of repeating KG's statements that appellant had touched her inappropriately. While these unobjected-to hearsay statements were admitted for their truth—and we consider them as such—the lack of an applicable hearsay exception is concerning. Additionally, as recounted at trial, the key statement by KG was in response to a leading question from her mother. After KG indicated that appellant had done something wrong, her mother asked "can you show me where he touched you" which presupposed that an inappropriate touch was the "something wrong."

Having reviewed the entire record, we are not convinced beyond a reasonable doubt that appellant committed the offense of sexual abuse of a child. The evidence in this case did not "exclude every fair and reasonable hypothesis of the evidence except that of guilt." Dep't **[*17]** of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook [hereinafter Benchbook], para. 8-3 (10 Sept. 2014). Accordingly, we will set aside the finding of guilty in our decretal paragraph.

B. Indecent Exposure

During the course of appellant's friendship with KG's family, he was also introduced to Mrs. SG. Mrs. SG was an adult woman also living in family housing on Fort Riley. Appellant would stop by and talk to Mrs. SG while she was sitting outside on her porch. At trial, however, one instance stood out in her mind.

Mrs. SG stated she was sitting on her porch talking with appellant. She stated it was a perfectly normal conversation, until it suddenly wasn't. Specifically, she testified it got awkward when appellant unbuttoned his ACU pants, took out his penis, and began "messing" with himself by stroking his penis. Mrs. SG estimated this went on for twenty minutes while she tried to ignore what appellant was doing and concentrated on her laptop. She stated she discussed this event with her husband that night but decided not to report the incident as it did not happen again.

Prior to instructing the members on findings, the military judge conducted an *Article 39(a)*, UCMJ, session **[*18]** to discuss instructions. Specifically, the military judge addressed whether indecent exposure was a lesser-included offense of indecent acts:

> MJ: Now regarding Charge II and its Specification as I mentioned in the 802 conference this morning I saw one lesser include [sic] of indecent exposure; does either side want to be heard on that?
>
> DC: No, Your Honor.

At the end of the *Article 39(a)*, UCMJ, session, and again at several more instances during the remainder of the trial, the defense did not object to the military judge's proposed

---

[8] We say "nearly identical" for two reasons. First, the panel members had the ability to observe the witness's reaction when the video was played in court. Second, ***HN6*** the **[*15]** admonition that we recognize the panel's ability to see and hear the witnesses applies not only to credibility determinations, but also to "weigh[ing] the evidence." ***UCMJ art. 66(c)***.

[9] In its brief the government does not rely on either child's testimony in arguing in favor of affirmance.

instruction on the lesser-included offense.[10] After being notified of the issue first at a R.C.M. 802 conference, and later at the *Article 39(a)*, UCMJ, session, the defense chose not to object to the instruction on the lesser-included offense.

We find that this amounted to an affirmative waiver of the matter.

> ***HN9*** "Deviation from a legal rule is 'error' unless the rule has been waived." *United States v. Olano, 507 U.S. 725, 732-33, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)*. Waiver is the "intentional relinquishment or abandonment of a known right." *United States v. Harcrow, 66 M.J. 154, 156 (C.A.A.F. 2008)* (quoting *United States v. Olano, 507 U.S. 725, 732-33, 113 S. Ct. 1770, 123 L. Ed.2d 508 (1993)*). "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *Id.* (quoting *Olano, 507 U.S. at 733*).

United States v. Girouard, 70 M.J. 5, 10 (C.A.A.F. 2011). In *Girouard*, the court found that waiver was not present, because (unlike this case), the case law governing what constituted a lesser-included offense had changed between trial and appeal. That is, the defense counsel in *Girouard* did not intentionally relinquish a known right, as the right had not yet been clearly identified in *United States v. Jones, 68 M.J. 465 (C.A.A.F. 2010)*. The present case was tried well after *Jones*. Here, the military judge specifically notified the defense that he intended to instruct on the lesser-included offense of indecent exposure, and the defense declined the military judge's invitation to be heard on the matter. Moreover, the defense was provided a copy of the written instructions to **[*20]** review, and heard the instructions given to the panel. In each instance, the elements of the two offenses in question were laid out one after the other without objection. Under the circumstances of this case, this constituted waiver.

Even assuming that an objection to the instruction on the lesser-included offense of indecent exposure was not affirmatively waived, the failure to object to the instructions forfeited the objection, absent plain error. R.C.M. 920(f); *United States v. Tunstall, 72 M.J. 191, 193 (C.A.A.F. 2013)*; *see also United States v. Wilkins, 71 M.J. 410, 412 (C.A.A.F. 2012)* (citing *United States v. Arriaga, 70 M.J. 51, 54 (C.A.A.F. 2011)*); *Davis, 75 M.J. 537*.

HN10 "Under a plain error analysis, [an appellant] 'has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused.'" *Tunstall, 72 M.J. at 193-94* (quoting *Girouard, 70 M.J. at 11*).

Applying the elements test, appellant claims that the military judge committed error as an "indecent act does not require proof of an additional element not found in the instruction for indecent exposure" and that "proof of indecent exposure requires proof that the exposure was intentional and that it was made at a place where the conduct could reasonably be expected to be viewed by people other than members of the accused's family or household."

We first note that a reasonable panel could **[*21]** have credited the testimony that appellant pulled out and exposed his penis on Mrs. SG's front porch, but not credited the testimony that he then stroked his penis for twenty minutes while she continued to work on her computer. That is, the panel could have credited the evidence supporting the *exposure*, while not crediting the *act* of masturbation.

We also note that ***HN11*** the element of indecent exposure that requires the conduct to occur somewhere other than in front of his own family or household serves as a limitation on what conduct is indecent. That is, being seen naked by your own family—while an "exposure"—is not an indecent exposure. Appellant was charged with exposing his penis to Mrs. SG, a person he clearly knew not to be a member of his family. Moreover, as charged, the specification alleged that appellant pulled out his penis and stroked it on the front porch of Mrs. SG. That is, as charged, appellant's exposure of his penis was an intentional act, committed in public; it was not an accidental or negligent exposure or an exposure in front of his family.

HN12 When it comes to unpreserved error, the burden is on the appellant to establish prejudice. *Wilkins, 71 M.J. at 413*; *United States v. Humphries, 71 M.J. 209, 217 n.10*. "Appellant bears the burden of **[*22]** proving prejudice because he did not object at trial. Appellant must show 'that under the totality of the circumstances in this case, the Government's error . . . resulted in material prejudice to [his] substantial, constitutional right to notice.'" *Wilkins, 71 M.J. at 413* (alterations in original) (quoting *Humphries, 71 M.J. at 215*) (internal citation omitted).

---

[10] ***HN8*** The maximum authorized punishment for an indecent act includes up to five years of confinement. *See Manual for Courts-Martial, United States* (2008 ed.) [hereinafter *MCM*, 2008 ed.] pt. IV, ¶ 45.f.(6). The maximum authorized punishment for indecent exposure includes up to one year of confinement. *MCM*, 2008 ed. at ¶ 45.f.(7). That is, a conviction on indecent exposure reduced the possible confinement that could be adjudged for that offense **[*19]** by 80%.

In *Wilkins* the United States Court of Appeals for the Armed Forces (C.A.A.F.) found that the military judge committed error by instructing the panel on abusive sexual contact as a lesser-included offense of aggravated sexual assault based on how the offense was charged. However, as the appellant had not objected at trial, the C.A.A.F. tested for plain error. The C.A.A.F. found that the appellant was "on notice of all of the elements he had to defend against." *Wilkins, 71 M.J. at 414*. Additionally, the lesser-included offense did not change the defense's strategy at trial. *Id.* Thus while finding error, and finding that it was plain and obvious, the court affirmed the findings as the appellant in *Wilkins* did not carry his burden of demonstrating a material prejudice to a substantial right. *Id. at 413* ("Appellant has not met this burden because he cannot establish prejudice to his ability to defend against **[*23]** the charge he was convicted of or his right to notice."). *Cf. United States v. Riggins, 75 M.J. 78, 85 (C.A.A.F. 2016)* (preserved constitutional error reviewed for harmlessness beyond a reasonable doubt).

In the present case, appellant does not even attempt to meet his burden. While appellant's brief identifies that plain error is the appropriate test, the brief addresses only the first prong of the plain error test, and does not address whether the error was plain or obvious, and if so, how the error resulted in a material prejudice to a substantial right of appellant. Accordingly, appellant has failed to meet his burden and is not entitled to relief. Even if we were to attempt to meet appellant's burden for him regarding the plain and obvious nature of the error, we find that as in *Wilkins*, the instruction on the lesser-included offense did not deprive appellant of notice regarding what he was defending against or alter his trial strategy. The defense in this case did not hinge on whether appellant's actions were an exposure or an indecent act. Rather, the defense's case claimed that the charged misconduct simply never happened, a theory that applies with equal force to both indecent acts and indecent exposure.

Finally, setting aside whether **[*24]** appellant waived, forfeited, or met his plain error burden in this case, we find that this issue is controlled by our superior court's decision in *United States v. Rauscher, 71 M.J. 225 (C.A.A.F. 2012)*. In that case, the appellant was charged with assault with intent to commit murder (a violation of *Article 134*), but convicted of the lesser-included offense of aggravated assault with a dangerous weapon or means likely to cause death or grievous bodily harm (a violation of *Article 128*). *Id.* In a per curiam opinion, our superior court never addressed the elements test to determine whether aggravated assault is a lesser-included offense of assault with intent to commit murder. Rather, the C.A.A.F. looked at the words of the specification which alleged that the appellant committed "an assault . . . by stabbing [the victim] in the hand and chest with a knife." *Id. at 226*. *Id.* The court was "convinced that the specification clearly allege[d] every element of [aggravated assault]." *Id.* That is, an elements test is unnecessary if the specification itself alleges the lesser-included offense in question.

In this case, the specification alleged that appellant did "wrongfully commit indecent conduct, to wit: pulling his penis out and openly stroking it with his hand **[*25]** in the presence of [SG]." ***HN13*** One commits indecent exposure when one "intentionally exposes, in an indecent manner, the genitalia . . . ." *MCM*, 2008 ed. at ¶ 45.a.(n). As every element of indecent exposure was contained in the specification, appellant was on notice that he was charged with indecent exposure. *Jones, 68 M.J. at 472* ("The charge sheet itself gives content to that general language, thus providing the required notice of what an accused must defend against.").

CONCLUSION

The finding of guilt to the Specification of Charge I, sexual abuse of a child, is set aside and that charge and its specification are DISMISSED. The finding as to the Specification of Charge II, indecent exposure, is AFFIRMED. The sentence is set aside. In accordance with R.C.M. 810, a sentence rehearing is authorized. All rights, privileges, and property of which appellant has been deprived by virtue of that portion of the findings and sentence set aside by our decision, are ordered restored. *See UCMJ arts. 58b(c)* and *75(a)*.

Senior Judge HAIGHT and Judge PENLAND concur.

End of Document