IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee,	)	BRIEF ON BEHALF OF
	)	THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 40294
	)	
Senior Airman (E-3)	)	USCA Dkt. No. 23-0198/AF
ISRAEL E. FLORES	)	
United States Air Force	)	20 September 2023
Appellant.	)	

BRIEF ON BEHALF OF THE UNITED STATES

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

ISSUE PRESENTED

WHETHER SENTENCE APPROPRIATENESS REVIEW FOR SEGMENTED SENTENCING MUST CONSIDER EACH SEGMENTED SENTENCE TO CONFINEMENT, OR INSTEAD ONLY THE OVERALL SENTENCE.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), Uniform Code of Military Justice (UCMJ). This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's statement of the case is correct.

STATEMENT OF THE FACTS

Appellant's Crimes

On 25 November 2020, Appellant, who was twenty-three years old and in a relationship with SSgt EF at the time, was babysitting two-year-old JF. (JA at 27.) JF is SSgt. EF's son. (JA at 27.) While babysitting, Appellant "struck JF on his head and face with Appellant's hand on two or more occasions." (JA at 28.) Appellant also struck JF on the head and face with a spatula. (JA at 28.) When SSgt EF, JF's mother, returned home from work that evening, she found JF in his crib and "noticed dry feces on [JF's] buttocks and genitals" and "marks on [JF's] face and head." (JA at 28.) When asked about the marks on JF, Appellant told SSgt EF "that [JF] must have fallen in his crib." (JA at 28.) Appellant eventually admitted to SSgt EF. that he "slapped [JF] a couple of times" because "[JF] spilled the coffee grounds." (JA at 28.) After Appellant left SSgt EF's residence, SSgt EF noticed more swelling and a mark on the backside of JF's head. (JA at 28.) Later that evening, after seeking advice from her friend, SSgt EF drove JF to the emergency room, called the local Sheriff's Office, and notified her leadership what had happened. (JA at 29.) JF was evaluated at a local hospital. (JA at 29.) No skull fractures were observed, but "bruising was noted to the upper portion of the left" and right ear, and on the "scalp behind the left ear." (JA at 29.) Hospital

personnel also noted bruising on the right cheek and an abrasion on JF's inner lower lip. (JA at 29.)

The next day, SMSgt OM, Appellant's First Sergeant, escorted Appellant to the Office of Special Investigations (OSI) for a subject interview. (JA at 29.) After his OSI interview, SMSgt OM told Appellant "I do not want to know anything about the case and you need to get an Area Defense Counsel (ADC)." (JA at 29.) SMSgt OM provided Appellant with the ADC's phone number and further stated, "[i]f you need anything, let's work out places to stay and "no judgment until all this stuff shakes out -I'm your Shirt." (JA at 29.) Willingly, Appellant replied "[y]ou know[,] it is what it is – it's okay. I've got plenty of stuff on her," and "I wasn't even there." (JA at 29.)

Later, the South Carolina Department of Social Services interviewed Appellant. In the interview, Appellant stated that "the allegations that he assaulted [JF] were not true and that he did not do any harm to [JF]." (JA at 29.) Appellant also told the case worker that "he did not know who was watching [JF] while SSgt [EF] was working." (JA at 29.) Appellant also provided the names of two alibi witnesses, who, when interviewed later, "both denied spending any time with [Appellant]" on the day of the assaults. (JA at 30.) Appellant later made a failed attempt to obtain a restraining order against SSgt EF because of her "false

allegations against [him] in that [he] physically harmed [JF] to which [Appellant] denied adamantly." (JA at 30.)

In the stipulation of fact, Appellant admitted as true and correct that he "with intent to deceive, verbally [told] SMSgt OM, 'I was not even there,' or words to that effect, referring to SSgt [EF's] home on 25 November 2020." (JA at 30.)

Plea Agreement

Appellant entered into a plea agreement with the convening authority. (JA at 30-37.) Appellant pleaded guilty to Charge I and its Specification, making a false official statement in violate of Article 107, UCMJ. (JA at 32.) The plea agreement permitted a term of confinement between six months and three years for the false official statement alone. (JA at 33.) The military judge sentenced Appellant to 12 months of confinement for the false official statement. (JA at 26.) As for Charge II, Specifications 1 and 2, Appellant pleaded guilty to the lesser included offense of assault consummated by a battery in violation of Article 128, UCMJ. (JA at 32.)[1] Under the plea agreement, the maximum amount of confinement for each assault specification was six months. (JA at 33.) The military judge sentenced Appellant to six months of confinement for each assault. (JA at 26.) All sentences were to run concurrently. (JA at 34.) In total, the

[1] Appellant was originally charged with two specifications of battery of a child under the age of 16 in violation of Article 128, UCMJ.

military judge sentenced Appellant to 12 months of confinement, a bad-conduct discharge, forfeiture of all pay and allowances for 12 months, and a reduction to the grade of E-1. (JA at 13-14.)

Air Force Court of Criminal Appeals Opinion

Before AFCCA, both Appellant and Appellee briefed the court on whether 12 months confinement for the false official statement was inappropriately severe. (Supp. JA 126,144.) Neither party argued for unitary sentence appropriateness review. (Supp. JA 126,144.) AFCCA affirmed the findings and sentence. (JA at 2.) AFCCA said that while "there were mitigating circumstances and evidence of rehabilitative potential, [it] did not agree that Appellant's adjudged sentence was inappropriately severe." (JA at 9.) AFCCA reiterated that the "[t]he circumstances surrounding the assault consummated by a battery *and* underlying false official statement are aggravating." (JA at 9) (emphasis added).

AFCCA addressed both the false official statement and the two assaults consummated by a battery in its opinion. When addressing the false official statement, AFCCA noted that "Appellant continued to attempt to escape responsibility for his actions" when he told SMSgt OM that he "wasn't even there." (JA at 9.) AFCCA explained that "Appellant was reluctant to admit that he struck JF on the head and face because JF had spilled coffee grounds." (JA at 9.) Appellant chose to minimize the assault, leaving SSgt EF to seek advice from a

friend "instead of arming her with a full, accurate, and timely disclosure of the events so that she could decipher JF's symptoms and make well-informed medical decision for her toddler as quickly as possible." (JA 9.) AFCCA said, "[i]t was proper to consider the totality of the circumstances and Appellant's rehabilitative potential in determining an appropriate sentence for the false official statement [sic] *and* an appropriate sentence for crimes of which Appellant was convicted." (JA at 9-10) (emphasis added). AFCCA "conducted a thorough review of Appellant's entire court-martial records, including Appellant himself, the nature and seriousness of the offenses, Appellant's record of service, and all matters contained in the record of trial." (JA at 10.) AFCAA concluded "that the nature and seriousness of the offenses support[ed] the adjudged sentence." (JA at 10.)

SUMMARY OF THE ARGUMENT

The United States agrees with Appellant that Courts of Criminal Appeals (CCAs) must consider each segmented sentence to confinement, not the overall, unitary sentence when conducting sentence appropriateness review. In this case, AFCCA did so. Appellant asserts that AFCCA only considered the overall sentence and ultimately conflated the aggravating circumstances surrounding the assaults when determining whether 12 months of confinement the false official was appropriate. But a careful analysis of its opinion shows that AFCCA did consider each segmented sentence *and* the relevant facts surrounding the false official

statement. AFCCA analyzes both assaults and the false official statement independently. AFCCA relied on permissible evidence in aggravation when concluding the circumstances of the false official statement outweighed the evidence in mitigation or of positive rehabilitative potential. The aggravating facts that AFCCA relied on in evaluating the sentence for the false official statement did not stem from the assaults themselves, rather from Appellant's conscious decision to attempt to evade responsibility.

In sum, AFCCA did not abuse its discretion when conducing its Article 66(d), UCMJ, sentence appropriateness review. AFCCA applied the correct law to the facts, there was no miscarriage of justice, and Appellant received a fair sentence appropriateness review. As a result, this Court should affirm the lower courts findings and sentence.

ARGUMENT

AFCCA CORRECTLY CONSIDERED EACH SEGMENTED SENTENCE TO CONFINEMENT IN ITS SENTENCE APPROPRIATENESS REVIEW.

Standard of Review

This Court's review of decisions by a Court of Criminal Appeals "on issues of sentence appropriateness is limited to the narrow question of whether there has been an 'obvious miscarriage[] of justice or abuse[] of discretion." United States v. Behunin, 83 M.J. 158, 161 (C.A.A.F. 2023) *see also* United States v. Gay, 75.

M.J. 264, 267 (C.A.A.F. 2016) (explaining that this Court reviews the CCA's sentence appropriateness determination for an abuse of discretion). An abuse of discretion occurs when the CCA's findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the CCA's decision on the issue exceeds choices arising from the applicable facts and the law. United States v. Ayala, 81 M.J. 25, 27-28 (C.A.A.F. 2021). This Court's authority is limited to reviewing matters of law and therefore lacks the power CCAs have to review sentence appropriateness. Article 67(c)(4), UCMJ.

Law

Sentence Appropriateness

CCAs "may only affirm…the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ. "[A]ccused's own sentence proposal is a reasonable justification of its probable fairness to him." United States v. Fields, 74 M.J. 619, 625 (A.F. Ct. Crim. App 2015) (quoting United States v. Hendon, 6 M.J. 171, 175 (C.M.A. 1979)). "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988). The review requires an "individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and

the character of the offender." United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982) (citation and internal quotation marks omitted).

Sentencing Evidence

"Trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." Rules for Courts-Martial (R.C.M.) 1001(b)(4). This Court has held that uncharged misconduct that is part of a continuous course of conduct may be admitted as evidence in aggravation. United States v. Nourse, 55 M.J. 229, 232 (C.A.A.F. 2001). Evidence in aggravation must be directly related to or resulting from the offense of which the appellant has been found guilty. Id. Uncharged misconduct can be admitted as evidence in aggravation in sentencing if it was "directly preparatory to the crime for which [the appellant] was convicted." United States v. Hardison, 64 M.J. 279, 282 (C.A.A.F. 2007) (citing United States v. Wingart, 27 M.J. 128, 135 (C.M.A. 1988); *see also* United States v. Mullens, 29 M.J. 398, 400 (C.M.A. 1990) (explaining that uncharged misconduct consisted of "a continuous course of conduct involving the same or similar crimes, the same victims, and a similar situs").

R.C.M. 1002(f) requires sentencing authorities to consider the nature and circumstances of the offense and history and characteristics of the appellant. In

considering evidence listed in R.C.M. 1002(f), the court-martial may look to any evidence admitted by the military judge during findings. R.C.M. 1002(g).

CCAs are Presumed to Know the Law

In determining whether a CCA has applied the correct legal principles and law, this Court acknowledges that "CCAs are presumed to know the law and follow it." United States v. Thompson, 83. M.J. 1, 4 (C.A.A.F. 2021) (quoting United States v. Chin, 75 M.J. 220, 223 (C.A.A.F 2016).

Analysis

The United States agrees with Appellant that the correct sentence appropriateness review at the CCA level when the military judge adjudged segmented sentences at trial level is to consider the appropriateness of each segmented sentence individually, not the overall sentence. The United States disagrees with Appellant's assertion that AFCCA did not do so in this case. A review of AFCCA's opinion shows the Court considered the segmented sentence for the false official statement independently, analyzing the offense and the appropriate evidence in aggravation. This Court should affirm the lower court's sentence.

A. AFCCA did not abuse its discretion when conducting its sentence appropriateness review under Article 66(d), UCMJ, because its review applied the correct law and considered each segmented sentence.

AFCCA conducted "an individualized consideration of the particular [Appellant] on the basis of the nature and seriousness of the offense and character of the offender." *See* Snelling, 14 M.J. at 268. Appellant asks this Court to find that AFCCA abused its discretion in failing to conduct a proper Article 66(d) review and asserts that it ignored each segmented sentence. But AFCCA did consider each segmented sentence, in particular the segmented sentence that Appellant challenges on appeal.[2] The lower court scrutinized the false official statement sentence, correctly applied the law to the facts, and concluded 12 months of confinement was appropriate.

CCAs may only affirm the sentence as it finds current in law and fact based on the entire record. *See* Article 66(d)(1), UCMJ. After reviewing evidence admitted during findings and sentencing, AFCCA concluded that "the circumstances surrounding the assaults consummated by a battery *and* the underlying false official statement are aggravating." (JA at 9) (emphasis added). The language employed by AFCCA shows they considered each offense separately, and the sentence applied to each offense separately. When affirming

[2] Appellant did not challenge the appropriateness of the sentences imposed for the assaults consummated by a battery at AFCCA.

the sentence, AFCCA stated that "[i]t was proper to consider the totality of the circumstances and Appellant's rehabilitative potential in determining an appropriate sentence for the false official statement [sic] *and* an appropriate sentence for the crimes of which Appellant was convicted." (JA at 9-10) (emphasis added). Again, this shows AFCCA was considering the false official statement independently from the other crimes Appellant pleaded guilty to.

AFCCA's sentence appropriateness review was not an abuse of discretion and was reasonable under the circumstances. Appellant entered into a plea agreement where he could be sentenced to three years confinement on the false official statement alone – three times the sentence adjudged. (JA at 33.); s*ee also* Fields, 74 M.J. at 625 (finding that a plea agreement with the convening authority suggests fairness and appropriateness). In his unsworn statement, Appellant admitted he was "lying…out of fear of repercussions." (JA at 24.) He acknowledged the aggravating facts surrounding the false official statement and understood it was a serious offense, which is precisely why a plea agreement with a potential maximum three times higher than what was ultimately adjudged was fair and appropriate.

AFCCA's opinion was not an error of law that materially prejudiced the substantive right of the Appellant. *See* Article 59(a), UCMJ. Nor was AFCCA's decision a miscarriage of justice. AFCCA applied the sentencing principles and

laws outlined in R.C.M. 1001(b)(4), R.C.M. 1002(f), and R.C.M. 1002(g) when reviewing Appellant's segmented sentences. AFCCA looked at the entire record and the totality of the circumstances, and acknowledged Appellant admitted evidence both in mitigation and rehabilitative potential. The adjudged sentence is supported by the facts and the law. *See* R.C.M. 1002(f) (allowing sentencing authorities to consider the nature and circumstance of the offense, history of the accused, impact of the offense on victims). Appellant received a fair sentence appropriateness review. Thus, there was no abuse of discretion when AFCCA found that 12 months of confinement for the false official statement was not inappropriately severe.

Not only did AFCCA apply the correct sentencing principles, but it also considered each segmented sentence in Appellant's sentence appropriateness review. Appellant mentions that "AFCCA 'conclude[d] that the nature and seriousness of the offenses support the adjudged sentence'" to argue that the lower court reviewed the sentences unitary and therefore did not conduct a proper Article 66(d) review. (App. Br. at 23.) But AFCCA referencing the multiple offenses in its concluding paragraph does not mean it analyzed the sentences to confinement unitarily. AFCCA must conduct an overall assessment of whether the sentence is appropriate under Article 66(d), UCMJ, which requires AFCCA to look at the nature and circumstance of each offense. *See* R.C.M. 1002(f). Moreover, under

Article 66(d), UCMJ, AFCCA is statutorily required to review the appropriateness of each part of the sentence, whether raised by Appellant or not. Thus, it was appropriate for AFCCA to discuss the entire sentence in the last paragraph of its opinion, after discussing the appropriateness of the sentence for the false official statement in the preceding paragraphs.

In previous decisions, AFCCA has considered segmented sentences instead a unitary sentence in its sentence appropriateness review. *See* United States v. Bennett, ACM S32722, 2023 CCA LEXIS 293, *14 (A.F. Ct. Crim. App. 14 July 2023) (unpub. op.) ("Because segmented sentences to confinement are a required part of the entered sentence, R.C.M. 1111(b)(2), to approve an entered sentence we must ensure each component of the entered sentence is correct in law and fact."); United States v. Injerd, ACM 40111, 2022 CCA LEXIS 727, *29 (A.F. Ct. Crim. App. 20 December 2022) (unpub. op.) (approving the sentence after considering the entire record, including the fact that the military judge imposed segmented sentence of three months' confinement for Appellant's conviction for Specification 1 of Charge I); *see also* United States v. Goldman, ACM 39939, 2022 CCA LEXIS 43, *2 (A.F. Ct. Crim. App. 20 January 2022) (unpub. op.) (acknowledging that effective 1 January 2019 R.C.M. 1002(d)(2) addresses segmented sentencing for confinement and fines and concurrent or consecutive confinement terms).

Yet Appellant argues that AFCCA did not consider each segmented sentence in his case and therefore did not conduct a proper Article 66(d) review. Appellant cites United States v. Souders, ACM 40145, 2023 CCA LEXIS 126 at *23 (A.F. Ct. Crim. App. 9 March 2023) (unpub. op.) to support that AFCCA believes that "no authority compelled [AFCCA] to consider each sentence separately." Appellant uses this language from Souders to conclude that AFCCA is not considering segmented sentences and is only looking at the unitary sentence in sentence appropriateness review. (App. Br. at 16.) But this Court must put the Souders sentence appropriateness review in context. In Souders, the quoted language came from the Court's discussion of a segmented sentence for the appellant's indecent conduct conviction. Souders, unpub. op. at *2. The appellant asked AFCCA to find his four-year sentence for indecent conduct inappropriate in comparison to the two-year sentence he received for each of ten convictions for communicating indecent language. Id. at *22. Before conducting its sentence appropriateness analysis, AFCCA made two points. First, "to the extent that an appellant challenges the weight given to considerations that might have shaped any part of the sentence, our determination of that sentence that should be approved is de novo, not differential." Id. *23. Second:

> [AFCCA] is unaware of any authority that would require this court to use a segmented term of confinement identified by an appellant as a benchmark to evaluate "the sentence or such part or amount of the sentence" that 'should be approved' under Article 66, UCMJ. Even when this court has compared sentences between appellants, we have been mindful that sentence comparison is only one aspect of our Article 66, UCMJ, review.

Id. Looking at the entire Souders opinion in context, AFCCA was not suggesting that it would conduct unitary sentencing. Instead, the Court conveyed that it would not conduct a sentence comparison between two different segmented sentences. In fact, AFCCA did review each contested segmented sentence separately, not the unitary sentence. In the opinion, each review of the segmented sentence review had its own subheading. Id. at *22-27. And, in any event, AFCCA did not even cite Souders in its opinion in this case. Even if Souders stood for the proposition Appellant claims it does, there is no indication that AFCCA applied that reasoning in Appellant's case.

Appellant cites the one line in the Souders opinion as a proposition that AFCCA is only considering the unitary sentence in a sentence appropriateness review. That is simply not the case. As Appellant mentions in its brief, since the MJA 2016, many CCAs have looked to the segmented sentences in sentence appropriateness review. *See* Bennett, unpub. op. at *14; Injerd, unpub. op. at *29 Goldman, unpub. op. *2; United States v. Alkazahg, 81 M.J, 764, 785-86 (N-M Ct. Crim. App. 2021). No different in Appellant's case.

In line with Article 56(c)(2), UCMJ, mandating military judges to adjudicate a specific term of confinement for each offense, AFCCA here considered each offense and its respective term of confinement. Before AFCCA, the parties briefed the challenged segmented sentence and specifically addressed the false official statement. In his brief before AFCCA, Appellant specifically stated that "[t]welve months of confinement for a single false official statement is not appropriate." (Supp. JA at 129.) In its response, the United States address that "the weight of the evidence supported the judge's sentence for the false official statement." (Supp. JA at 145). Based on the arguments posed by both parties, it is not logical to conclude that AFCCA would then sua sponte consider only the combined, unitary sentence during appropriateness review. If AFCCA had been conducting a unitary sentence appropriateness review, one would have expected the lower court would have explicitly said so and explained its legal authority for doing so. Absent such a statement, this Court should presume that AFCCA knew that law and did not analyze the sentence as a whole, but analyzed the segmented sentence that Appellant challenged on appeal and then each other part of the sentence under its mandated Article 66(d) review.

Thus, AFCCA considered each segmented sentence in Appellant's case and therefore did not abuse its discretion when conducting its sentence appropriateness review under Article 66(d), UCMJ.

B. AFCCA considered permissible evidence in aggravation when concluding that 12 months of confinement for the false official statement was appropriate.

AFCCA correctly considered appropriately admissible evidence in aggravation when reviewing the circumstances surrounding the false official statement. The statement was part of a series of misconduct consciously committed after the assault of JF. Appellant repeated the same lies about the same offense to many individuals – denying any responsibility or knowledge of the assaults on JF to SSgt EF, SMSgt OM, and the Department of Social Services. (JA at 3-4). Appellant even filed a restraining order against SSgt EF alleging false allegations. (JA at 4.) AFCCA noted that Appellant "continued to attempt to escape responsibility for his actions" when he "minimized the assault-leaving [SSgt] EF to rely on a friend's advice" and when he told his First Sergeant that he "wasn't even there." (JA at 9.) Appellant's lies and denial of assaulting JF "[were] directly preparatory" to the false official statement and therefore directly related to the offense Appellant pleaded guilty to. *See* Hardison, 64 M.J. at 282. The uncharged misconduct was also part of a continuing scheme, that is, repeated lies all constituting an attempt to evade responsibility for assaulting JF. *See* R.C.M. 1001(b)(4); *see also* Nourse, 55 M.J. at 232 (holding that uncharged larcenies were admissible evidence in aggravation because the conduct was part of a scheme to continue to steal from the Sherriff's office).

Appellant states that the false official statement alone does not warrant 12 months of confinement because the false official statement to SMSgt OM did not thwart any medical treatment. (App. Br. at 23.) Appellant relies on United States v. Buber, 62 M.J. 476 (C.A.A.F. 2006) where this Court found "[a] single statement made to law enforcement ten days before the child's death did not necessarily support any determination that were was a causal connection between the statement to law enforcement, any medical treatment, or the failure to give any necessary medical treatment." (App. Br. at 22.) The United States acknowledges that Appellant's lies did not thwart medical care for JF. But the causation between the lies and seeking medical attention was not the root of AFCCA's sentence appropriateness review. There was no evidence that the appellant in Buber made other omissions or concealments to evade responsibility for the crime. In contrast, Appellant continued to conceal the assault and lie about his whereabout the night of the crime. Appellant's reliance on Buber does not support the contention that his sentence for the false official statement was inappropriately severe. AFCCA was transparent in its opinion that the aggravating factor surrounding the false official statement was Appellant's "continued attempt to escape responsibility." (JA at 9.) AFCCA, after seeing all evidence admitted at the trial level, considered permissible aggravation evidence that directly related to the false official statement. *See* R.C.M. 1001(b)(4) & 1002(f)-(g). The delay in seeking medical

attention was not the crux of AFCCA's sentence appropriateness analysis and therefore Appellant's reliance on Buber is unpersuasive.

Appellant also asserts that "AFCCA "lumped together the circumstances surrounding the assaults and the false official statement when it analyzed the sentence." (App. Br. at 20.) Just because AFCCA considered the totality of the circumstances and Appellant's rehabilitative potential in determining an appropriate sentence, does not mean it conducted a unitary sentence review. According to the sentencing rules, the sentencing authority and Courts of Criminal Appeals conducting a sentence appropriateness review have to consider evidence outlined in R.C.M. 1002(f) and 1002(g), such as the nature and circumstances of the offense and history and characteristics of the accused, rehabilitative potential, and evidence admitted at trial during findings proceedings. Segmented sentencing does not require the CCA to review everything in isolation. Here, AFCCA focused its analysis on the false official statement and the surrounding evidence, in particular, that "Appellant was reluctant to admit that he struck J.F." and that "Appellant chose to minimize the assault." (JA at 9.) AFCCA showed that Appellant "continued to attempt to escape responsibility for his actions when he then tells his First Sergeant that he 'wasn't even there,'" which was evidence in aggravation not stemming from the assaults.

Appellant also claims that AFCCA looked at all the segmented sentences as a unitary sentence "while ignoring the plea agreement, and determined that a year was appropriate for striking 'a helpless two-year-old child who could not express himself what he had endured.'" (App. Br. at 21-22.) Appellant uses this language to try to persuade this Court that AFCCA looked at the unitary sentence instead of the segmented sentences. That is simply not the case. When AFCCA stated that "JF was a helpless two-year-old child who could not express himself what he had endured compound's Appellant's actions," it was providing background to show that:

> in light of the anguish JF was exhibiting, Appellant chose to minimize the assault-leaving [SSgt] EF to rely on a friend's advice instead of arming her with a full, accurate, and time disclosure of the events so that she could decipher JF's symptoms and make well-informed medical decisions for her toddler as quickly as possible. When Appellant told SMSgt OM, that he 'wasn't even there,' he continued to escape responsibility for his actions.

(JA at 9.) The one line Appellant relies on to support its argument was only used as background facts in the AFCCA opinion to show Appellant lied and had a motive to lie to avoid criminal liability. It did not suggest that AFCCA was conducting a unitary review of sentence appropriateness. All the statements made by Appellant to deny the assault or to prove he was not there the night of the crimes were a continuous course of misconduct to escape responsibility for the crimes committed. Appellant fails to recognize that AFCCA considered all facts

on the record to evaluate the totality of the circumstances surrounding the false official statement.

AFCCA did not unduly focus on the assaults themselves when finding that 12 months confinement for the false official statement was appropriate. AFCCA did not mention that Appellant hit JF with a spatula or hit JF multiple times, which are aggravating facts related to the assaults. Instead, AFCCA analyzed Appellant's continuous course of conduct in that he lied multiple times to evade responsibility for his crimes, which involved assaulting a child. (JA at 9.) For these reasons, the evidence in aggravation for the assaults did not bleed over to the false official statement analysis. While it was appropriate for AFCCA to consider the totality of the circumstances – including that Appellant was lying to evade responsibility for assaulting a child – that does not mean that AFCCA conducted a unitary sentencing review. AFCCA merely considered all admissible aggravating evidence in assessing the severity of the false official statement. Thus, AFCCA properly relied on evidence in aggravation to conclude that 12 months of confinement for the false official statement was not inappropriately severe.

Conclusion

AFCCA properly considered each segmented sentence component and the totality of the circumstances surrounding the false official statement. AFCCA relied on permissible evidence in aggravation to conclude that 12 months of

confinement was an appropriate sentence. AFCCA did not abuse its discretion because it conducted a proper sentence appropriateness review.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claim and affirm the decision of the Court of Criminal Appeals.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and transmitted by electronic means with the consent of the counsel being served via email to heather.caine.1@us.af.mil on 20 September 2023.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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

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

/s/ Vanessa Bairos, Capt, USAF

Attorney for the United States (Appellee)

Dated: 20 September 2023

APPENDIX

Cited Unpublished Opinions

United States v. Bennett

United States Air Force Court of Criminal Appeals

July 14, 2023, Decided

No. ACM S32722

Reporter
2023 CCA LEXIS 293 *

UNITED STATES, Appellee v. Jacob R. BENNETT, Airman First Class (E-3), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Pilar G. Wennrich. Sentence: Sentence adjudged on 30 December 2021 by SpCM convened at Wright-Patterson Air Force Base, Ohio. Sentence entered by military judge on 13 January 2022: Bad-conduct discharge, confinement for 100 days, and reduction to E-1.

Counsel: For Appellant: Major Nicole J. Herbers, USAF.

For Appellee: Lieutenant Colonel Thomas J. Alford, USAF; Major John P. Patera, USAF; Mary Ellen Payne, Esquire.

Judges: Before JOHNSON, MERRIAM, and ANNEXSTAD, Appellate Military Judges. Judge MERRIAM delivered the opinion of the court, in which Chief Judge JOHNSON and Judge ANNEXSTAD joined.

Opinion by: MERRIAM

Opinion

MERRIAM, Judge:

A special court-martial composed of a military judge alone found Appellant guilty, in accordance with his pleas and a plea agreement, of one specification of failure to go on divers occasions, two specifications of wrongful use of cocaine, one specification of wrongful use of fentanyl, and one specification of wrongful use of marijuana, in violation of Articles 86 and 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 886, 912a.[1] The military judge sentenced Appellant to a bad-conduct discharge, confinement for 100 days, and reduction to the grade of E-1.[2]

Appellant did not submit matters for the convening authority's consideration and the convening authority took no action on findings or sentence. The military judge entered judgment as adjudged. Appellant received 71 days of pretrial confinement credit.

Appellant submitted the case through counsel "on its merits with no specific assignments of error," but, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant asked that we consider the following matter:

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[1] All references to the UCMJ, the Manual for Courts-Martial, and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial*, *United States [*2]* (2019 ed.).

[2] Specifically, the military judge sentenced Appellant to 100 days' confinement for each of the five specifications of which Appellant was convicted and, in accordance with the plea agreement, the military judge directed all terms of confinement to run concurrently.

whether Appellant's sentence was inappropriately severe.[3] Though we find the sentence as a whole was not inappropriately severe, we modify the sentence to address an error not raised by Appellant:[4] the portion of Appellant's segmented sentence to confinement for the Specification of Charge I exceeded the maximum punishment authorized. We affirm the findings as entered. Regarding Appellant's sentence to confinement for the Specification of Charge I, we affirm only one month confinement. We affirm the remaining sentence as entered.

I. BACKGROUND

In late September 2021, approximately one-and-a-half years after Appellant entered active duty in the United States Air Force, members from Appellant's unit completed a "health and wellness check" at Appellant's off-base residence [*3] because he did not report to work and did not respond to phone calls. Around midday, Appellant "answered the door in his pajamas and flip flops" and his "pupils were enlarged." Based on Appellant's physical condition and the disarray of his home, a search authorization for Appellant's bodily fluids was obtained, with the results showing 2,860 nanograms per milliliter (ng/mL) of a cocaine metabolite in his system. Appellant later admitted he had used cocaine with his then-girlfriend, KJ, between 18 and 19 September 2021.

Between 4 and 19 October 2021, on seven different occasions Appellant failed to report for duty on time. Though required to report for duty at 0730, on these days, Appellant did not arrive at work until between 1000 and 1300. During the guilty plea inquiry, Appellant explained that "most of the time" he was "just sleeping and [ ] would wake up and report in around between 10 or 1."

On or about 20 October 2021, Appellant again used cocaine. Appellant purchased what he believed to be "normal cocaine" from a civilian who approached his car while he was parked in an off-base store parking lot. Unbeknownst to him, the cocaine was laced with fentanyl. Appellant was in the car [*4] with KJ and his 2-year-old son. Appellant "tested" the substance and shortly thereafter he "became unresponsive." As Appellant described to the military judge during the providence inquiry, the cocaine and fentanyl combination "basically killed me, ma'am. My head started spinning and then I remember waking up in the back of [an] ambulance." KJ called 911. Members of the Dayton Police Department and Dayton Fire Department responded and administered Nalzone, which helped Appellant regain consciousness. This incident triggered a second search authorization, and blood and urine samples were collected. The results showed 28,828 ng/mL of a cocaine metabolite and 5 ng/mL of fentanyl in his system. The sample also revealed 16 ng/mL of a marijuana metabolite in Appellant's system. Appellant subsequently admitted that he had used marijuana sometime between 29 September 2021 and 20 October 2021. He admitted he smoked a "joint" with KJ in his home and that he did not like its effects, because it caused him to feel "lightheaded, hungry, and lethargic."

II. DISCUSSION

A. Whether Appellant's Sentence is Inappropriately Severe

1. Additional Background

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[3] Appellant also noted that he "understands this Court will . . . review the entire record of this proceeding for factual and legal sufficiency . . . as is provided for and required by **Article 66(d), UCMJ**, **10 U.S.C. § 866(d)**." We did not consider factual sufficiency because Appellant did not make "a specific showing of a deficiency in proof" as required by **10 U.S.C. § 866(d)(1)(B)(i)**. **National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(b)(1)(B), 134 Stat. 3388, 3612 (1 Jan. 2021)**. We further note Appellant pleaded guilty to the offenses of which he was convicted.

[4] To its credit, in its answer to Appellant's merits brief, the Government alerted this court to the sentencing error necessitating modification.

Appellant's plea agreement required that he be sentenced [*5] to between 100 and 180 days of confinement for each specification and that all confinement run concurrently. The plea agreement contained no additional limitations or restrictions on sentence. The military judge imposed the minimum confinement allowable under the plea agreement of 100 days per specification, along with a bad-conduct discharge and reduction to the grade of E-1.

Appellant asks this court to disapprove the adjudged punitive discharge because the sentence "was inappropriately severe given the matters in mitigation and extenuation" that "clearly documented mental health concerns, attempts to seek care, and no unit support for the underlying basis for his misconduct—poor coping for the increasing family/life stressors—which manifested in insomnia, depression, and anxiety."[5]

2. Law and Analysis

We review issues of sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006) (footnote omitted).

This court "may affirm only . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). Courts of Criminal Appeals "assess sentence appropriateness by considering the particular appellant, the nature and [*6] seriousness of the of-fense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc) (per curiam) (alteration in original) (citation omitted). Although this court has broad discretion in determining whether a particular sentence is appropriate, and Article 66, UCMJ, empowers us to "do justice," we have no authority to "grant mercy" by engaging in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted).

A plea agreement with the convening authority is "some indication of the fairness and appropriateness of [an appellant's] sentence." *United States v. Perez*, No. ACM S32637 (f rev), 2021 CCA LEXIS 501, at *7 (A.F. Ct. Crim. App. 28 Sep. 2021) (unpub. op.); *see also United States v. Fields*, 74 M.J. 619, 625 (A.F. Ct. Crim. App. 2015) (holding an "accused's own sentence proposal is a reasonable indication of its probable fairness to him" (citations omitted)).

Based on evidence admitted during presentencing proceedings and considered by the military judge in deciding sentence, Appellant was facing difficult and real personal concerns, including financial, child custody and childcare, relationship, and some associated mental health challenges. However, in facing these challenges, Appellant chose to engage in repeated misconduct over a period of several weeks, including several uses of illegal drugs. Some of Appellant's drug use occurred while he was [*7] aware he was already under investigation for misconduct. One instance of drug use, during which Appellant used cocaine laced with fentanyl, occurred in a car in a drug store parking lot while Appellant's 2-year-old son and then-girlfriend were in the car with him, and resulted in emergency personnel being called to resuscitate Appellant. Appellant was also convicted of failing to report to work on time on divers occasions, an offense for which he had been previously reprimanded. Though a minor offense, this misconduct meant Appellant was not performing his duties and required the time and attention of other unit members.

Appellant asserts he received "no unit support for the underlying basis for his misconduct—poor coping for the increasing family/life stressors—which manifested in insomnia, depression, and anxiety." This assertion of "no unit support" is belied by Appellant's own brief, in which Appellant acknowledges that his unit provided referrals to budgeting classes and switched his work assignments to accommodate childcare. Evidence adduced during the presen-tencing hearing indicated that to accommodate childcare scheduling, Appellant's unit moved his duty assignment from shift [*8] work to normal Monday through Friday business hours, perhaps an atypical arrangement for a junior enlisted member in a security forces squadron. Moreover, his commander initiated a commander-

[5] Appellant does not, and did not at trial, assert that his "mental health concerns" rose to the level of exculpating Appellant or meriting assessment under R.C.M. 706.

directed mental health referral for evaluation and services, which she terminated because Appellant indicated he was pursuing such services on his own.

Aware of all the evidence in mitigation and extenuation, the military judge sentenced Appellant to the shortest term of confinement permissible under the terms of the plea agreement, a plea agreement that allowed, but did not require, imposition of a bad-conduct discharge.

Having reviewed the entire record, we find Appellant's total sentence was not inappropriately severe and we affirm it, subject to our modification of the segmented sentence to confinement for the Specification of Charge I, to which we now turn.

B. Impermissible and Inappropriate Segmented Sentence to Confinement

1. Additional Background

The plea agreement in this case stated Appellant would be sentenced to concurrent periods of confinement of between 100 and 180 days for each of the specifications with which he was charged, explicitly including for the Specification of Charge I, which [*9] alleged a violation of Article 86, UCMJ. Consistent with the plea agreement, the military judge adjudged and entered 100 days of confinement for each of the five specifications of which Appellant was convicted, to be served concurrently, for a total of 100 days of confinement. This included a sentence of 100 days' confinement for the Article 86, UCMJ, violation.

2. Law

We review issues of sentence appropriateness de novo. *Lane*, 64 M.J. at 2. This court "may act only with respect to the findings and sentence as entered into the record." Article 66(d)(1), UCMJ. Further, this court "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as [it] finds correct in law and fact and determines, on the basis of the entire record, should be approved." *Id.*

"In announcing the sentence in a general or special court-martial in which the accused is sentenced by a military judge alone . . . , the military judge shall, with respect to each offense of which the accused is found guilty, specify the term of confinement . . . ." Article 56(c)(2), UCMJ, 10 U.S.C. § 856(c)(2). "The military judge at a general or special court-martial shall determine an appropriate term of confinement and fine, if applicable, for each specification for which the accused was found guilty . . . . [*10] [S]uch a determination may include a term of no confinement or no fine when appropriate for the offense," except when a mandatory minimum sentence applies. Rule for Courts-Martial (R.C.M.) 1002(d)(2)(A). The Discussion of this Rule further provides that "[t]he military judge should determine the appropriate amount of confinement or fine, if any, for each specification separately. The appropriate amount of confinement or fine that may be adjudged, if any, is at the discretion of the military judge subject to these rules." *Id.* at Discussion.

When entering judgment in a case where the accused was convicted of more than one specification and any part of the sentence was determined by a military judge, the judgment must specify:

> (A) the confinement and fine for each specification, if any; (B) whether any term of confinement shall run consecutively or concurrently with any other term(s) of confinement; and (C) the total amount of any fine(s) and the total duration of confinement to be served[ ] after accounting for . . . any terms of confinement that are to run consecutively or concurrently.

R.C.M. 1111(b)(2).

"The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." Article 56(a), UCMJ, 10 U.S.C. § 856(a). [*11] "The maximum limits for the authorized punishments of confinement, forfeitures and punitive discharge (if any) are set forth for each offense listed in Part IV

of this Manual." R.C.M. 1003(c)(1)(A)(i). "A sentence which exceeds the maximum punishment authorized by the Table of Maximum Punishments cannot be affirmed—however 'appropriate' it may seem to an appellate tribunal." *United States v. Ortiz*, 24 M.J. 164, 171 (C.M.A. 1987).

The maximum punishment prescribed by the President for failing to go to, or going from, one's appointed place of duty in violation of Article 86, UCMJ, is "confinement for 1 month and forfeiture of two-thirds pay per month for 1 month." *Manual for Courts-Martial, United States* (2019 ed.), pt. IV, ¶ 10.d.(1).

3. Discussion

One of many changes to the military justice system enacted as part of the Military Justice Act of 2016[6] (MJA 2016) was the institution of "segmented sentencing" when the sentence is adjudged by a military judge alone. Prior to MJA 2016, a court-martial would adjudge a "unitary sentence"—a single sentence that expressed the entire punishment for all findings of guilty. Under MJA 2016, a system of combined unitary and segmented sentences operates when a military judge decides sentence for multiple offenses. Under this system, a military judge announces and enters judgment of discrete [*12] sentences to any confinement or fines for each specification separately, indicating whether multiple sentences to confinement are to be served concurrently or consecutively. A unitary sentence based on all offenses of which an accused is convicted is adjudged and entered for any other components of the sentence, such as punitive discharge, reduction in grade, forfeitures, or reprimand.

Article 56, UCMJ, and R.C.M. 1002 are clear that the individual components of segmented sentences must comply with other sentencing rules. Yet none of the legal personnel involved with this case at trial recognized (or voiced such recognition) that the agreed-upon punishment range of 100 to 180 days' confinement for the violation of Article 86, UCMJ, was approximately three to six times the maximum confinement of one month authorized for that offense. To ensure clarity, we explicitly hold that under segmented sentencing procedures, the confinement or fine adjudged for each specification must comport with the maximum punishment applicable to that offense. It is necessary but insufficient that the total adjudged punishment does not exceed the combined maximum punishment available based on the offenses and court-martial forum; the individual segment [*13] of a sentence to any confinement or fine must also comport with the maximum punishment applicable to that offense. Counsel and military judges are further reminded that under segmented sentencing procedures, military judges are to determine an appropriate term of confinement (and fine, if applicable) for each specification *separately*. R.C.M. 1002(d)(2)(A).

In addition to the problematic segmented sentence for the Specification of Charge I, there were four segmented sentences to confinement for 100 days. In accordance with the plea agreement, all sentences to confinement were adjudged to be served concurrently. Thus, in this case, adjudging a segment of confinement that exceeded the maximum punishment authorized for the specification, but which did not exceed the total confinement agreed upon under the plea agreement, resulted in no effective difference to Appellant's actual period of confinement to be served. That is, Appellant would have been sentenced to serve a total of 100 days' confinement whether the segmented sentence for the Specification of Charge I was 100 days (as it was), one month (the maximum authorized punishment), or no confinement. Thus, Appellant was not exposed to additional confinement [*14] time due to the military judge's error. Nevertheless, a record reflecting a sentence of over three times the maximum for the offense could theoretically prejudice Appellant in some future context. Moreover, we cannot approve a sentence that is not correct in law.

When the military judge adjudged and entered judgment for a sentence to confinement of 100 days for the Article 86, UCMJ, violation, she erred as a matter of law.[7] We may affirm only "the sentence or such part or amount of the

[6] The act was part of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5001-5542, 130 Stat. 2000, 2894-2967 (23 Dec. 2016).

[7] We note that the military judge first erred by accepting a plea agreement in which the Government and Appellant agreed to an impermissible sentence. Neither party has suggested the plea agreement should be revisited, that Appellant's plea was

sentence as [we] find[ ] correct in law and fact," and we may act only "with respect to the findings and sentence as entered into the record." Article 66(d)(1), UCMJ. Because segmented sentences to confinement are a required part of the entered sentence, R.C.M. 1111(b)(2), to approve an entered sentence we must ensure each component of the entered sentence is correct in law and fact. Accordingly, we must determine what part, if any, of the segmented sentence to confinement for the Specification of Charge I is correct in law and fact. The Government contends we should disapprove the period of confinement for the Specification of Charge I that exceeds one month, implicitly suggesting both that one month is appropriate for the offense and that the Government [*15] agrees such a remedy sufficiently allows the Government to enjoy the benefit of its plea agreement bargain. Appellant does not address this issue on appeal, and therefore does not suggest an alternative reduced sentence, limiting his discussion of the sentence solely to the claim of inappropriate sentence severity noted above.

We are mindful that after considering all the sentencing evidence, the military judge elected to sentence Appellant to the minimum period of confinement available under the range permitted by the plea agreement for each offense. But we also note that in the plea agreement, Appellant and the Government both agreed, albeit impermissibly, that Appellant could be confined for between 100 and 180 days for the Article 86, UCMJ, violation. Because one month of confinement is a lesser sentence than that to which Appellant agreed, and because the total sentence of confinement to be served remains the same (as all sentences to confinement run concurrently), Appellant continues to enjoy the full benefit of his plea agreement bargain under the Government's proposed modified confinement term of one month.

The segmented sentence for the Specification of Charge I shall be confinement for one [*16] month, to be served concurrently with the sentences to confinement for the other offenses, which are not affected by our modification. The remaining bad-conduct discharge, total sentence to confinement of 100 days, and reduction to E-1 are affirmed.

III. Conclusion

We affirm only so much of the segmented sentence to confinement for the Specification of Charge I as provides for confinement for one month. We affirm the remainder of the sentence. The findings as entered and the sentence, as modified, are correct in law and fact, and no further error materially prejudicial to the substantial rights of the Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d).

Accordingly, the findings and sentence, as modified, are **AFFIRMED**.

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improvident, or that the errors at trial involved ineffective assistance of counsel. Our sentence modification sufficiently addresses the error and we do not address these other possible issues.

United States v. Goldman

United States Air Force Court of Criminal Appeals

January 20, 2022, Decided

No. ACM 39939

Reporter
2022 CCA LEXIS 43 *; 2022 WL 194307

UNITED STATES, Appellee v. Paul J. GOLDMAN, Airman First Class (E-3), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Remanded by United States v. Goldman, 2022 CCA LEXIS 511, 2022 WL 3903151 (A.F.C.C.A., Aug. 30, 2022)

Decision reached on appeal by United States v. Goldman, 2023 CCA LEXIS 327 (A.F.C.C.A., Aug. 7, 2023)

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Charles G. Warren. Sentence: Sentence adjudged on 11 March 2020 by GCM convened at Barksdale Air Force Base, Louisiana. Sentence entered by military judge on 21 May 2020: Bad-conduct discharge, confinement for 10 months, reduction to E-1, and a reprimand.

Counsel: For Appellant: Major Jenna M. Arroyo, USAF.

For Appellee: Lieutenant Colonel Matthew J. Neil, USAF; Lieutenant Colonel Dayle P. Percle, USAF; Major Abbigayle C. Hunter, USAF; Mary Ellen Payne, Esquire.

Judges: Before JOHNSON, LEWIS, and ANNEXSTAD, Appellate Military Judges. Senior Judge LEWIS delivered the opinion of the court, in which Chief Judge JOHNSON and Judge ANNEXSTAD joined.

Opinion by: LEWIS

Opinion

LEWIS, Senior Judge:

In accordance with Appellant's pleas and pursuant to a plea agreement, a general court-martial composed of a military judge found Appellant guilty of two specifications of willfully disobeying a superior commissioned officer, one specification of failure to obey a lawful general regulation, one specification of wrongful use of marijuana, three specifications of assault consummated by a battery, two specifications of assault consummated by a battery of a child, one specification [*2] of obstruction of justice, one specification of wrongful extramarital sexual conduct, one specification of child endangerment, and one specification of drunk and disorderly conduct, in violation of Articles 90, 92, 112a, 128, 131b, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 890, 892, 912a, 928, 931b, and 934.[1],[2]

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[1] Unless otherwise noted, references to the UCMJ and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*). As Appellant's convicted offenses spanned from 1 December 2015 to 6 September 2019, references to the punitive articles of the UCMJ are to the 2019 *MCM, Manual for Courts-Martial, United States* (2016 ed.), and *Manual for Courts-Martial, United States* (2012 ed.).

Some of Appellant's offenses occurred prior to 1 January 2019 and Appellant elected to be sentenced under the sentencing procedures that took effect on 1 January 2019. *See* Rule for Courts-Martial (R.C.M.) 1002(d)(2) (addressing segmented sentencing for confinement and fines and concurrent or consecutive confinement terms). Consistent with the plea agreement, the military judge sentenced Appellant to a bad-conduct discharge, a total of ten months of confinement,[3] reduction to the grade of E-1, and a reprimand.

Pursuant to the plea agreement, the convening authority agreed to dismiss the following, with prejudice, after announcement of sentence: (1) Charge IV and its two specifications, which alleged violations of Article 120, UCMJ, 10 U.S.C. § 920 (*Manual for Courts-Martial, United States* (2016 ed.)); and (2) Charge V, Specification 4, which alleged a violation of [*3] Article 128, UCMJ, 10 U.S.C. § 928 (*Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*)). Prior to adjourning the court-martial, the military judge granted the Government's motion to dismiss with prejudice Charge IV and its specifications and Charge V, Specification 4.

On 5 May 2020, after considering Appellant's clemency submission and consulting with the staff judge advocate, the convening authority took no action on the findings or sentence. The convening authority granted Appellant's request to defer the adjudged reduction to the grade of E-1 from 14 days after the sentence was announced until the date of the entry of judgment (EoJ). The convening authority also deferred the automatic forfeitures of pay and allowances from 14 days after announcement of sentence until the date of the EoJ. The convening authority waived the automatic forfeitures for a period of six months, or expiration of term of service, with the waiver commencing on the date of the EoJ, and directed the forfeitures be paid to Appellant's former spouse, MP, for the benefit of Appellant's dependent child, EG. Finally, the convening authority provided the language for Appellant's reprimand.

The military judge signed the EoJ on 21 May 2020. [*4] The EoJ does not state that Charge IV and its two specifications and Charge V, Specification 4, were dismissed *with prejudice*. Rather, it states they were "Withdrawn and Dismissed After Arraignment."

Appellant raises three assignments of error: (1) whether the convening authority's failure to unambiguously dismiss certain charges and specifications with prejudice constituted noncompliance with a material term of the plea agreement; (2) whether Appellant is entitled to sentence relief because his record of trial is incomplete; and (3) whether Appellant is entitled to appropriate relief as the convening authority failed to take action on the sentence as required by law.[4]

We find that a remand to the Chief Trial Judge, Air Force Trial Judiciary, is the appropriate response to resolve Appellant's first assignment of error. *See* *United States v. Samples*, No. ACM S32657, 2021 CCA LEXIS 463, at *5 (A.F. Ct. Crim. App. 15 Sep. 2021) (unpub. op.) (finding a failure to state charged offenses in an EoJ were dismissed with prejudice implies those charged offenses were dismissed without prejudice).

During the remand, we authorize a detailed military judge to address the errors and omissions documented in Appellant's second and third assignments of error. We also authorize correction of additional errors [*5] in the EoJ and correction of the record of trial due to an omission of the audio recording of one session of the trial proceedings.[5]

I. BACKGROUND

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[2] Pursuant to the plea agreement, Appellant pleaded guilty, excepting certain words from one of the three specifications of assault consummated by a battery, one of the two specifications of assault consummated by a battery of a child, and the child endangerment specification.

[3] The confinement terms ran concurrently and varied from a low of three months to a high of ten months.

[4] We have reworded the assignments of error. We granted Appellant's motion to file issue (3) as a supplemental assignment of error.

[5] Some of these issues were discovered in conducting our **Article 66, UCMJ, 10 U.S.C. § 866**, review.

The military judge convicted Appellant of 13 offenses across 5 charges. We summarize the offenses generally and group certain offenses together.[6] We describe most of the offenses in chronological order.

A. Assault Consummated by a Battery, Child Endangerment, and Drunk and Disorderly Offenses

Appellant was convicted of assault consummated by a battery against three adults and two children. He was also convicted of child endangerment of one of the two children. Finally, Appellant was convicted of a drunk and disorderly conduct offense that occurred the same night as three of the battery offenses.

The first battery offense occurred between April 2016 and December 2017. During an argument, Appellant unlawfully pushed MP, his first wife, on the chest with his hands. The push caused MP's body to hit a wall putting a hole in it. Later, MP took three photographs, which showed red marks on her body.

The child endangerment offense occurred while Appellant was still married to MP. The victim of the offense was his then six-month-old daughter, EG. In April [*6] 2017, MP was changing EG's diaper while simultaneously arguing with Appellant. Appellant threw a plush ostrich toy with plastic eyes at MP. The toy was about half of the size of his daughter. During the providence inquiry, Appellant described the throw as "hard and directly like a fastball." Appellant also described the throw as a "seven or an eight" on a scale of zero to ten, with ten being the hardest he could throw it. The toy missed MP, hit a wall, and struck objects on EG's changing table before stopping within six inches of EG. Appellant described why he believed his actions constituted culpable negligence that might have resulted in foreseeable harm to EG and why he breached his duty of care for her.

The second battery offense occurred in the summer of 2018. By this time, MP and Appellant had divorced. EG, then 2 years old, was visiting Appellant in San Antonio, Texas, under a custody arrangement. While driving, Appellant unlawfully struck EG across the face with his hand causing her lip to bleed. At the time Appellant struck her, EG was strapped in a car seat in the backseat. Appellant used force against EG that went beyond any disciplinary purpose. During the providence inquiry, [*7] Appellant described his level of force as "unreasonable and excessive."

Appellant committed the third, fourth, and fifth battery offenses on 22 December 2018 while at a local San Antonio hotel. Two of the offenses were against adults and one was against a child. On this evening, Appellant, his second wife, MO, and her family were attending a holiday party at the hotel, where they had also rented a room. MO's family included MO's mother, MO's sister, and MO's one-year-old daughter. Once in the hotel room, Appellant was told by MO and her family to go to sleep, as he was intoxicated from consuming alcohol earlier that night. Appellant became agitated and tried to leave the hotel room. MO's mother and sister were between Appellant and the hotel room's door. First, Appellant pushed MO's mother on her body with his arms causing her to move. Second, Appellant pushed MO's sister in a similar manner with a similar result. Third, and finally, Appellant pushed MO's mother a second time, which caused her to fall into MO's sister, who then fell into MO's one-year-old daughter. According to Appellant, none of the three sustained any injuries.

The drunk and disorderly conduct offense also occurred [*8] on the same night as described above and while at the hotel. Due to his intoxication, Appellant was "loud and obnoxious" and "disruptive and rude" which led to an adjacent guest complaining to the hotel's staff. The hotel staff called the San Antonio police who responded to Appellant's room. Despite the arrival of uniformed officers, Appellant continued to be loud and belligerent which led the police to detain him in handcuffs inside his hotel room. Appellant stated during the providence inquiry that his actions "lowered the image of the Air Force to several civilians" including MO's family and the police officers who responded.

B. Extramarital Sexual Conduct and Obstruction of Justice

[6] The background is drawn from the stipulation of fact, Appellant's providence inquiry, and the testimony of sentencing witnesses.

In the first few months of 2019, while still married to MO,[7] Appellant met a woman on the dating application Tinder. Eventually, this woman allowed Appellant to move into her residence. She knew he was in the military. Appellant's supervisor discussed these living arrangements with Appellant and warned him to be careful, as he was still married. Despite the warning, Appellant began a sexual relationship with the woman and engaged in sexual intercourse with her on multiple occasions in a month. Others learned [*9] of this sexual relationship, including MO and the woman's estranged husband.[8] In his providence inquiry, Appellant provided reasons why he believed his actions were service discrediting and constituted wrongful extramarital sexual contact.

At the time of this sexual relationship, Appellant believed that he would face a criminal investigation for the December 2018 incidents with MO's family at the San Antonio hotel. Appellant's commander had also issued him a no-contact order, which prohibited communication with MO. Appellant thought the ensuing investigation would reveal, and ultimately encompass, his sexual relationship with the woman he met on Tinder. Appellant then asked her to lie, if questioned, and say she had not had sex with him. Appellant explained in his providence inquiry why he believed his actions constituted obstruction of justice.

C. Drug Offense

Appellant wrongfully used marijuana, once, in a vehicle with another Airman on Joint-Base San Antonio (JBSA)-Lackland. This offense occurred in the late May to late June 2019 timeframe. Appellant's wrongful use of marijuana was discovered when his urine tested positive for tetrahydrocannabinol, the active ingredient in marijuana. [*10] On 23 June 2019, Appellant's commander restricted him to the limits of JBSA-Lackland.

D. Disobedience Offenses

Appellant failed to obey a lawful general regulation, Air Force Instruction 31-101, *Integrated Base Defense* (5 Jul. 2017), by failing to register a privately owned firearm that he stored in his base house on JBSA-Lackland. This offense was discovered in November 2018 when security forces responded to Appellant's house after Appellant displayed "suicidal ideations." These included Appellant placing the loaded firearm against his head with his finger on the trigger. Eventually, Appellant changed his mind, placed the firearm on top of a printer, and went to bed before being awoken by security forces.

Appellant disobeyed two different orders of his commander between 1 April 2019 and 6 September 2019. First, Appellant disobeyed the order restricting him to JBSA-Lackland in August 2019 when he left the installation with his brother who had recently graduated from Basic Military Training. Appellant also violated the no contact order prohibiting him from contacting his second wife, MO, on at least two occasions in April and May 2019. Appellant was ordered by his commander into pretrial [*11] confinement on 6 September 2019 and so remained, at various locations, until he was sentenced.

II. DISCUSSION

A. Plea Agreement Noncompliance

[7] Appellant was also not legally separated from MO.

[8] Appellant told the military judge the woman was legally separated from her husband and that the husband was a former military member.

The parties agree that the EoJ and Statement of Trial Results[9] do not show that the convening authority dismissed either Charge IV and its specifications or Specification 4 of Charge V with prejudice. Initially, Appellant requested our court take corrective action by dismissing the affected charge and specifications with prejudice. However, in Appellant's reply brief, the requested remedy is a corrected EoJ to show the dismissal with prejudice occurred and consistent with what our court did in Samples. *See*, unpub. op. 2021 CCA LEXIS 463, at *5-11.

The Government requests we exercise our R.C.M. 1112(c)(2) authority and modify the EoJ ourselves. The Government states that other Courts of Criminal Appeals have exercised their authority to amend EoJs "with some regularity." Our court was granted discretion to correct EoJs by the President in the 2019 *MCM*. It is obvious from the cases cited in the Government's answer that other Courts of Criminal Appeals have exercised this discretion. We disagree with the Government that this is the "most appropriate remedy" in this particular case. We agree [*12] with Appellant's proposed resolution and see no reason to depart from the remand approach this court took in Samples.

A plea agreement in the military justice system establishes a constitutional contract between the accused and the convening authority. *See* *United States v. Smead*, 68 M.J. 44, 59 (C.A.A.F. 2009) (citing *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006)) (addressing a pretrial agreement). "In a criminal context, the [G]overnment is bound to keep its constitutional promises." *Lundy*, 63 M.J. at 301. "When an appellant contends that the [G]overnment has not complied with a term of the agreement, the issue of noncompliance is a mixed question of fact and law." *Smead*, 68 M.J. at 59 (citing *Lundy*, 63 M.J. at 301). Appellant has the burden to establish both materiality and noncompliance. *Lundy*, 63 M.J. at 302. "In the event of noncompliance with a material term, we consider whether the error is susceptible to remedy in the form of specific performance or in the form of alternative relief agreeable to the appellant." *Smead*, 68 M.J. at 59 (citation omitted).

The parties agree that the dismissal with prejudice provision of the plea agreement was material to Appellant's plea of guilty and the EoJ does not reflect that the convening authority complied with that provision. We agree that the provision was material as it provided Appellant protection from facing later prosecution for the charged [*13] offenses, which the convening authority agreed to dismiss with prejudice. We find the convening authority complied with the provision as the military judge dismissed the affected charge and specifications, on the record. However, the EoJ, which the military judge signed, does not reflect the convening authority's compliance or demonstrate the actions the military judge took on the record. Therefore, as the failure to state that offenses were dismissed with prejudice implies that they were dismissed without prejudice, we find a remand appropriate to correct the EoJ. *See* *Samples*, unpub. op. 2021 CCA LEXIS 463, at *5.

B. Additional EoJ Errors

On remand, a detailed military judge may also modify the EoJ to correct the following errors:

- The EoJ incorrectly states the convening authority deferred "all of the adjudged" forfeitures. First, the military judge *adjudged* no forfeitures. Second, the convening authority's decision on action memorandum correctly omitted any reference to *adjudged* forfeitures when addressing the question of deferral.

- The convening authority deferred Appellant's reduction to the grade of E-1 from 14 days after announcement of sentence until the date of the EoJ. The EoJ omits the convening [*14] authority's decision on deferral of

[9] Appellant also correctly notes that the Statement of Trial Results failed to include the command that convened this court-martial as required by R.C.M. 1101(a)(3). Appellant does not raise an assignment of error. We find there is no prejudice from this minor omission. *See* *United States v. Moody-Neukom*, No. ACM S32594, 2019 CCA LEXIS 521, at *2-3 (A.F. Ct. Crim. App. 16 Dec. 2019) (unpub. op.) (per curiam).

reduction in grade.[10] Instead, the EoJ repeats a statement, which is partially incorrect, regarding deferral of forfeitures.

• The convening authority waived the automatic forfeitures of all pay and allowances for a period of six months or release "of" confinement, whichever is sooner, and directed the forfeitures be paid to MP for the benefit of Appellant's dependent child. However, the EoJ only states that the "pay" was directed to be paid to MP, rather than the "total pay and allowances."

• The reprimand in the EoJ misspells United States Air Force. It is correctly spelled in the convening authority's decision on action memorandum.

C. Record of Trial Completeness

Appellant makes three claims that the record of trial is incomplete. We address an additional deficiency in the audio recordings of the trial proceedings we identified during our Article 66, UCMJ, review.

First, Appellant claims that three appellate exhibits are incomplete—Appellate Exhibit XIV, pages 9-11, Appellate Exhibit XVII, pages 28-29, and Appellate Exhibit XVIII, pages 39-40—because the pages are blank except for the page numbers annotated on the bottom. The Government asserts that nothing is missing [*15] because these pages were intentionally left blank. If a detailed military judge determines the Government is correct, then pages may be substituted in the record to identify that the affected pages were "intentionally left blank." If a detailed military judge determines Appellant is correct, then the military judge may attempt to reconstruct the affected portions of the appellate exhibits or indicate that such a process cannot be completed.

Second, Appellant asserts that the record of trial is missing email rulings made by the military judge on 21 January 2020 on a defense motion to dismiss for violations of Article 10, UCMJ, 10 U.S.C. § 810, and a defense motion for appropriate relief to release Appellant from pretrial confinement. On 13 September 2021, we granted the Government's motion to attach a declaration from the assistant trial counsel in Appellant's case and a six-page email containing the military judge's rulings on the two motions.[11] On remand, a detailed military judge may follow the process in R.C.M. 1112(d)(2) to correct the record of trial to add the email rulings made by the trial judge as an appellate exhibit.

Third, Appellant claims that his copy of the record of trial did not include the court reporter's certification. [*16] We granted the Government's unopposed motion to attach a copy of the court reporter's certification. However, in performing our review of the original record of trial docketed with the court, we note that it already contained the court reporter's certification in volume 7. As Appellant and his counsel received the court reporter's certification when this court granted the motion to attach, this claim of error does not require corrective action on remand. We find this claim of error warrants no further discussion or relief. *See* *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

In conducting our Article 66, UCMJ, review, we could not locate one audio recording of one session of open court in the record of trial. R.C.M. 1112(b)(2) requires a "substantially verbatim recording of the court-martial proceedings except sessions closed for deliberations or voting." The missing recording would cover the proceedings conducted on 15 January 2020 beginning at 1110 hours and ending at 1200 hours. This recording would correspond to pages 1-39 of the certified transcript. On remand, a detailed military judge may follow the process in R.C.M. 1112(d)(2) to correct the record of trial to add the omitted recording. If the military judge determines that the recording is present

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[10] Appellant identified this error, but did not assert prejudice from it. We find it appropriate to authorize the error be corrected on remand.

[11] The motion to attach was unopposed. We understand we are permitted to supplement the record when deciding issues that are raised by the materials in the record but are not fully resolvable by those materials. *See* *United States v. Jessie*, 79 M.J. 437, 440-42 (C.A.A.F. 2020). Here the military judge stated his intent to rule on these two motions "ASAP" but his email rulings were not marked as an appellate exhibit.

in the record of trial, [*17] but was mislabeled, then the disc that contains the recordings of open sessions of the court may be modified accordingly.[12]

D. Convening Authority's Decision on Action

Regarding Appellant's third assignment of error, consistent with our superior court's decision in *United States v. Brubaker-Escobar*, M.J. , No. 20-0345, 81 M.J. 471, 2021 CAAF LEXIS 818, at *1-2 (C.A.A.F. 7 Sep. 2021) (per curiam), we find the convening authority made a procedural error when she failed to take action on the entire sentence, as Appellant was found guilty of at least one offense that occurred prior to 1 January 2019 and the charges were referred after 1 January 2019. Rather than test that procedural error for material prejudice to a substantial right of Appellant, we authorize a detailed military judge on remand to resolve the procedural error. This course of action is appropriate, as we have already determined a remand is necessary to resolve Appellant's first assignment of error.

III. Conclusion

The record of trial is **REMANDED** to the Chief Trial Judge, Air Force Trial Judiciary, for correction of the entry of judgment as noted above. Article 66(g), UCMJ, 10 U.S.C. § 866(g); R.C.M. 1111(c)(3).

A detailed military judge may correct the record of trial under R.C.M. 1112(d) to address (1) the blank pages in three appellate exhibits, (2) the two email rulings made by the military judge that were [*18] not included in the record of trial, and (3) the missing audio recording of one session of open court.

A detailed military judge may return the record of trial to the convening authority or her successor to take action on the sentence.

A detailed military judge may conduct one or more Article 66(f)(3), UCMJ, 10 U.S.C. § 866(f)(3), proceedings using the procedural rules for post-trial Article 39(a), UCMJ, 10 U.S.C. § 839(a), sessions.

Thereafter, the record of trial will be returned to the court for completion of appellate review under Article 66(d), UCMJ.

Appellate counsel for the Government will inform the court not later than 15 March 2022, in writing, of the status of compliance with the court's decree unless the record of trial has been returned to the court prior to that date.

End of Document

[12] The file names of the recordings include a date and time, none of which correspond to the date and time of the session of court that we cannot locate.

United States v. Injerd

United States Air Force Court of Criminal Appeals

December 20, 2022, Decided

No. ACM 40111

Reporter
2022 CCA LEXIS 727 *; 2022 WL 17819694

UNITED STATES, Appellee v. Erland E. INJERD, Airman First Class (E-3), U.S. Air Force, Appellant

Notice: THIS IS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 30.4.

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Christopher James. Sentence: Sentence adjudged on 6 March 2021 by GCM convened at Dyess Air Force Base, Texas. Sentence entered by military judge on 26 March 2021: Dishonorable discharge, confinement for 30 months, and reduction to E-1.

Counsel: For Appellant: Major Alexandra K. Fleszar, USAF; Mark C. Bruegger, Esquire.

For Appellee: Lieutenant Colonel Thomas J. Alford, USAF; Lieutenant Colonel Matthew J. Neil, USAF; Major Morgan R. Christie, USAF; Major John P. Patera, USAF; Captain Olivia B. Hoff, USAF; Mary Ellen Payne, Esquire.

Judges: Before POSCH, RICHARDSON, and CADOTTE, Appellate Military Judges. Senior Judge POSCH delivered the opinion of the court, in which Judge RICHARDSON and Judge CADOTTE joined.

Opinion by: POSCH

Opinion

POSCH, Senior Judge:

A general court-martial composed of a military judge convicted Appellant, contrary to his pleas, of attempting to escape custody, desertion, resisting apprehension, striking a superior noncommissioned officer, failure to obey a lawful order, unlawfully carrying a concealed handgun, assault upon a person in the execution of military law enforcement duties, fleeing apprehension, and resisting apprehension, [*2] in violation of Articles, 80, 85, 87a, 91, 92, 114, 128, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 880, 885, 887a, 891, 892, 914, 928, 934, respectively.[1],[2] Appellant was sentenced to a dishonorable discharge, confinement for 30 months, and reduction to the grade of E-1.[3]

On 26 March 2021, the convening authority signed a Decision on Action memorandum that deferred the reduction in grade until entry of judgment. At the same time, the convening authority waived automatic forfeitures for the

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[1] References to the UCMJ and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] Consistent with Appellant's pleas, he was acquitted of one specification each of fleeing apprehension and assaulting a superior noncommissioned officer, in violation of Articles 87a and 91, UCMJ, 10 U.S.C. §§ 887a, 891.

[3] The military judge ordered that Appellant receive 304 days' credit plus an additional 5 days of judicially ordered credit for illegal pretrial punishment under Article 13, UCMJ, 10 U.S.C. § 813—for a total of 309 days of confinement credit.

benefit of Appellant's spouse and two dependent children for a period of six months, or upon release from confinement or expiration of term of service, whichever was sooner, with the waiver commencing on the date of the decision on action.[4] The convening authority took no action on the sentence.

On appeal, Appellant raises 15 issues, two of which are assignments of error raised through appellate counsel. Appellant asks whether: (1) his conviction for resisting apprehension by Officer JB, a Department of the Air Force police officer, as alleged in Specification 1 of Charge I, is legally and factually insufficient; and (2) his sentence of 30 months confinement, as reflected in the entry of judgment, exceeds the adjudged sentence. In addition to [*3] these issues, Appellant personally raises 13 issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). In that regard, Appellant contends that (3) his squadron commander lacked authority to strip him of his Second Amendment[5] right to possess a firearm in his home, and accordingly, the attempted seizure of his personally owned firearms was unlawful, rendering his conviction for resisting apprehension legally and factually insufficient; (4) his conviction for assaulting Officer JB is legally and factually insufficient; (5) his conviction for assaulting his supervisor, a noncommissioned officer (NCO), is legally and factually insufficient; (6) his sentence to 14 months' confinement for assaulting Officer JB (6 months) and his supervisor (8 months) is inappropriately severe; (7) his conviction for carrying a concealed weapon is factually and legally insufficient; (8) the omission of Prosecution Exhibit 16 is a substantial omission that warrants setting aside his conviction for desertion;[6] (9) the preemption doctrine prohibited the Government from charging him with fleeing and resisting apprehension by federal civilian authorities in Specifications 1 and 2, respectively, of Charge VI as violations of Article 134, UCMJ, because Congress enumerated the underlying [*4] offenses in Article 87a, UCMJ; (10) the preemption doctrine prohibited the Government from charging him with attempt to escape from the custody of state civilian authorities in Specifications 1 and 2 of Charge VIII as attempted violations of Article 134, UCMJ, because Congress enumerated the underlying offenses in Article 87a, UCMJ; (11) the military judge erred by failing to merge for sentencing purposes the resisting apprehension and assault charges associated with Officer JB; (12) the military judge erred by failing to dismiss for findings, or merge for sentencing purposes, the specifications alleging he fled and resisted apprehension by federal civilian authorities; (13) assistant trial counsel committed prosecutorial misconduct by arguing that a dishonorable discharge was merely a service characterization rather than a punishment; (14) the military judge erred by not granting Appellant additional credit for the Government's violations of Article 13, UCMJ, 10 U.S.C. § 813; and (15) all of Appellant's convictions are legally and factually insufficient.

In this decision, we address Appellant's two assignments of error raised by counsel. With respect to the conviction for resisting apprehension by Officer JB in Specification 1 of Charge I, we conclude that the evidence [*5] is legally insufficient to affirm that conviction. Accordingly, we set aside the findings of guilty of Specification 1 of Charge I, and Charge I. Because that specification was the sole remaining specification under the charge, we dismiss with prejudice both Specification 1 of Charge I, and Charge I. As to the second assignment of error, we find no merit to the contention that Appellant's sentence as reflected in the entry of judgment exceeds the adjudged sentence. As a result of our finding the conviction for Specification 1 of Charge I legally insufficient, we reassess the sentence to a dishonorable discharge, confinement for 27 months, and reduction to the grade of E-1.

With respect to the 13 issues personally raised by Appellant, issues (3) and (11) are mooted by our decision. With respect to the remaining issues, the court considered Appellant's arguments and finds none warrant discussion or relief. *See* *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987). Finding Appellant's remaining convictions

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[4] The entry of judgment states that the convening authority directed the waiver to begin "on the date of this judgment [26 March 2021]," which is incorrect, but of no consequence because the military judge entered judgment the same day as the convening authority's decision on action.

[5] U.S. CONST. amend. II.

[6] Prosecution Exhibit 16 was described as a large container with compartments that held personal items that belonged to Appellant. Trial counsel described the items when she marked the exhibit, which was admitted without objection. Although the military judge permitted the Government to substitute photographs for the exhibit, the photograph is of the brown paper evidence bag that housed the container.

legally and factually sufficient, and no other error materially prejudicial to a substantial right of Appellant occurred, we affirm the remaining findings and the sentence as reassessed.

I. Background

If there was one incident that set in [*6] motion a chain of events that would result in the convictions under review, it might be when Appellant learned that his squadron commander did not recommend his promotion to senior airman (E-4). On 10 April 2020, in a meeting with Appellant, the commander read aloud a written notification of that decision. He did so in the presence of Appellant's leadership team. He asked if Appellant had any questions. Appellant answered, "no," and was directed to sign an indorsement that stated he had been informed of the decision. After receiving a "direct order" from his commander to acknowledge "receipt and understanding," Appellant said he was not going to sign it. Appellant made this comment after discussing the matter privately with his first sergeant, a senior NCO in the grade of E-8.

For this incident, one week later Appellant's commander served him with a letter of reprimand for disobeying that direct order. As before, Appellant refused to acknowledge "receipt and understanding." He did, however, respond to the reprimand in an email on 22 April 2020. Appellant titled his email, "Faithless Power," and sent it to his group and squadron commanders and others in the unit. In a memorandum attached [*7] to that email, Appellant accused his commander of "blatantly lying," and challenged the commander's authority to issue orders. Alluding to ideals in the Preamble to the United States Constitution, Appellant disparaged his commander and leadership cadre, stating, among other things:

> I composed a few clever ideas then realized I would rather not throw my pearls before swine . . . .
> The fact is, there are boundaries on what [the squadron commander] -- or anyone else -- can order me to do, and endorsing any document does not fall in his purview. I have obeyed every valid order I have been given -- including hints and even invalid orders on occasion, simply to engender peace and harmony -- but the question is, have those in leadership acquitted themselves well? Have they labored to form a more perfect union? Have they established justice? Have they worked to ensure domestic tranquility for those under them? Have they promoted the welfare of their [A]irmen? Whether my antagonists successfully fabricate sufficient calumnies to continue down their path, God only knows, but He also knows how much it may cost.

Appellant singled out his commander and others by name, stating: "[They] and their ilk [*8] have so much to lose." Appellant rhetorically asked, "[W]ho is to stop them" after they "dishonor someone" and "vilify" someone's "reputation."

As could be expected, Appellant's response captured the attention of superiors. Appellant's squadron commander testified he was disturbed by its "somewhat threatening tone." He described the response as "alarming" and unlike anything he had seen in his career. It caused him concern for his own safety and the safety of others. Appellant's supervisor, a senior NCO in the grade of E-7, testified that the response "was very different than anything [they] had received up to that point." Unlike past dealings where Appellant went into "very lengthy, very articulate, [and] very specific" detail "to explain his side of the story," this response suggested that "perhaps [Appellant] was done working within the systems that had already been laid out for him." The supervisor was especially bothered that Appellant had "list[ed] names of the individuals that perhaps could or would be judged," without stating "necessarily by whom."

Appellant's leadership cadre was aware that he kept three firearms in his residence on base. Appellant's supervisor testified "that [*9] before we were to enter into any subsequent rounds of administrative actions possibly involving the [s]quadron [c]ommander [and] . . . higher levels, that we would feel safer if we were able to have [Appellant] store his weapons at the base armory." The first sergeant sought guidance from the group commander and a chief master sergeant (E-9) who was the group superintendent. Acting on that guidance, the first sergeant recommended the commander "remove [Appellant's] weapons for a cool down period and get him over to mental health." In the

first sergeant's telling, he made this recommendation because he "didn't feel comfortable with [his] commander's name being on an email that . . . [he] thought was directed as a threat to [his commander]."[7]

In response to the email and following the recommendation of the first sergeant, the commander directed the first sergeant "to temporarily remove [Appellant]'s firearms from his possession." Because Appellant lived on base, the commander asked the first sergeant to go to Appellant's home "to first ask him to voluntary relinquish his firearms . . . [a]nd if he didn't voluntarily relinquish control of his firearms to effect their relinquishment." The [*10] first sergeant did as instructed, first asking security forces for assistance because he was "not trained to remove weapons from homes." He testified that he believed "it's safer for law enforcement to remove those weapons."

What happened next led to three of Appellant's ten convictions, all of which he challenges on appeal. In the afternoon of 22 April 2020, Officer JB, a Department of the Air Force civilian police officer, was dispatched to Appellant's residence. In the presence of that officer, Appellant's first sergeant, and Appellant's supervisor, Appellant declined to voluntarily surrender his firearms. Appellant then refused to follow the officer's instructions to turn around and place his hands behind his back. As the officer approached, a melee ensued at the front door of the home. Evidence showed that Appellant assaulted the police officer by striking him in the face with a closed fist and inserting a finger into his eye. During the same incident, Appellant struck his supervisor in the face with a closed fist before Appellant retreated inside his home. For this conduct, Appellant was convicted of resisting apprehension by Officer JB, assault upon a person in the execution [*11] of military law enforcement duties, and striking a superior noncommissioned officer.

Almost immediately, additional security forces personnel were dispatched to the scene. In time, Appellant broke through a window in his home and ran to the perimeter of the base. He scaled a barbed wire fence and ran towards tree cover, where he eluded his pursuers.

Two weeks later, in Dallas, Texas, Appellant fled and resisted apprehension by officers of the Federal Bureau of Investigation. When Appellant was taken into custody, the officers discovered a concealed handgun Appellant carried inside the waistband of his shorts. Later that day, Appellant attempted to escape from the custody of officers of the Dallas Police Department and the Grand Prairie Detention Center. Appellant was convicted of desertion from his unit until apprehension by civilian authorities. In traveling to Dallas, Appellant violated an order that limited personnel to stay within a specified distance from Dyess Air Force Base unless on approved leave or other exception.

II. Discussion

We examine Appellant's claim that his conviction for resisting apprehension by Officer JB at the front door of his home is legally insufficient, and [*12] that his sentence of 30 months' confinement as reflected in the entry of judgment exceeds the adjudged sentence. We consider these allegations of error and begin with Appellant's contention that his conviction is legally insufficient.

A. Legal Insufficiency

1. Additional Background

Officer JB arrived at Appellant's home in a patrol car marked "Police." He wore a black uniform that displayed the Department of the Air Force Seal and "Police" on each shoulder. His uniform had a badge with his name over the

[7] The first sergeant believed it was standard practice in such a situation to temporarily remove weapons for a "cooling off" period. His belief was founded on almost 20 years in the Air Force, including three tours as a first sergeant. The first sergeant testified that he took threats and suicidal ideation seriously because, prior to being a first sergeant, he had a commander who was killed in his office "by a member of [their] unit."

right chest pocket and he wore a Department of the Air Force badge over the left chest pocket. On his duty belt he carried an M18 pistol, one extra magazine, an extendable baton, a taser with two cartridges, two sets of handcuffs, and a medical pouch.

When Officer JB arrived, Appellant's first sergeant and supervisor were already outside the home. They explained to the officer that they were there to remove Appellant's firearms and store them in the armory. Officer JB was informed that Appellant had sent a "manifesto" earlier that day with "threats" against various people. Officer JB understood that his "primary responsibility was the safety and security of those that were there." He testified [*13] that he informed the two NCOs that if Appellant refused to relinquish his firearms, he could detain Appellant.

Either Appellant's supervisor or first sergeant knocked on Appellant's door and Appellant answered. The first sergeant explained they were there out of concern due to Appellant's email in response to the letter of reprimand. The first sergeant told Appellant that he had an order from the commander to temporarily remove Appellant's firearms and put them in the base armory. Appellant asked if they had a warrant. The first sergeant responded that they did not need a warrant because they had an order from their commander. He explained that the removal was temporary, and the firearms would remain Appellant's personal property, but Appellant would not be permitted to keep them at his residence.

The first sergeant then asked Appellant if he would comply with the commander's order. Appellant stated that he "refused to do so," and was silent when he was again asked if he would comply. Appellant then asked, "What happens next?" The first sergeant testified he told Appellant that Officer JB would detain Appellant while Officer JB removed the firearms from the home:

> Q (Trial Counsel). How [*14] did you respond?
>
> A (First Sergeant). *I informed him that the officer would detain him and he would remove the weapons*.
> Q. So in this conversation with [Appellant] did you mention the Commander at all?
> A. No, ma'am. I don't believe so.
> Q. Did you mention if there was an order or not?
> A. I don't know if I did. I'm not sure.
>
> *Q. Why did you tell [Appellant] that then the officer was going to detain him*?
>
> *A. In order to remove the weapons*.

(Emphasis added).

Officer JB testified that while he and the two NCOs stood near Appellant on the front stoop, Appellant "began balling his fists [and] giving off [other] pre-assault indicators," namely a "clenched jaw" and "turning slightly red in the face." Officer JB also observed Appellant assume "a squared-off fighter's position with his hands by his side." Officer JB testified his focus was on "[t]he safety of everybody at the scene." He decided he "needed to gain control of the situation and deescalate" as much as possible. He told Appellant, "[W]e don't need to go down that road."

Officer JB ordered Appellant to turn around and place his hands behind his back. He testified that his purpose was so that he "could place [Appellant] in handcuffs for the time [*15] period so [they could] deescalate." He gave Appellant the order three times, and each time Appellant refused to comply. Officer JB testified that telling a suspect to "turn around" three times is considered "the final challenge position." It is the last step before an officer moves to place handcuffs on a person. Based on Appellant's three refusals, Officer JB began to approach Appellant to place handcuffs on his wrists.

On direct examination, Officer JB described what happened next:

A [Officer JB]. As I approached after the third warning, [Appellant] swung at me at which point, I ducked and closed the distance.[8] *And that's where we began fighting*.
Q [Trial Counsel]. How did he swing at you?
A. I believe with his left hand.
Q. Was it a closed fist or an open hand?
A. A closed fist.
Q. Where was he aiming?
A. I believe my face.
(Emphasis added).

Officer JB described how, at that point, both NCOs "were attempting to assist [him] in placing [Appellant] in *custody*." (Emphasis added). In Officer JB's telling, "Unfortunately, whenever that happened, they pinned me up against [Appellant], so I was unable to move." Appellant used his left thumb and gouged Officer JB's right eye. In time, Officer JB broke [*16] free while the NCOs had Appellant "pinned up against the corner of the wall." Trial counsel asked Officer JB to describe what the NCOs were doing:

Q [Trial Counsel]. When [Appellant's first sergeant and supervisor] had [Appellant] pinned up against the wall and you were backed with that reactionary gap that you had created, what were they doing on the wall?
A [Officer JB]. I believe they were trying to gain control of [Appellant].
Q. Was [Appellant] compliant or resistant?

A. *Resistant*.
Q. What do you mean by that?

A. *He was not complying with any of our commands*.
(Emphasis added).

When he was free, Officer JB took steps in an attempt to subdue Appellant and place him in his custody. He removed his taser from its holster, and three times shouted to the NCOs to "[g]et off of him." Officer JB testified his purpose at that point was "so that [he] could reengage and place [Appellant] in *custody*." (Emphasis added). After Officer JB shouted "Taser, Taser, Taser" as a warning, the NCOs immediately let go of Appellant and backed up. However, before Officer JB could use the Taser, Appellant's wife intervened by opening the front door. As she stood in the doorway, she "grabbed [Appellant] by the arm [*17] and pulled him inside the house," and then the door slammed shut. Officer JB used his police radio to call for assistance from security forces personnel at the Base Defense Operations Control Center "as well as advising them that [they] had a barricaded suspect."

Officer JB testified when he responded to Appellant's residence his initial "concern was the safety and welfare of everyone on scene." He acknowledged on cross-examination by trial defense counsel that if Appellant had complied with being "detained and handcuffed," he would have "investigated" the alleged order violation. Trial defense counsel asked if Appellant's "custody status" would have changed at some point to "assault on a police officer." Officer JB responded if he had been able to place Appellant into custody after the assault, Appellant's "custody [status] would have changed to ['apprehended for assault on a police officer.']"

2. Standard of Review

A Court of Criminal Appeals "may affirm only such findings of guilty" as it "finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). Our assessment [*18] is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

[8] In response to later questioning by the military judge, Officer JB explained he was about two feet away from Appellant when he extended his arm towards Appellant and "[t]hat's when [Appellant] swung at [him]."

"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." *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). To reach a determination of legal sufficiency, there must be some competent evidence in the record "from which the [trier of fact was] entitled to find beyond a reasonable doubt, the existence of every element of the offense charged." *United States v. Wilson*, 6 M.J. 214, 215 (C.M.A. 1979) (internal quotation marks and citation omitted).

An examination for legal sufficiency "involves a very low threshold to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal quotation marks and citation omitted). "In determining whether *any* rational trier of fact could have determined [*19] that the evidence at trial established guilt beyond a reasonable doubt, [this court is] mindful that the term 'reasonable doubt' does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." *Id.* (citation omitted). The Government can meet its burden of proof with circumstantial evidence. *Id.* (citations omitted). When examining the evidence in the light most favorable to the prosecution, "a rational factfinder[ ] could use his 'experience with people and events in weighing the probabilities' to infer beyond a reasonable doubt" that an element was proven. *United States v. Long*, 81 M.J. 362, 369 (C.A.A.F. 2021) (quoting *Holland v. United States*, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150, 1954-2 C.B. 215 (1954)).

3. Elements of Resisting Apprehension

Appellant was found guilty of resisting apprehension by Officer JB in violation of Article 87a, UCMJ. For Appellant to be found guilty of this offense, as charged in Specification 1 of Charge I, the Prosecution was required to prove three elements beyond a reasonable doubt: (1) that Officer JB attempted to apprehend Appellant; (2) that Officer JB was authorized to apprehend Appellant; and (3) that Appellant actively resisted the apprehension. *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 12.b.(1). [*20]

"Apprehension is the taking of a person into custody." Article 7(a), UCMJ, 10 U.S.C. § 807(a); *see also MCM*, pt. IV, ¶ 12.c.(1)(a); Rule for Courts-Martial (R.C.M.) 302(a)(1). "Apprehension is the equivalent of 'arrest' in civilian terminology." R.C.M. 302(a)(1), Discussion; *accord United States v. Harris*, 29 M.J. 169, 170 (C.M.A. 1989). An "apprehension" is distinct from the "detention of a person for investigative purposes," in that probable cause is required to apprehend. R.C.M. 302(a)(1), Discussion; *see also* R.C.M. 302(c) (requiring probable cause to apprehend). Conversely, an "investigative detention" does not require probable cause, "normally involves a relatively short period," and does not permit an extensive search of the detainee. R.C.M. 302(a)(1), Discussion.

Under Article 7(b), UCMJ, 10 U.S.C. § 807(b), "[a]ny person authorized under regulations governing the armed forces to apprehend persons subject to [the UCMJ] or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it." Further, "[a] person subject to the UCMJ or trial thereunder may be apprehended for an offense triable by court-martial upon probable cause to apprehend." R.C.M. 302(c). Probable cause to apprehend "exists when there are reasonable grounds to believe that an offense has been or is being committed and the person to be apprehended committed or is committing it." *Id.*

A "specific intent to [*21] apprehend" is "necessary evidence" to convict. *Harris*, 29 M.J. at 171. Stated differently, the crime of resisting apprehension requires that "there must have been a 'specific intent' on the part of the person attempting the apprehension." *Id.* (citation omitted). However, evidentiary sufficiency to affirm a conviction for this offense "does not turn on the police officer's subjective motive." *Id.* Instead, "[w]hat matters is what [the officer] communicated to the appellant." *Id.* (citing *United States v. Sanford*, 12 M.J. 170, 174 (C.M.A. 1981)). "An

apprehension is made by clearly notifying the person to be apprehended that person is in custody," and such notice may be verbal or "implied by the circumstances." R.C.M. 302(d)(1); *see also* Harris, 29 M.J. at 171 (observing that notice of apprehension under R.C.M. 302(d)(1) is an "objective standard" and "may be implied by the circumstances").

In evaluating whether an appellant had "clear notice of the apprehension which he was charged with resisting," the United States Court of Appeals for the Armed Forces (CAAF) has stated "[t]he critical question [for legal sufficiency] . . . is whether the evidenced circumstances . . . were such that a rational person could find beyond a reasonable doubt that appellant knew he was being apprehended." *United States v. Diggs*, 52 M.J. 251, 255 (C.A.A.F. 2000) (citing *Jackson*, 443 U.S. at 319).

An appellant's "resistance [*22] must be active, such as assaulting the person attempting to apprehend." *MCM*, pt. IV, ¶ 12.c.(1)(c). "Mere words of opposition, argument, or abuse, and attempts to escape from custody after the apprehension is complete, do not constitute the offense of resisting apprehension although they may constitute other offenses." *MCM*, pt. IV, ¶ 12.c.(1)(c).

4. Analysis

Both at trial and on appeal, the Government relied on the theory that Officer JB initially sought to apprehend Appellant when he tried to place handcuffs on Appellant's wrists for refusing to comply with the commander's order to relinquish his firearms. The Government did not argue at trial, and does not argue on appeal, that Appellant resisted apprehension for the crime of assault. Trial counsel argued that Officer JB's verbal commands to Appellant to turn around and put his hands behind his back gave Appellant notice of apprehension.[9] Trial counsel argued Appellant's resistance to apprehension began with his failure to comply with Officer JB's verbal commands and his resistance included the swing he took at Officer JB's face with a closed fist.[10] In the Government's view, as briefed in its answer to the assignment of error, "[b]ecause the commander's order was clearly communicated [*23] to Appellant, and Appellant made clear he would not follow it, Officer JB had sufficient grounds to apprehend" Appellant for violation of that order.

We have examined the record of trial in light of the Government's theory with deference to a rational factfinder, drawing every reasonable inference that may be made from the evidence in the Government's favor. *Robinson*, 77 M.J. at 297-98; *Barner*, 56 M.J. at 134. Resolution of this assignment of error turns on whether it was apprehension, as distinct from detention, that Appellant resisted, and, if so, whether the Government proved beyond a reasonable doubt that Appellant was aware of that apprehension when he failed to comply with Officer JB's directions and then swung at Officer JB's face. In our evaluation of the evidence in the case before us, we are not convinced a rational trier of fact could find that Officer JB attempted to apprehend Appellant for violation of the commander's order. Instead, the evidence shows Officer JB's purpose, and the actual notice to Appellant, was to simply *detain* Appellant to allow a peaceful removal of firearms from his home.

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[9] The Prosecution's argument at trial was less nuanced than the Government's argument on appeal. During closing argument, trial counsel made no obvious distinction between apprehension or detention. Trial counsel initially argued Appellant knew he would be detained if he failed to comply with the order to relinquish his firearms, describing the conduct as follows: "[Officer JB] tells [Appellant] there is an order from the commander and if you don't comply with that order you will be temporarily detained when we take these firearms." In the same argument, trial counsel argued that Officer JB's initial attempt to handcuff Appellant constituted attempted apprehension: "So [Officer JB] tries to apprehend [Appellant] by walking towards him, he has handcuffs on his utility belt, he says turn around [and] put your hands behind [your] back, [Appellant]'s about to be apprehended."

[10] After findings were announced, and during argument on the motion whether the resisting apprehension and assault specifications were an unreasonable multiplication of charges for sentencing, trial counsel explained "that the resisting apprehension *was a number of things*." (Emphasis added). However, trial counsel explained "the gouging of the eye portion is not at all part of the resisting [apprehension]."

To begin, when Appellant answered the door, Officer JB did not have a warrant or prior authorization to apprehend [*24] Appellant for an offense that might have warranted investigation, nor was there an outstanding warrant or authorization to apprehend. Officer JB's trial testimony established he was unaware of any criminal case pending against Appellant. Officer JB testified about a conversation he had with Appellant's first sergeant moments before they knocked on Appellant's door. He was aware the NCOs "had an order from their commander to confiscate the firearms for storage in the arms room." During that conversation, Officer JB stated that "safety of everybody there" was "their first duty." Officer JB testified that he told the first sergeant that if Appellant refused to surrender those firearms, then Officer JB "could *detain* [Appellant], *not apprehend*, but *detain*, pending an investigation [for violation] of Article 92, [UCMJ,] failure to obey a lawful order." (Emphasis added).

Officer JB's testimony demonstrates he understood there was a legal difference between detaining Appellant and apprehending him. He believed that the former was temporary such as holding someone for an investigative reason, while the latter was more formal, signifying charges were imminent. Even after Officer JB observed Appellant's [*25] "pre-assault" indicators, his purpose in handcuffing Appellant at that point was detention. He testified his concern was everyone's safety and welfare and that "[g]iven the pre-assault indicators, my intention was to detain [Appellant] so that I can *investigate* . . . whether this order existed, you know, what was going on with it."[11] (Emphasis added). Officer JB's purpose in detaining Appellant is consistent with information the first sergeant told Appellant after Appellant answered the door. After Appellant asked, "What happens next," the first sergeant told Appellant that Officer JB "would detain him and he would remove the weapons." At no time was Appellant told that he was under apprehension, or would be, for violation of his commander's order or another offense.

In *Harris*, the CAAF's predecessor court set aside an appellant's conviction for resisting apprehension despite the fact he had led a military police officer on a high-speed chase, and later fled on foot after the officer shouted, "Hold it, Military Police." 29 M.J. at 170. The court's analysis turned on the police officer's testimony that he did not intend to apprehend the appellant, but instead, had only wanted to stop the appellant and [*26] determine whether to apprehend him. *Id.* at 171. Like the police officer in Harris, Officer JB initially intended only to detain Appellant, and then only if necessary. Officer JB's stated purpose when he initially appeared in uniform on Appellant's front stoop was to ensure the safety and security of Appellant and the two NCOs who were charged with carrying out their commander's order to take Appellant's firearms from his residence and put them in the armory.

As discussed earlier in this opinion, in evaluating the question of circumstantial notice of apprehension, the CAAF instructs that "[t]he critical question . . . is whether the evidenced circumstances . . . were such that a rational person could find beyond a reasonable doubt that appellant knew he was being apprehended." *Diggs*, 52 M.J. at 255 (citation omitted). Such knowledge turns on proof an appellant had "clear notice of the apprehension which he was charged with resisting." *Id.* (citations omitted). In Diggs, the CAAF reviewed the legal sufficiency of a conviction for resisting apprehension. *Id.* at 252. The Diggs appellant was discovered hiding in the bedroom closet of another NCO's wife. *Id.* Upon that NCO's discovery of the appellant, the appellant offered to turn himself [*27] in to military police. *Id.* at 255. However, the apprehending NCO who discovered the appellant insisted that the appellant accompany the NCO to the police station. *Id.* In that case there was evidence that the apprehending NCO "rejected [the] appellant's offer to turn himself in" such that the resistance the appellant later demonstrated met the elements for resisting apprehension. *Id.* In finding the conviction legally sufficient, the CAAF observed that the appellant had "admitted his wrongdoing and that he should be placed in the custody of military police. This was not a situation where a servicemember was simply being questioned or investigated for a prior offense." *Id.*

Unlike the appellant in Diggs who acceded to *apprehension*, Appellant was made aware only that he was being *detained*. His first sergeant told him that was what would happen if he refused to comply with their commander's

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[11] At one point, Officer JB answered "yes" to a question trial defense counsel asked that was predicated on him "moving in to apprehend [Appellant]." At another point when answering a question from trial defense counsel, Officer JB acknowledged he wanted to "arrest" Appellant so that he could conduct an investigation into the alleged Article 92, UCMJ, order violation. We agree with Appellant that well prior to this, Officer JB was consistent in stating in his own words that he needed to detain Appellant to ensure the safety of everybody on scene or conduct an investigation. When combined with Officer JB's testimony of what it means to "apprehend" versus "detain," his overall testimony evidenced an intent to detain.

order. On these facts, no rational trier of fact could conclude that Officer JB's initial purpose was anything other than to possibly detain Appellant for the safety of everyone present and to investigate the circumstances of the order violation. According to Officer JB's uncontradicted testimony, Appellant's manifestation [*28] of pre-assault indicators did not change the officer's intent. Contrary to its theory at trial and on appeal, the Government did not prove beyond a reasonable doubt that Officer JB attempted to apprehend Appellant when Appellant swung at him, much less that Appellant had clear notice he was being apprehended and not detained in line with Officer JB's testimony.

To be sure, Officer JB's purpose changed during the physical altercation on Appellant's stoop. He testified that if Appellant had not eluded him at the doorstep after swinging at his face with a closed fist, he would have apprehended Appellant for assault on a police officer. However, the Government did not argue either at trial or on appeal that Appellant resisted apprehension for the offense of assault, or that Officer JB attempted to apprehend Appellant for any suspected UCMJ violation other than his refusal to obey his commander's order to relinquish his firearms.

An appellate court may not "affirm[ ] a conviction based on a different legal theory than was presented at trial." *United States v. English*, 79 M.J. 116, 122 (C.A.A.F. 2019) (citations omitted). For aforementioned reasons, we find Appellant's conviction legally insufficient for failure to prove beyond a reasonable doubt [*29] that Appellant had clear notice of apprehension. Having found the conviction legally insufficient, the court does not address Appellant's claim of factual insufficiency.

This court may reassess a sentence only if it may reliably determine that, absent the error, the sentence would have been "at least of a certain magnitude." *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000) (citation omitted). Having considered the entire record, including the fact that the military judge imposed a segmented sentence of three months' confinement for Appellant's conviction for Specification 1 of Charge I, we conclude that we are able to reassess the sentence in accordance with the principles articulated in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). We are confident, moreover, that absent the error, an appropriate sentence would have included the other components of the adjudged sentence, including a dishonorable discharge. Accordingly, we find that absent the error, the adjudged sentence would have included at least a dishonorable discharge, 27 months of confinement, and reduction to the grade of E-1.

B. Announcement of Sentence

Appellant contends that the length of his adjudged confinement is 26 months vice the 30 months listed in the entry of judgement. We disagree.

1. Additional Background [*30]

As noted earlier in this opinion, Appellant was convicted of desertion, as charged in the Specification of Charge IV; he was also convicted of failure to obey a lawful order that limited personnel to stay within a specified distance from Dyess Air Force Base, as charged in the Specification of Charge V. During sentencing proceedings, on Appellant's motion, the military judge found these offenses were "an unreasonable multiplication of charges for sentencing purposes." He ruled, "As such, they will be merged for sentencing purposes."

When announcing sentence on 6 March 2021, the military judge announced a term of confinement for each of Appellant's ten convictions. For the Specification of Charge IV (desertion) he adjudged confinement for four months. For the Specification of Charge V (failure to obey a lawful order) he adjudged confinement for one month. Tallying both terms (5 months) and the combined terms adjudged for the other eight specifications (26 months), the total confinement adjudged was 31 months. However, in announcing sentence, the military judge announced, also, that "[a]ll sentences to confinement will run consecutively, with the exception of Charge IV and Charge V, which [*31] will run concurrently pursuant to R.C.M. 1002(d)(2)(B)(iii)."

The military judge did not announce the total period of confinement that Appellant was to serve for all ten specifications after taking his application of R.C.M. 1002(d)(2)(B)(iii) into consideration. However, in his Statement of Trial Results dated the same day that he announced sentence, the military judge stated the total adjudged confinement as 30 months. The entry of judgment signed by the military judge on 26 March 2021 also stated that Appellant was to serve a total confinement period of 30 months. Also, both the Statement of Trial Results and entry of judgment stated that each of the confinement terms for the Specifications of Charges IV and V were concurrent with the other "pursuant to R.C.M. 1002(d)(2)(B)(iii)."

2. Analysis

The Government argues that 30 months' confinement is correct because the military judge merged the sentences for Charge IV and Charge V and intended each to run concurrently with the other. In the Government's telling, "effectively, the one-month sentence of Charge V would be subsumed by the four-month sentence of Charge IV." The Government explains that the correct way to tally Appellant's total confinement is to combine the 4 months' confinement for these merged specifications, [*32] and the 26 months' confinement for the remaining specifications. The entry of judgment, the Government argues, is correct as a result.

Appellant takes a different view. He argues that the Government would be correct if one assumes that the term of confinement for each Specification of Charges IV and V was to run concurrently *only with the other*. He argues that, as announced, the combined confinement terms for Charges IV and V (5 months) run concurrently *with the terms of confinement for all eight specifications* (26 months). As a result, the tally of Appellant's total confinement is 26 months vice the 30 months listed in the entry of judgment.

We conclude that the Government's view is correct because it has support in the record. In announcing that the confinement terms for the Specifications of Charges IV and V would run concurrently, the military judge explained his decision was "pursuant to R.C.M. 1002(d)(2)(B)(iii)." This rule states that "[t]he terms of confinement for two or more specifications shall run concurrently . . . when the accused is found guilty of two or more specifications and the military judge finds that the charges or specifications are unreasonably multiplied." Here, the military judge merged [*33] two, and only two, specifications for an unreasonable multiplication of charges: the Specifications of Charges IV and V. No other charges or specifications were merged for purposes of sentencing by ruling of the military judge.

We are confident that the logical conclusion from the military judge's reference to R.C.M. 1002(d)(2)(B)(iii) when he announced sentence is that the terms of confinement for each Specification of Charges IV and V would run concurrently with the other. By citing this rule, the military judge was clear that the only terms of confinement that would run concurrently were for those specifications he merged for sentencing. Because the other eight specifications were not included in the military judge's merger ruling, the merged term of confinement for Charges IV and V (four months) runs consecutively, not concurrently, with the combined 26 months' confinement adjudged for those eight specifications. It follows then that the 30 months' confinement tallied in the entry of judgment is correct.

In reaching this result, we hew closely to the principle that "[a] sentence need not be so clear as to eliminate every doubt, but sentences should be clear enough to allow an accused to ascertain the intent [*34] of the court or of the members." *United States v. Stewart*, 62 M.J. 291, 294 (C.A.A.F. 2006) (citation omitted). In that regard, the sentence "should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them." *Id.* (internal quotation marks and citation omitted). "A sentence that is so ambiguous that a reasonable person cannot determine what the sentence is may be found illegal." *Id.* (citing *United States v. Earley*, 816 F.2d 1428, 1430 (10th Cir. 1987)). Lastly, we note that neither Appellant nor trial defense counsel took issue with the military judge's sentence, nor did they express any concern about the announcement or ask the military judge to "call the court-martial into session to correct the announcement." *See* R.C.M. 1007(c). Moreover, Appellant did not bring a post-trial motion "to correct a computational, technical, or other clear error in the sentence" within five days after receipt of the entry of judgment. *See* R.C.M. 1104(b)(1)(C) and (b)(2)(C).

Because the military judge referenced R.C.M. 1002(d)(2)(B)(iii), we are convinced that the sentence was not ambiguous, and that the entry of judgment correctly reflects Appellant's adjudged confinement. Therefore, relief is not warranted on this issue.

III. CONCLUSION

The findings of guilty to Specification 1 of Charge I and Charge I are **SET ASIDE**. Accordingly, [*35] Charge I and its underlying Specification 1 are **DISMISSED WITH PREJUDICE**. We reassess Appellant's sentence to a dishonorable discharge, 27 months of confinement, and reduction to the grade of E-1. The remaining findings and the sentence as reassessed are correct in law and fact, and no other error materially prejudicial to a substantial right of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the remaining findings and the sentence as reassessed are **AFFIRMED**.

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