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. 40341
	)	
Staff Sergeant (E-5)	)	USCA Dkt. No. 24-0098/AF
THOMAN M. SAUL	)	
United States Air Force	)	7 August 2024
Appellant.	)	

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v.	)	Crim. App. No. 40341
Staff Sergeant (E-5) **THOMAS M. SAUL** United States Air Force *Appellant.*	)	USCA Dkt. No. 24-0098/AF

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

ISSUE PRESENTED

WHETHER A GUILTY PLEA FOR WILLFUL DESTRUCTION OF PROPERTY UNDER ARTICLE 109, UCMJ, CAN BE PROVIDENT WHEN AN ACCUSED THRICE TOLD THE MILITARY JUDGE THAT HE "DID NOT INTEND TO DAMAGE THE [PROPERTY]" AND THAT HE WAS SURPRISED THERE WAS ACTUAL DAMAGE.

STATEMENT OF STATUTORY JURISDICTION

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

STATEMENT OF THE CASE

The United States agrees with Appellant's statement of the case.

STATEMENT OF THE FACTS

Appellant's Voluntary Actions Willfully Destroyed the Windshield

Appellant pleaded guilty to destroying non-military property in violation of Article 109, UCMJ. In the Care[1] inquiry, Appellant described the following events. At their home, Appellant and his wife, SSgt AS, had an argument on 19 February 2021. (JA at 26.) As a result of this argument, SSgt AS left the house with their children to go to a friend's house. (JA at 26-27.) This made Appellant distressed, and he started drinking around 2:00 a.m. on 20 February 2021. (JA at 27.) Appellant, a diabetic, believed that alcohol affected him. (Id.) After drinking, Appellant fell asleep. (Id.) Later that morning, Appellant woke up between 8:00 a.m. and 10:00 a.m. (JA at 42.) He discovered that his wife and children had returned home. (Id.) Although, Appellant was still drunk, he was still able to talk to his wife. (JA at 43.) Also, Appellant managed to stand and had sufficient balance to walk around the house. (Id.)

During the morning, Appellant took the keys to his wife's rental vehicle, and walked about 40 feet to his wife's vehicle. (JA at 44.) In walking to the vehicle, Appellant did not fall or use the wall to support himself. (JA at 45.) Appellant remembered opening the door and putting his foot on the brake to push the start

[1] United States v. Care, 40 C.M.R. 247 (C.M.A. 1969) (requiring the military judge to make a finding that the accused made a knowing, intelligent, and a conscious waiver to accept the guilty plea).

button to start the vehicle. (Id.) Appellant stood about 25 to 30 feet from his wife. (Id.) He demanded that she take the vehicle and leave. (Id.) Despite Appellant's demands, his wife stated that she was not going anywhere. (JA at 47.) If Appellant made her leave, she planned to call the police. (Id.)

Appellant explained to the military judge that he put his hands on the rental vehicle, hung his head, and asked his wife to leave again. (Id.) Appellant then struck the corner of the windshield with his hand with an open palm. (JA at 27, 47-48.) Appellant's said his specific goal was not to "completely demolish, or annihilate, or damage the window, but [his] intent was to hit the windshield with a large amount of force." (JA at 48.) As Appellant walked towards his wife, he looked back and noticed that the windshield was cracked. (JA at 48, 103.) Appellant mentioned that he was surprised that there was actual damage. (JA at. 48.)

Appellant agreed with the military judge that the damage to the vehicle's windshield was a "logical consequence" of him voluntarily striking it. (JA at 53.) Appellant stated that he was 6'2" inches tall and weighed about 235 pounds. (JA at 54.) Thus, Appellant agreed that the force he would use to strike the windshield would be greater than that exhibited by an "average man" – defined as 5'10," 180 pounds – showing that he would cause more destruction than the average-sized man. (JA at 54.)

Throughout the Care inquiry, the military judge identified the issue that Appellant must have acted "willfully" when he destroyed the windshield. (JA at 55.) The military judge wanted to ensure that the action – hitting the windshield – was done "intentionally and understanding the natural consequence." (JA at 55.) So the military judge took a recess to review relevant case law. (JA at 69.) The military judge and counsel viewed and discussed the following cases about Article 109, UCMJ, destroying non-military property: United States v. White, 61 M.J. 521 (N.M. Ct. Crim. App. 2005); United States v. George, 35 C.M.R. 801 (A.F.B.R. 1965); United States v. Hoyt, 48 M.J. 839 (N.M Ct. Crim. App. 1998). (JA at 71.) The military judge mainly relied on Hoyt and White.

The military judge explained that Hoyt seemed to imply that if the damage was the "natural consequence" of the action, he could find the Appellant guilty. (JA at 71.) Then the military judge addressed White, where the court discussed direct and circumstantial evidence regarding the appellant's specific intent. (JA at 72.) He noted that the Court of Criminal Appeals (CCA) reversed the appellant's conviction of Article 109, UCMJ, finding that it did not meet the standard for legal and factual sufficiency. (JA at 72.)

Circuit defense counsel asserted that although Appellant did not have the desire to damage the windshield, such damage was "still the practically certain consequence to happen and that such flow naturally and probably from the action

that was taken." (JA at 74.) Thus, circuit defense counsel stated that along with the damage being the result of a "willful action," the damage had to be "practically certain to follow." (JA at 74.) Circuit defense counsel argued that the facts of Appellant's case met the standard of willfulness regardless of any desire that Appellant may have had. (Id.) Circuit defense counsel reiterated that destroying the windshield, "especially with force," was a probable consequence of Appellant slapping the windshield.

With White in mind, the military judge once again recognized that Appellant was probably bigger than the average male. And the military judge considered whether he should consider Appellant's size – whether Appellant's size led to more destruction versus the average-size man. (JA 72-73.)

Circuit defense counsel pointed out that Appellant's size was a factor to consider:

> Firstly, Sergeant Saul, 6'2", 240 pounds, approximately, upset, angry, intentionally using force, the natural consequences of that action is damage. And again, as the White court points out, it's *practically certain*, not definitively certain, not guaranteed to happened, but practically certain to follow, and then regardless of any desire.

(JA at 76.)

Then the military judge asked Appellant the following:

> MJ: Do you agree that *you* striking the windshield, and the windshield cracking out and spidering [sic] like it did is a

> natural consequence of *you* striking the windshield? Or a probabl[e] consequence?
>
> ACC: Yes. Yes, Your Honor.
>
> MJ: Okay. I kind of spoke over you, so I want to make sure it's clear; do you agree that *you* smacking the windshield, a natural consequence of that action is that the windshield will spider out?
>
> ACC: Yes, Your Honor.

(JA at 76-77.)

Next the military judge asked circuit trial counsel his thoughts. (JA at 77.) Circuit trial counsel then further distinguished Appellant's case from White by pointing out that in White, the damage to non-military property was incidental to the appellant's actions that sought to injure himself. (Id.) In contrast, Appellant intended to hit the windshield. (Id.) The natural and probable consequence of a large and strong individual would be damage to the windshield. (Id.) Circuit trial counsel also explained that Appellant's size and strength were facts to consider demonstrating Appellant's "ability to actually effectuate" the outcome, which was to destroy the windshield. (Id.) Based on the discussions between both parties, the military judge agreed that this case was distinguishable from White. (JA at 78.)

The military judge found that the discussion with circuit defense counsel, circuit trial counsel, and Appellant was enough to find Appellant guilty of Article 109, UCMJ, willfully destroying non-military property. (JA at 79.) The military

judge noted that he wanted to make sure that he followed the correct law and went through painful questions to find Appellant's plea sufficient for the specification. (Id.) As a result, the military judge found Appellant's plea of guilty provident. (JA at 83.)

SUMMARY OF THE ARGUMENT

The military judge did not abuse his discretion in accepting Appellant's guilty plea because the record reveals no substantial basis in law and fact to question the plea. The military judge applied the correct law and applied the facts of the case to the law in a reasonable manner.

Willful destruction of non-military property, like other specific intent crimes, can be proven by showing that the destruction was the natural and probable consequences of a voluntary act. *See e.g.* Pettibone v. United States, 148 U.S. 197, 207 (1893); United States v. Willis 46 M.J. 259, 261-62 (C.A.A.F. 1997); United States v. Stoker, 706 F.3d 643, 646 (5th Cir. 2013); United States v. White, 61 M.J. 521 (N.M. Ct. Crim. App. 2005). Here, the military judge correctly relied on this permissive inference to find Appellant's guilty plea provident. Appellant admitted that he voluntarily hit the windshield with a large amount of force. (JA at 48.) Appellant also admitted that destroying the windshield, by causing it to spider out, was a natural and probable consequence of his action of smacking the windshield. (JA at 77.) Thus, the military judge appropriately found that Appellant had the

requisite intent to sustain his plea to willful destruction. The military judge did not abuse his considerable discretion when he used this well-established permissive inference during Appellant's Care inquiry.

Although Appellant initially stated in his providence inquiry that he did not intend to damage the windshield (JA at 48), that is not dispositive. This Court has used the permissive inference that an accused intends the natural and probable consequences of his voluntary actions to uphold a guilty plea conviction for attempted murder, another specific intent crime, under similar circumstances where an accused disavowed specific intent. *See* Willis 46 M.J. at 261-62. Military judges may properly use circumstantial evidence to find a factual basis for a plea. Id. As a result, the military judge here properly used circumstantial evidence to infer Appellant's intent to destroy the windshield, and Appellant's uninformed, initial statements about intent do not create a substantial basis to question the plea. When the military judge explained the correct law on discerning specific intent to Appellant, he admitted to the factual circumstances necessary to support his plea.

Finally, the military judge never adopted a recklessness standard in the Care inquiry and instead, correctly found Appellant guilty of *willfully* destroying the windshield. For the above reasons, the military judge did not abuse his discretion when he accepted Appellant's guilty plea to willfully destroying the windshield.

This Court should therefore affirm the decision of the Air Force Court of Criminal Appeals.

ARGUMENT

APPELLANT'S GUILTY PLEA FOR WILLFUL DESTRUCTION OF NON-MILITARY PROPERTY WAS PROVIDENT DESPITE THE FACT THAT HE TOLD THE MILITARY JUDGE THAT HE DID NOT INTEND TO DESTROY THE WINDSHIELD BECAUSE DESTRUCTION OF THE WINDSHIELD WAS A NATURAL AND PROBABLE CONSEQUENCE OF APPELLANT'S ACTIONS.

Standard of Review

This Court reviews a military judge's decision to accept a plea of guilty for abuse of discretion. *See* United States v. Forbes, 78 M.J. 279, 281 (C.A.A.F. 2019) (citation omitted). In reviewing the providence of a plea, a military judge abuses his discretion only when there is "a substantial basis in law and fact for questioning the guilty plea." United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008) (internal quotation marks and citation omitted). "[T]he military judge's determinations of questions of law arising during or after the plea inquiry are reviewed de novo." Id. at 321. "[A]ppellant bears the burden of establishing that the military judge abused that discretion, i.e., that the record shows a substantial basis in law or fact to question the plea." United States v. Phillips, 74 M.J. 20, 21-22 (C.A.A.F. 2015) (citation omitted). The military judge must find an adequate factual basis to support the plea, "an area in which [this Court] afford significant

deference." United States v. Jordan, 57 M.J. 236, 238 (C.A.A.F. 2002). In reviewing the providence of Appellant's guilty plea, this Court considers Appellant's colloquy with the military judge, as well as any inferences that may be reasonably drawn from it. United States v. Carr, 65 M.J. 39, 41 (C.A.A.F. 2007).

Law and Analysis

To constitute an offense under Article 109, UCMJ, destroying non-military property, the destruction inflicted must be done willfully, that is, "intentionally." Manual for Courts-Martial part IV, ¶ 45.c.(2) (2019 ed.) (MCM). Destroying non-military property is a specific intent crime. United States v. Bernacki, 33 C.M.R. 173, 176 (C.M.A. 1963). "Willfulness" may be proved by circumstantial evidence, such as how the acts were done. MCM, part IV, ¶ 45.c.(2). In United States v. George, 35 C.M.R. 801, 811 (A.F.B.R. 1965), the court held that a finding of willfulness does not require that an appellant had a full conscious awareness of the ultimate consequences of their purposeful act.

A. The military judge applied correct legal principles in the providence inquiry, because willful destruction of non-military property, a specific intent crime, can be proven by showing that the destruction was the natural and probable consequences of a voluntary act.

The military judge did not abuse his discretion by considering whether the destruction of the windshield was the natural and probable consequence of Appellant striking the windshield. It is well-established in criminal law that a factfinder may (but is not required to) infer a defendant's specific intent by considering the natural and probable consequences of the defendant's voluntary acts. The Supreme Court itself has long acknowledged this principle:

> The specific intent to violate the statute must exist to justify a conviction…It is true that if the act in question is a natural and probable consequence of an intended wrongful act, then the unintended wrong may derive its character from the wrong that was intended.

Pettibone v. United States, 148 U.S. 197, 207 (1893).

As the Fifth Circuit has reiterated more recently, "[i]ntent may, and generally must, be proven circumstantially. Generally, the natural probable consequences of an act may satisfactorily evidence the state of mind accompanying the act, even when a particular mental attitude is a crucial element of the offense." United States v. Stoker, 706 F.3d 643, 646 (5th Cir. 2013) (quoting United States v. Maggitt, 784 F.2d 590, 593 (5th Cir. 1986)). *See also* United States v. Desposito, 704 F.3d 221, 230 (2d Cir. 2013) (specific intent to obstruct justice may

be proven by showing that a defendant's act has "the natural and probable effect of interfering with the due administration of justice").

Military courts have likewise used the permissive inference that an individual intends the natural and probable consequences of his actions to allow a factfinder to infer specific intent. In United States v. Johnson, 24 M.J. 101 (C.M.A. 1987), this Court held that the intent to cause certain results can be established by evidence those results follow "naturally and probably from the action that was taken." 24 M.J. at 105-06. In Johnson, the accused was convicted of the sabotage of two RF-4 aircraft, in violation of 18 U.S.C. § 2155 and Article 108, UCMJ, willfully damaging the same aircraft by placing bolts in their engine intakes. In affirming the appellant's conviction of sabotage, this Court held that the "intent" required under the statute meant the accused must have known:

> that the result is practically certain to follow regardless of any desire, purpose, or motive to achieve the result. Thus, § 2155(a) would be satisfied if someone acted when he knew that injury to the national defense would be the almost inevitable result, even though the reason for his action had nothing to do with national defense.

Johnson, 24 M.J. at 105. Thus, the appellant's volitional act of placing bolts in the engine intakes gave rise to a permissive inference that he acted with the knowledge of the likely consequences of doing so, and so intended such consequences. Id. That said, the court also noted that because only a permissive inference is involved, specific "intent is lacking *unless* the factfinder determines not only that the

prohibited results were highly foreseeable, but also that the accused, in fact, knew they were almost certain and nonetheless went ahead." Id. at 105-06 (emphasis added).

The use of this permissive inference in courts-martial also extends to cases involving Article 109, UCMJ destruction of non-military property, the offense at issue in Appellant's case. In White, 61 M.J. at 523, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) adopted the natural and probable consequence test outlined Johnson to evaluate whether the Appellant had the necessary specific intent to damage a vehicle (non-military property) when he jumped onto the bonnet of the vehicle in an attempt to injury himself. 61 M.J. at 523. The NMCCA found insufficient evidence of specific intent because the Court was not convinced the appellant knew that damage to the vehicle was "almost certain" or "highly foreseeable" when he jumped onto the bonnet. Id. *See also* Hoyt, 48 M.J. at 842 (recognizing, in the context of willful destruction of non-military property under Article 109, UMCJ, that "as a rule of circumstantial evidence, a court-martial is certainly free to infer that a sane person intends the natural and probable consequences of his conduct").

Contrary to Appellant's suggestion, United States v. Bernacki, 33 C.M.R. at 176, does not undermine the principle that, under Article 109, UCMJ, the factfinder may infer specific intent to destroy based on the natural and probable

consequences of the accused's voluntary actions. (App. Br. at 13-14.) Bernacki merely held that Article 109 requires the specific intent to damage non-military property and that recklessness will not suffice – a holding that says nothing about how such specific intent might be discerned Id. at 176. Under the particular facts of Bernacki, this Court found that the appellant's conduct of driving his car at 110 miles per hour to avoid the police amounted to a mere reckless disregard of property rights but did not demonstrate a specific intent to damage the car. Id. at 174-76.

Bernacki does not control here. In Bernacki, the facts showed that the appellant was trying to protect himself and the car, because, even while driving at 110 mph, he applied his breaks while making a turn, right before he crashed. 33 C.M.R. at 174. This contradicted a finding of specific intent to damage the vehicle. And while driving at 110 mph was surely reckless, crashing the vehicle was not necessarily the natural and probable consequence of driving so fast. In contrast, the military judge in Appellant's cases applied the natural and probable consequence standard and elicited that hitting a glass windshield with a large amount carries a strong guarantee of destruction – facts not present in Bernacki. As will be discussed in more detail later, the record does not support that the military judge used a recklessness, rather than specific intent, standard. So Bernacki has no application here.

In sum, the military judge applied correct principles of law in evaluating whether Appellant had the requisite specific intent to be guilty of willful destruction of the windshield. There is no basis in law to question the plea.

B. The military judge reasonably applied the facts to the law in concluding that destruction of the windshield was a natural and probable consequence of Appellant hitting the windshield with a large amount of force.

Not only did the military judge apply the correct law as described above, his application of the facts elicited in the Care inquiry to the law was also reasonable and within his broad discretion. As the military judge correctly recognized, Appellant's case is distinguishable from White. In White, where Appellant jumped in front of a vehicle traveling at a low speed, the circumstantial evidence did not show that the damage to the vehicle was a natural and probable consequence of the appellant's actions. 61 M.J. at 522. As the court emphasized, the appellant wanted to injure himself and not the vehicle, and given the low rate of speed, it was not "almost certain" or "highly foreseeable" that damage to the vehicle would have resulted. Id. at 524. In contrast, here, direct and circumstantial evidence showed that destroying the windshield was a natural and probable consequence of Appellant's voluntary action. Appellant was larger than your average man, and he admittedly hit the windshield with a large amount of force. (JA at 48, 76.) Appellant hit a glass windshield – an object commonly known to break when force is applied. When the military judge asked if the windshield "cracking and

spidering out" was a natural or probable consequence of Appellant striking the windshield, Appellant responded, "Yes. Yes. Your Honor." (JA at 76.) This admission was sufficient to establish that Appellant specifically intended to destroy the windshield.

A couple of analogies explain why the military judge's application of the law was reasonable. If a child lightly bounces a small rubber ball off a window, and the window breaks, the child did not willfully damage the window, because it was not "highly foreseeable" or "almost certain" that the child's seemingly innocuous actions would cause such damage. But an adult could not throw a paperweight at a mirror in anger and then assert that he did not intend to destroy the mirror. Breaking the mirror is a natural and probable consequence of assaulting it with a paperweight, and such destruction is "highly foreseeable" and "almost certain." The same was true here. Appellant cannot believably claim that he did not intend to destroy the windshield when its destruction was the highly foreseeable and almost certain result of his violent actions. Contrary to his argument on appeal (App. Br. at 19), by striking the windshield with such force, Appellant was acting with a "bad purpose" and "with knowledge that his action would be unlawful." The military judge correctly applied these principles and based on Appellant's admissions about the natural and probable consequences of

his actions, there was no *substantial* basis in law or fact for questioning his guilty plea.[2]

In evaluating the military judge's decision to accept Appellant's plea, this Court should keep in mind the nature and character of a guilty plea. *See* United States v. Faircloth, 45 M.J. 172, 174 (C.A.A.F. 1996). Whether the windshield spidering out was indeed the natural or probable consequence of Appellant striking the windshield was "a matter of proof" that Appellant could have contested at a litigated trial. *See* id. Instead, Appellant pleaded guilty and thereby waived a trial on the facts for that issue. Id. When Appellant admitted that destruction of the windshield was a natural and probable consequence of his actions, those factual circumstances established the factual predicate for Appellant's specific intent under prevailing law. Id. Nothing more was required to support the plea. And this Court should not now speculate as to the existence of facts that might invalidate Appellant's admissions about the natural and probable consequences of his actions. *See* id. (citing United States v. Johnson, 42 M.J. 443, 445 (C.A.A.F. 1995)).

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[2] To the extent Appellant argues that his intoxication made it less likely he had the specific intent to destroy the windshield (App. Br. at 19), that contention is not supported by the record. Appellant drank earlier that morning around 2:00 a.m. (JA at 27.) Appellant woke up around 8:00 and 10:00 a.m., and around this time he destroyed the windshield. (JA at 42.) During this morning, Appellant conversed with his wife, was able to stand and walk around his house, and remembered opening the door and putting his foot on the brake to push the start button to start the vehicle. (JA at 43, 45-46.) No evidence in the record demonstrated that Appellant did not appreciate the nature of his conduct.

Keeping in mind the considerable deference owed to the military judge's acceptance of a guilty plea, this Court should find that the military judge did not abuse his discretion in finding a factual basis to support Appellant's specific intent to destroy the windshield.

C. Applying this Court's reasoning from United States v. Willis, it does not matter that Appellant stated in his plea inquiry that he did not intend to damage the window; those statements were clarified and superseded by the military judge's later discussion of the natural and probable consequences of Appellant's act.

Appellant argues that applying a permissive inference to find specific intent was inappropriate in guilty plea context where Appellant affirmatively stated at several points during his plea inquiry that he did not intend to damage the windshield. (App. Br. at 23-24.) But this Court has rejected a similar argument in United States v. Willis, 46 M.J. at 261-62, a case that bares many similarities to this one. In Willis, on the day of his Article 32 hearing, the appellant headed towards the office of the chief of military justice, Capt MH, where he knew his aunt and uncle were located. Id. at 260. The appellant went into this office with the intent to kill his aunt, who would be testifying against him at the Article 32 hearing. Id. As the appellant attempted to open the office door, it was jammed. Id. The appellant managed to open the door about six inches, and at that time, he believed his attempt to kill his aunt was "hopeless." Id. Given that the door was open about six inches, and that Capt MH was sitting directly within the appellant's

view, the appellant fired a shot at Capt MH. Id. Then the appellant fired more shots where he thought his aunt was located. Id.

At his court-martial, the appellant pleaded guilty to the attempted murder of his uncle – a crime requiring specific intent. During his providence inquiry, the appellant stated that he "didn't have the intent" to shoot his uncle, but he did endanger him at the time. Id. Despite the admission of lack of intent, this Court still found Appellant's plea to attempted murder to be provident. Id. This Court concluded that Appellant still "created a killing zone" by shooting from behind the office door, and "the natural and probable consequences of [the] appellant's actions was the death or grievous bodily harm of whoever was behind the door," including his uncle. Id. at 261-62. This Court based its rationale on the premise that a court "may find specific intent from the 'high risk of homicide' accompanying a defendant's actions and an inference that the defendant 'intended the natural and probable consequences of … [his] acts….'" Id. at 261 (quoting United States v. Roa, 12 M.J. 210, 211 (C.M.A. 1982)).

At bottom, Willis stands for two propositions applicable to Appellant's case: (1) in accepting a guilty plea, a trial court may use the permissive inference that a person intends the natural and probable consequences of his voluntary acts to find specific intent; (2) that permissive inference can overcome other disavowals of intent made during the plea inquiry. It follows that Appellant's initial claims that

he did not intend to destroy the windshield do not create a substantial basis in law or fact to question his guilty plea. The military judge did not abuse his discretion by accepting Appellant's guilty plea after using a permissive inference to establish Appellant's specific intent.

D. A military judge can use circumstantial evidence to find a guilty plea provident.

Appellant also argues that the military judge could not use circumstantial evidence to contradict direct evidence that Appellant did not have the intent to destroy the windshield. (App. Br. at 25.) Once again, Willis dispels this notion. In Willis, the appellant stated during his providence inquiry that he did not intend to murder his uncle, but this Court used circumstantial evidence to find that the appellant did have the requisite intent to kill his uncle. Id. at 261-62. Appellant's case is no different. Although Appellant initially told the military judge that he did not have the intent to destroy the windshield, circumstantial evidence dictated otherwise, as previously described.

Like this Court did in Willis, state and federal courts recognize that circumstantial evidence may be used to support a guilty plea. In State v. Rupp, the Court of Appeals of Wisconsin explained that "[j]ust as circumstantial evidence is sufficient to sustain a finding of guilt at trial, it may establish a factual basis for a plea." No. 00-2071-CR, 2002 Wisc. App. LEXIS 10 at *9 (Wis. Ct. App. 2002) (unpub. op.). The court continued:

> A factual basis for a plea exists if an inculpatory inference can be drawn from the complaint or facts admitted to by the defendant even though it may conflict with an exculpatory inference elsewhere in the record and the defendant later maintains that the exculpatory inference is the correct one.

Id. at *9-10. *See also* State v. Valdez, A19-1477, 2020 Minn. App. Unpub. LEXIS 747 at *6 (Minn. Ct. App. 2020) (unpub. op.) ("In assessing the accuracy of a guilty plea, we may consider circumstantial evidence of the defendant's intent."). Similarly, in United States v. Espinosa, the Court of Appeals for the Fifth Circuit found that circumstantial evidence created a sufficient factual basis to support the appellant's guilty plea to conspiracy to distribute drugs. No. 20-50787, 2021 U.S. App. LEXIS 31522 at *7 (5th Cir. 2021) (unpub. op.).

As the above cases make clear, in guilty plea cases, trial judges may use circumstantial evidence and are not limited to the facts admitted by an accused. To ensure that a plea is provident, the military judge may consider a stipulation of fact, the colloquy with the accused, and *any reasonable inferences drawn therefrom*. United States v. Hardeman, 59 M.J. 389, 391 (C.A.A.F. 2004) (citing Care, 40 C.M.R. at 252) (emphasis added). In Appellant's case, it was reasonable and appropriate for the military judge to draw inferences from the plea colloquy to establish Appellant's specific intent to destroy non-military property.

Appellant relies on Francis v. Franklin, 471 U.S. 307, 314-15 (1985) for the proposition that a military judge cannot use a permissive inference to contradict

direct evidence. (App. Br. at 26.) In Franklin, the Court held that a permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense could justify given the proven facts before the jury. Id. But Appellant's intent was still up for debate even after he said three times that he did not intend to destroy the windshield. As this Court has explained, "[i]f an accused sets up matter inconsistent with the plea at any time during the proceeding, the military judge must either resolve the apparent inconsistency or reject the plea." United States v. Garcia, 44 M.J. 496, 498 (C.A.A.F. 1996) (internal quotations omitted). Here, the military judge was allowed to resolve apparent inconsistency and was not bound under Franklin by what Appellant had initially said. After the military judge explained the correct law to Appellant regarding how specific intent could be discerned, Appellant and his trial defense counsel agreed that Appellant had the necessary specific intent to be found guilty of willful destruction of non-military property. Also, the permissive inference at issue was justifiable: common sense could justify that hitting an object with a large amount of force would destroy it. Franklin, 471 U.S. at 314-15. Under these circumstances, Appellant's reliance on Franklin is not persuasive

For these reasons, the military judge did not abuse his discretion when he used circumstantial evidence to find Appellant's plea to willful destruction of non-military property provident.

E. The military judge found Appellant guilty of *willfully* destroying non-military property, not recklessly doing so.

1. The military judge did not use a recklessness mens rea to find Appellant guilty.

Appellant argues that the military judge used a recklessness standard to find him guilty. (App. Br. at 20.) But military judge used a willfulness standard and therefore did not find Appellant guilty of recklessly destroying the windshield. Appellant says that the "[d]efinitions of 'recklessness' in the UCMJ also mirrors the Military Judge's 'probable' or 'natural consequence' language." (App. Br. at 22.) This is not the case. Under Article 114, UCMJ, reckless endangerment, the Manual describes "recklessness" as:

> Conduct that exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. The accused need not intentionally cause a resulting harm or know that his conduct is substantially certain to cause that result. The ultimate question is whether, under all the circumstances, the accused's conduct was of that heedless nature that made it actually or imminently dangerous to the rights or safety of others.

MCM, pt. IV, ¶ 52.c.(1)(c). In contrast, under Article 114, UCMJ, reckless endangerment, the Manual also describes a standard of culpability higher than recklessness:

> "Wanton" includes "reckless" but may connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.

MCM, pt. IV, ¶ 52.c.(1)(d). The recklessness standard includes "culpable disregard of *foreseeable* consequences." (emphasis added). The willfulness standard includes a "disregard of *probable* consequences," which is a more aggravated offense that involves mere recklessness. (emphasis added). Further, the Manual defines "willfully" under Article 92, failure to obey order or regulation, as the doing of an act knowingly and purposely, specifically intending the *natural and probable consequences of the act*. MCM, pt. IV, ¶ 18.c.(3)(c) (emphasis added). Reading the explanations under Article 114 and 92, UCMJ, does not suggest that recklessness includes a disregard of probable consequences. In fact, it suggests that willful offenses are more aggravated than reckless offenses, and that willful offenses use the natural and probable consequences standard. *See also* United States v. Rodriguez, No. 201500247, 2017 CCA LEXIS 42 at *46-47 (N.M. Ct. Crim. App. 30 January 2017) (unpub. op.) (J. Marks dissenting) (describing that a culpably negligent act is a disregard for the foreseeable consequences… "Notably, a foreseeable consequence of an act is not necessarily a natural and probable consequence of that act.").

Appellant also highlights that circuit defense counsel mentioned to the military judge "the reckless disregard for the consequences" standard. (App. Br. at 20.) Appellant therefore argues that the military judge also used a recklessness standard to find Appellant guilty. (Id.) But nowhere in the Care inquiry did the

military judge accept the notion that Appellant had a "reckless" or "conscious disregard for the consequences." The word reckless appeared only once in the Care inquiry, when circuit defense counsel mentioned it. (JA at 39.) Even after circuit defense counsel mentioned recklessness, the military judge was still concerned with the specific intent element of willfulness and purpose, along with the fact that Appellant said that he did not intend to destroy the vehicle. (JA at 40, 49, 52, 55, 65, 68, 72, 74.) Since military judges are presumed to know the law absent evidence to the contrary, nothing in the record supports that the military judge here erroneously used a recklessness standard. *See* United States v. Leipart, ___ M.J. ___ (C.A.A.F. 1 August 2024), slip. op. at 14 (refusing to presume the military judge adopted trial counsel's erroneous view of the law where nothing in the record suggested the military judge did so).

In sum, the military judge did not use a recklessness standard to find Appellant guilty. The military judge knew that Appellant willfulness was the correct mens rea to apply in Appellant's case and did not abuse his discretion in applying it.

2. Recklessness does not encompass the natural and probable consequence doctrine.

Appellant asserts that this Court and AFCCA have quoted definitions of recklessness that include the military judge's "probable consequence" language, and that the military judge therefore erroneously used a recklessness standard during the plea inquiry. (App. Br. at 22.) But Appellant misreads the cases he cites.

First, Appellant cites United States v. Herrmann, 76. M.J. 304, 308 (C.A.A.F. 2017), which said, "when the natural or probable consequence of a particular conduct would be death or grievous bodily harm, it may be inferred that the conduct is 'likely' to produce that result." (App. Br. at 22.) In that case, this Court addressed the crime of reckless endangerment under Article 134, UCMJ, which required the mens rea of recklessness. Herrmann, 76. M.J. at 308. But reckless endangerment also required another element – that death or grievous bodily harm was a "likely" result of the appellant's conduct. Id. When the Court talked about the natural and probable consequences standard, it was discussing the definition of "likely," which was a separate element from recklessness. Id. Therefore, this Court did not define recklessness using the natural and probable consequences standard. Herrmann is inapposite.

Appellant also cites United States v. Cooper, which said "[t]he operation of a vehicle is reckless 'when it exhibits a culpable disregard of foreseeable

consequences to others from the act or omission involved.'" (App. Br. at 22 citing ACM 40092 (f rev), 2023 CCA LEXIS 7 at *7 (A.F. Ct. Crim. App. 11 January 2023) (unpub. op.)) Appellant reads Cooper to say that culpable disregard of foreseeable consequences is the same as the disregard of natural and probable consequences. That is not the case. The appellant in Cooper was convicted of wanton operation of a vehicle and involuntary manslaughter by culpable negligence. Id. at *17-18. So Cooper discussed multiple mens rea – culpable negligence, recklessness, and wantonness. AFCCA defined culpable negligence as "an act or omission accompanied by a culpable disregard for the *foreseeable* consequences to others of the act or omission." Id. (emphasis added). AFCCA also defined recklessness as the "culpable disregard of *foreseeable* consequences to others from the act or omission involved." Id. at *17 (emphasis added). The court then explained that wanton "includes 'reckless,' but in describing the operation or physical control of a vehicle wanton…may, in a proper case connote willfulness, or a disregard of *probable* consequences, and thus describe a more aggravated offense" than recklessness and culpable negligence. Id. at *17 (emphasis added). When discussing involuntary manslaughter, the opinion noted that while death may be foreseeable, it still may not meet the threshold of being a natural and probable consequence, meaning that a natural and *probable* consequence is different from a *foreseeable* consequence. Id. at *18. As a result, Cooper supports, rather than

undermines the military judge's acceptance of Appellant's guilty plea. If it was only possible (merely foreseeable) that Appellant *might* have destroyed the windshield by striking it, then Appellant's plea would have been improvident. But instead, Appellant admitted that destruction was the *probable* consequence of his action, taking his conduct out of the realm of recklessness.

In the end, the military judge here applied the natural and probable consequence standard during Appellant's Care inquiry, and never relied on a recklessness standard to find Appellant guilty. Given that the military judge used the legal correct standards, he did not abuse his discretion.

CONCLUSION

The military judge did not abuse his discretion when he found that the natural and probable consequences of Appellant hitting the windshield with a large amount of force was destruction of the windshield. The military judge applied correct legal standards and inferred Appellant's intent by using the permissive inference that an accused intends the natural and probable consequences of his voluntary actions. The military judge did use and could use circumstantial evidence to infer Appellant's mens rea in a guilty plea case. Lastly, the military judge never applied a recklessness standard, and properly found Appellant guilty of willfully destroying the windshield. For these reasons, the United States respectfully requests that this Court find that Appellant's guilty plea to Article 109,

UCMJ, destroying non-military, was provident and affirm the decision of the Air Force 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 spencer.nelson.1@us.af.mil and michael.bruzik@us.af.mil on 7 August 2024.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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

This brief contains 6,901 words.

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

/s/ Vanessa Bairos, Maj, USAF

Attorney for the United States (Appellee)

Dated: 7 August 2024

APPENDIX

Cited Unpublished Opinions

United States v. Rodriguez

United States Navy-Marine Corps Court of Criminal Appeals

January 30, 2017, Decided

No. 201500247

Reporter
2017 CCA LEXIS 42 *

UNITED STATES OF AMERICA, Appellee v. NATHANIEL RODRIGUEZ, Aviation Electronics Technician First Class (E-6), U.S. Navy, Appellant

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Subsequent History: Decision reached on appeal by United States v. Rodriguez, 2018 CCA LEXIS 472 (N-M.C.C.A., Oct. 2, 2018)

Prior History: [*1] Appeal from the United States Navy-Marine Corps Trial Judiciary Military Judge: Commander Marcus N. Fulton, JAGC, USN. Convening Authority: Commander, Navy Region Northwest, Silverdale, WA. Staff Judge Advocate: Commander Edward K. Westbrook, JAGC, USN.

Counsel: For Appellant: Captain Daniel R. Douglass, USMC; Lieutenant Doug Ottenwess, JAGC, USN.

For Appellee: Major Cory A. Carver, USMC; Lieutenant Jetti L. Gibson, JAGC, USN.

Judges: Before PALMER, MARKS, and CAMPBELL, Appellate Military Judges. MARKS, SJ, concurring in part and dissenting in part. CAMPBELL, SJ, concurring in part and dissenting in part.

Opinion by: PALMER

Opinion

PALMER, Chief Judge:

A panel of members with enlisted representation, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of four specifications of assault consummated by battery and one specification of aggravated assault of a child with means or force likely to produce death or grievous bodily harm in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928 (2012).[1] The aggravated assault conviction was for a lesser included offense, as the members acquitted the appellant of intentional infliction of grievous bodily harm. The appellant was sentenced to [*2] two years' confinement and a bad-conduct discharge. The convening authority approved the sentence as adjudged and executed all but the discharge.

The appellant asserts 10 assignments of error (AOE)[2]: (1) the military judge erred by denying defense access to potentially favorable

[1] The appellant was acquitted of another aggravated assault with means or force likely to produce death or grievous bodily harm, and the military judge granted a RULE FOR COURTS-MARTIAL (R.C.M.) 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) motion for a finding of not guilty for a single specification of maiming in violation of Article 124, UCMJ.

[2] The fifth, sixth, seventh, eighth and ninth AOEs are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

evidence in the complaining witness's psychotherapist-patient records; (2) the evidence is legally and factually insufficient to support a conviction for aggravated assault with means or force likely to produce death or grievous bodily harm; (3) the military judge committed prejudicial error by instructing the members that "'the risk of death or grievous bodily harm must be more than merely a fanciful, speculative or remote possibility;'" (4) the military judge's failure to grant a mistrial after the government gave the members inadmissible matters too prejudicial for a curative instruction necessitates setting aside the findings and sentence; (5) the military judge committed prejudicial error by denying the motion to sever charges against the appellant; (6) the report of results of trial misstates the appellant's conviction for aggravated assault; (7) two years' confinement [*3] is an inappropriately severe sentence and was likely influenced by the evidence of the appellant's steroid use erroneously presented to the members; (8) the appellant's inadequate medical care during post-trial confinement violated his Eighth Amendment and Article 55, UCMJ, rights; (9) the assault consummated by battery convictions represent an unreasonable multiplication of charges; and (10) the military judge committed plain error by instructing the members that "if based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the crime charged, you must find him guilty."

Additionally, we specified the issue of whether Specifications 1 and 2 of Charge II are multiplicious. In response, the appellant argues that they are and that Specification 2 should have been dismissed before findings.

We find merit only in the third AOE—that the military judge erred in the findings instructions regarding aggravated assault of a child with a means or force likely to produce death or grievous bodily harm. In our decretal paragraph, we set aside that conviction and the sentence, thereby rendering the sixth and seventh AOEs moot. We conclude the remaining findings are correct in [*4] law and fact, and no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

I. Background

The appellant's convictions involve assaults of his ex-girlfriend, former Petty Officer First Class BLS, and their six-week-old daughter, AMR.

During 2012, the appellant, on divers occasions, kicked, punched, slapped, and choked BLS at their Oak Harbor, Washington home. That June, while vacationing in South Padre Island, Texas, the appellant pushed BLS, causing her to fall and fracture her elbow. The assaults stopped when the appellant deployed that fall and for the duration of BLS' pregnancy, which began shortly after the appellant's return. But on 18 September 2013—the night before AMR was born—the appellant broke down a locked bathroom door and attacked BLS, punching and kicking her, including in her stomach.

On 2 November 2013, BLS awoke early to drive visiting family members to the airport. The appellant remained home alone with AMR and BLS's four-year-old son from her prior marriage. Between 1430 and 1500 that afternoon, BLS returned from the airport. Upon entering the home, the appellant alerted her that AMR was in distress. After the appellant [*5] called an urgent care center, he and BLS drove AMR to an emergency room.

The emergency room doctor observed AMR breathing slowly and having seizures. The doctors discovered an acute subdural hemorrhage, or recent bleeding between

AMR's brain and skull. Based on this finding, the doctor arranged to fly AMR to a trauma center.

The next night, 3 November, civilian law enforcement conducted a non-custodial interview of the appellant at the trauma center. During the interview, the appellant described the events of 2 November in detail. Between 1300 and 1330 that afternoon, he fed AMR, burped her, and prepared to change her diaper. While AMR laid face-up on the couch, she vomited what appeared to be most of the bottle of formula. The appellant said he rolled her on her side and burped her, but she began gurgling. Her breaths were short, and she was not crying normally. The appellant said he picked her up, carried her to the sink, turned her face down, held her in his left hand, and patted her back with his right hand. He stated formula and mucus leaked from her nose and mouth, but her breathing remained short. When the appellant turned AMR face up, her lips were blue. He said he was "tapping [*6] on her back . . . trying to just . . . shaking her chest to see if you know more stuff would come out and it didn't and she was just turning bluer and bluer. So at this point she started seizing up."[3] Her body became "stiff as a board."[4] The appellant said he laid her on the couch, elevated her neck, and attempted to give her cardiopulmonary resuscitation with two fingers on her chest. She started breathing again, but not normally. Her body was alternately stiff and limp. While her body was relaxed, the appellant changed her diaper and replaced her sleeper. He did not call 911 or otherwise seek assistance until after BLS came home.

Testimony from the treating physicians and AMR's treatment records comprise the remaining evidence about what happened to the infant. Although AMR presented at the emergency room without any significant external trauma, her seizures continued for another day or so. Ultimately, all organic causes for AMR's injuries were eliminated. Because the appellant and BLS denied that AMR had suffered a fall or other accident, the doctors rendered a medical diagnosis of non-accidental trauma. As a result of AMR's injuries, she and her half-brother were placed in protective [*7] custody.

During an argument on 15 November 2013, while AMR remained in the hospital and in protective custody, the appellant sent BLS a series of incriminating text messages. Begging BLS not to leave him, the appellant offered a written confession that he had struck BLS, including while she was pregnant:

> Appellant: And for what its [sic] worth, ive [sic] never tried to blame me hitting you on you. I said that you know what to do and say to provoke the absolute worst part of me to come out. Save this message if you want, im [sic] admitting to it.
> BLS: Admitting to what[?]
> Appellant: Hitting you. I admit to it entirely. . . . Hitting a pregnant woman is a felony that has no statute of limitations and ill [sic] admit to that too.[5]

BLS testified that in December 2013 an argument ensued after she questioned the appellant about his version of what happened to AMR on 2 November. According to BLS, the appellant then choked her nearly to unconsciousness.[6] Eventually, she reported the alleged choking incident and the appellant's pattern of physical abuse that occurred in 2012.

BLS left the appellant in February 2014 and

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[3] Prosecution Exhibit (PE) 4 at transcript page 559.

[4] *Id.* at 551.

[5] PE 1 at 1.

[6] The members acquitted the appellant of this assault allegation.

regained custody of her children in April 2014, purportedly because of the separation. [*8] She provided Naval Criminal Investigative Service agents a statement and gave them the appellant's incriminating text messages on 20 June 2014.

II. Discussion

A. Factual and legal sufficiency

We review questions of legal and factual sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, any reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Day*, 66 M.J. 172, 173-74 (C.A.A.F. 2008) (citing *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)). In applying this test, "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).

The test for factual sufficiency is whether "after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt." *United States v. Rankin*, 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006) (citing *Turner*, 25 M.J. at 325 and Art. 66(c), UCMJ), *aff'd on other grounds*, 64 M.J. 348 (C.A.A.F. 2007). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether [*9] the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399. While this is a high standard, the phrase "beyond a reasonable doubt" does not imply that the evidence must be free from conflict. *Rankin*, 63 M.J. at 557.

In order to convict the appellant of aggravated assault consummated by a battery upon a child under the age of 16, by a means or force likely to produce death or grievous bodily injury, in violation of Article 128, UCMJ, (Specification 5 of Charge II) the government had to prove:

> One, that on or about 2 November 2013, at or near Oak Harbor, Washington, the accused did bodily harm to AMR;
> Two, that the accused did so by moving her with his body;
> Three, that the bodily harm was done with unlawful force or violence;
> Four, that the force was used in a manner likely to produce death or grievous bodily harm; and
> Five, that AMR was a child under the age of 16 years.[7]

As described, *supra*, on 2 November 2013 AMR presented to a medical facility suffering from an acute subdural hemorrhage, a permanent injury to her brain. At trial, multiple medical experts testified as to the cause of AMR's injuries and cited "trauma is probably the highest, the [*10] most likely cau--reason, whether it be accidental or non-accidental[,]"[8] as no organic or non-trauma event would have caused AMR's seizures or subdural bleeding; that AMR was too young to roll over and thus unable to cause the injuries to herself; that the injuries most likely occurred on 2 November 2013; that it was unlikely the injury occurred before the morning of 2 November 2013 because AMR was "eating normally . . . and

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[7] Record at 1097; Manual for Courts-Martial, United States (2012 ed.), Part IV, ¶ 54(b)(4)(a).

[8] Record at 463.

acting normally;"[9] and that subdural hemorrhaging can be caused by acceleration/deceleration forces such as shaking or whiplash. AMR's grandparents and her aunt and uncle testified they had done nothing to harm AMR, and AMR was fine before being left alone with the appellant. The appellant's own statements reveal AMR went into distress while under his exclusive care in the five to six hours before her respiratory arrest. Additionally, even though the appellant described his daughter as turning blue, having seizures, and not breathing—to the extent he needed to revive her with cardiopulmonary resuscitation—he inexplicably did not call 911 or seek medical attention for her until BLS came home.

Finding the members were properly instructed on the use of circumstantial [*11] evidence,[10] and recognizing that "[f]indings may be based on direct or circumstantial evidence[,]"[11] after weighing all the evidence in the record of trial, the pleadings, and having made allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt of the appellant's guilt. With the exception of the instructional error discussed *infra*, we are similarly satisfied the appellant's court-martial was legally sufficient.

B. Aggravated assault instruction

The appellant claims prejudicial error in the military judge's instruction that "the risk of death or grievous bodily harm must be more than merely a fanciful, speculative, or remote possibility." We agree.

Proper instructions to the members are a question of law we review *de novo*. When, as here, the appellant fails to object to an instruction at trial, we review for plain error. *United States v. Payne*, 73 M.J. 19, 22-23 (C.A.A.F. 2014). Plain error requires an appellant to demonstrate that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011) (holding that where an erroneous instruction implicated a constitutional issue and where the error was obvious, the appellant must also suffer prejudice [*12] to a substantial right).

1. Error that was plain or obvious

The subject instruction provisions, taken directly from the Military Judges' Benchbook,[12] defined "force likely to produce death or grievous bodily harm," an element of aggravated assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm:

> A force is likely to produce death or grievous bodily harm when the natural and probable results of its particular use would be death or grievous bodily harm. It is not necessary that death or grievous bodily harm actually result.
>
> . . . .
>
> The likelihood of death or grievous bodily harm is determined by measuring two factors. Those two factors are: one, the risk of harm; and two, the magnitude of the harm. In evaluating the risk of the harm, the risk of death or grievous bodily harm must be more than merely a fanciful, speculative or remote possibility. In evaluating the magnitude of the harm, the consequence of death or grievous bodily harm must be at least probable and not

[9] *Id.* at 528.

[10] *Id.* at 1106.

[11] R.C.M. 918(c).

[12] Military Judges' Benchbook, Dept. of the Army Pamphlet, 27-9 at 735-36 (10 Sep 2014).

> just possible, or in other words, death or grievous bodily harm would be a natural and probable consequence of the accused's act. Where the magnitude of the harm is great, you may [*13] find that an aggravated assault exists even though the risk of harm is statistically low. For example, if someone fires a rifle bullet into a crowd, and a bystander in the crowd is shot, then to constitute an aggravated assault, the risk of harm by hitting—of hitting that person need only be more than merely a fanciful, speculative or remote possibility since the magnitude of harm which the bullet is likely to inflict on that person it—it hits is great.[13]

The military judge's error in providing this instruction was plain or obvious. Weeks before this trial, the Court of Appeals for the Armed Forces (CAAF) expressly overruled *United States v. Joseph*, 37 M.J. 392 (C.M.A. 1993), which formed much of the basis for the subject instruction. *United States v. Gutierrez*, 74 M.J. 61, 68 (C.A.A.F. 2015). In *Gutierrez*, the CAAF found no authority for defining "'likely'" as "'more than merely a fanciful, speculative, or remote possibility'" and invalidated the risk of harm prong of the two-part analysis within the instruction. *Id.* at 66 (citing *Joseph*, 37 M.J. at 397). Instead, "likely" must be defined consistently for all Article 128, UCMJ, prosecutions, and not inconsistently with the "plain English" meaning of the word. *Id.* Further, the CAAF held that grievous bodily harm is likely when it is the "'natural and probable consequence'" [*14] of the particular act alleged. *Id.* (quoting *United States v. Weatherspoon*, 49 M.J. 209, 211 (C.A.A.F. 1998) (quoting Manual for Courts-Martial (MCM), United States (1995 ed.), Part IV, ¶ 54(c)(4)(a)(ii)). The Military Judges' Benchbook having not yet incorporated *Gutierrez* by the date of trial does not impact the plain or obvious error of instructing on the repudiated *Joseph* standard.[14]

2. Material prejudice to a substantial right

Next we consider whether the error materially prejudiced a substantial right of the appellant. The right to accurate members' instructions is substantial because, in cases such as this, it is Constitutional. An accused's right to a fair trial obligates a military judge to "'provide appropriate legal guidelines to assist the jury in its deliberations . . . .'" *United States v. Wolford*, 62 M.J. 418, 419 (C.A.A.F. 2006) (quoting *United States v. McGee*, 23 C.M.A. 591, 1 M.J. 193, 195, 50 C.M.R. 856 (C.M.A. 1975)). When an instruction contains "misdescriptions" of even a single element of an offense, "the erroneous instruction precludes the jury from making a finding on the *actual* element of the offense" and violates the Constitution's Sixth Amendment. *Neder v. United States*, 527 U.S. 1, 9-10, 12, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (emphasis in original) ("[A]n improper instruction on an element of the offense violates the Sixth Amendment's jury trial guarantee."); *see also United States v. Smith*, No. 201100594, unpublished op, 2012 CCA LEXIS 908, at *11 (N-M. Ct. Crim. App. 27 Dec 2012) ("[A] jury instruction which [*15] lessens to any extent the Government's burden to prove every element of a crime violates due process.")

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[13] Record at 1098-99; *see also* Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at 735-36 (10 Sep 2014).

[14] The unofficial Military Judge's Benchbook published 12 September 2016, and incorporating changes made in February, May, and September 2016, reflects the deletion of the second paragraph of the instruction, including the two-factor analysis and the example. Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at 738 (Unofficial ver. 16.2, 12 Sep 2016). *See United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) ("In undertaking our plain error analysis in this case, we therefore consider whether the error is obvious at the time of appeal, not whether it was obvious at the time of the court-martial.")

(citing *Francis v. Franklin*, 471 U.S. 307, 313-14, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985)).

The ultimate, fact-specific question is whether error not only affected the substantial right to a fair trial, but also materially prejudiced it. *See United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998). Further clarifying this standard, the CAAF espoused "the *Fisher* requirement that plain error have 'an unfair prejudicial impact on the jury's deliberations.'" *Id.* (quoting *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986)).

Although we find the appellant's conviction to be factually sufficient, we recognize that the members largely relied on circumstantial evidence to determine that AMR's grievous bodily injuries resulted from the appellant's battery of AMR. Unlike the overwhelming proof that AMR was grievously injured, as defined by the law,[15] there was little direct evidence on the exact means by which the appellant caused those injuries. In finding the appellant guilty, the members most certainly relied on evidence the appellant had sole custody of AMR for the five to six hours before her seizures and respiratory arrest, his failure to summon emergency services, and the expert witness testimony citing trauma as the cause of her injuries. Nevertheless, when faced with circumstantial [*16] evidence of the actual force the appellant used and the lack of any relevant external injuries to AMR, the members had to assess the relationship among AMR's injuries, the appellant's means of harming his daughter, and whether those means were likely to produce death or a grievous bodily injury. Instead of being instructed on the "plain English" meaning of the word "likely,"[16] they were told to evaluate the risk of harm and advised that the threshold for the risk of death or grievous bodily harm need only be more than a fanciful, speculative, or remote possibility. At best, the members would have been confused by this instruction, and at worst, misled. Under the circumstances of this case, we are unable to conclude the members would have found the appellant guilty absent this error. Thus we find the instructional error materially prejudiced the appellant's substantial rights.

[15] Grievous bodily injury is defined as "serious bodily injury. It does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries." MCM, Part IV, ¶ 54(c)(4)(a)(iii).

[16] *Gutierrez*, 74 M.J. at 66.

C. Psychotherapist-Patient records

The appellant alleges the military judge erroneously denied production of BLS's mental health records for *in camera* review, because two psychotherapist-patient privilege exceptions applied in this case: (1) child abuse and (2) constitutional necessity.

In accordance with [*17] MILITARY RULE OF EVIDENCE (MIL. R. EVID.) 513, SUPPLEMENT TO THE MANUAL FOR COURTS-MARTIAL (2012 ed.):

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the [UCMJ], if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

Two of the eight exceptions to the privilege are relevant here: (1) "when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;" and (2) "when admission or disclosure of a communication is constitutionally required."

MIL. R. EVID. 513(d)(2),(8). To invoke an exception and secure production of privileged mental health records, a moving party must (1) "set forth a specific factual basis demonstrating a reasonable likelihood that the requested privileged records would yield evidence admissible under an exception to [MIL. R. EVID.] 513;" (2) proffer whether "the information sought [is] merely cumulative of other information available;" and (3) proffer whether "the [*18] moving party [made] reasonable efforts to obtain the same or substantially similar information through non-privileged sources[.]" *United States v. Klemick*, 65 M.J. 576, 580 (N-M. Ct. Crim. App. 2006).

The appellant moved to compel production of BLS's privileged mental health records, citing BLS's numerous mental health diagnoses discussed and disclosed at the Article 32, UCMJ, hearing and in discovery. Invoking the constitutional exception, the appellant argued he needed to determine whether BLS's conditions might "disrupt her memory, identity, or perception of the environment or otherwise make her dramatic, emotional, and erratic" and thus affect her credibility.[17] The military judge denied the motion.

On appeal, the appellant has challenged the military judge's decision that the constitutional exception did not apply and, for the first time, raised the child abuse exception. We begin our analysis with the child abuse exception.

1. Child abuse exception

The appellant failed to raise the MIL. R. EVID. 513(d)(2) child abuse exception before or at trial and therefore forfeited it. Thus we review the military judge's failure to invoke the exception *sua sponte* for plain error. *Powell*, 49 M.J. at 464; *see also Klemick*, 65 M.J. at 579. To find plain error, an appellant must demonstrate that: (1) there [*19] was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. *Girouard*, 70 M.J. at 11. The military judge did not err by not ordering production of BLS's mental health records pursuant to the child abuse exception.

Considering the first *Klemick* factor, the appellant set forth no factual basis demonstrating a reasonable likelihood that there was evidence of child abuse in BLS's counseling records. Unlike the records sought in the *Klemick* case, where the incident of alleged child abuse precipitated the patient's counseling, BLS's counseling preceded the allegation of child abuse by at least a year. *See* 65 M.J. at 580 ("The death of a child at the hands of his father, followed soon thereafter by a discussion between the parents of the father's treatment of the child and then by psychological counseling for the child's mother, reasonably led to the conclusion that records of that counseling would contain information related to the event and the reactions of the victim's mother.")

The appellant was not a spouse charged with a crime against a child of either spouse. He and BLS never married. While one could logically argue that the child abuse exception should apply [*20] to unmarried as well as married parents when their child is the victim, the military judge committed no error in failing to extend the exception beyond its plain language.

Finding no error, we end our analysis of this exception.

2. Constitutional exception

The appellant raised constitutional necessity in his unsuccessful pretrial motion to compel production of BLS's mental health records. We

[17] Appellate Exhibit (AE) II at 4-5.

review the military judge's decision to deny production of mental health records for *in camera* review for an abuse of discretion. *Klemick*, 65 M.J. at 580. "'An abuse of discretion arises in cases in which the judge was controlled by some error of law or where the order, based upon factual, as distinguished from legal, conclusions, is without evidentiary support.'" *United States v. Travers*, 25 M.J. 61, 63 (C.M.A. 1987) (quoting *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 274 S.E. 2d 290, 291 (1981)).

During oral argument, trial defense counsel proffered that BLS exhibited borderline personality disorder symptoms. The appellant testified to observing: "[c]utting—self-cutting issues, depression—lot of depression, lot of anxiety, strong impulsive decisions especially with money, sometimes poor hygiene" and mood swings.[18] No psychologist testified about borderline personality disorder, because the government had not yet responded to the appellant's request for [*21] an expert witness in this field. However, trial defense counsel failed to submit excerpts from the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, scholarly articles, or any other documentary evidence about the effects of borderline personality disorder. Instead, trial defense counsel proffered that those who suffer from the disorder "have significant departures from reality at times, [and] experience their own version of reality . . . ."[19]

Pointing to contradictions in BLS's testimony at the Article 32, UCMJ, hearing and her history of mental health treatment, the appellant also argued that he needed to mine BLS's mental health records for statements that might impeach her testimony on the merits or potential testimony during presentencing. The military judge dismissed these arguments as a fishing expedition, not a specific factual basis for piercing the privilege.

In his ruling, the military judge correctly spelled out the three requirements *Klemick* imposes on a party seeking privileged psychotherapist-patient communications. The military judge focused on the requirement of a "specific factual predicate" as a prerequisite to even an *in camera* review of privileged records.[20]

In his [*22] findings of fact, the military judge pointed to specific examples of inconsistencies in BLS's statements and Article 32, UCMJ, testimony. Specifically, she reported multiple allegations of assault and battery at the hands of the appellant in her 20 June 2014 statement but "did not tell the truth about any of the incidents she first reported on 20 June 2014 when those incidents initially occurred and she was questioned about them by medical, law enforcement, or other persons."[21] She denied suffering any abuse at the hands of her ex-husband despite evidence of a substantiated allegation of physical abuse against him in 2010. Finally, the military judge pointed to trial defense counsel's receipt of numerous medical records concerning BLS, evidence of her diagnosis of post-traumatic stress disorder, and the absence of evidence of any new diagnoses since her relationship with the appellant.

The military judge concluded that the appellant's speculation about what was protected in BLS's mental health records and its impact on her credibility fell short of "a specific factual showing as required by *Klemick*."[22] Despite the evidence that BLS suffered from one or more mental health conditions, the [*23] military judge specifically

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[18] Record at 22.

[19] *Id.* 30.

[20] AE XI at 3.

[21] *Id.* at 4.

[22] *Id.* at 7.

cited the absence of "documentary or testimonial evidence, that such conditions or the attendant diagnosis effect [sic] perception or memory."[23] Again finding no specific, factual support, he also rejected trial defense counsel's assertion that BLS's records contained statements needed to impeach her testimony on the merits and potentially, on sentencing. We find no error of law controlled the military judge's conclusions, and there was sufficient evidentiary support for his findings of fact. Thus, we find no abuse of discretion.

Near the end of the government's case, trial counsel disclosed to trial defense counsel that BLS had suddenly admitted to suffering from borderline personality disorder. Shortly thereafter, trial defense counsel called an expert psychologist who testified specifically about how borderline personality disorder manifests itself. This expert testimony arguably provided the specific factual basis missing from the appellant's pretrial motion. Because the appellant did not renew his motion for production of the privileged records again after the psychologist's testimony, there is no ruling from the presiding military judge. However, even [*24] with a more specific factual basis satisfying the first *Klemick* prong, the records sought were merely cumulative of other evidence already presented and thus do not satisfy the second *Klemick* prong. 65 M.J. at 580.

Trial defense counsel were able to explore BLS's multiple diagnoses and their effects and repeatedly impeach her credibility. After BLS confirmed her borderline personality disorder diagnosis, the appellant's expert psychologist explained its symptoms to the members. The psychologist pointed to BLS's own words in her journal as consistent with borderline personality disorder. In the privacy of her journal, BLS described herself as deceptive and manipulative: "I lie, manipulate others to get what I want, I'm selfish, 2 faced . . . ."[24] Trial defense counsel was able to elicit an admission that BLS lied at the Article 32, UCMJ, hearing to protect her ex-husband when she denied accusing him of physical abuse. BLS acknowledged she had begun living with her ex-husband again two weeks before the court-martial.

The constitutional necessity of examining BLS's mental health records diminished with each piece of non-privileged medical evidence, testimony, and written reflection challenging her credibility. [*25] Perhaps the best indicator of the appellant's successful impeachment of BLS, without her mental health records, is the verdict. The members convicted the appellant of the four specifications of assault preceding his texted confession of 15 November 2013. The only evidence of the alleged aggravated assault in December 2013 was BLS's testimony, and the members found her word alone insufficient. Again, we find no abuse of discretion in the sustained MIL. R. EVID. 513 privilege afforded to BLS's mental health records.

D. Mistrial for inadmissible evidence

The appellant avers error in the military judge's failure to grant a mistrial after the members briefly had access to inadmissible, prejudicial evidence.

"The decision to grant a mistrial rests within the military judge's discretion, and we will not reverse his determination absent clear evidence of abuse of discretion." *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990) (citing *United States v. Rosser*, 6 M.J. 267, 270-71 (C.M.A. 1979)). "[M]istrial is a drastic remedy, and such relief will be granted only to

[23] *Id.*

[24] PE 54 at 24.

prevent a manifest injustice against the accused." *Id.* (citing *United States v. Pastor*, 8 M.J. 280, 281 (C.M.A. 1980)); *see also* RULE FOR COURTS-MARTIAL (R.C.M.) 915, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) ("The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice [*26] because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings.") A military judge's most important consideration when ruling on a mistrial motion is the "'desires of and the impact on the defendant.'" *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003) (quoting *United States v. Harris*, 51 M.J. 191, 196 (C.A.A.F. 1999)). Given the drastic nature of a mistrial, courts prefer using a curative instruction as an alternative remedy. *Rushatz*, 31 M.J. at 456. The CAAF has often found a curative instruction "adequate to neutralize certain inadmissible evidence which might have prejudiced the accused." *United States v. Barron*, 52 M.J. 1, 5 (C.A.A.F. 1999) (citing *United States v. Balagna*, 33 M.J. 54 (C.M.A. 1991)). Members are presumed to have complied with a military judge's curative instructions absent evidence to the contrary. *Rushatz*, 31 M.J. at 456 (citations omitted).

In this case, a motion for mistrial arose because of the inadvertent, temporary admission of evidence previously deemed inadmissible under MIL. R. EVID. 404(b). When the government sought to admit evidence of uncharged misconduct within the appellant's incriminating text messages, the military judge found its probative value substantially outweighed by the danger of unfair prejudice.[25] Nevertheless, within minutes of the government's publication of the text messages to the members, trial defense counsel realized that reference to the uncharged [*27] misconduct had not been redacted from the exhibit. After initially proposing a curative instruction, the appellant moved for a mistrial.

Having considered the totality of the circumstances, the military judge found a mistrial "not manifestly necessary in the interests of justice."[26] Among the circumstances cited were the trial defense counsel's failure to detect the inadmissible reference when the exhibit was admitted into evidence and its relative inconspicuousness within the lengthy exchange of text messages.

The military judge then deferred to trial defense counsel for corrective measures. At trial defense counsel's request, the government replaced the exhibit depicting screen shots of the text messages with a typed transcript. The transcript did not contain a black box of redacted text that might remind members of what had been removed. The military judge also invited trial defense counsel to draft a curative instruction, which he read to the members twice. The appellant offers no evidence rebutting the presumption that the members complied with the curative instruction.

The military judge applied the correct standard in finding a mistrial unnecessary to prevent manifest injustice. [*28] He read trial defense counsel's preferred curative instruction to the members on two separate occasions. The corrective measures taken were more than adequate to mitigate the error and protect the fairness of the trial. The appellant has failed to demonstrate that the military judge abused his discretion.

E. Severance of charges

The appellant alleges that denial of his motion to sever the specifications with separate

[25] AE XIII at 4, 6.

[26] Record at 715.

victims resulted in actual prejudice and deprived him of a fair trial.

We review a military judge's decision to deny a motion to sever offenses for an abuse of discretion. *United States v. Southworth*, 50 M.J. 74, 76 (C.A.A.F. 1999). An accused may file a motion for "severance of offenses, but only to prevent manifest injustice." R.C.M. 906(b)(10). "Ordinarily, all known charges should be tried at a single court-martial. Joinder of minor and major offenses, or of unrelated offenses is not alone a sufficient ground to sever offenses." R.C.M. 906(b)(10), Discussion.

Denial of a motion to sever offenses does not constitute an abuse of discretion unless the accused can show "actual prejudice in that it prevented him from receiving a fair trial; it is not enough that separate trials may have provided him with a better opportunity for an acquittal." *United States v. Duncan*, 53 M.J. 494, 497-98 (C.A.A.F. 2000) (citations omitted). [*29]

To determine if denial caused actual prejudice by depriving the appellant of a fair trial, we consider three factors: "(1) whether the evidence of one offense would be admissible proof of the other; (2) whether the military judge has provided a proper limiting instruction; and (3) whether the findings reflect an impermissible crossover." *Southworth*, 50 M.J. at 76 (citing *United States v. Curtis*, 44 M.J. 106, 128 (C.A.A.F. 1996) *rev's as to sentence on recon.*, 46 M.J. 129 (C.A.A.F. 1997) (additional citations omitted)).

1. Would evidence of one offense be admissible proof of the other?

Evidence of the offenses against BLS would not be admissible to prove the offense against AMR and *vice versa*. However, finding that this first factor favors the appellant, alone, does not require severance, because a proper instruction from the military judge can address this concern. *Duncan*, 53 M.J. at 498 (citing *Southworth*, 50 M.J. at 77-78).

2. Did the military judge provide a proper limiting instruction?

The military judge provided the standard spillover instruction as a proper limiting instruction to the members.[27] As the appellant points out, the previous military judge who ruled on the severance motion mentioned the need for "a specific, tailored limiting instruction to prevent impermissible crossover."[28] While finalizing the findings instructions, the military [*30] judge addressed this with trial defense counsel: "[Y]ou'd like me to tailor it to specifically mention that the evidence that the accused committed an offense against one alleged victim does not constitute evidence that he would have assaulted the second victim, and put it in terms of separating victims, is that correct?"[29] Trial defense counsel agreed. Beyond the verbatim Military Judges' Benchbook's spillover instruction, the military judge added the following: "Proof that the accused committed assault against one person does not give rise to permit any inference that the accused assaulted anyone else."[30] Thus, the instruction addressed impermissible crossover using the standard, approved language as well as the appellant's requested language.

3. Do the findings reflect an impermissible crossover?

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[27] *Id.* at 1107-09.

[28] AE XII at 7.

[29] Record at 1044.

[30] *Id.* at 1109.

The appellant argues that his conviction for aggravated assault of AMR reflects impermissible crossover. We disagree. It is true that the government's presentation of evidence at court-martial did not perfectly segregate the specifications involving AMR from those involving BLS, and trial counsel did imply that the appellant lost control while handling AMR. But amidst all the evidence of the dysfunctional [*31] relationship between the appellant and BLS, there was no evidence that the appellant reacted to his daughter with anything like the frustration that characterized his interactions with her mother.

Although our ruling on instructional error moots any alleged prejudice, we nevertheless find the denial of the appellant's motion to sever did not give rise to actual prejudice that denied the appellant a fair trial.

F. Cruel and unusual punishment in post-trial confinement

The appellant asserts he has received inadequate medical treatment during post-trial confinement, constituting cruel and unusual punishment in violation of the Eighth Amendment to the Constitution and Article 55, UCMJ.

Prohibitions against the infliction of "cruel and unusual punishment" derive from the Constitution and the UCMJ. U.S. CONST. amend. VIII; Art. 55, UCMJ.[31] The Supreme Court has interpreted "punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society . . . or which involve the unnecessary and wanton infliction of pain[,]" to violate the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 102-03, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976) (internal citations and quotation marks omitted); *see also United States v. Lovett*, 63 M.J. 211, 214 (C.A.A.F. 2006).

But before prisoners may seek judicial intervention in their allegations of cruel and unusual punishment, they must [*32] exhaust administrative remedies. *United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997); *United States v. Coffey*, 38 M.J. 290, 291 (C.M.A. 1993) ("In this regard appellant must show us, absent some unusual or egregious circumstance, that he has exhausted the prisoner grievance system of the [confinement facility] and that he has petitioned for relief under Article 138, UCMJ . . . ."") (citation omitted)). "In addition to promoting resolution of grievances at the lowest possible level, the exhaustion requirement in *Coffey* is intended to ensure that an adequate record has been developed with respect to the procedures for considering a prisoner grievance and applicable standards." *Miller*, 46 M.J. at 250.

In this case, the appellant has failed to demonstrate that he has exhausted his administrative remedies. By his own admission, he has not forwarded his complaints to his commanding officer, pursuant to Article 138, UCMJ, or the confinement facility's grievance procedures. His rationale does not rise to the level of unusual or egregious circumstances. In his affidavit, the appellant claimed he feared the Technical Director would intercept and dismiss his complaint, as occurred with a prior grievance involving incoming mail. However, the appellant has failed to show us that he has even addressed a complaint to his commanding [*33] officer. Therefore, the appellant has not made the required showing for relief from this court.

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[31] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII; "Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter." Art. 55, UCMJ.

G. Unreasonable multiplication of charges

The appellant next alleges the military judge erred in denying his motion to dismiss one or more specifications of assault of BLS for unreasonable multiplication of charges.

We review a military judge's decision to deny relief for unreasonable multiplication of charges for an abuse of discretion. *United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2012).

Like the appellant, we turn to *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001) for the factors guiding our analysis:

> (1) Did the appellant object at trial that there was an unreasonable multiplication of charges and/or specifications?;
> (2) Is each charge and specification aimed at distinctly separate criminal acts?;
> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?;
> (4) Does the number of charges and specifications [unreasonably] increase the appellant's punitive exposure?; and
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

Id. at 338 (citing *United States v. Quiroz*, 53 M.J. 600, 607 (N-M. Ct. Crim. App. 2000)).

First, the appellant made an objection for unreasonable multiplication at trial, after the government rested its case.

Second, we consider whether [*34] Specifications 1, 2, and 3 under Charge II refer to separate and distinct acts.[32] The appellant argues that Specification 1 alleged a course of conduct broad enough to include the assaults alleged in Specifications 2 and 3. However, Specifications 2 and 3 alleged specific assaults for which the government submitted documentary evidence in corroboration. BLS testified that the more egregious assault to her face and head in May 2012, alleged in Specification 2, was the first altercation that left her with a black eye. She authenticated a photograph she took of the black eye in May 2012. Specification 3, which alleged a pushing incident that occurred near South Padre Island, Texas, was necessarily a distinct act because it occurred at a different situs— than the assaults described in Specifications 1 and 2.

Third, because Specification 3 addresses a separate assault, which also caused distinct harm to BLS,[33] it neither misrepresents nor exaggerates the appellant's criminality.

Fourth, the number of specifications did not unreasonably increase the appellant's punitive exposure. Each specification increased the maximum confinement by six months, resulting in a significant proportional increase [*35] with each additional specification. However, Specifications 2 and 3 were distinct assaults which reasonably increased the appellant's punitive exposure. Moreover, the appellant already benefitted from reduced punitive exposure from Specification 1 itself, as the government could have charged other individual assaults within this specification as

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[32] Specification 1: In that [the appellant] . . . did, at or near Oak Harbor, Washington, on divers occasions from in or about February 2012 to in or about September 2012, unlawfully touch [BLS] on the head, neck, arms, legs, and torso with his arms, hands, legs, and feet.

Specification 2: In that [the appellant] . . . did, at or near Oak Harbor, Washington, in or about May 2012, unlawfully strike [BLS] in her face and head with his hand. .

Specification 3: In that [the appellant] . . . did, at or near South Padre Island, Texas, in or about June 2012, unlawfully push [BLS] on her body with his hands.

[33] The government presented hospital records documenting injuries to BLS's elbow, which she attributed to the appellant's assault described in Specification 3.

separate specifications, rather than consolidating them in Specification 1. This reduced the appellant's punitive exposure. *See* *Campbell*, 71 M.J. at 25 (finding no abuse of discretion in the military judge's refusal to dismiss charges for possessing and stealing the same narcotics, on the same divers occasions, as "[t]he Government's decision to charge on divers occasions only exposed [Campbell] to eleven years of confinement[,]" thereby reducing "rather than exaggerating [her] criminality or exposure," as she "could have faced thirty-one separate specifications of larceny" and "thirty-one years of confinement.")

Fifth, there is no evidence of prosecutorial overreach or abuse in charging. The aforementioned decision to consolidate in Specification 1 all but two of the assaults in an eight-month pattern of physical abuse, weighs against any allegation of overreach or abuse. [*36]

For these reasons, we find the military judge did not abuse his discretion in denying the appellant's motion to dismiss any specification for unreasonable multiplication of charges.

H. Instruction regarding a finding of guilty

The appellant avers error in the military judge's instruction to members that, "[i]f, based upon your consideration of the evidence, you are firmly convinced that the accused is guilty of the crime charged, you must find him guilty."[34]

We found no error in the use of the same challenged reasonable doubt instruction in *United States v. Rendon*, 75 M.J. 908, 917 (N-M. Ct. Crim. App. 2016), *petition for rev. filed*, __ M.J. __, No. 17-0168/MC (C.A.A.F. Dec. 30, 2016), and in accordance with that holding, we summarily reject this AOE as meritless. *United States v. Clifton*, 35 M.J. 79, 81 (C.M.A. 1992).

I. Multiplicity

The appellant argues Specifications 1 and 2 of Charge II are multiplicious because Specification 2 describes one specific act (unlawfully striking BLS in the face and head with his hand in or about May 2012) that is encapsulated in Specification 1 (on divers occasions unlawfully touching BLS on the head, neck, arms, legs, and torso with his hands, legs, and feet from February 2012 to in or about September 2012).

Whether two offenses are multiplicious is a question of [*37] law that we review *de novo.* *United States v. Anderson*, 68 M.J. 378, 385 (C.A.A.F. 2010). But when an appellant fails to raise the issue at trial, he forfeits any error unless he can show plain error. An appellant may show plain error by showing that the specifications at issue are "facially duplicative, that is, factually the same." *United States v. Michelena*, No. 201400376, 2015 CCA LEXIS 463, at *4, unpublished op., (N-M. Ct. Crim. App. 29 Oct 2015) (quoting *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000)). "Whether specifications are facially duplicative is determined by reviewing the language of the specifications and facts apparent on the face of the record." *Id.* (citations and internal quotation marks omitted).

The appellant did not raise a multiplicity objection at trial.[35] Thus we assess for plain

[34] Record at 1110-11.

[35] Although the appellant, at trial, characterized Specification 1 of Charge II as a "catchall" and asked the military judge to dismiss it, he did so in the context of an R.C.M. 917 motion for a finding of not guilty. He did not raise the issue of multiplicity, or otherwise implicate R.C.M. 907(b)(2). Record at 958. *See* *Payne*, 73 M.J. at 22-23 (reviewing the military judge's instructions regarding the elements of one specification of a charge for plain error, where trial defense counsel had lodged a "general objection" to the specifications of a charge, which did not "identify which specification or specifications he was

error, and whether the appellant has met his burden to demonstrate that Specifications 1 and 2 are factually the same. We find he has not.

Specification 1 alleges the appellant, on divers occasions from February 2012 to in or about September 2012, did "unlawfully touch [BLS] on the head, neck, arms, legs, and torso with his arms, hands, legs, and feet."[36] Specification 2 alleges the appellant did, in or about May 2012, "unlawfully strike [BLS] in her face and head with his hand."[37] The specifications are obviously not factually identical. Although the dates [*38] and location in Specification 2 overlap with those in Specification 1, the singular event of the appellant striking BLS *in* her face and head with his hand is factually different than the divers touching *on* the various parts of her body. These factual differences were addressed by BLS in her testimony. She described a pattern of abuse, starting in February 2012, occurring "a couple times a month" wherein the appellant would hit or kick her "in places that could be covered up with clothing: my legs, my arms, my back, [and my] shoulders . . . ."[38] She further testified to a separate incident in which the appellant "punched the back of my head, and then I turned and he ended up giving me a black eye."[39] She explained this was the first time he struck her and left a visible injury that she could not cover with clothing or attribute to an accident. She specifically testified this particular assault occurred in May 2012. We have no difficulty concluding this separate incident comprised the evidence the members used to convict the appellant on Specification 2 of Charge II.[40]

We are unpersuaded by the appellant's reliance on *United States v. Maynazarian*, 12 C.M.A. 484, 31 C.M.R. 70, 72 (C.M.A. 1961), in which our superior court held it was "improper for the [*39] government to seek, at one and the same time, to charge an accused with a general course of misconduct over a stated period and select from that [misconduct] a specific act to be alleged as a separate offense". (Citations omitted). Multiplicious dates do not necessarily result in multiplicious specifications. Although Maynazarian was charged, like the appellant, with two UCMJ specifications in which the second specification described an offense occurring on a single date that fell within a five-month date period contained in the first specification, the similarities end there. Maynazarian was charged with embezzlement larceny offenses, in which the separately charged larceny was in fact "part and parcel of the former." The court found the record "devoid of *any* evidence demonstrating the two charged offenses were separate." *Id.* at 485. (emphasis added.) Not so here, where the record clearly supports that Specification 2 was a separate and

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referring to or which elements he felt the military judge should have instructed on"). Likewise, the appellant did not raise the issue of multiplicity in his initial brief, or in his three, separate supplemental assignments of error.

[36] "Specification 1: In that [the appellant] . . . did, at or near Oak Harbor, Washington, on divers occasions from in or about February 2012 to in or about September 2012, unlawfully touch [BLS] on the head, neck, arms, legs, and torso with his arms, hands, legs, and feet."

[37] "Specification 2: In that [the appellant] . . . did, at or near Oak Harbor, Washington, in or about May 2012, unlawfully strike [BLS] in her face and head with his hand."

[38] Record at 693-94.

[39] *Id.* at 699.

[40] We are equally convinced the members correctly applied the evidence to the appropriate specification. When instructing the members, the military judge correctly ensured that he did not use the word "face" when describing Specification 1 and omitted the word "head" when describing Specification 2, advising the members the *actus reus* of Specification 2 was "striking her in the face with his hands." Record at 1093; AE XXXII at 2. When afforded an opportunity by the military judge, the appellant did not object to these instructions. Record at 1042-44. Moreover, the military judge provided an appropriate spillover instruction. *See* II(E), *supra*.

distinguishable assault upon BLS.

Even assuming *arguendo* that the appellant did not forfeit the multiplicity issue, we remain convinced in *de novo* review that Specification 1 and 2 were not multiplicious. A primary question in resolving multiplicity issues is [*40] whether the charged offenses "amount to the 'same act or course of conduct' or whether they are distinct and discrete acts, allowing separate convictions." *United States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007) (quoting *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993)) (additional citation omitted). We find, for the same reasons discussed *supra*, that striking BLS in the face during May of 2012 was a distinct and discrete act from the offenses described in Specification 1. Here, Specification 2 requires proof of a fact that Specification 1 does not—that the appellant struck BLS in the face. "[S]imply because two offenses violate the same statute or law does not make them the same offense as a matter of fact[.]" *United States v. Neblock*, 45 M.J. 191, 196, (C.A.A.F. 1996). There being no evidence that the appellant's punching BLS's face in May 2012 was part of the same acts or course of conduct alleged in Specification 1, we find no multiplicity in the appellant's convictions under Specifications 1 and 2 of Charge II.

III. Conclusion

The guilty finding to Specification 5 under Charge II and the sentence are set aside. The remaining findings are affirmed. The record is returned to the Judge Advocate General of the Navy for remand to an appropriate convening authority with a rehearing on the set aside conviction and sentence or on the sentence alone is authorized. [*41] Art. 66(d), UCMJ.

Concur by: MARKS (In Part); CAMPBELL (In Part)

Dissent by: MARKS (In Part); CAMPBELL (In Part)

Dissent

MARKS, SJ, concurring in part and dissenting in part:

I respectfully dissent from the majority's opinion with regard to the second Assignment of Error (AOE), (Part II, Section A), and the factual sufficiency of the appellant's conviction of assault with means or force likely to produce death or grievous bodily harm. Instead of setting aside the conviction of Charge II, Specification 5, and authorizing a rehearing, I would affirm the conviction only in so far as it includes the lesser included offense of assault consummated by battery of a child and reassess the sentence to 18 months' confinement and a bad-conduct discharge. I concur with the majority on the remaining AOEs.

A. Factual sufficiency of assault with means likely to produce death or grievous bodily harm

Having reviewed the evidence *de novo, United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002), and "weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," I am not "convinced of the [appellant's] guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).[1]

As the majority implies, the prosecution in this case relied almost entirely on the circumstantial evidence [*42] of AMR's injury. I concur with the majority that the forensic evidence and testimony of the doctors,

[1] Having found the evidence factually insufficient, we need not address legal sufficiency.

radiologists, and medical experts constitute overwhelming proof that AMR suffered grievous harm to her brain. The appellant's sole custody of AMR for five to six hours before she showed signs of distress is more than adequate evidence that he is responsible for her injury. The who, what, when, and where regarding the injuries are relatively clear. But as the government's child abuse expert testified, injury alone does not prove child abuse. Evidence of the how and why is necessary. But such evidence is insufficient in this case, at least with regards to means or force likely to produce death or grievous bodily harm.

First, the government never articulated, with any particularity, the means or force the appellant used. The specification alleging aggravated assault of AMR accused the appellant of "moving her with his body."[2] In his opening statement, assistant trial counsel previewed his case: AMR suffered an injury, and by process of elimination, the appellant is the person who "did it to her."[3] Even after presenting all its evidence, the government still stopped short of specifying a manner [*43] in which the appellant move AMR. Trial counsel repeatedly cited the diagnosis of "trauma"[4] and referred vaguely to the appellant's "actions,"[5] accusing him of "inflict[ing]" AMR's injuries,[6] "caus[ing] brain damage to his daughter,"[7] and "hurt[ing]"[8] her.

AMR's injuries revealed no more definitive evidence. Absent were the retinal hemorrhages, bruises (other than to her eyelid), cracked ribs, and spiral fractures that often indicate how someone has mishandled a child. All of the doctors who testified identified non-accidental trauma as the most likely source of AMR's subdural hemorrhage or hematoma, but many explained that the diagnosis was made by process of elimination. A pediatrician who specializes in child abuse testified that the most common non-accidental trauma resulting in subdural hematoma was "acceleration/deceleration injury . . . kind of akin to whiplash. It's kind of what you may commonly think [sic] as shaking."[9] But then she qualified her use of the word "shaking" by saying, "I've had some cases with [histories] of very creative ways to cause that type of motion to a baby's head, so there's no classic one way to do it."[10]

Other than the appellant, there were no witnesses to what caused AMR's injuries. [*44] While her four-year-old half-brother was home at the time, there is no evidence that he reported hearing AMR cry or seeing anything. Only BLS's father testified to ever having seen the appellant handle AMR inappropriately: "one time [AMR] was fussing, and [the appellant] did grab her by the chin and shake her and shush her a little bit, which I thought was a little—little rough for a 6-week-old baby. That was—that's the only thing I noticed."[11] No one testified to witnessing the appellant shout or vent his frustrations at AMR. Instead, the government cited his sleep deprivation and regular consumption of energy drinks, the stress of his upcoming move to Hawaii, and his inexperience as a father as evidence he lost control with his daughter. They offered no confession or admissions from

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[2] Charge Sheet, Charge II, Specification 5.

[3] Record at 217.

[4] *Id.* at 1048, 1050, 1052.

[5] *Id.* at 1048.

[6] *Id.*

[7] *Id.* at 1049.

[8] *Id.* at 1054.

[9] *Id.* at 464.

[10] *Id.* at 465.

[11] *Id.* at 877.

the appellant,[12] only the recording of his 3 November 2013 interview with the civilian investigators. While trial counsel challenged aspects of the appellant's account and questioned some of his actions, they failed to discredit them entirely.

We have no evidence of how vigorously or violently the appellant moved his daughter's body beyond what we can infer from her one-time injury. As the majority states [*45] *supra*, circumstantial evidence is admissible on that point. It allows us to conclude with confidence that the appellant moved AMR with a means or force that *resulted* in her grievous bodily injury. But that is not enough. Likelihood of death or grievous injury from the means or force used is also an element of this offense. According to the government's child abuse expert, "when a baby undergoes a—a trauma like some sort of shaking, the brain kind of *can* move inside the skull. . . . It *can* cause injury to the brain tissue, it *can* cause blood vessels to break and to bleed, things like that."[13] Just because something can happen does not necessarily mean it is likely to happen. "[S]eizures aren't in every case of head trauma, but they do occur in a good number of cases of head trauma."[14] While a "good number" is more than a possibility, we do not have any evidence the expert equated it to a likelihood. To find the evidence factually sufficient to affirm this conviction, we have to extrapolate the nature of the means or force the appellant used *and then* predict the probable, not just possible, outcome of its repeated use. I do not believe the evidence in this case carries us across both of those hurdles. [*46]

C. LIO of assault consummated by battery

Although I find the evidence of aggravated assault with means or force likely to produce death or grievous bodily harm factually insufficient, I would "'affirm . . . so much of the finding as includes a lesser included offense.'" *United States v. Upham*, 66 M.J. 83, 87 (C.A.A.F. 2008) (quoting Article 59(b), UCMJ); *see also* *United States v. McKinley*, 27 M.J. 78, 79 (C.M.A. 1988) (noting that when "proof of an essential element is lacking," an appellate court "may substitute a lesser-included offense for the disapproved findings.").

The elements of the lesser included offense (LIO) of assault consummated by battery upon a child under 16 years are:

One, that on or about 2 November 2013, at or near Oak Harbor, Washington, the accused did bodily harm to [AMR];

Two, that the accused did so by moving her with his body;

Three, that the bodily harm was done with unlawful force or violence; and

Four, that [AMR] was a child under the age of 16 years.[15]

Missing is the element about use of means or force likely to produce death or grievous bodily harm. Instead, battery must be committed with intent or culpable negligence.[16] As the appellant was acquitted of intending to harm AMR, we focus on culpable negligence. A culpably negligent [*47] act is one "accompanied by a culpable disregard for the foreseeable consequences to others of that act

[12] The appellant's incriminating texts addressed assaults of his then-girlfriend, BLS, and made no mention of their daughter. Prosecution Exhibit 1.

[13] Record at 465 (emphasis added).

[14] *Id.* at 467.

[15] Record at 1100; MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) (MCM), Part IV, ¶ 54(b).

[16] MCM, Part IV, ¶ 54(c)(2)(d).

or omission."[17] Notably, a foreseeable consequence of an act is not necessarily a natural and probable consequence of that act.[18]

According to the appellant's interview, he patted and shook his daughter to clear her airway after she vomited formula. Although a new father, he understood not to shake her hard: "I don't mean like rough like shaking her or anything like that. . . . I would never do that . . . ."[19] But he did shake or move AMR hard enough to cause her brain injury. Whether he acted out of frustration or panic, he disregarded his understanding of the risk and acted in a way he could have reasonably foreseen could cause her injury.

While I do not believe the evidence supports the inference that the appellant acted with a means or force that would probably cause death or grievous bodily harm, I do believe it is sufficient to infer that the injury was a foreseeable consequence of his means or force. Therefore, I would affirm only so much of the finding of Charge II, Specification 5, as constitutes assault consummated by battery of a child.[20]

D. Sentence reassessment

Next I consider [*48] whether I would reassess the appellant's sentence, using the four factors in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013):

(1) Dramatic changes in the penalty landscape and exposure.

(2) Whether an appellant chose sentencing by members or a military judge alone.

(3) Whether the nature of the remaining offenses captures the gravamen of criminal conduct included within the original offenses and, in related manner, whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses.

(4) Whether the remaining offenses are of the type that judges of the courts of criminal appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial.

First, the maximum confinement for assault consummated by battery of a child is two years—vice five years for aggravated assault with means or force likely to produce death or bodily harm.[21] A sixty-percent reduction in exposure to confinement is dramatic. Second, the appellant chose sentencing by members, making reassessment of the sentence less predictable. Third, the remaining offenses are now all assaults consummated by battery. There is no longer an aggravated assault, but [*49] that change does not reflect any suppression of evidence. The culpability of the appellant has changed, but the gravamen of the injury to the child has not. Finally, the remaining offenses are of the type that the judges of this court can reliably determine what sentence would have been imposed at trial.

Considering the totality of the circumstances reflected in these four factors, I would reassess the sentence and reduce it from two years' confinement to 18 months' confinement.

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[17] MCM, Part IV, ¶ 44(c)(2)(a)(i); *see* *United States v. Mayo*, 50 M.J. 473, 474 (C.A.A.F. 1999) (applying the definition of culpable negligence in Article 119, UCMJ, manslaughter, to Article 128, UCMJ, assault.)

[18] MCM, Part IV, ¶ 44(c)(2)(a)(i).

[19] PE 4 at transcript page 572.

[20] The change in the finding to Charge II, Specification 5 moots the sixth AOE, the allegation of error in the report of results of trial with regard to this specification.

[21] MCM, App. 12, p. A12-5.

CAMPBELL, SJ, concurring in part and dissenting in part:

I join in Parts I and II of the majority opinion, except for a portion of the unreasonable multiplication of charges analysis (Part II, Section G), and its holding on the specified issue (Part II, Section I). Respectfully, I find that Specifications 1 and 2 under Charge II are multiplicious. Consequently, without reaching whether they also represent an unreasonable multiplication of charges, I would set aside the conviction for that second specification, with prejudice, within Part III of the majority opinion, in which I also join.

In *United States v. Maynazarian*, 12 C.M.A. 484, 31 C.M.R. 70, 71 (C.M.A. 1961) the court "recognized that a military accused could be charged with and found guilty of a single-act offense by alleging [*50] and finding a course of the same conduct between two dates. . . ." but also held "that a conviction under such broad pleadings would bar a second conviction at the same trial for a single-act offense within the charged period." *United States v. Neblock*, 45 M.J. 191, 199 (C.A.A.F. 1996) (citations omitted).

The members here were instructed, in part, that convicting the appellant of Charge II's non-aggravated assault specifications required that they be convinced beyond a reasonable doubt:

> In Specification 1: That on divers occasions from about February to about September 2012, at or near Oak Harbor, Washington, the accused did bodily harm to B. S.;
> Two: that the accused did so by striking her on the head, neck, arms, legs and torso with his arms, hands, legs and feet; and
> Three, that the bodily harm was done with unlawful force or violence.
> In Specification 2:
> That in or about May 2012, at or near Oak Harbor, Washington, the accused did bodily harm to B. S.;
> That the accused did so by striking her in the face with his hands; and
> Three, that the bodily harm was done with unlawful force or violence.[1]

Inexplicably, these findings instructions for Specifications 1 and 2 differed from the actual charge sheet, which, as amended, respectively alleged the appellant [*51] "did . . . unlawfully *touch* . . . [B.S.] on the head, neck, arms, legs, and torso with his arms, hands, legs, and feet" and "did . . . unlawfully strike . . . her face *and head* with his hand." (emphasis added). Responding to the defense motion to dismiss the specifications under RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), the assistant trial counsel explained that "strike" was amended to "touch" in Specification 1 in order to describe more, not less, of the appellant's alleged misconduct—specifically, a neck-choking incident that might not be considered a strike—without indications that the amendment was to somehow differentiate the specifications.[2]

Like our superior court in *Maynazarian*, I "simply cannot disregard the fair probability that the second, specific . . . [assault consummated by battery] charged was embraced in the first general count." 31 C.M.R. at 72.[3] Regardless of the instructions removing

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[1] Record at 1093-94.

[2] *Id.* at 961-62.

[3] *See also United States v. Thayer*, 16 M.J. 846, 847-48 (N-M.C.M.R. 1983) (N-M.C.M.R. 1983) (modifying findings and reassessing the sentence when [*52] "the accused was convicted of wrongful sale of five pounds of marijuana from about March 1981 to about December 1981 (Charge II, specification 33), six wrongful sales of marijuana to a named individual within the same period of time or from March to August 1981 (Charge II, specifications 1 through 6), and a wrongful sale of marijuana to another named individual

"head" from the elements of the alleged May 2012 specific act and the fact that the face is part of the head, Specification 2 is encapsulated within Specification 1 based on the language alleged in the charge sheet.[4]

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between March 1981 and August 1981 (Charge II, specification 20)," because "[t]he sales to the individuals named in specifications 1 through 6 and 20 of Charge II involved portions of the five pounds of marijuana specified in . . . specification 33 of Charge II" and thus were "multiplicious"); *United States v. Gill*, 37 M.J. 501, 509-10 (A.F.C.M.R. 1993) (finding a "multiplicity issue" arose when the court-martial members, through exceptions and substitutions of the alleged dates, convicted the appellant of committing "aggravated assault. . . on 13 December 1989, and . . . [separately committing] the same type of conduct against the same victim on divers occasions from 15 August 1989 to 13 December 1989" because "the individual offense [then] fell within the period of the 'course of conduct' offense"), *rev. denied*, 39 M.J. 376 (C.M.A. 1994); *United States v. Stephenson*, 25 M.J. 816, 816-17 (A.F.C.M.R. 1988) (setting aside and dismissing five specifications, which each alleged possession [*53] of the same drug in the same vicinity on "specific dates," as multiplicious for findings with the remaining specification, that "alleged a five month period which encompassed the times alleged in all of the five other specifications. . . . [because it] is improper . . . to go to findings on both the specific-series specifications and the related umbrella specification") (citations and internal quotation marks omitted), *rev. denied*, 26 M.J. 224 (C.M.A. 1988);. *Cf. United States v. Dorflinger*, No. ACM 38572, 2015 CCA LEXIS 326, at *8 n.4, unpublished op. (A.F. Ct. Crim. App. 11 Aug. 2015) ("Since both specifications alleged a single use [of morphine], this case does not present the former jeopardy problem that arises when a specification alleging misconduct on divers occasions over a period of time overlaps with another specification alleging the same offense during the period of time covered by the divers occasions specification.") (citation omitted), *rev. denied*, 75 M.J. 110 (C.A.A.F. 2015).

[4] No further multiplicity analysis is required. But to the extent that the majority opinion seemingly blends multiplicity and unreasonable multiplication of charges by analyzing whether there was evidence of the specific offense alleged in Specification 2, as the appellant points out, "[t]he government did not argue . . . nor were there any instructions . . . that the face punch should only be considered for Specification 2, and not for Specification 1." Appellant's Brief on Specified Issue of 19 Dec 2016 at 4.

United States v. Espinosa

United States Court of Appeals for the Fifth Circuit

October 20, 2021, Filed

No. 20-50787

Reporter
2021 U.S. App. LEXIS 31522 *; 2021 WL 4898723

UNITED STATES OF AMERICA, Plaintiff—Appellee, versus JOHNNY ESPINOSA, Defendant—Appellant.

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [*1] Appeal from the United States District Court for the Western District of Texas. USDC No. 7:20-CR-15-1.

Counsel: For United States of America, Plaintiff - Appellee: Joseph H. Gay, Jr., Assistant U.S. Attorney, U.S. Attorney's Office, San Antonio, TX; Richard Louis Durbin, Jr., Assistant U.S. Attorney, U.S. Attorney's Office, San Antonio, TX.

For Johnny Espinosa (Federal Prisoner: #43742-177), Defendant - Appellant: Mark Glendon Parenti, Parenti Law, P.L.L.C., Houston, TX.

Johnny Espinosa (Federal Prisoner: #43742-177), Defendant - Appellant, Pro se, Seagoville, TX.

Judges: Before JONES, SMITH, and HAYNES, Circuit Judges.

Opinion

PER CURIAM:*

Appellant Johnny Espinosa pled guilty to one count of conspiracy to possess with intent to distribute 50 grams or more of methamphetamine in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A). Espinosa now, for the first time, maintains that the factual basis for his plea is insufficient to establish that he conspired with others to distribute the methamphetamine. We disagree; the factual basis is sufficient to support Espinosa's conspiracy charge. The judgment of the district court is AFFIRMED.

I. Background

Detectives with the Midland, Texas Police Department received information from a cooperating source [*2] in October 2019 indicating that Appellant Johnny Espinosa was distributing methamphetamine. The detectives gave their source $ 600 to purchase methamphetamine from Espinosa as part of a controlled buy. Espinosa agreed to sell the source two ounces (approximately 56 grams) of methamphetamine.[1] But, when the source arrived at Espinosa's home to complete the transaction, Espinosa explained that he could

* Pursuant to **5TH CIRCUIT RULE 47.5**, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in **5TH CIRCUIT RULE 47.5.4**.

[1] The "average [methamphetamine] addict would generally use only about a quarter of a gram in order to 'stay up for the day.' Since one ounce contains 28.35 grams . . . ounce-quantity purchases [are] the equivalent of purchasing around 113 daily doses for an average user." *United States v. Sturgill*, 761 F. App'x 578, 586 (6th Cir. 2019).

only provide 42 grams and would have the other half ounce (approximately 14 grams) later. The source arranged another controlled buy from Espinosa in December 2019 and once again purchased 42 grams of methamphetamine. Espinosa also unsuccessfully tried to sell the source a shotgun.

Law enforcement officers executed a search warrant at Espinosa's residence in December 2019, shortly after the second sale. They found "two firearms, plastic baggies, cutting agents, and digital scales." The government filed a criminal complaint against Espinosa several days later for "knowingly and intentionally possessing] a quantity of methamphetamine with the intent to distribute" in violation of 21 U.S.C. § 841(a)(1). A grand jury then indicted Espinosa in January 2020 on one count of conspiracy to possess with intent to distribute [*3] 50 grams or more of methamphetamine in violation of 21 U.S.C. §§ 846, 841(a)(1), and (b)(1)(A).[2] Espinosa signed a written plea agreement in February 2020. By doing so, Espinosa specifically affirmed that his attorney explained "all of the elements of the offense(s) to which [he entered] a plea of guilty." He also admitted that "he conspired with others to distribute and possess with intent to distribute fifty grams or more of actual methamphetamine."

After signing the plea agreement, Espinosa appeared before a magistrate judge and formally entered a plea of guilty. Espinosa also confirmed that he understood the plea agreement and agreed with its terms. He then reaffirmed that the facts set out in the plea agreement were "accurate, true[,] and correct[.]" After determining that Espinosa was "competent to stand trial . . ." and that his plea was "freely, knowingly and voluntarily made[,]" the magistrate judge recommended that the district court accept Espinosa's guilty plea. The district court then adopted the magistrate judge's findings and recommendation without objection and accepted the guilty plea.

The probation office prepared a presentence investigation report (PSR) that calculated a sentencing guideline range of [*4] 121 to 151 months based on a total offense level of 29 and a criminal history category of IV. Espinosa has three drug-related convictions, ranging from possession to delivery of a controlled substance.[3] The district court adopted the PSR and its application of the guidelines. It then sentenced Espinosa to a term of 141 months imprisonment and five years of supervised release. In doing so, the district court repeatedly emphasized Espinosa's extensive criminal history. Espinosa did not challenge the adequacy of the factual basis for his guilty plea in district court, but he did timely appeal on that basis. He contends that the district court plainly erred because the record does not provide "a sufficient basis to support the crime of conspiracy to distribute methamphetamine." And he further argues that the alleged error affected his substantial rights.

II. Standard of Review

"This court reviews guilty pleas for compliance with Rule 11 [of the Federal Rules of Criminal Procedure], usually under the clearly erroneous standard." *United States v. Escajeda*, 8 F.4th 423, 426 (5th Cir. 2021) (citing *United States v. Garcia-Paulin*, 627 F.3d 127, 130-31 (5th Cir. 2010)). "But 'when the defendant does not object to the sufficiency of the factual basis of his plea before the district court—instead raising for the

[2] It is unclear why Espinosa was indicted for conspiracy to possess with intent to distribute rather than for distribution alone as indicated in the original criminal complaint.

[3] A number of other drug-related charges against him were dismissed.

first time on appeal [*5] . . . our review is restricted to plain error.'" *Escajeda*, 8 F.4th at 426 (quoting *United States v. Nepal*, 894 F.3d 204, 208 (5th Cir. 2018)) (alteration in original). "To establish eligibility for plain-error relief, a defendant must" demonstrate that (1) the district court committed an error; (2) the error was plain; and (3) the error affected his substantial rights. *Greer v. United States*, 141 S. Ct. 2090, 2096, 210 L. Ed. 2d 121 (2021) (internal quotations and citations omitted). A defendant's substantial rights are generally only affected if there is "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Id.* (quoting *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904-05, 201 L. Ed. 2d 376 (2018)). Once a defendant satisfies those three requirements, "an appellate court may grant relief if it concludes that the error had a serious effect on 'the fairness, integrity or public reputation of judicial proceedings.'" *Greer*, 141 S. Ct. at 2096-97 (quoting *Rosales-Mireles*, 138 S. Ct. at 1905).

"[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it, and . . . that burden should not be too easy for defendants [to overcome] . . . ." *United States v. Dominguez Benitez*, 542 U. S. 74, 82, 124 S. Ct. 2333, 2339, 159 L. Ed. 2d 157 (2004). Put another way, "[satisfying all four prongs of the plain-error test 'is difficult.'" *Greer* , 141 S. Ct. at 2097 (quoting *Puckett v. United States*, 556 U. S. 129, 135, 129 S. Ct. 1423, 1429, 173 L. Ed. 2d 266 (2009)). In determining whether the defendant has met his burden, this Court "examin[es] the entire record for facts supporting the guilty plea and draw[s] reasonable [*6] inferences from those facts to determine whether the conduct to which the defendant admits satisfies the elements of the offense charged." *Escajeda*, 8 F.4th at 426 (citing *Nepal*, 894 F.3d at 208).

III. Discussion

The first prong of plain error analysis inquires whether the factual record supports Espinosa's commission of the charged crime. Guilty pleas must comply with Rule 11 of the Federal Rules of Criminal Procedure. *United States v. Castro-Trevino*, 464 F.3d 536, 540 (5th Cir. 2006) (citations omitted). Rule 11(b)(3) requires courts to ascertain whether "there is a factual basis for the plea." "The factual basis for a guilty plea must be in the record and sufficiently specific to allow the court to determine whether the defendant's conduct is within the ambit of the statute's prohibitions." *United States v. Broussard*, 669 F.3d 537, 546 (5th Cir. 2012) (internal quotations and citations omitted). Thus, "the district court must compare: (1) the conduct to which the defendant admits; and (2) the elements of the offense charged in the indictment." *Id.* The district court plainly errs when the admitted conduct does not satisfy the offense elements.

"To prove a drug conspiracy, the government must show (1) an agreement between two or more persons to violate narcotics laws; (2) knowledge of the agreement; and (3) voluntary participation in the agreement." *Escajeda*, 8 F.4th at 426 (citations omitted). This court recognizes that "a single buy-sell [*7] agreement cannot constitute a conspiracy under the 'buyer-seller' exception-a rule that 'shields mere acquirers and street-level users . . . from the more severe penalties reserved for distributors.'" *Escajeda*, 8 F.4th at 426 (quoting *United States v. Delgado*, 672 F.3d 320, 333 (5th Cir. 2012) (en banc)). But this exception does not apply to defendants who, like Espinosa, make *two sales* to government informants. *Escajeda*, 8 F.4th at 426. Nonetheless, "an 'agreement' with a government informant cannot be the basis for a conspiracy conviction because the informant does not share the requisite criminal purpose." *Escajeda*, 8 F.4th at 426 (quoting *Delgado*,

672 F.3d at 341). The two controlled buys therefore cannot prove that Espinosa was involved in a conspiracy.

The factual basis supporting Espinosa's guilty plea is nevertheless sufficient because it includes ample circumstantial evidence of his involvement in a drug distribution conspiracy. "A drug distribution conspiracy agreement—and the conspiracy itself—may be 'tacit' and inferred from 'circumstantial evidence,' 'presence,' and 'association.'" *Escajeda*, 8 F.4th at 427 (quoting *United States v. Akins*, 746 F.3d 590, 604 (5th Cir. 2014) and *United States v. Crooks*, 83 F.3d 103, 106 (5th Cir. 1996)). A comparison between the circumstantial evidence here and the evidence highlighted by the court in United States v. Escajeda is instructive. 8 F.4th at 425, 427. There, officers searched the defendant's home and found "100 grams of cocaine . . . . a Glock, ammunition, and [*8] over $ 6,000 in cash." *Id.* at 425. The court determined that there was "plenty of circumstantial evidence of [the defendant's] involvement in a drug distribution conspiracy . . . ." before emphasizing that "sizeable amounts of cash, large quantities of drugs, and the presence of weapons have all served as proof for drug conspiracy charges in this court's caselaw."[4] *Id.* at 427 (citations omitted). Here, officers found "two firearms, plastic baggies, cutting agents, and digital scales" at Espinosa's residence. While they did not find any drugs, officers knew Espinosa could obtain more methamphetamine based on his own statements to the confidential source.[5] Thus, like the defendant in Escajeda, the factual basis supporting Espinosa's guilty plea is sufficient.

To conclude that the factual basis supporting Espinosa's guilty plea is deficient would undermine the longstanding tradition of holding defendants to their sworn testimony. Espinosa admitted in his plea agreement that "he conspired with others to distribute and possess with intent to distribute fifty grams or more of actual methamphetamine." He then reaffirmed this admission under oath at a hearing. But Espinosa now contends that "[t]here is nothing [*9] to support the existence of a plan between Espinosa and anyone else to distribute the drugs." "This Court 'generally will not allow a defendant to contradict his testimony given under oath at a plea hearing.'" *United States v. Smith*, 945 F.3d 860, 863 (5th Cir. 2019) (quoting *United States v. McDaniels*, 907 F.3d 366, 371 (5th Cir. 2018)); *see also* *United States v. Strother*, 458 F.2d 424, 426 fn. 3 (5th Cir. 1972). To allow such contradictions, "there must be independent indicia of the likely merit of the petitioner's contentions, and mere contradiction of his statements at the guilty plea hearing will not carry his burden." *United States v. Raetzsch*, 781 F.2d 1149, 1151 (5th Cir. 1986). "This requires 'specific factual allegations,' typically 'supported by the affidavit of a reliable third person.'" *Smith*, 945 F.3d at 863 (quoting *United States v. Fuller*, 769 F.2d 1095, 1099 (5th Cir. 1985)). Espinosa has not provided any evidence contradicting his several sworn admissions of conspiring to possess and distribute methamphetamine. We hold him to his sworn statements.

Even assuming, contrary to the foregoing, that

[4] The defendant in Escajeda also "admitted that he had been selling between four and five ounces of cocaine per week . . . ." for about a year , that "he had not had a job outside of cocaine distribution for the last six or seven years[,] and that the cash the officers found was from narcotics sales." 8 F.4th at 425. While Espinosa did not say anything similar, this difference alone does not meaningfully distinguish him from the defendant in Escajeda. Indeed, Espinosa's lengthy criminal history provides a similar basis for inferring motive, intent, and lack of mistake in this drug distribution conspiracy.

[5] While the controlled buys themselves cannot prove that Espinosa was involved in a conspiracy, no binding authority suggests that *information* conveyed by the seller during the buys cannot be used for that purpose.

the district court plainly erred by accepting Espinosa's guilty plea, the error would not have affected his substantial rights. Again, a defendant's substantial rights are generally only affected if there is "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Greer*, 141 S. Ct. at 2096 (quoting *Rosales-Mireles*, 138 S. Ct. at 1904-05). Espinosa argues that his substantial rights were affected because he did [*10] not benefit from his plea bargain and because the conspiratorial aspect of his plea negatively affected his sentence. The first argument fails because, in exchange for his plea, the Government recommended that Espinosa receive "a three-level reduction for acceptance of responsibility." This reduction was reflected in the calculation of Espinosa's total offense level. The second argument also fails because Espinosa has not demonstrated that the district court imposed a higher sentence based on the conspiracy offense. The district court never even used the word conspiracy or any variation thereof during sentencing. To the contrary, it was primarily concerned with Espinosa's lengthy criminal history involving drugs. Espinosa has not shown that, but for the alleged error, there was a reasonable probability he would not have entered his guilty plea and would have gone to trial. Absent such a showing, his substantial rights were not affected.

Espinosa also unsuccessfully argues that a factual sufficiency error necessarily "violates a defendant's substantial rights . . . ." by citing *Garcia-Paulin*, 627 F.3d at 134. But Garcia-Paulin is inapposite because there, "[n]othing in the factual basis" supported the defendant's convictions. [*11] *Id.* at 133. Espinosa thus mistakenly equates *no* factual basis with an *insufficient* factual basis. Here, circumstantial evidence supports the factual basis for Espinosa's conviction. In any event, when "error by the district court is subject to reasonable dispute . . . . that is not plain error." *Broussard*, 669 F.3d at 550 (citing *Puckett*, 556 U.S. at 135, 129 S. Ct. at 1429).

Moreover, Espinosa's substantial rights were not affected because he claims he should have been convicted for distribution, which he admitted, rather than conspiracy. But both crimes result in the same penalty range. Espinosa pled guilty to conspiracy to possess with intent to distribute 50 grams or more of methamphetamine in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A). 21 U.S.C. § 846 provides that "[a]ny person who attempts or *conspires to commit any offense* defined in this subchapter *shall be subject to the same penalties as those prescribed for the offense* . . . ." Espinosa expressly admitted to distributing more than 50 grams of methamphetamine in violation of 21 U.S.C. § 841(b)(1)(A)(viii), and a sufficient factual basis in the record supports his admission. The government confirms that:

> [under] 21 U.S.C. § 841(b)(1)(B) [punishment for a violation involving] 5 grams or more of methamphetamine provided for imprisonment of five to 40 years for distribution of five grams or more [*12] of actual methamphetamine. [And] Espinosa's prior conviction for possession with intent to distribute methamphetamine . . . could have increased that range to 10 years to life, the same punishment range as the conspiracy to which he pled guilty, 21 U.S.C. § 841(b)(1)(A).

There is no indication the district court would have imposed a different sentence if Espinosa had pled guilty to distributing methamphetamine outside of a conspiracy.

Because Espinosa's arguments fail the first three prongs of plain error review, we need not consider the fourth prong.

IV. Conclusion

For these reasons, the district court did not plainly err by accepting Espinosa's guilty plea. The judgment is AFFIRMED.

End of Document

State v. Rupp

Court of Appeals of Wisconsin, District Two

January 9, 2002, Decided ; January 9, 2002, Filed

No. 00-2071-CR

Reporter

2002 Wisc. App. LEXIS 10 *; 2002 WI App 56; 251 Wis. 2d 479; 640 N.W.2d 564

State of Wisconsin, Plaintiff-Respondent, v. John A. Rupp, Defendant-Appellant.

Notice: [*1] PURSUANT TO RULE 809.23(3) OF APPELLATE PROCEDURE, AN UNPUBLISHED OPINION IS OF NO PRECEDENTIAL VALUE AND FOR THIS REASON MAY NOT BE CITED IN ANY COURT OF THIS STATE AS PRECEDENT OR AUTHORITY EXCEPT TO SUPPORT A CLAIM OF RES JUDICATA, COLLATERAL ESTOPPEL OR LAW OF THE CASE.

Prior History: APPEAL from a judgment and an order of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. Cir. Ct. No. 94-CF-64.

Disposition: Affirmed.

Judges: Before Nettesheim, P.J., Brown and Anderson, JJ.

Opinion

P1. PER CURIAM. John A. Rupp appeals pro se from a judgment sentencing him after revocation of probation and from an order denying his motion for sentence modification based on a new factor. Rupp attacks the validity of his no contest plea, the revocation of his probation, and the sentence imposed after revocation by a variety of claims, including claims that the prosecution breached the plea agreement and that he was denied the effective assistance of counsel by each of the five different attorneys appointed to represent him in the history of this prosecution. Despite Rupp's utilization of the wrong procedure and that he raises many of his claims for the first time on appeal, we consider many of the issues. We affirm the judgment and order.

P2. In 1994, Rupp was charged as a party to the crime of two counts of burglary and one count of theft. When [*2] Rupp failed to post $ 2,000 cash bond by September 13, 1994, a bench warrant was issued. Rupp did not appear for the trial scheduled to commence on November 8, 1994, and was not placed into custody again until August 4, 1996. Under a plea agreement, Rupp entered a no contest plea to one count of burglary and the other two counts were dismissed and read-in at sentencing. On September 12, 1996, Rupp was sentenced to four years' probation with sixty days' jail time as a condition of probation. Rupp was permitted work and child care release privileges. The prosecution moved to revoke those release privileges after it discovered that while on release, Rupp drove a car without a valid driver's license. In April 1999, Rupp's probation was revoked. Rupp was then sentenced to six years' imprisonment. On July 13, 2000, Rupp filed a pro se motion for sentence modification.

P3. We first observe that Rupp's appeal is limited to issues "*initially raised* by the events of the resentencing hearing and the judgment entered after that hearing." ***State v. Scaccio***, 2000 WI App 265, P10, 240 Wis. 2d 95, 622 N.W.2d 449. An appeal taken from sentencing

after revocation does not [*3] bring the original judgment of conviction before this court. ***Id.*** A defendant is barred from challenging the underlying judgment of conviction unless relief was timely sought from that conviction. ***Id.*** at P11. Rupp did not timely appeal the original judgment of conviction and therefore is barred from challenging the validity of his plea and the original sentence. Additionally, Rupp raises claims that were never raised in the trial court. Issues not presented to the trial court will not be considered for the first time on appeal. *See* ***State v. Caban***, 210 Wis. 2d 597, 604-05, 563 N.W.2d 501 (1997). Rupp failed to file a motion in the trial court to withdraw his plea or claiming ineffective assistance of counsel. A claim of ineffective assistance of counsel not preserved by raising it at a postconviction hearing before the trial court is deemed waived. ***State v. Waites***, 158 Wis. 2d 376, 392-93, 462 N.W.2d 206 (1990). Rupp's appellant's brief may not masquerade as a petition for a writ of habeas corpus.

P4. Despite these constraints on our appellate review, we address the claims Rupp makes for the single reason that they [*4] serve as the rungs on a ladder ending at the pinnacle issue, the only issue properly raised on appeal-whether the sentence imposed violated Rupp's right to due process because it was based on inaccurate information or an erroneous exercise of discretion. Simply, Rupp claims that because his plea is invalid, the trial court was without sentencing authority. In order to withdraw a guilty plea after sentencing, a defendant must show that a manifest injustice would result if the withdrawal were not permitted. ***State v. Booth***, 142 Wis. 2d 232, 235, 418 N.W.2d 20 (Ct. App. 1987). Rupp has not met the standard.

P5. Rupp first contends that he should be allowed to withdraw his plea because the prosecution breached the plea agreement. Rupp identifies several alleged breaches: the prosecution's motion to revoke Rupp's work and child care release privileges, coercion in the execution of new probation rules which prevented Rupp from being self-employed or entering into any contracts for home improvement work, the recommendation and ultimate revocation of his probation, and the six-year sentence. The record does not establish a breach of the plea agreement. Although the prosecution [*5] agreed to a joint sentencing recommendation, it adhered to the recommendation at sentencing. There was no promise to refrain from seeking modification of the conditions of probation. Thus, the subsequent actions Rupp complains about were not subject to constraints of the plea agreement. Also, once revocation occurred, the prosecution was free to argue for any sentence after revocation. *See* ***State v. Windom***, 169 Wis. 2d 341, 350, 485 N.W.2d 832 (Ct. App. 1992) (plea agreement is limited to the original sentence for probation). The terms of probation and the recommendation for revocation were not within the prosecution's authority and do not support a request to withdraw the plea. Rupp has served his condition time and any claims regarding release privileges for that time are moot.

P6. Next, Rupp claims that his plea was not voluntary. He contends that his plea was coerced by the threat that he would not be permitted release on bail without the plea. A plea is manifestly unjust if it is involuntary. ***Hatcher v. State***, 83 Wis. 2d 559, 564, 266 N.W.2d 320 (1978). The procedure used at the plea hearing fully conformed to the strictures of [*6] ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). The alleged threat was known to Rupp at the time he entered his plea, yet he executed a "guilty plea acceptance form" which acknowledged that no threats or promises were made to induce the plea other than the plea agreement. In response to the trial court's inquiry during the plea hearing, Rupp denied that anyone made

threats to induce the plea. There is simply no evidence of coercion.

P7. In his reply brief, Rupp argues for the first time that he did not understand the elements of the charged offenses. We will not, as a general rule, consider arguments raised for the first time in a reply brief. ***Caban***, 210 Wis. 2d at 605. The plea questionnaire stated the elements of the offense and they were repeated at the plea hearing when the trial court read the count to which Rupp entered his no contest plea. At no time did Rupp express a lack of understanding. *See* ***State v. Schill***, 93 Wis. 2d 361, 379-80, 286 N.W.2d 836 (1980). Even if we were to conclude that the plea procedure was inadequate with respect to the elements of the offense, Rupp's assertion [*7] in his reply brief that he did not understand the elements of the offense has not been presented to the trial court. If his assertion is truthful, the State has not had the opportunity to show by clear and convincing evidence that the plea was knowingly and voluntarily entered. ***State v. Hansen***, 168 Wis. 2d 749, 755, 485 N.W.2d 74 (Ct. App. 1992). We cannot address the issue.

P8. Rupp suggests that we have jurisdiction over this issue because we denied his motion for a remand. He refers to the motion for remand to which the State filed an objection. That motion sought to stay the appeal and remand the record so Rupp could pursue a motion for reconsideration of the sentence based on newly discovered evidence. Before this court could rule on whether a remand was appropriate, Rupp's motion for reconsideration was filed and decided by the trial court without a remand. Our November 1, 2000 order accepted jurisdiction of the trial court's order denying the motion for reconsideration as if this court had remanded the issue. Wis. Stat. § 808.075(5), (6) (1999-2000). [1] However, this did not vest jurisdiction over Rupp's claim that he did not [*8] understand the nature of the offense. His request for a remand did not suggest that he had filed a motion for withdrawal of the plea and the motion filed in the trial court only sought reconsideration of the sentence.

P9. Rupp also argues that the trial court was without jurisdiction to accept the plea because there was no factual basis for it. A manifest injustice has occurred if the plea is accepted without an adequate factual basis. ***State v. Black***, 2001 WI 31, P11, 242 Wis. 2d 126, 624 N.W.2d 363. Rupp claims that there was no evidence that he actually entered the dwelling and stole the antique items that he sold to antique dealers. The trial court is not required to conduct a mini-trial at every plea hearing to establish that the defendant committed the crime charged beyond a reasonable doubt. ***Id.*** at P14. The trial court "is not required to satisfy the defendant that he or she [*9] committed the crime charged. Indeed, the defendant evidenced his or her own satisfaction by entering a plea and thereby waiving his or her right to a jury trial." ***Id.*** at P12 "If the facts as set forth in the complaint meet the elements of the crime charged, they may form the factual basis for a plea." ***Id.*** at P14.

P10. The criminal complaint identified Rupp as one of three persons who sold stolen antiques to several antique dealers. Rupp was identified by antique dealers at the preliminary hearing. The items were taken from a farmhouse on property that was being maintained as part of an estate proceeding. The house was not lived in. One of the owners of the stolen antiques testified that someone broke into the farmhouse and removed items without permission. A basement window was broken. Earlier that same year, Rupp had made inquiries to the owner about renting the barn

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

and other buildings on the farm. Just as circumstantial evidence is sufficient to sustain a finding of guilt at trial, it may establish a factual basis for a plea. *See* ***id.*** at P16 ("a factual basis for a plea exists if an inculpatory inference can be drawn from the complaint or facts [*10] admitted to by the defendant even though it may conflict with an exculpatory inference elsewhere in the record and the defendant later maintains that the exculpatory inference is the correct one"). The plea was not invalid for the lack of a factual basis.

P11. We summarily reject Rupp's contention that the prosecution knowingly falsified the complaint. [2] The evidence at the preliminary hearing verified much of the information in the complaint. Further, Rupp's no contest plea stands as an admission to the material facts stated in the complaint. *See* ***State v. Liebnitz***, 231 Wis. 2d 272, 287-88, 603 N.W.2d 208 (1999). While the principles of ***Franks v. Delaware***, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978), mandating a hearing when a defendant makes a substantial preliminary showing that the prosecution has made a false statement or critical omission, apply to the validity of the complaint, ***State v. Mann***, 123 Wis. 2d 375, 384-85, 367 N.W.2d 209 (1985), Rupp's conclusory assertion of falsified information is not sufficient to require a ***Franks*** hearing. "To mandate an evidentiary hearing, the challenger's [*11] attack must be more than conclusory and must be supported by more than a mere desire to cross-examine." ***Mann***, 123 Wis. 2d at 388 (quoting ***Franks***, 438 U.S. at 171).

P12. A claim of ineffective assistance of trial counsel is raised. As we have previously noted, Rupp did not raise this claim in the trial court. While this appeal was pending, Rupp filed a habeas action in the circuit court. Again, Rupp claims that because our order of February 20, 2001, denied his request to stay this appeal pending a decision on his habeas petition, these issues are properly raised in this appeal. The issues in this appeal are confined to the issues raised in the trial court prior to the filing of the notice of appeal. *See* ***Chicago & N. W. R.R. v. LIRC***, 91 Wis. 2d 462, 473, 283 N.W.2d 603 (Ct. App. 1979), [*12] *aff'd*, 98 Wis. 2d 592, 297 N.W.2d 819 (1980) (an appeal from a judgment does not embrace an order entered after judgment). This is an appeal from Rupp's criminal conviction. Indeed, a petition for a writ of habeas stands as an independent civil action and not as a motion in another proceeding. *See* ***Maier v. Byrnes***, 121 Wis. 2d 258, 260, 358 N.W.2d 833 (Ct. App. 1984). The pending habeas petition does not confer appellate jurisdiction over the issues raised by that petition.

P13. Rupp first complains that the two attorneys who represented him prior to his plea were ineffective because they did not make a reasonable investigation of the crime and Rupp's lack of knowledge that items being sold to antique dealers were stolen. He asserts that the attorneys should have filed motions for dismissal. Rupp entered a valid no contest plea. A plea of guilty or no contest, when knowingly and voluntarily made, waives all nonjurisdictional defects and defenses. ***State v. Andrews***, 171 Wis. 2d 217, 223, 491 N.W.2d 504 (Ct. App. 1992). This waiver includes claims of violation of constitutional rights prior to the plea. *See* ***State v. Riekkoff***, 112 Wis. 2d 119, 123, 332 N.W.2d 744 (1983). [*13] Any claim of ineffective assistance of counsel prior to the plea is waived.

P14. Rupp argues that the attorney representing him during the plea was

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[2] Rupp vigorously repeats claims that a criminal prosecution against him filed in Juneau county in March 2000 was based on falsified information. Those claims cannot be raised in this appeal.

ineffective for permitting him to enter a plea to a crime he did not commit and that the trial court had no jurisdiction to accept. We have determined that the plea was not coerced and that the factual basis for the plea was sufficient. There is no merit to Rupp's claim. Although Rupp alleges that this same attorney allowed him to be sentenced on the basis of inaccurate information, he does not explain what the inaccuracies were. We need not consider arguments not developed. ***Estrada v. State***, 228 Wis. 2d 459, 465 n.2, 596 N.W.2d 496 (Ct. App. 1999).

P15. Rupp claims that he was denied the right to counsel when his release privileges were revoked. Release privileges may be withdrawn by the trial court "at any time by order entered with or without notice." Wis. Stat. § 303.08(2). Rupp was not entitled to counsel.

P16. In claiming that counsel was ineffective at resentencing, Rupp argues that counsel should have raised the ineffectiveness of the previous attorneys and filed motions he alleges [*14] his other attorneys should have filed. Those claims lack merit and counsel is not ineffective for not pursuing them. "It is well-established that an attorney's failure to pursue a meritless motion does not constitute deficient performance." ***State v. Cummings***, 199 Wis. 2d 721, 748 n.10, 546 N.W.2d 406 (1996). The same is true with respect to Rupp's claim that counsel allowed him to be resentenced based on accurate information. In considering this issue later in this opinion, we conclude it too lacks merit.

P17. The record belies Rupp's claim that he was denied effective counsel on this appeal after resentencing because postconviction counsel abandoned him. Postconviction counsel moved to withdraw after being discharged by Rupp. Rupp was advised by this court that as an alternative to self-representation he could require appointed counsel to file a no merit report and thereby test whether counsel's representation was effective. Rupp elected to discharge counsel and proceed pro se. Postconviction counsel did not abandon Rupp and Rupp cannot now claim that counsel was ineffective. "A defendant who insists on making a decision which is his or hers alone to make in [*15] a manner contrary to the advice given by the attorney cannot subsequently complain that the attorney was ineffective for complying with the ethical obligation to follow his or her undelegated decision." ***State v. Divanovic***, 200 Wis. 2d 210, 225, 546 N.W.2d 501 (Ct. App. 1996).

P18. We finally reach the pinnacle issue in this appeal: whether the sentence was based on inaccurate information or the result of an erroneous exercise of discretion. Aside from Rupp's claims that the entire proceeding was infested with false information, the inaccurate information Rupp points to is the prosecutor's description of charges Rupp faced in Juneau county for fraud by a home improvement contractor. The defendant has the burden of proving by clear and convincing evidence the inaccuracy of the information and that the information was prejudicial. ***State v. Littrup***, 164 Wis. 2d 120, 132, 473 N.W.2d 164 (Ct. App. 1991). Rupp has failed to meet this burden.

P19. Whether or not Rupp did the things the prosecutor described is a factual question. At sentencing, the trial court heard Rupp's version of the dispute with the home owner and Rupp's denial that he took [*16] money for home improvement work that he failed to perform. The trial court found it probable that the truth lay between the two differing versions. Inaccuracy was not established.

P20. Even if the information about the conduct leading up to the revocation of probation was inaccurate, it was not prejudicial. Rupp was

not sentenced on the allegations of contractor fraud. The trial court reviewed and relied on the circumstances of the burglary and the victim's personal anguish because of the loss of family heirlooms. "Uncharged offenses may be considered by a sentencing court because they indicate whether the crime was an isolated act or a pattern of conduct." ***State v. Johnson***, 158 Wis. 2d 458, 469, 463 N.W.2d 352 (Ct. App. 1990). The trial court properly limited its consideration of the alleged contractor fraud as bearing on Rupp's character.

P21. Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Bizzle***, 222 Wis. 2d 100, 104, 585 N.W.2d 899 (Ct. App. 1998). An erroneous exercise of discretion might be found for: (1) failure [*17] to state on the record the relevant and material factors which influenced the court's decision; (2) reliance upon factors which are totally irrelevant or immaterial to the type of decision to be made; and (3) too much weight given to one factor in the face of other contravening considerations. ***Id.*** at 105.

P22. The trial court considered the severity of the offense, including the two offenses dismissed but read-in for sentencing. Rupp's prior record for burglaries dating back to his first offense at a young age was noted. The trial court found that Rupp's explanation of the offense and other conduct demonstrates his tendency to lay blame on someone else and his refusal to accept personal accountability. For that reason, the court found a need to protect the public by a prison sentence that did not unduly depreciate the seriousness of the offense. The six-year sentence was a proper exercise of discretion.

P23. Rupp makes several challenges to the procedure utilized during his probation revocation. He also claims that information leading to revocation was falsified, his attorney was ineffective during that proceeding, and that he was denied due process of law [*18] because others similarly situation were not revoked. These claims are not properly before this court. To challenge his probation revocation, Rupp needed to timely seek judicial review in the circuit court by a petition for a writ of certiorari. ***State ex rel. Mentek v. Schwarz***, 2001 WI 32, P6, 242 Wis. 2d 94, 624 N.W.2d 150. A claim of ineffective counsel at a probation revocation proceeding may be raised by a petition for a writ of habeas corpus. ***State ex rel. Vanderbeke v. Endicott***, 210 Wis. 2d 502, 522-23, 563 N.W.2d 883 (1997). Even if the petition for a writ of habeas corpus filed while this appeal was pending raised these claims, they are not, for reasons previously explained, subject to review in this appeal. We do not address any claims regarding the revocation of Rupp's probation.

By the Court.-Judgment and order affirmed.

This opinion will not be published. *See* Wis. Stat. Rule 809.23(1)(b)5.

State v. Valdez

Court of Appeals of Minnesota

August 31, 2020, Filed

A19-1477

Reporter
2020 Minn. App. Unpub. LEXIS 747 *; 2020 WL 5107288

State of Minnesota, Respondent, vs. Abram Valdez, Appellant.

Notice: THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

Prior History: [*1] Dakota County District Court File No. 19WS-CR-18-15725.

Disposition: Reversed and remanded.

Counsel: For Respondent: Keith Ellison, Attorney General, St. Paul, Minnesota; and Alina Schwartz, Campbell Knutson, Eagan, Minnesota.

For Appellant: Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, Colin Colby, Certified Student Attorney, St. Paul, Minnesota.

Judges: Considered and decided by Cochran, Presiding Judge; Slieter, Judge; and Bryan, Judge.

Opinion by: COCHRAN

Opinion

UNPUBLISHED OPINION

COCHRAN, Judge

In this direct appeal from the judgment of conviction, appellant seeks to withdraw his guilty plea to domestic assault. Because we conclude that appellant's plea is inaccurate, we reverse and remand to allow appellant to withdraw his guilty plea.

FACTS

The state filed a complaint against appellant Abram Valdez that charged him with five offenses, including one count of gross-misdemeanor domestic assault—fear against his stepsister and one count of gross-misdemeanor domestic assault—fear against his stepfather. According to the complaint, the stepsister reported that she found Valdez in her bedroom taking some of her personal property. She confronted Valdez. Valdez yelled at her and grabbed her [*2] by the throat. The stepsister did not believe that Valdez was trying to choke her, but she did believe that Valdez was going to hit her with a flashlight.

The argument woke Valdez's stepfather. The stepfather heard Valdez tell the stepsister to get out of their house and saw Valdez holding a flashlight as if he intended to hit someone with it. The stepfather told Valdez to leave the house. In response, Valdez threw furniture around the living room. Valdez's mother attempted to intervene, and Valdez unintentionally hit her. The stepfather called 911. He reported to police that he feared for the safety of himself and his family. Valdez left the house before the police arrived. When police later apprehended Valdez, he indicated

that he was the one who had been assaulted, and that his family members had hit him multiple times.

Valdez entered into a plea agreement with the state. He pleaded guilty only to the charge of domestic assault against his stepfather. He did not plead guilty to the charge of domestic assault against his stepsister or any of the other charges. At the plea hearing, Valdez and his attorney attempted to establish a factual basis for his plea with the following colloquy: [*3]

> Q: Mr. Valdez, is it true that on November 10th, 2018, in the city of South St. Paul, County of Dakota, State of Minnesota, you were in the city of South St. Paul, correct?
> A: Yes.
> Q: And on that day, you got into a verbal argument with your sister, correct?
> A: Yes.
> Q: And you'd agree with me that during that verbal argument, through your words or actions, you intended to cause fear of bodily harm?
> A: Yes.

Valdez also submitted a plea petition that read, in relevant part, "I got into a verbal argument with the victim and through my words or actions I intended to cause fear of bodily harm."

The district court accepted Valdez's guilty plea to domestic assault against his stepfather and sentenced him on a later date. Pursuant to the plea agreement, the other four charges were dismissed. Valdez appeals, seeking to withdraw his plea.

DECISION

Valdez argues that he must be allowed to withdraw his guilty plea because it is inaccurate, and therefore invalid. In his initial brief to this court, Valdez argued that his guilty plea was inaccurate because the record did not demonstrate that he intended to cause his stepsister fear of immediate bodily harm. In its brief, the state argued that the record established [*4] that Valdez did intend to cause his stepsister to fear immediate bodily harm. Because Valdez pleaded guilty to, and stands convicted of, domestic assault against his stepfather, not his stepsister, we asked the parties for supplemental briefing on whether Valdez's guilty plea to domestic assault against his stepfather—not his stepsister—was accurate. In their supplemental briefs, the parties disagree over whether the record supports a finding that Valdez assaulted his stepfather.

"To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent." *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). "If a guilty plea fails to meet any of these three requirements, the plea is invalid." *State v. Johnson*, 867 N.W.2d 210, 214 (Minn. App. 2015), *review denied* (Minn. Sept. 29, 2015). Whether a plea is valid is a question of law that we review de novo. *Raleigh*, 778 N.W.2d at 94.

Valdez challenges only the accuracy of his plea. "The accuracy requirement protects a defendant from pleading guilty to a more serious offense than that for which he could be convicted if he insisted on his right to trial. To be accurate, a plea must be established on a proper factual basis." *Id.* (citations omitted). "The factual basis must establish sufficient facts on the record to support a conclusion that defendant's [*5] conduct falls within the charge to which he desires to plead guilty." *Munger v. State*, 749 N.W.2d 335, 338 (Minn. 2008) (quotation omitted).

Typically, the factual basis for the plea is established when the defendant describes the crime in his own words. *Lussier v. State*, 821 N.W.2d 581, 589 (Minn. 2012). But "a

defendant may not withdraw his plea simply because the court failed to elicit proper responses if the record contains sufficient evidence to support the conviction." *Raleigh*, 778 N.W.2d at 94. Thus, a plea colloquy may be supplemented by other parts of the district court record, including—under appropriate circumstances—the complaint. *Lussier*, 821 N.W.2d at 589 (citing *State v. Trott*, 338 N.W.2d 248, 252 (Minn. 1983) (permitting the use of the whole record, including the complaint and photographs, to establish the factual basis for a guilty plea)).[1]

Valdez was convicted of domestic assault—fear, under Minn. Stat. § 609.2242, subd. 2 (2018). A person is guilty of domestic assault—fear if he commits an act with intent to cause his family or household member to fear immediate bodily harm or death. *Id.*, subd. 1 (2018). Valdez argues that the record does not support a finding that he committed an act with the intent to cause his stepfather to fear immediate bodily harm or death. *See* Minn. Stat. § 609.2242, subd. 1(1) (2018) (defining domestic assault—fear). The state maintains that the record does support such a finding. [*6]

Intent is generally proved with circumstantial evidence, "by drawing inferences from the defendant's words and actions in light of the totality of the circumstances." *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997). In assessing the accuracy of a guilty plea, we may consider circumstantial evidence of the defendant's intent. *See* *Nelson v. State*, 880 N.W.2d 852, 860 (Minn. 2016). A fact-finder may "infer that a person intends the natural and probable consequences of her actions." *State v. Janecek*, 903 N.W.2d 426, 431 (Minn. App. 2017) (quotation omitted). That a victim actually did fear bodily harm—though not dispositive of the defendant's intent—is circumstantial evidence of a defendant's intent to cause fear of immediate bodily harm. *Cf.* *State v. Schweppe*, 306 Minn. 395, 237 N.W.2d 609, 614 (Minn. 1975) (concluding that "the victim's reaction to the threat was circumstantial evidence relevant to the element of intent of the defendant in making the threat" in a terroristic threats case). And, a defendant may intend a single act to cause multiple victims to fear immediate bodily harm or death, therefore constituting multiple assaults. *See* *State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1998) ("When an assailant fires numerous shots from a semiautomatic weapon into a home, it may be inferred that the assailant intends to cause fear of immediate bodily harm or death to those within the home.").

Here, the plea colloquy alone is plainly insufficient to [*7] establish that Valdez committed an act with the intent to cause his stepfather to fear immediate bodily harm or death. During the plea colloquy, Valdez admitted that he got into a verbal argument with his stepsister and testified that he intended to cause fear of bodily harm through his words or actions. But Valdez did not mention his stepfather. Thus, Valdez did not admit that he intended to cause his stepfather to fear immediate bodily harm or death at the plea hearing.

Valdez's plea petition also does not support an inference that he intended to cause his stepfather to fear immediate bodily harm. While Valdez indicated in his plea petition that he "got into a verbal argument with the victim

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[1] While Minnesota precedent allows some information from the complaint to supplement the plea-hearing record, the *extent* to which allegations in the complaint, not acknowledged or admitted at the plea hearing, may fill gaps in an otherwise inaccurate, non-*Alford*/*Goulette* plea is an open question of law. We need not answer that question here because we conclude that even considering the allegations in the complaint, the record does not demonstrate that Valdez intended to cause his stepfather to fear immediate bodily harm or death.

and through [his] words or actions [he] intended to cause fear of bodily harm," the plea petition does not identify the victim or specify that he intended to cause fear of bodily harm to anyone other than the victim. And, as noted above, Valdez admitted that he got into a verbal argument with his stepsister, not his stepfather.

The state asserts that Valdez's plea is nonetheless accurate because the allegations in the complaint may be used to supplement the plea colloquy and plea petition.[2] On this [*8] basis, the state maintains that the record is sufficient to establish that Valdez's plea was accurate with regard to the charge of domestic assault against his stepfather. We are not persuaded.

The complaint alleges that Valdez got into an argument with his stepsister that woke his stepfather. When the stepfather went into the living room, he saw Valdez yelling at the stepsister and holding a flashlight as if he was going to hit someone. The stepsister told police that she believed that Valdez was going to hit her with the flashlight. She also told police that earlier in the altercation, Valdez had grabbed her by the throat. When the stepfather found the two arguing, he instructed Valdez to leave. At that point, Valdez threw furniture around the living room, but there is no allegation that Valdez directed the furniture toward his stepfather. Valdez's mother intervened, and Valdez unintentionally hit her. Valdez's stepfather ultimately called police, and later reported that he feared for the safety of himself and his family.

The state argues that Valdez intended the natural consequences of these actions, and that one natural consequence is that Valdez's stepfather would fear [*9] immediate bodily harm. *See* *Janecek*, 903 N.W.2d at 431. We are not convinced that a natural and probable consequence of the acts described in the complaint is that a person in the stepfather's position would fear immediate bodily harm or death. It is clear that the allegations in the complaint are sufficient to establish that Valdez intended to cause his stepsister to fear immediate bodily harm or death—he put his hands on her neck, yelled at her, and held a flashlight as if he were going to hit her. And the allegations also clearly demonstrate that Valdez was disruptive. But the complaint does not allege that Valdez took any action toward his stepfather. Valdez purportedly threw furniture around the living room after his stepfather told him to leave, but there is no allegation that Valdez threw anything at his stepfather or threatened him. And though Valdez purportedly hit his mother when she tried to intervene, Valdez's mother reported to police that the strike was unintentional. Thus, while Valdez's stepfather reported that he feared for his safety, we cannot confidently infer from the allegations in the complaint that Valdez intended to cause his stepfather to fear immediate bodily harm or death. We therefore [*10] conclude that Valdez's guilty plea to domestic assault against his stepfather was inaccurate, and therefore invalid.

The state argues that we should affirm because the inaccuracy in Valdez's plea colloquy was harmless. *See* Minn. R. Crim. P. 31.01 ("Any error that does not affect substantial rights must be disregarded."). It maintains that "[t]he confusion arising from this error did not alter the outcome for appellant or impact appellant's substantive rights in any way." We disagree. The state's argument amounts to a contention that an inaccurate plea is permissible so long as the plea was

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[2] In its supplemental brief, appellant contends that an appellate court may consider only "the record made when the defendant entered the plea" to determine whether the factual basis for the plea is sufficient. As discussed above, the extent to which a court may consider allegations in the complaint to supplement the plea record is an open question of law. But we need not resolve the issue in this case. *See supra* n.1.

otherwise knowing and voluntary. But if a guilty plea is not knowing, voluntary, *and* accurate, it is invalid. *Johnson*, 867 N.W.2d at 214.

In support of its argument that the error in accepting appellant's guilty plea was harmless, the state cites an unpublished opinion that also involved a guilty plea to a count involving one victim but a plea colloquy that referenced another victim of a different count that was ultimately dismissed. *See* *Aron v. State*, No. A06-0389, 2007 Minn. App. Unpub. LEXIS 321, 2007 WL 1053195 (Minn. App. Apr. 10, 2007), *review denied* (Minn. June 19, 2007). In that unpublished and non-precedential opinion, we affirmed because the plea colloquy, supplemented by the allegations in the complaint, made [*11] it clear that the defendant also assaulted the victim in the pleaded-to count. *Id.* at *3-4. Thus, we concluded that the plea was accurate and stated that "[n]o manifest injustice resulted from the confusion." *Id.* at *4. The unpublished opinion cited by the state does not support its position because, as discussed above, Valdez's plea was inaccurate. Because Valdez's guilty plea was inaccurate, it is constitutionally invalid. *See* *Johnson*, 867 N.W.2d at 214. We reverse and remand for the district court to allow Valdez to withdraw his plea.

Reversed and remanded.

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