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. 40189
	)	
Airman First Class (E-3)	)	USCA Dkt. No. 23-0162/AF
KRISTOPHER D. COLE	)	
United States Air Force	)	5 September 2023
Appellant.	)	

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Airman First Class (E-3) **KRISTOPHER D. COLE** United States Air Force *Appellant.*	)	USC Dkt. No. 23-0162/AF

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

ISSUE PRESENTED

WHETHER APPELLANT IS ENTITLED TO RELIEF BECAUSE THE MILITARY JUDGE MISAPPREHENDED THE OFFENSE IN SPECIFICATION 2 OF CHARGE II FOR WHICH HE SENTENCED APPELLANT.

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

Appellant's statement of the case is correct. Appellant pleaded guilty to one charge and one specification of aggravated assault via strangulation on divers occasions (Charge II, Specification 1), one specification of simple assault

with an unloaded firearm (Charge II, Specification 2), and one specification of assault consummated by a battery (Charge II, Specification 7), all in violation of Article 128, UCMJ. (JA at 31). A military judge sitting alone as a general court-martial found Appellant's plea provident and sentenced him. (JA at 95, 109).

STATEMENT OF THE FACTS

Appellant met A1C RL at her first duty assignment, Davis-Monthan Air Force Base, Arizona, sometime in July 2019. (JA at 115). The two enjoyed similar interests and spent time at Appellant's off-base home. (Id.). "From approximately August 2019 through January 2021, A1C [RL] would spend time at [Appellant]'s apartment on the weekends." (JA at 116). Not long after the two started their unofficial romantic relationship, Appellant began physically assaulting A1C RL. (JA at 116).

While A1C RL visited Appellant's home in September 2019, Appellant pointed an unloaded firearm at A1C RL's head. (JA at 119). The incident began when Appellant became angry at A1C RL for not reassembling one of his rifles in a sufficiently precise manner. (Id.). Appellant "got angry at A1C [RL] and yelled at her, saying that she could not go to bed until she fixed the gun and put it back together completely." (Id.). Appellant then walked over to A1C RL, "held up his 9mm Smith and Wesson pistol … to her temple, yelling at her." (Id.). He yelled,

"don't disrespect me in my own house, you are going to do this. My house, my rules, you are going to finish it, that's what I told you to do." (Id.).

A1C RL was terrified – "[s]he did not know that [Appellant] had pulled the firing pin out of the firearm, and she truly thought he might pull the trigger and kill her." (JA at 119). Later Appellant boasted to his roommate that "he pulled the trigger when he held the pistol to A1C [RL's] temple" but that it was "fine because [he] took the firing pin out and the gun was not loaded." (Id.). When A1C RL's coworker confronted Appellant about the incident, Appellant laughed, and he confirmed to her coworker that he had held a pistol up to A1C RL's temple. (JA at 120).

Appellant submitted a plea agreement and agreed to plead guilty to Specifications 1, 2, and 7 of Charge II, unmodified. (JA at 110-114). Per Appellant's plea agreement, he elected to be tried by a military judge alone. (JA at 111). Appellant agreed that the judge could only impose a 6-month maximum confinement term and a 60-day minimum for Specification 1, 2, and 7 of Charge II, respectively, and that any adjudged confinement was "[t]o be served consecutively." (Id.).

Stipulation of Fact

Trial counsel provided the military judge with a copy of the stipulation of fact. (JA at 48). The military judge explained to Appellant that the stipulation of

fact would be used in two ways. "First, I will use it to determine if you are guilty of the offenses to which you've plead guilty. And second, I will use it to determine an appropriate sentence for you." (JA at 49). Appellant, trial defense counsel, and trial counsel agreed the military judge could use the stipulation of fact for these two purposes. (JA at 49). The first paragraph of the stipulation of fact also stated it could be used for any purpose in the court-martial. (JA at 115).

The military judge conducted a colloquy about the stipulation of fact with Appellant, and he read and explained each paragraph of it aloud to Appellant. (JA at 50-67). As he read the stipulation of fact aloud, the military judge noticed the referral date in the document was incorrect, and he asked:

> [Military Judge]: Can I stop you there, was this referred on 14 June 2021 or 14 June 2020? I don't have the charge sheet in front of me, I don't think.
>
> [Trial Counsel]: No, Your Honor, it was not referred on 14 June 2021. The stipulation of fact is to read as if it was going to trial on 14 June 2021.
>
> [Military Judge]: Okay. It doesn't say that though, right? I am not crazy. I think it looks to me like it was referred on 5 March.

(JA at 50). The referral date is found on the charge sheet. (JA at 32).

The military judge skipped reading the general nature of the charges. (JA at 43-44). But the stipulation of fact headers provided the general nature of each charge to which Appellant was pleading guilty. (JA at 116, 119, 120). The header

immediately preceding the details of the simple assault with an unloaded firearm read "Assault with an *Unloaded* Firearm (Article 128, UCMJ)." (JA at 119) (emphasis added).

Care Inquiry

The military judge conducted a Care[1] inquiry with Appellant. (JA at 68-78). The specification at issue here (Charge II, Specification 2) read:

> In that [Appellant], United States Air Force, 355th Aircraft Maintenance Squadron, Davis-Monthan Air Force Base, Arizona, did within the state of Arizona, between on or about 1 September 2019 and on or about 18 September 2019, assault Airman First Class [RL] by pointing an unloaded firearm at her head.

(JA at 33). The military judge read the following elements for Specification 2 of Charge II to Appellant:

> [Military Judge]: Thank you. All right, [Appellant], thank you. Let's move on to Specification 2 of Charge II. That specification is, again, a violation of Article 128 of the Uniform Code of Military Justice. The elements of that offense, which is called assault consummated by battery, are, one, that between on or about 1 August 2019 and on or about 20 January 2020, within the state of Arizona, you did assault [A1C RL] by offering to do bodily harm to her. Two, that you did so by pointing at her with a certain weapon, to wit, an unloaded firearm. Three, that you intended to do bodily harm and four, that the weapon was a dangerous weapon.

(JA at 72). The military judge provided the following definitions to Appellant:

[1] United States v. Care, 18 U.S.C.M.A. 535 (C.M.A. 1969).

> An assault is an unlawful offer made with force or violence to do bodily harm to another, whether or not the offer consummated. An offer to do bodily harm is an unlawful demonstration of violence by an intentional act or omission which creates in the mind of another, a reasonable apprehension of receiving immediate bodily harm.
>
> Bodily harm means an offensive touching of another, however slight. It is not necessary that bodily harm actually be inflicted, however, you must have intended to do the bodily harm. Intent to do bodily harm may be proved by circumstantial evidence. When bodily harm has been inflicted by means of intentionally using force in a manner capable of achieving that result. It may be inferred that the bodily harm was intended. And the offer to do bodily harm is unlawful if done without legal justification or excuse and without the lawful consent of the victim.
>
> A weapon is a dangerous weapon when used in a manner capable of inflicting death or grievous bodily harm. What constitutes a dangerous weapon depends not on the nature of the object itself, but on its capability, given the manner of its use to inflict grievous bodily harm.
>
> Firearm means any weapon which is designed to or may be readily converted to expel any projectile by the action of an explosive.

(JA at 72-73). Trial defense counsel did not object to any of the elements or definitions provided by the military judge. After providing the definitions to Appellant, the military judge asked him, "

> [Military Judge]: . . . what I wanted to ask you was, the unloaded firearm, it was a 9mm Smith and Wesson, I believe in the stipulation of fact, it stated, and I wanted to ask you if you consider that a dangerous weapon under the definitions I have given you?

[Appellant]: Yes, Your Honor.

(JA at 75). Trial defense counsel did not object to any of the military judge's questions of Appellant during the Care inquiry.

References to Unloaded Firearm

During the stipulation of fact inquiry, the military judge read four passages aloud that stated the firearm was unloaded or inoperable. He read paragraph 25 aloud which stated Appellant pointed an "unloaded firearm at A1C RL." (JA at 62). He read paragraph 29 aloud which stated Appellant pulled the firing pin out of the firearm. (JA at 63). The military judge then read paragraph 30 aloud which explained that the firearm was inoperable and unloaded. (JA at 64).

The military judge said the weapon was an "unloaded firearm" when reading the elements of Specification 2 of Charge II. (JA at 72). In Appellant's description of the offense, he said the gun was unloaded or inoperable three times: "While the firearm was *unloaded* and had the *firing pin removed*, which means it could *not have been fired*." (JA at 74) (emphasis added). Then the military judge referred to "the unloaded firearm" in his follow up questions with Appellant. (JA at 75).

On nine occasions during the stipulation of fact inquiry and guilty plea inquiry, Appellant or military judge stated the firearm was unloaded or inoperable.

(JA at 72, 74, 75). Then during trial counsel's sentencing argument, she reiterated that the firearm was unloaded or inoperable five times. (JA at 102).

Maximum Punishment and Adjudged Sentence

The military judge and counsel discussed the maximum punishment calculation in an R.C.M. 802 conference, and the military judge summarized the meeting:

> We had another RCM 802 conference this morning and in that particular conference, the [G]overnment and the defense just wanted to let me know how they calculated the maximum punishment that would be authorized based upon the offenses that [Appellant] was pleading guilty to. And, I appreciate that and I did look through the appendix to the Manual for Courts-Martial and I do agree with counsel on the maximum punishment that they had already agreed to.

(JA at 41). Neither trial counsel nor trial defense counsel objected to or added to the military judge's summary of the R.C.M. 802 conference. (JA at 42). The military judge queried counsel about the maximum punishment available:

> [Military Judge]: Trial counsel what do you calculate the maximum punishment authorized by law in this case based solely on Airman Cole's guilty plea?
>
> [Assistant Trial Counsel]: Six years and six months, Your Honor.
>
> [Military Judge]: Thank you, and defense, do you agree?
>
> [Defense Counsel]: Yes, Your Honor.

> [Military Judge]: All right [sic], so that is the maximum confinement that is authorized.

(JA at 78).

Appellant was sentenced by the military judge to a reduction in grade to E-1, three consecutive terms of confinement, and a bad conduct discharge. (JA at 35-36). Specifically, he was sentenced to six months confinement for the aggravated assault via strangulation on divers occasions (Charge II, Specification 1), six months confinement for the simple assault with an unloaded firearm (Charge II, Specification 2), and two months confinement for the assault consummated by a battery (Charge II, Specification 7). (Id.).

SUMMARY OF THE ARGUMENT

The military judge made three legal errors during the guilty plea inquiry with Appellant. Although the military judge erred, the errors were nonconstitutional because they did not violate Appellant's constitutional right against self-incrimination or his right to proper notice of the offenses.

Appellant's right against self-incrimination was not violated when the military judge added two unnecessary elements to the simple assault with an unloaded firearm offense and questioned Appellant about the elements. Appellant did not admit that the firearm he point at A1C RL was a dangerous weapon, just that it could have been one under the legal definition provided by the military judge. And Appellant did not admit that he committed bodily harm on A1C RL.

Rather, he stated that he only intended to point the firearm at her head – a required element of simple assault.

Just as Appellant right against self-incrimination was not violated, neither was Appellant's right to proper notice. Appellant was given notice of simple assault with an unloaded firearm on the charge sheet, in the stipulation of fact, and during the Care inquiry. And the military judge demonstrated over and over on the record that he understood that was the offense for which he was sentencing Appellant.

Even though nonconstitutional errors occurred, the military judge's errors did not contribute to Appellant's sentence. The military judge knew the offense was simple assault with an unloaded firearm. He did not elicit that Appellant intended to do bodily harm, and based on the facts provided at trial, the military judge could not realistically determine that Appellant *actually* harmed A1C RL. Trial counsel did not argue any incorrect elements as aggravating evidence in sentencing. Finally, the military judge was aware of the overall punishment, and he had evidence before him supporting a sentence to six months of confinement. The military judge's errors did not contribute to the sentence and were harmless beyond a reasonable doubt. United States v. Wolford, 62 M.J. 418, 420 (C.A.A.F. 2006).

Although the United States does not agree that the errors were of a constitutional magnitude, the United States can meet the higher constitutional-error burden of showing harmlessness. Thus, if the errors were not constitutional, then Appellant cannot meet his burden of showing prejudice under a plain error standard. Appellant has not shown a reasonable probability that, but for the errors, his sentence would have been different. United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017).

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

ARGUMENT

APPELLANT SUFFERED NO PREJUDICE, BECAUSE THE MILITARY JUDGE UNDERSTOOD THE OFFENSE IN SPECIFICATION 2 OF CHARGE II, WHEN HE SENTENCED APPELLANT.

Standard of Review

Standard of Review for Nonconstitutional Error

Where an appellant forfeited a nonconstitutional right "by failing to raise it at trial, we review for plain error." United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). Appellant must show "(1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights." Lopez, 76 M.J. at 154 (citing United States v. Knapp, 73 M.J. 33, 36 (C.A.A.F. 2014)). "[T]he appellant

'must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different." Lopez, 76 M.J. at 154 (citing Molina-Martinez v. United States, 136 S. Ct. 1338, 1343, 194 L. Ed. 2d 444 (2016)).

Standard of Review for Constitutional Error

"[W]here a forfeited constitutional error was clear or obvious, 'material prejudice' is assessed using the 'harmless beyond a reasonable doubt' standard set out in Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)." United States v. Tovarchavez, 78 M.J. 458, 460 (C.A.A.F. 2019) (citing United States v. Jones, 78 M.J. 37, 45 (C.A.A.F. 2018)). "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." Wolford, 62 M.J. at 420 (internal quotations omitted).

Law

Sentencing Errors

The sentencing authority must consider, among other things, "the nature and circumstances of the offense." 10 U.S.C. § 856(c)(1)(A); R.C.M. 1002(f)(1). If an error arises in sentencing, then "[a] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." 10 U.S.C. § 859; United States v. Edwards, 82 M.J. 239, 247 (C.A.A.F. 2022).

Exceeding Scope of Guilty Plea Inquiry

Rule for Courts-Martial 910(e) requires:

> The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea. The accused shall be questioned under oath about the offenses.

"Unless the military judge has ranged far afield during the providence inquiry, the accused's sworn testimony will provide evidence directly relating to the offenses to which he has pleaded guilty." United States v. Holt, 27 M.J. 57, 60 (C.M.A. 1988) (internal quotations omitted). Information elicited by a military judge during the Care inquiry is admissible for sentencing so long as it is "closely related to" and "not far afield of" the offenses to which Appellant pleaded guilty. United States v. Price, 76 M.J. 136, 139 (C.A.A.F. 2017).

Maximum Confinement

The maximum confinement available for simple assault when committed with an unloaded firearm is three years. Manual for Courts-Martial, United States pt. IV, ¶ 77.d.(1)(b) (2019 ed.). The maximum confinement for assault consummated by a battery is 6 months. MCM, pt. IV, ¶ 77.d.(2)(a). The maximum confinement available for aggravated assault with a dangerous weapon committed with a loaded firearm is eight years. MCM, pt. IV, ¶ 77.d.(3)(a).

Analysis

A. The military judge made three legal errors during Appellant's Care inquiry.

The Government acknowledges that the military judge made three legal errors during Appellant's Care inquiry, but the errors were not prejudicial to Appellant. First, the military judge characterized the simple assault with an unloaded firearm as an assault consummated by a battery. (JA at 71).

Second, the military judge provided additional elements and definitions that were not part of the charged offense to Appellant during the Care inquiry. (JA at 71). Specifically, he added two elements of aggravated assault with a dangerous weapon: "intent to do bodily harm" and the "weapon was a dangerous weapon." (JA at 71); MCM, pt. IV, ¶ 77.b.(4)(a)(ii-iii).

Third, and finally, the military judge asked Appellant to draw two flawed legal conclusions about the nature of the unloaded firearm and bodily harm. When discussing the unloaded firearm, the military judge said: ". . . I wanted to ask you was, the *unloaded* firearm . . . I wanted to ask you if you consider that a dangerous weapon under the definitions I have given you?" (JA at 75) (emphasis added).

Legally, an unloaded firearm is not a dangerous weapon.[2] Then when discussing bodily harm, the military judge said, "Would you agree that pointing the gun at her and stating what you stated was bodily harm under the definitions I gave you?" (JA at 75). But pointing the unloaded firearm at A1C RL's head was only an offer to do bodily harm, and it did not actually constitute an offensive touching. Having acknowledged error, only the prejudice analysis remains.

B. ***Although the military judge erred, the errors were nonconstitutional because Appellant's constitutional right against self-incrimination and his right to proper notice were not violated.***

Appellant argues that "[t]he military judge's misapprehension of the offense charged in Specification 2 of Charge II is an error of constitutional magnitude." (App. Br. at 21). Appellant raises the constitutional question for the first time on appeal before this Court, and he did not raise it before AFCCA. Appellant claims violations of his right to silence and a right to notice escalated the errors to a constitutional violation. (App. Br. at 15). But the military judge did not violate

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[2] In United States v. Davis, this Court held "that an unloaded pistol is not a dangerous weapon under the President's interpretation of Article 128" under the 1995 Manual. 47 M.J. 484, 486 (C.A.A.F. 1998). The definition of "other means or force" in the 1995 Manual stated, "an unloaded pistol, when presented as a firearm and not as a bludgeon, is not a dangerous weapon or a means of force likely to produce grievous bodily harm, whether or not the assailant knew it was unloaded." MCM, pt. IV, ¶ 54c(4)(a)(ii) (1995 ed.). But the 2019 edition of the Manual does not include the same language in its definitions. But the service courts have used the 2019 Manual's definition of "dangerous weapon" to conclude an unloaded firearm is not a dangerous weapon. United States v. Bousman, 2023 CCA LEXIS 66, *29 (A.F. Ct. Crim. App. 8 February 2023) (unpub. op.).

Appellant's constitutional rights because (1) the military judge did not compel Appellant "to be a witness against himself," U.S. Const. amend. V, and (2) Appellant had proper notice of the offense he pleaded guilty to and was sentenced for.

1. ***The military judge did not violate Appellant's constitutional right against self-incrimination by asking general questions about erroneous additional elements.***

A military judge might violate an accused's right against self-incrimination during a Care inquiry if he asked questions that were not "closely related to" and are "far afield of" the offenses to which an accused pleaded guilty. United States v. Price, 76 M.J. 136, 139 (C.A.A.F. 2017).

Appellant argues the military judge misapprehended the offense when he provided Appellant with the dangerous weapon definition. (App. Br. at 20). The military judge provided Appellant with the definition of a dangerous weapon:

> A weapon is a dangerous weapon when used in a manner capable of inflicting death or grievous bodily harm. What constitutes a dangerous weapon depends not on the nature of the object itself, but on its capability, given the manner of its use to inflict grievous bodily harm.

(JA at 72). Then during the Care inquiry, the military judge asked, ". . . the unloaded firearm, it was a 9mm Smith and Wesson . . . I wanted to ask you if you consider that a dangerous weapon under the definitions I have given you?" Appellant responded, "Yes, Your Honor." (JA at 75). But the military judge did

not ask Appellant if his firearm was *actually* used as a dangerous weapon, he simply asked if Appellant considered it to be one. The military judge asked Appellant to draw a legally incorrect conclusion that the weapon used in the offense was "dangerous," but Appellant did not admit any fact that was not encompassed by the offense as charged. Appellant went on to explain multiple times that the firearm was unloaded, and the firing pin was removed, which was consistent with the term "unloaded firearm" used in the specification. (JA at 74). Appellant repeatedly contradicted the idea that the firearm was a dangerous weapon when he told the military judge the firearm was unloaded during his Care inquiry. (JA at 74).

Appellant also argues that the military judge "accepted Appellant's plea, while under the misapprehension that the offense required this specific intent to harm." (App. Br. at 21). But the military judge did not ask Appellant during the providence inquiry whether he intended to cause bodily harm:

> [Military Judge]: Would you agree that pointing the gun at her and stating what you stated was bodily harm under the definition I gave you?
>
> [Appellant]: Yes, Your Honor.
>
> [Military Judge]: And my other question is, did you intend to point the gun at her?
>
> [Appellant]: Yes, Your Honor.

(JA at 75). The military judge only elicited that Appellant intended to point the gun at A1C RL. (Id.). And Appellant only admitted that he offered to do bodily harm to A1C RL by pointing the firearm at her – the offer element of simple assault. *See* MCM, pt. IV, ¶ 77.b.(1)(a) ("That the accused attempted to do or *offered* to do bodily harm to a certain person") (emphasis added). But the military judge never forced Appellant to admit that he *actually* intended bodily harm on A1C RL. Although the military judge asked Appellant to draw a legally incorrect conclusion that pointing the gun at A1C RL was "bodily harm," rather than an offer to do bodily harm, the military judge did not require Appellant to admit to any *fact* that Appellant would not have admitted otherwise. The fact that Appellant pointed the gun to A1C RL's head was encompassed within the specification at issue, and the military judge asking about it did not violate Appellant's right against self-incrimination.

Appellant's constitutional rights against self-incrimination not violated, thus, the error does not reach a constitutional magnitude. Appellant was not forced to forego his constitutional rights during the Care inquiry.

2. The military judge did not violate Appellant's constitutional right to notice by asking general questions about erroneous additional elements.

Appellant argues that the military judge laid out an aggravating offense during Appellant's Care inquiry that was not charged, and Appellant did not have notice that the military judge would be sentencing him for it. (App. Br. at 25).

The due process principle of fair notice mandates that an accused has a right to know what offense and under what legal theory he will be tried and convicted." United States v. Riggins, 75 M.J. 78, 83 (C.A.A.F. 2016) (internal citation and quotations omitted). "The charge sheet provides the accused notice that he or she will have to defend against any charged offense and specification." United States v. Armstrong, 77 M.J. 465, 469 (C.A.A.F. 2018).

Appellant alleges he was not on notice of an aggravated assault with a dangerous weapon. (App. Br. at 14-15). The Government agrees that Appellant was not on notice of the aggravated assault with a dangerous weapon, but AFCCA did not affirm a conviction for that offense, and Appellant was not sentenced for the greater offense.

The military judge erroneously added elements to the simple assault with an unloaded firearm offense, but he did not violate Appellant's constitutional right to proper notice by doing so. Appellant knew "what offense and under what legal theory he will be tried and convicted," simple assault with an unloaded firearm. Riggins, 75 M.J. at 83. Appellant had a copy of the charge sheet, the stipulation of fact, and the plea agreement. Appellant's admissions during the providence inquiry established that he was fully aware of the Government's charging theory based on the individual elements of the charge against him. He explained in his own words

that he was guilty of simple assault with an unloaded firearm, and his trial defense counsel was present during the court-martial.

Appellant alleges that the addition of the elements meant the military judge viewed the offense through the lens of the aggravating factors. (App. Br. 15, 31). But looking at the entire proceeding, time and time again the military judge reiterated that the firearm was unloaded. Each of the elements for the offense charged was provided to the Appellant, the military judge added additional definitions, but then proceeded to discuss the simple assault with an unloaded firearm and not aggravated assault with a loaded firearm. Appellant was on notice of the offense for which he was convicted and sentenced. The specification was not deficient. Appellant's description in his own words described simple assault with an unloaded firearm and the military judge understood the offense for which he was sentencing Appellant.

C. Even if the United States must meet the higher constitutional burden, the military judge's errors did not contribute to Appellant's sentence.

Assuming this Court finds constitutional error and that the burden remains on the Government to prove harmlessness, the Government can still prove beyond a reasonable doubt that the military judge's errors did not contribute to Appellants sentence. The Government meets its burden in this case for six reasons. First, the military judge knew that the firearm was unloaded. Second, the military judge never elicited that Appellant actually injured or harmed A1C RL, nor that he

intended to so, and the military judge could not have realistically thought, based on the facts elicited, that Appellant could have actually harmed the victim. Third, trial counsel did not argue any of the wrong elements as aggravating factors. Fourth, the military judge was aware of the overall max punishment based on the guilty plea. Fifth, the military judge had evidence before him supporting a sentence of six months confinement. And sixth, the military judge used the proper offense code for simple assault with an unloaded firearm on the statement of trial results and entry of judgment.

1. ***The military judge understood that Specification 2 of Charge II was committed with an unloaded firearm because he referred to the firearm as unloaded, and the parties stated the firearm was unloaded or inoperable multiple times.***

The facts elicited by the military judge did not support a finding of aggravated assault.

The military judge did not elicit facts establishing that Specification 2 of Charge II was an aggravated assault. Thus, the facts upon which Appellant was sentenced were consistent with the charged offense of simple assault with an unloaded firearm and not another offense.

Appellant pleaded guilty to an aggravated assault offense for strangling A1C RL (Specification 1, Charge II). During the Care inquiry on that offense, the military judge asked follow-up questions about Appellant committing bodily harm on A1C RL. (JA at 71). He asked if Appellant had "permission or authority to do

the bodily harm to her;" was he forced "to do bodily harm to her;" and could Appellant have "avoided doing that bodily harm to her." (Id.). The military judge did not ask these same follow-up questions during the Care on the simple assault. Thus, the military judge showed he understood the difference between simple assault and aggravated assault. And the military judge did *not* elicit these same facts – which would have been required for aggravated assault – for Specification 2 of Charge II.

The stipulation of fact stated four times that the firearm was unloaded or inoperable, and the military judge read the stipulation aloud to Appellant.

The military judge conducted a colloquy with Appellant about the stipulation of fact. And the military judge read every paragraph of the stipulation of fact aloud changing the language from first person to second person throughout. (JA at 50). The military judge read paragraphs 25, 29, and 30 aloud, and these paragraphs stated the firearm was unloaded or that Appellant had removed the firing pin making it inoperable. (JA at 62, 63, 64). This proves the military judge read the uncontroverted facts of the case at least once. The stipulation of fact was entered as a prosecution exhibit, and it was evidence of "the nature and circumstances of the offense." 10 U.S.C. § 856(c)(1)(A); R.C.M. 1002(f)(1). The military judge could consider the stipulation of fact during his sentencing deliberations. Four times in the stipulation of fact it stated the firearm was "unloaded" or the "firing pin was removed." (JA at 119). The plain language of

the stipulation of fact reminded the military judge the offense was simple assault with an unloaded firearm and not aggravated assault with a loaded firearm.

Appellant points to the fact that the military judge "skipped reading the general nature of the charges" as evidence that the military judge did not understand the offense. (App. Br. at 17). But the headers in the stipulation of fact stated the general nature of each offense. (JA at 116, 119, 120). Specifically, the header immediately preceding the details of the simple assault with an unloaded firearm read "Assault with an *Unloaded* Firearm (Article 128, UCMJ)." (JA at 119) (emphasis added).

During the Care inquiry, both the military judge and Appellant said the firearm was unloaded or inoperable multiple times.

The military judge and Appellant referred to the firearm as "unloaded" throughout the Care inquiry. The military judge instructed Appellant that he would use the Care inquiry for the purposes of findings and sentencing. (JA at 49). The military judge said the weapon was an "unloaded firearm" when reading the elements of Specification 2 of Charge II. (JA at 72). In Appellant's description of the offense, he said the gun was unloaded or inoperable three times: "While the firearm was *unloaded* and had the *firing pin removed*, which means it could *not have been fired*." (JA at 74) (emphasis added). Then the military judge referred to "the unloaded firearm" in his follow up questions with Appellant. (JA at 75). The military judge stated or was reminded 14 times that the firearm was unloaded –

nine times during the stipulation of fact inquiry and Care inquiry, and five times during the Government's sentencing argument. (JA at 72, 74, 75). Although the military judge erroneously mentioned dangerous weapons in his initial advice to Appellant, he was regularly reminded throughout the proceeding that the firearm was unloaded. As a whole, these circumstances support that Appellant was properly sentenced for an offense involving an unloaded firearm, and not based on more aggravating facts.

2. The military judge never elicited that Appellant actually injured or harmed A1C RL, nor that he intended to commit bodily harm.

The military judge never elicited facts that Appellant committed bodily harm upon A1C RL for Specification 2 of Charge II. (JA at 75). Appellant only admitted that he pointed an unloaded firearm at A1C RL's head and yelled at her – the offer element of simple assault. (JA at 74); *See* MCM, pt. IV, ¶ 77.b.(1)(a) ("That the accused attempted to do or *offered* to do bodily harm to a certain person") (emphasis added). But the military judge never forced Appellant to admit that he *actually* committed bodily harm on A1C RL or that he intended to do so.

Looking at the record, the military judge would not have been able to make a finding that bodily harm occurred with the evidence elicited in the stipulation of fact and the Care inquiry. Based on the facts elicited, the military judge could not possibly have believed that Appellant could have harmed A1C RL with the unloaded firearm in that situation. Therefore, when sentencing Appellant, the

military judge did so based on the facts that Appellant could not and did not actually harm or injure A1C RL and had no intent to do so, since the firearm was unloaded. This supports that Appellant's sentence was appropriate for someone who had committed a simple assault with an unloaded firearm, rather than a more severe offense.

3. Trial counsel did not argue any of the incorrect elements as aggravating factors.

Trial counsel's sentencing argument focused on the aggravating factors laid out in the stipulation of fact and provided during the Care inquiry. She did not discuss the additional, erroneous elements that the military judge provided during the Care inquiry. Trial counsel reiterated five times that the firearm was unloaded or inoperable, and she did not discuss bodily harm or committing bodily harm on A1C RL. (R. at 152-106). Trial counsel did not emphasize these points, and in doing so, she ensured the Government's recommended sentence was based only on the offenses to which Appellant pleaded guilty.

4. The military judge was aware of the overall max punishment based on the guilty plea.

When establishing the maximum punishment based on the offenses to which Appellant pleaded guilty, the military judge agreed with counsel that the maximum period of confinement was six years and six months. The maximum period of confinement available under the law for Specifications 1 and 7 of Charge II was a

total of three and a half years of confinement. *See* MCM, pt. IV, ¶ 77.d.(2)(a) (assault consummated by a battery); MCM, pt. IV, ¶ 77.d.(3)(b)(iii) (aggravated assault in which substantial bodily harm is inflicted by strangulation). The maximum period of confinement for simple assault with an unloaded firearm is three years. *See* MCM, pt. IV, ¶ 77.d.(1)(b). These three offenses together have a maximum confinement period of six and a half years.

In contrast, the maximum period of confinement for aggravated assault with a dangerous weapon, specifically a loaded firearm, is eight years. *See* MCM, pt. IV, ¶ 77.d.(3)(a)(i). If the military judge had been viewing the offense as aggravated assault with a loaded firearm the maximum confinement period for all three offenses would have been 11.5 years – eight of which would have been attributable to aggravated assault. MCM, pt. IV, ¶ 77.d.(3)(a)(i). The maximum sentence discussed by the parties reflected simple assault with an unloaded firearm, again showing the military judge understood the gravity of the offense for which he was sentencing Appellant.

5. The military judge had evidence before him supporting a sentence of six months confinement.

The military judge had evidence before him supporting a sentence of six months of confinement. The Government's sentencing case revolved around the stipulation of fact which laid out Appellant's transgressions in detail, and it included uncontroverted stipulations of testimony from A1C RL. (JA at 115-120).

Then in his Care inquiry Appellant reiterated that he knew he terrified A1C RL when he pointed the firearm at her, and she did not know that it was unloaded. (JA at 74). Appellant's own words – under oath – were the strongest evidence that could then be used by the sentencing authority to determine his punishment.

The defense's case was a standard sentencing package consisting of an unsworn statement, a photo collage, and two, character letters. (JA at 151-157). Appellant's vague discussion of a traumatic brain injury was largely unpersuasive because no evidence was presented that such an injury caused his actions or influenced his decisions afterwards. (JA at 96-97).

Appellant claims the military judge viewed the entire proceeding through an "incorrect prism" of aggravating factors. (App. Br at 31). He did not. Nine times during the stipulation of fact inquiry and Care inquiry the Appellant or military judge stated the firearm was unloaded or inoperable. (JA at 72, 74, 75). In addition, the military judge never elicited that Appellant committed bodily harm on A1C RL, injured her, or intended to do either. Then during trial counsel's sentencing argument, trial counsel reiterated that the firearm was unloaded or inoperable another five times, and she did not argue the erroneous aggravating elements. (JA at 102). The military judge also understood that he was not sentencing Appellant based on an offense with an 8-year maximum. The record supports that the military judge viewed the offense through the appropriate prism.

Appellant claims that had the military judge correctly understood that the offense charged was a simple assault . . . there is a real possibility that he may have sentenced Appellant to a lesser sentence." (App. Br. at 29). This is unpersuasive. Appellant's argument ignores the fact that A1C RL genuinely believed she was going to die in that moment, and Appellant ignores his own cavalier response when confronted about the incident. He laughed. (JA at 119). These are aggravating factors that the military judge considered. These factors created the *correct* prism of aggravating factors through which the military judge could view the offenses. (JA at 119). These aggravating factors unmistakably led to Appellant receiving six months confinement – the maximum under the plea agreement and two and a half years below the maximum available under the law. (JA at 111); MCM, pt. IV, ¶ 77.d.(1).

Appellant goes on to argue, that "the military judge sentenced Appellant to the minimum of 2 months confinement for Specification 7 [aggravated assault by strangulation], despite the aggravating circumstances of that offense, suggesting he was receptive to Appellant's mitigation case when he sentenced Appellant for an offense that he did not misapprehend." (App. Br. at 33). But nothing in Appellant's sentencing case overcame the cruelty Appellant showed by putting A1C RL – his romantic partner – in fear of her life and the remorselessness he showed afterwards.

The Government acknowledges that showing an error did not have an influence on the sentence is more difficult than in findings. Edwards, 82 M.J. at 247. And the difficulties arise because "there is a broad spectrum of lawful punishments that a panel might adjudge." Edwards, 82 M.J. at 247. But in this case, the spectrum of punishments was significantly limited through the plea agreement before Appellant arrived at trial, and the military judge adjudged a sentence within that limited spectrum – making the prejudice analysis easier to apply in this case. Appellant's sentence fell within the lawful range available for a simple assault with an unloaded firearm, and what's more, it fell within the even smaller range available pursuant to the plea agreement.

Appellant committed egregiously cruel conduct, which traumatized A1C RL by making her believe she was going to die. A1C RL said in her unsworn statement, "I am still haunted by the night Cole held a gun to my head." (JA at 149). She continued, "I was afraid of his anger and aggression, but I was frozen in place and could not muster the courage to try and escape the situation." (JA at 150). Under such circumstances, it is not difficult to ascertain that the military judge would have still sentenced Appellant to the full six months of confinement, despite the errors in the Care inquiry. This Court can be convinced beyond a reasonable doubt that the military judge's errors did not contribute to the sentence.

Since the United States can meet the higher constitutional-error burden of showing harmlessness, it follows that if the error was not constitutional, then Appellant cannot meet his burden of showing prejudice under a plain error standard. For the same reasons described above, Appellant has not shown a reasonable probability that, but for the errors, his sentence would have been different.

In sum, the military judge's errors did not contribute to the sentence. The facts elicited over and over again on the record demonstrated that the military judge knew he was sentencing Appellant for pointing an unloaded firearm at A1C RL's head and making her believe she would die that night. The military judge sentenced Appellant based on the actual aggravating factors of Appellant's conduct – not those erroneous elements associated with a different offense. Appellant was not prejudiced by the military judge's errors.

6. The military judge entered the correct offense code on the Entry of Judgment indicating he understood the offense was simple assault with an unloaded firearm.

The Department of Defense using the Defense Incident-Based Reporting System (DIBRS) codes all the UCMJ offenses for their entry into the National Incident-Based Reporting System (NIBRS). (JA at 169). The code for simple assault with an unloaded firearm is "128-A1," and the code for aggravated assault with a dangerous weapon specifically a loaded firearm is "128-J2." (JA at 169).

The military judge properly coded the simple assault with an unloaded firearm code as "128-A1" on the statement of trial results and the entry of judgment. (*Statement of Trial Results*, dated 15 June 2021, ROT, Vol. 1 at 1; JA at 35). The military judge entered "128-A1" under Specification 2 of Charge II, and the military judge signed both documents. (Id.).

Although a DIBRS code is neither a finding nor part of a sentence, it is circumstantial evidence that the military judge sentenced Appellant to simple assault with an unloaded firearm. *See* United States v. Lepore, 81 M.J. 759, 762-63 (A.F. Ct. Crim. App. 2021) (en banc). In reviewing the statement of trial results immediately following sentencing or the entry of judgment later, the military judge would have likely questioned the code had he actually believed the offense was aggravated assault with a dangerous weapon.

D. Assuming this was constitutional error, this Court should overrule Tovarchavez; follow Greer v. United States, and require Appellant to show a reasonable probability that, but for the errors, the outcome of the proceeding would have been different.

If this Court finds the errors were constitutional, under Tovarchavez, the Government must show that the constitutional error was "harmless beyond a reasonable doubt." 78 M.J. at 460. But this Court has called into question the continuing viability of Tovarchavez. *See* United States v. Long, 81 M.J. 362, 371 (C.A.A.F. 2021). In Long, this Court recognized that after Tovarchavez was decided, the Supreme Court held that, in a plain error review of nonstructural

constitutional error, the appellant – not the Government – has the burden of providing prejudice. Id. (citing Greer v. United States, 141 S. Ct. 2090, 2100 (2021).

According to the Supreme Court, to prove prejudice, the appellant must show "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." Greer, 141 S. Ct. at 2095. And in conducting its plain error review, the appellate court can review the entire record. Id. at 2104. In Long, this Court declined to decide the applicability of Greer to the military. 81 M.J. at 371. If this Court decides constitutional error occurred here, the issue will become ripe, and this Court should overturn Tovarchavez, follow Greer, and require Appellant to prove prejudice.

CONCLUSION

Appellant is not entitled to relief because the military judge did not misapprehend the nature of Appellant's conduct in support of Specification 2 of Charge II. In the end, the military judge sentenced Appellant based on the facts elicited during the Care inquiry, which were consistent with simple assault with an unloaded firearm, and not a more serious offense. Appellant suffered no prejudice because the military judge's errors did not contribute to his sentence. And he was sentenced within the lawful bounds of the President's maximum sentences and his own plea agreement with the convening authority.

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and sentence in this case.

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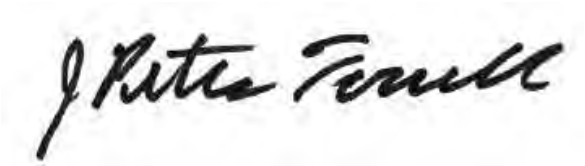

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and transmitted by electronic means via email to sam.golseth@us.af.mil and abhishek.kambli@us.af.mil on 5 September 2023.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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

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

/s/ Jocelyn Q. Wright, Capt, USAF

Attorney for the United States (Appellee)

Dated: 5 September 2023

APPENDIX

United States v. Bousman

United States Air Force Court of Criminal Appeals

February 8, 2023, Decided

No. ACM 40174

Reporter
2023 CCA LEXIS 66 *; 2023 WL 1816930

UNITED STATES, Appellee v. Kaleb A. BOUSMAN, Airman (E-2), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Prior History: **[*1]** Appeal from the United States Air Force Trial Judiciary. Military Judge: Andrew R. Norton; Christina M. Jimenez (entry of judg-ment). Sentence: Sentence adjudged on 6 May 2021 by GCM convened at Can-non Air Force Base, New Mexico. Sentence entered by military judge on 27 July 2021: Bad-conduct discharge, confinement for 15 months, reduc-tion to E-1, and a reprimand.

Counsel: For Appellant: Major Alexandra K. Fleszar, USAF.

For Appellee: Lieutenant Colonel Matthew J. Neil, USAF; Major Morgan R. Christie, USAF; Major John P. Patera, USAF; Mary Ellen Payne, Esquire.

Judges: Before JOHNSON, POSCH, and RICHARDSON, Appellate Military Judges. Chief Judge JOHNSON delivered the opinion of the court, in which Sen-ior Judge POSCH and Judge RICHARDSON joined.

Opinion by: _

Opinion

JOHNSON, Chief Judge:

A general court-martial composed of a military judge alone convicted Appellant, contrary to his pleas, of one specification of resisting apprehension, one specification of failure to obey a lawful order, one specification of controlling a motor vehicle while drunk, one specification of wrongfully using provoking language, one specification of assault with a dangerous weapon, and three specifications of simple assault, in violation of *Articles 87a*, *92*, **[*2]** *113*, *117*, and *128, Uniform Code of Military Justice (UCMJ)*, *10 U.S.C. §§ 887a*, *892*, *913*, *917*, and *928*.[1] The military judge sentenced Appellant to a bad-conduct discharge, confinement for 15 months, reduction to the grade of E-1, and a reprimand. The convening authority took no action on the findings or sentence, but waived automatic forfeiture of pay and allowances for the benefit of Appellant's dependent child for a period of six months.

Appellant raises six issues for our consideration on appeal, which we have consolidated and reordered for purposes of our analysis: (1) whether Appellant's convictions for Specification 2 (simple assault), Specification 3 (assault with a dangerous weapon), and Specification 4 (simple assault) of Charge I are legally and factually sufficient and may be affirmed on appeal; (2) whether trial counsel's findings argument was improper; (3) whether the military judge erred by denying Appellant credit for the Government's violations of *Article 13, UCMJ*, *10 U.S.C. § 813*; and (4)

[1] The military judge found Appellant not guilty of one specification of insubordinate conduct toward a noncommissioned officer, one specification of failure to obey a lawful order, and three specifications of aggravated assault in violation of *Articles 91*, *92*, and *128 UCMJ*, *10 U.S.C. §§ 891*, *892*, *928*. The military judge found two of the specifications of simple assault of which he found Appellant guilty were lesser included offenses of aggravated assaults of which he found Appellant not guilty.

whether the doctrine of cumulative error warrants relief.[2] In addition, although not raised by Appellant, we address an additional issue: the convening authority's failure to state his reasons for denying Appellant's request to defer his punishments. We have carefully considered issues (3) and **[*3]** (4) and find they do not require discussion or warrant relief.[3] We further find Appellant's conviction for assault with a dangerous weapon is not factually sufficient and set it aside, but affirm the lesser included offense of simple assault with a firearm in violation of *Article 128, UCMJ*, affirm the remaining findings, and reassess Appellant's sentence.

I. Background

Appellant was stationed at Cannon Air Force Base (AFB), New Mexico, in June 2020 at the time of the offenses for which he was convicted. Appellant was married at the time and had one child, but his spouse and child had moved to another state without him. Appellant lived in an area of base housing known as Chavez Housing, which was across a street and adjacent to the main part of Cannon AFB.

Technical Sergeant (TSgt) DC was Appellant's next-door neighbor in Chavez Housing, where TSgt DC lived with his wife and children. TSgt DC planned a barbecue at his house on the evening of Saturday, 6 June 2020, to which he invited Appellant and others. TSgt DC knew Appellant worked parttime at the base's auto hobby shop on Saturdays. As TSgt DC was outside his house preparing for the barbecue, he saw Appellant return home around the middle of that day **[*4]** to care for his dogs. TSgt DC and Appellant conversed briefly, and TSgt DC had the impression Appellant "was having a rough day at work" and was "a little bit annoyed." However, Appellant was "talking coherently" and "holding a normal conversation," and TSgt DC thought little of their conversation when Appellant returned to his work.

TSgt DC next heard from Appellant at approximately 1900 that evening, when he received a text from Appellant asking if TSgt DC knew "how to do stitches." After they exchanged some texts, Appellant indicated he intended to "take care of it himself" but he would be late to the barbecue. Appellant came to TSgt DC's house at approximately 2100, with an apparent cut on his torso. At trial, TSgt DC described Appellant's appearance:

> He looked worse for wear. He was wearing a tank top that had been cut opened, he was bleeding pretty bad. The hole in his tank top was big enough that I could see where he had bandaged himself. He just didn't look good.

When TSgt DC questioned Appellant about what had happened, Appellant apologized for being late but claimed he had gone "to collect some money that somebody owed him" when he had been "jumped" by "some guys," one of whom **[*5]** stabbed him before Appellant "beat the guy up." However, Appellant persistently refused suggestions from TSgt DC and others that he seek medical attention and insisted he was "fine." According to TSgt DC, Appellant was not stumbling or slurring his words, and he was speaking coherently. Appellant ate a plate of food as he conversed with TSgt DC in the driveway of the house. TSgt DC recalled Appellant had a bottle of tequila in his hand at some point, but did not remember whether he saw Appellant drink from it or not.

In the meantime, elsewhere on Cannon AFB, Senior Airman (SrA) KC, who worked with Appellant at the auto hobby shop and considered him a friend, had a conversation about Appellant with KR, the auto hobby shop manager. SrA KC had seen and conversed with Appellant that day at work and had not noted anything out of the ordinary. However, that night KR sent SrA KC a text message asking SrA KC to call. When they spoke, KR explained Appellant had sent KR a photo that apparently depicted Appellant in a bloody shirt. KR asked SrA KC to go check on Appellant at his residence. As a result, SrA KC and a friend who was with him at the time drove in separate cars to Appellant's house **[*6]** while Appellant was at the barbecue at TSgt DC's house.

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[2] Appellant personally raises issue (3) pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

[3] Issue (3) was thoroughly litigated before trial and addressed in a written ruling by the military judge.

TSgt DC testified these two cars arrived unexpectedly at his driveway at a high rate of speed. TSgt DC, SrA KC, and another friend of Appellant who was attending the barbecue, CC,[4] described the ensuing encounter in somewhat different ways, but generally agreed on certain elements. When SrA KC arrived and exited his car, Appellant took out a pocketknife, opened it, and confronted SrA KC in the driveway with the knife in his hand. SrA KC said he had come to check on Appellant, but Appellant wanted SrA KC to leave. SrA KC and CC later testified Appellant held the knife to SrA KC's stomach during the confrontation. After failing to persuade Appellant to accept assistance, SrA KC and his friend returned to their cars and drove away.[5]

Appellant then returned to his seat in the driveway. However, TSgt DC perceived Appellant was angry and agitated after SrA KC left. After a "couple of minutes," Appellant went into his house. CC followed Appellant into the house. According to CC, after he again told Appellant to go to a hospital or get treated, Appellant held up a knife toward CC's throat, approximately five or six inches away from CC's neck. **[*7]** In response, CC raised his hands between the knife and his neck. CC subsequently testified Appellant told CC that Appellant was leaving and they were "not going to see him again." While still holding a knife near CC's throat, Appellant then pulled out a handgun, warned CC "don't call the cops or else," and put the gun against CC's torso. CC described the gun as "tan" in color; however, he did not have an opportunity to inspect it and did not know if it was loaded. CC responded that Appellant could leave if he wanted to.

Appellant then told CC they were going outside and to "put [his] hands down," and they departed the house with CC walking in front of Appellant. CC later testified he did not know what Appellant was holding in his hands when CC exited the house, or if Appellant had "put [the gun] away or stopped or anything," because Appellant was behind him. TSgt DC saw them come outside; he observed Appellant was holding an "extremely long" Bowie-type knife and had a handgun tucked into his waistband at his lower back. Appellant got in his truck and drove away. CC, who looked "afraid" and "shaken up" to TSgt DC, said Appellant had "pulled a gun on him."

In the meantime, while Appellant **[*8]** was inside his house with CC, TSgt DC's wife had called security forces. SSgt AG and SrA AA[6] from security forces were dispatched from the main base to Chavez Housing to respond to what was described as "a possibly intoxicated, injured, suicidal, panicked, combative individual that was also armed," driving an old blue pickup truck. SSgt AG and SrA AA arrived at the gate to Chavez Housing and used their vehicle to block the outbound lane. Almost immediately, they saw Appellant's truck driving toward the gate. Appellant's vehicle made a turn, and SSgt AG and SrA AA followed him. They found Appellant attempting to pull his truck into the open garage of a house; however, Appellant appeared to have gotten his truck wedged between a vehicle inside the garage and the wall of the garage. SSgt AG and SrA AA exited their vehicle and SSgt AG began giving Appellant instructions to place his arms in the air, turn the truck off, and exit the truck. Appellant did not initially comply, and he shouted back that SSgt AG should drag him out of the truck while appearing to reach behind his seat. Appellant eventually did exit the truck after two additional security forces members, GM[7] and SrA TW, arrived. **[*9]**

Appellant then began walking toward the security forces members, shouting expletives and insults at them, and telling them to shoot him because that was "all [ ] cops are good for." GM and SrA AA observed the handle of a pocketknife protruding from Appellant's front pants pocket. SSgt AG, GM, and SrA AA attempted to calm Appellant by talking to him, but SSgt AG observed Appellant was becoming more "hostile" and "aggressive." None of the security forces members drew a weapon at any point during the encounter.

Eventually, after Appellant took a step toward SSgt AG, GM grabbed Appellant's arms from behind and the two of them fell to the ground. SSgt AG and SrA AA moved to help GM control Appellant, who resisted vigorously. SrA AA saw that Appellant had managed to grab his pocketknife and open the blade, and Appellant was making stabbing

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[4] CC was an active duty Air Force member in June 2020 and at the time of Appellant's trial.

[5] The military judge found Appellant not guilty of a charged assault on SrA KC with a dangerous weapon.

[6] SrA AA subsequently separated from the Air Force and was a civilian at the time of Appellant's trial.

[7] GM was an active duty Air Force member in June 2020 and at the time of Appellant's trial.

motions towards GM's leg with it. However, SrA AA did not see the knife contact GM's body. SrA AA grabbed Appellant's wrist and took the knife from him. GM heard SrA AA call out "knife" during the struggle, but he never saw the knife in Appellant's hand, he was not aware that Appellant was attempting to stab him, and he did not feel the knife make contact **[*10]** with him.

With difficulty, the security forces members were able to subdue and handcuff Appellant.[8] They noted Appellant smelled like alcohol. Later that night, approximately three hours after they apprehended Appellant, security forces took Appellant to the base medical facility to have his blood drawn. Appellant physically resisted the initial attempt to draw his blood; during the struggle, he licked the exposed arm of one of the security forces members who was attempting to restrain him. Appellant eventually submitted to the blood test. According to Dr. ES, the forensic toxicologist who testified at trial, subsequent analysis found Appellant's blood alcohol content at that time was 0.098 "gram percent."[9] By extrapolation, Dr. ES estimated that Appellant's peak blood alcohol concentration earlier on the night of 6 June 2020 might have been approximately 0.143 gram percent.

After Appellant's apprehension, security forces recovered a loaded, black .40 caliber handgun from Appellant's vehicle.

The following afternoon, Appellant texted an apology to TSgt DC stating that "he understood if [they] didn't want him to come around." TSgt DC responded to the effect that he just wanted to make sure **[*11]** Appellant was "okay." Appellant came to TSgt DC's house and sat with him in the driveway that afternoon. Appellant told TSgt DC, *inter alia*, that Appellant put up a big fight when security forces attempted to arrest him and "it took a lot of cops to end up getting his hands." Appellant did not mention a knife or gun. That same day Appellant also sent a non-specific apology to CC by text message.

Appellant subsequently agreed to speak to agents of the Air Force Office of Special Investigations (AFOSI) with his defense counsel present; the Government introduced a videorecording of this interview at trial. Appellant professed not to remember many of the events of the night of 6 June 2020. However, Appellant admitted to the agents he had made the cut on his torso himself and lied to TSgt DC about being attacked. Appellant said he made up the story because he did not want others to know he cut himself. In addition, he described leaving TSgt DC's barbecue to go into his house, where he "grabbed" his "normal carry" gun, which he put behind the seat of his truck. Appellant told the agents that when he was not carrying it, he normally left that particular gun, a black .40 caliber pistol, unloaded **[*12]** on a table in his house. Appellant told the agents that after he entered his house, he turned around and discovered CC behind him. According to Appellant, CC tried to "stop" Appellant, and Appellant told CC to get out of his way, or words to that effect. Appellant said he could not remember if he was already holding the pistol when he saw CC, and he did not say anything about holding either a knife or a gun toward CC.

II. Discussion

A. Legal and Factual Sufficiency

1. Law

We review issues of legal and factual sufficiency de novo. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)* (citation omitted). "Our assessment of legal and factual sufficiency is limited to the evidence produced at trial." *United States v. Rodela, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021)* (citation omitted), *rev. denied*, *82 M.J. 312 (C.A.A.F. 2022)*.

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[8] Because of Appellant's resistance, the security forces members had to chain two pairs of handcuffs together because they could not get his wrists close enough together for one pair.

[9] We understand "gram percent" to be a reference to the measurement of grams of alcohol per 100 milliliters of blood.

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson, 77 M.J. 294, 297-98 (C.A.A.F. 2018)* (citation omitted). "[T]he term 'reasonable doubt' does not mean that the evidence must be free from any conflict . . . ." *United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019)* (citation omitted). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." **[*13]** *United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001)* (citations omitted). Thus, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *King, 78 M.J. at 221* (alteration in original) (citation omitted).

"The test for factual sufficiency is 'whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt.'" *Rodela, 82 M.J. at 525* (second alteration in original) (quoting *United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)*). "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 the evidence constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017)* (alteration in original) (quoting *Washington, 57 M.J. at 399*), *aff'd*, *77 M.J. 289 (C.A.A.F. 2018)*.

The elements of the offense of assault with a dangerous weapon under *Article 128, UCMJ*, include: that the accused *offered to do bodily harm* to a certain person; that the offer was made with the intent to do bodily harm; and that the accused did so with a dangerous weapon. *10 U.S.C. § 928(b)(1)*; *see Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 77.b.(4)(a).

The elements of simple assault under *Article 128, UCMJ*, include: **[*14]** that the accused *attempted to do or offered to do bodily harm* to a certain person; that the attempt or offer was done unlawfully; and that the attempt or offer was done with force or violence. *10 U.S.C. § 928(a)(1)* and *(2)*; *see MCM,* pt. IV, ¶ 77.b.(1).

The Manual explains the difference between "attempt-type" assault and "offer-type" assault:

> An attempt-type assault requires a specific intent to inflict bodily harm, and an overt act—that is, an act that amounts to more than mere preparation and apparently tends to effect the intended bodily harm. An attempt-type assault may be committed even though the victim had no knowledge of the incident at the time.
>
> [ ] An offer-type assault is an unlawful demonstration of violence, either by an intentional or by a culpably negligent act or omission, which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm. Specific intent to inflict bodily harm is not required.

MCM, pt. IV, ¶ 77.c.(2)(b)(i) and *(ii)*.

An accused may be found guilty of a lesser included offense of the offense charged. *Article 79(a), UCMJ*, *10 U.S.C. § 879(a)*. "Whether one offense is a lesser included offense of another offense is a question of law." *United States v. Gonzales, 78 M.J. 480, 483 (C.A.A.F. 2019)* (citation omitted). An offense is a lesser included offense **[*15]** when it is "necessarily included in the offense charged." *Article 79(b)(1), UCMJ*, *10 U.S.C. § 879(b)(1)*. The United States Court of Appeals for the Armed Forces has explained:

> The "elements test" determines whether an offense is "necessarily included in the offense charged" under *Article 79, UCMJ*. We have applied the elements test in two ways. The first way is by comparing the statutory definitions of the two offenses. An offense is a lesser included offense of the charged offense if each of its elements is necessarily also an element of the charged offense. The second way is by examining the specification of the charged offense. An offense can also be a lesser included offense of the charged offense if the specification of the charged offense is drafted in such a manner that it alleges facts that necessarily satisfy all the elements of each offense.

United States v. Armstrong, 77 M.J. 465, 469-70 (C.A.A.F. 2018) (citations omitted).

2. Analysis

Appellant challenges the legal and factual sufficiency of his convictions for Specifications 2, 3, and 4 under Charge I. We address each specification in turn, beginning with the first Appellant addresses, Specification 4.

a. Charge I, Specification 4 (Simple Assault Lesser Included Offense)

Specification 4 of Charge I alleged Appellant: "did, at or near Cannon [AFB], **[*16]** New Mexico, on or about 6 June 2020, with the intent to inflict bodily harm, commit an assault upon [GM] . . . by attempting to stab him with a dangerous weapon to wit: a knife."

The military judge announced the following finding as to Specification 4 of Charge I: "Not Guilty of the charged offense of assault with a dangerous weapon, but Guilty of the lesser included offense of simple assault."

Appellant contends the simple assault of which the military judge convicted him was not a proper lesser included offense of the charged aggravated assault under *Article 128, UCMJ*, and the conviction must be set aside. We disagree.

Simple assault in violation of *Article 128, UCMJ*, may be charged under the theory that the accused either "attempted" to do bodily harm to the victim or "offered" to do bodily harm to the victim. *MCM*, pt. IV, ¶ 77.b.(1). As Appellant notes, in contrast, the elements of the current version of *Article 128, UCMJ*, as articulated in the Manual provide that an aggravated assault with a dangerous weapon not actually inflicting bodily harm requires an "offer" to do bodily harm with the weapon; there is no provision for an attempt-type aggravated assault with a dangerous weapon. *MCM*, pt. IV, ¶ 77.b.(4)(a).[10]

As the Manual explains, attempt-type assaults and offer-type assaults are not mutually exclusive. For example, if a perpetrator swings at the victim attempting to strike him, and the victim sees the swing and is thereby put in apprehension of being struck, the perpetrator may be guilty of both an attempt-type simple assault and an offer-type simple assault. *See* *MCM, pt. IV, ¶ 77.c.(2)(b)(iii)(C)*. Appellant's alleged attempt to stab GM could be both an attempt and an offer to do bodily harm, provided the attempt created in GM "a reasonable apprehension of receiving immediate bodily harm." *MCM, pt. IV, ¶ 77.c.(2)(b)(ii)*.

Nevertheless, Appellant contends Specification 4 cannot serve as a basis for his conviction for a lesser included offense of simple assault under an offer-type theory. We agree with him on this point. The evidence indicates GM was not aware of Appellant's attempt to stab him with the knife at the time it occurred. Although he heard SrA AA call out "knife," GM did not see the knife or Appellant's attempt to stab him, was unaware of the attempt at the time, and therefore was not put in reasonable apprehension of immediate bodily harm by the **[*18]** attempt. Although GM may have learned of Appellant's attempt later, he would not have been put in reasonable apprehension of immediate bodily harm of being stabbed at that point because Appellant had been disarmed and GM was no longer in danger. Moreover, although Appellant's action may have caused SrA AA apprehension, SrA AA was not the named victim, nor was he put in apprehension that Appellant's attempt to stab GM would cause SrA AA bodily harm.

However, we conclude the military judge *could* properly find Appellant guilty of simple assault on an attempt-type theory. Appellant is correct that the elements of aggravated assault with a dangerous weapon under *Article 128, UCMJ*, includes only offer-type assault. However, "[a]n offense can also be a lesser included offense of the charged offense if the specification of the charged offense is drafted in such a manner that it alleges facts that necessarily satisfy all the elements of each offense." *Armstrong, 77 M.J. at 470* (citations omitted); ***see also*** *United States v.*

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[10] As Appellant notes, prior versions of the Manual provided for both attempt-type and offer-type aggravated assault with a dangerous weapon. *See, e.g., Manual for* ***[*17]*** *Courts-Martial, United States* (2016 ed.), pt. IV, ¶ 54.b.(4).

Arriaga, 70 M.J. 51, 55 (C.A.A.F. 2011) (holding that although the elements of housebreaking are not necessarily included in the elements of burglary, *as charged* the specification included all the elements of housebreaking *and* burglary). Moreover, "[a] specification is **[*19]** sufficient if it alleges every element of the charged offense expressly or by necessary implication." Rule for Courts-Martial (R.C.M.) 307(c)(3). In this case, Specification 4 alleged Appellant "commit[ted] an assault" on GM by "attempting to stab" him with a knife "with the intent to inflict bodily harm." This specification thus alleged expressly or by necessary implication every element of an attempt-type simple assault: that Appellant attempted to do bodily harm to GM; that the attempt was done unlawfully; and that the attempt was done with force or violence.

Because Specification 4 of Charge I thus incorporated both aggravated assault with a dangerous weapon and simple attempt-type assault, Appellant was on notice to defend against both the greater and lesser offenses. He knew the Government intended to prove he attempted to stab GM with a knife with the intent to inflict bodily harm. Moreover, the military judge found Appellant guilty of a lesser-included offense without modification of the specification *as charged*. Accordingly, we are not persuaded by Appellant's arguments that he lacked adequate due process notice that he might be convicted of such a lesser included offense. *See United States v. Riley, 50 M.J. 410, 415 (C.A.A.F. 1999)* ("An appellate court may not affirm an **[*20]** included offense on 'a theory not presented to the' trier of fact." (citation omitted)).

Relying on *United States v. Walters, 58 M.J. 391 (C.A.A.F. 2003)*, Appellant further contends that our *Article 66, UCMJ, 10 U.S.C. § 866*, review is precluded because it is "impossible for this Court to determine on which theory of simple assault Appellant was found guilty and which he was acquitted." However, this situation does not raise the fatal ambiguity at issue in *Walters*, which specifically addressed the situation in which a finder of fact excepts "on divers occasions" language from a specification without identifying the single occasion of which they found the accused guilty. *Id. at 396-97*. The military judge made no such exception from Specification 4 of Charge I, nor did the specification even allege "on divers occasions." Moreover, in general, "[a] factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence supports at least one of the means beyond a reasonable doubt." *United States v. Brown, 65 M.J. 356, 359 (C.A.A.F. 2007)* (citations omitted). In Appellant's case the Defense made no request for special findings, and the evidence supports Appellant's conviction for simple assault against GM beyond a reasonable doubt.

Having given full consideration to Appellant's arguments, **[*21]** and drawing every reasonable inference from the evidence in favor of the Government, we conclude the evidence was legally sufficient to support Appellant's conviction for simple assault as a lesser included offense under Specification 4 of Charge I. Additionally, having weighed the evidence in the record of trial, and having made allowances for the fact that the trial judge personally observed the witnesses and we did not, we also find the evidence factually sufficient.

b. Charge I, Specification 2 (Simple Assault Lesser Included Offense)

Specification 2 of Charge I alleged Appellant: "did, at or near Cannon [AFB], New Mexico, on or about 6 June 2020, with the intent to inflict bodily harm, commit an assault upon [CC] . . . by pointing at him with a dangerous weapon to wit: a knife."

Appellant contends the military judge's finding of guilty of a lesser included offense of simple assault based on Specification 2 of Charge I is legally and factually insufficient. He contends an attempt-type simple assault was unavailable as a lesser included offense for reasons similar to his argument with respect to Specification 4 of Charge I, addressed above—that is, the elements of the charged aggravated **[*22]** assault with a dangerous weapon under *Article 128, UCMJ*, only permit an offer-type theory. With respect to a lesser included offer-type simple assault, Appellant contends the evidence does not support a finding that CC felt reasonable apprehension of

bodily harm when Appellant held a knife toward him. We find the evidence is sufficient to support Appellant's conviction on an offer-type theory of simple assault.[11]

On direct examination, CC testified that after he followed Appellant into his house, Appellant held a knife "up to [his] throat, maybe just a little distance away." On cross-examination, CC estimated the blade was approximately five or six inches from his neck. CC further testified on direct examination, "At that point [CC] threw [his] hands up between [Appellant] with the blade and [CC's] throat, trying to give [himself] more of a cushion." CC testified that "while [Appellant] was standing there with the knife to [CC's] throat," Appellant told him that he was leaving, they would not see him again, and "'don't call the cops or else,'" at which point he held the handgun to CC's "stomach." Appellant testified that at that point he felt "a little fear" and "suddenly betrayed."

Appellant cites the **[*23]** following cross-examination from CC's testimony:

> Q. Now, when he had that knife out, based on all the factors you observed, everything you knew about him before and what you knew about him from that night, you didn't think he was actually going to use that against you?
> A. No, Sir.
> Q. I'm sorry?
> A. No, Sir.
> Q. You were not concerned that he was going to inflict bodily harm on you?
> A. I didn't believe he would.
> Q. And he was at a distance where you had ample time and leverage to react without getting injured, or at least that was your perception at that time?
> A. Yes, Sir.
> Q. And that contributed to you not being afraid?
> A. Yes, Sir.
> Q. And actually believing he wasn't going to do anything?
> A. Yes, Sir.

On redirect examination, CC testified that although he was not "afraid" as Appellant was holding the knife near his throat, that changed when Appellant brought out the gun.

Despite CC's testimony that he did not believe Appellant would use the knife to inflict bodily harm on him, we find a rational factfinder could conclude beyond a reasonable doubt CC did feel reasonable apprehension. In general, brandishing a knife—even at a distance of several meters, much less six inches—may be sufficient to support **[*24]** a conviction for an offer-type assault. *See* *United States v. Smith, 4 C.M.A. 41, 15 C.M.R. 41, 43-45 (C.M.A. 1954)*; *see also* *United States v. Salazar, No. 202000134, 2021 CCA LEXIS 495, *5 (N.M. Ct. Crim. App. 27 Sep. 2021)* (per curiam) (unpub. op.) (explaining the "brazen act" of "holding a knife to another's throat" is a "clear way[ ] of creating reasonable apprehension of immediate bodily harm"). In this case, CC's immediate reaction to Appellant holding the knife toward his neck—throwing his hands up between the blade and his neck—demonstrates he felt some degree of apprehension. Under the circumstances, including the fact that CC had previously seen Appellant brandish a knife at the unarmed SrA KC, and Appellant's generally erratic behavior at the barbecue—such apprehension was reasonable. CC's testimony on cross-examination that he did not believe Appellant would actually use the knife on him would not prevent a rational trier of fact from finding Appellant had caused apprehension. The existence of reasonable apprehension does not rely on the victim's belief in any particular degree of probability that bodily harm would actually result. Even if CC believed it was unlikely Appellant would use the knife on him, the military judge could reasonably focus on CC's immediate reaction and find CC felt, at least initially, some reasonable apprehension. **[*25]**

As with Specification 4 of Charge I, Appellant cites *Walters* to contend that we cannot perform our *Article 66, UCMJ*, factual sufficiency review of Specification 2 of Charge I because we cannot tell whether the military judge convicted Appellant of simple assault under an attempt-type or an offer-type theory. As with Specification 4, we are not

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[11] Because we find Appellant's conviction legally and factually sufficient under an offer-type theory of simple assault, we find it unnecessary to analyze whether the conviction would be sufficient under an attempt-type theory of simple assault.

persuaded. This is not a situation where the military judge created a fatal ambiguity by excepting "on divers occasions" language from the specification, and the evidence supports the military judge could find at least one theory of guilt beyond a reasonable doubt. *See* Brown, 65 M.J. at 359 (citations omitted).

Having given full consideration to Appellant's arguments, and drawing every reasonable inference from the evidence of record in favor of the Government, we conclude the evidence was legally sufficient to support Appellant's conviction for simple assault as a lesser included offense under Specification 2 of Charge I. Additionally, having weighed the evidence in the record of trial, and having made allowances for the fact that the trial judge personally observed the witnesses and we did not, we also find the evidence factually sufficient.

c. Charge I, Specification 3 (Aggravated Assault) [*26]

Specification 3 of Charge I alleged Appellant: "did, at or near Cannon [AFB], New Mexico, on or about 6 June 2020, with the intent to inflict bodily harm, commit an assault upon [CC] . . . by pointing at him and touching him with a dangerous weapon to wit: a loaded firearm."

Appellant contends, *inter alia*, the Government failed to prove beyond a reasonable doubt that the gun Appellant pointed at CC and touched him with was loaded. The Government's theory, at trial and on appeal, is that the loaded black .40 caliber handgun recovered from Appellant's truck was the same gun Appellant pointed at CC. We acknowledge that by drawing every reasonable inference in favor of the Government, a rational factfinder could make such a finding beyond a reasonable doubt, and therefore the military judge's finding is legally sufficient. However, we are not ourselves convinced beyond reasonable doubt that the Government proved Appellant used a loaded firearm. Therefore, we must set aside Appellant's conviction for aggravated assault as a matter of factual sufficiency review.

Based on the evidence, we perceive two reasonable possibilities that the gun Appellant aimed at CC was not loaded. First, CC specifically **[*27]** described the pistol as "tan" in color. The handgun recovered from Appellant's truck was described as all black. CC testified he knew Appellant owned multiple weapons. No firearm or image of a firearm belonging to Appellant—black, tan, or otherwise—was actually introduced at trial. Based on the evidence, it is possible Appellant used one pistol to threaten CC and decided to take a different pistol with him in his truck. It is true that Appellant did not tell the AFOSI agents during his interview that he remembered handling two different firearms inside his house. However, on appeal Appellant aptly notes he apparently had the opportunity to also arm himself in the house with a different and much larger knife than the pocketknife he brandished at SrA KC and CC, as TSgt DC observed. Similarly, CC testified it was possible Appellant "put [the gun] away or stopped" before he went outside, because Appellant was behind CC and CC could not observe him. It is reasonable to conclude that if Appellant had the opportunity to pick up a different knife inside his house, and could have stopped and "put away" the gun he held without CC observing him, then Appellant could have put down one gun and **[*28]** picked up another. If CC's testimony is correct that Appellant was holding a "tan" handgun, not the black one recovered later, there is no evidence in the record to prove the "tan" one was loaded.

Additionally, assuming for our analysis that CC was mistaken about the color, and that the pistol CC saw was the same black one security forces found in the truck, we are not persuaded the Government proved beyond reasonable doubt it was loaded at the time he pointed it at CC. Appellant told the AFOSI agents he left it unloaded on a table in his house when he was not carrying it. This assertion, although arguably self-serving, was not contradicted by any evidence the Government introduced. Appellant told the agents he could not remember whether he confronted CC before or after he picked up the pistol. CC could not tell if the pistol was loaded or not. Although security forces later found it loaded, Appellant might have loaded it in his house after he told CC to turn around and leave, or at some point while he was in his truck.

"A weapon is dangerous when used in a manner capable of inflicting death or grievous bodily harm. What constitutes a dangerous weapon depends not on the nature of the **[*29]** object itself but on its capacity, given the manner of its use, to kill or inflict grievous bodily harm." MCM, pt. IV, ¶ 77.c.(5)(a)(iii). The evidence does not indicate Appellant used or threatened to use the gun in a manner that would have constituted a dangerous weapon

if it was unloaded, for example as a club. Accordingly, if the gun was not loaded, then Appellant would not be guilty of aggravated assault by pointing it at CC and touching him with "a dangerous weapon, to wit: a loaded firearm," as the military judge found. The two reasonable alternative possibilities presented by the evidence as described above lead us to agree with Appellant that his conviction for the aggravated assault alleged in Specification 3 of Charge I must be set aside.

However, we find the evidence both legally and factually sufficient to support Appellant's conviction for simple assault with a firearm as a lesser included offense under Specification 2 of Charge I, by excepting the words "dangerous" and "loaded." *See* *Riley, 50 M.J. at 415* ("Appellate courts have authority to set aside a finding of guilty and affirm only a finding of a lesser-included offense"); *Article 59(b), UCMJ*, *10 U.S.C. § 859(b)*. The Government introduced sufficient evidence to prove beyond **[*30]** a reasonable doubt Appellant offered to do bodily harm to CC, that he did so unlawfully, and that he did so with force or violence by using a firearm. Moreover, we find Specification 3 of Charge I alleged each of these elements either expressly or by necessary implication.

Appellant's remaining arguments regarding Specification 3 of Charge I do not impede us from affirming Appellant's conviction of the lesser included simple assault. Appellant contends he was too intoxicated to form the specific intent to inflict bodily harm, one of the elements of aggravated assault with a dangerous weapon under *Article 128, UCMJ*. However, the lesser included offense of a simple offer-type assault does not include this specific intent element. Moreover, the evidence that Appellant was able to walk, enter and exit buildings, handle weapons, converse with those around him, and operate a motor vehicle simply belies the contention that he was too intoxicated to form such specific intent. Appellant also contends the evidence does not prove CC believed he was at risk of immediate bodily harm when Appellant pointed the gun at him. We disagree. CC testified that he did feel fear and became afraid when Appellant pointed the **[*31]** gun at him. In addition, TSgt DC described CC as appearing "shaken up" and "afraid" immediately afterward, when CC said Appellant had pulled a gun on him. Again, so long as Appellant's offer of violence created reasonable apprehension in CC of imminent bodily harm, the Government did not need to prove CC believed in any specific probability that bodily harm would actually occur.

Accordingly, we set aside Appellant's conviction for assault with a dangerous weapon in violation of *Article 128, UCMJ*. Further, we except the words "dangerous" and "loaded" from Specification 3 of Charge I, find Appellant not guilty of the excepted words, and find him guilty of the lesser included offense of simple assault in violation of *Article 128, UCMJ*, and guilty of the remaining words in the specification.

d. Sentence Reassessment

Having modified the findings, we have considered whether we may reliably reassess Appellant's sentence in light of the factors identified in *United States v. Winckelmann, 73 M.J. 11, 15-16 (C.A.A.F. 2013)*. We conclude that we can. The modification results in a significant change to the penalty landscape and Appellant's exposure, but not necessarily a "dramatic" one. *See* *id. at 15*. Appellant's conviction for simple assault with a firearm not proven to be loaded rather than aggravated **[*32]** assault with a dangerous weapon reduces the maximum imposable term of confinement for the combined convictions from 11 years and 3 months to 6 years and 3 months; the remaining elements of the maximum punishment are unchanged. To be sure, Appellant's aggravated assault conviction carried by far the highest maximum term of confinement—eight years—and the military judge imposed a partially concurrent, partially consecutive term of 12 months of confinement for that offense alone. However, the lesser included offense of simple assault when committed with an unloaded firearm is punishable by three years in confinement and a dishonorable discharge, and remains the most serious of Appellant's offenses in terms of maximum punishment. *See MCM*, pt. IV, ¶ 77.d.(1)(b).

We find the remaining *Winckelmann* factors also favor reassessment. Appellant was sentenced by a military judge alone; the affirmed lesser included offense and remaining convictions very much "capture the gravamen of [the] criminal conduct included within the original offenses;" and the remaining offenses are of a type with which the judges of this court have "experience and familiarity." *Winckelmann, 73 M.J. at 16*. Furthermore, reassessment is greatly simplified by the fact the military judge **[*33]** imposed specific terms of confinement for each offense, each

concurrent or consecutive with the terms of confinement for the other offenses. Accordingly, we find sentence reassessment is appropriate.

The next question is what sentence the military judge would have imposed had he convicted Appellant of the lesser included simple assault with a firearm under Specification 3 of Charge I, rather than the charged offense. *See* id. at 15 (holding Courts of Criminal Appeals may reassess a sentence if it "can determine to its satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity") (quoting United States v. Sales, 22 M.J. 305, 308 (C.M.A. 1986)). Taking all factors into consideration, including *inter alia* the relationship of the affirmed lesser included offense to Appellant's other offenses, and that the essential nature of Appellant's misconduct remains unchanged, we conclude that the military judge would have imposed a sentence of at least four months in confinement for Specification 3 of Charge I, to be served concurrently with Specification 2 of Charge I (simple assault against CC by pointing at him with a knife) and consecutive with all other specifications. We further conclude our modifications to **[*34]** the findings undermine the language of the adjudged reprimand. Accordingly, we reassess the sentence to consist of a bad-conduct discharge, confinement for a total of seven months, and reduction to the grade of E-1.

B. Trial Counsel's Argument

1. Law

"We review prosecutorial misconduct and improper argument de novo and where . . . no objection is made, we review for plain error." United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019) (citing United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018)). Under plain error review, the appellant bears the burden to demonstrate error that is clear or obvious and results in material prejudice to his substantial rights. United States v. Knapp, 73 M.J. 33, 36 (C.A.A.F. 2014) (citation omitted). "When the issue of plain error involves a judge-alone trial, an appellant faces a particularly high hurdle." United States v. Robbins, 52 M.J. 455, 457 (C.A.A.F. 2000). A military judge is "presumed to know the law and to follow it absent clear evidence to the contrary," and to "distinguish between proper and improper" arguments. United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007) (citation omitted). Therefore, appellate relief for "plain error before a military judge sitting alone is rare indeed." Robbins, 52 M.J. at 457 (quoting United States v. Raya, 45 M.J. 251, 253 (C.A.A.F. 1996)).

"Improper argument is one facet of prosecutorial misconduct." United States v. Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017) (citation omitted). "Prosecutorial misconduct occurs when trial counsel 'overstep[s] the bounds of that propriety and fairness which should characterize **[*35]** the conduct of such an officer in the prosecution of a criminal offense.'" United States v. Hornback, 73 M.J. 155, 159 (C.A.A.F. 2014) (alteration in original) (quoting United States v. Fletcher, 62 M.J. 175, 178 (C.A.A.F. 2005)). Such conduct "can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, [for example] a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." Andrews, 77 M.J. at 402 (quoting United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996)). "[T]rial counsel may 'argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence.'" United States v. Halpin, 71 M.J. 477, 479 (C.A.A.F. 2013) (quoting United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000)). "A prosecutorial comment must be examined in light of its context within the entire court-martial." United States v. Carter, 61 M.J. 30, 33 (C.A.A.F. 2005) (citation omitted).

We assess prejudice from improper argument by considering whether the trial counsel's comments were so damaging that we cannot be confident the appellant was convicted on the basis of the evidence alone. *See* Halpin, 71 M.J. at 480; Fletcher, 62 M.J. at 184. In assessing prejudice from improper argument, we balance three factors: (1) the severity of the misconduct; (2) the measures, if any, adopted to cure the misconduct; and (3) the weight of the evidence supporting the conviction or sentence, as applicable. *See* Halpin, 71 M.J. at 480; Fletcher, 62 M.J. at 184. "[T]he lack of a defense objection is 'some measure of the minimal impact of a prosecutor's improper comment.'" **[*36]** United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001) (quoting United States v. Carpenter, 51 M.J. 393, 397 (C.A.A.F. 1999)).

2. Analysis

Appellant contends trial counsel's closing and rebuttal arguments were improper in three specific respects: mischaracterizing CC's testimony; expressing trial counsel's personal opinions; and mischaracterizing the law. Trial defense counsel did not object to any of the passages Appellant cites on appeal, so we review for plain error. We address each contention in turn.

a. Characterization of CC's Testimony

Trial counsel's closing argument included the following:

> How do we know this gun was loaded? And how do we know it was the gun that was found in the car? Well, Your Honor, when you look at the combination of the evidence in this case, when you look at the fact that [CC's] testimony says a knife was to his face and a gun was to his belly, and *he looked down and he thought he was dead*.

(Emphasis added).

Appellant asserts CC's testimony "never came close" to trial counsel's contention that CC "thought he was dead." The Government responds that trial counsel was merely "forcefully assert[ing]" a reasonable inference from CC's testimony. *See* United States v. Kropf, 39 M.J. 107, 108 (C.M.A. 1994) (citations omitted) (explaining trial counsel may make "vigorous arguments . . . based on a fair reading of the record"). We agree **[*37]** with Appellant that CC's testimony does not support a reasonable inference that CC "thought he was dead." CC testified that he felt "a little fear" and "betrayed" when Appellant put the pistol against him, but he did not believe Appellant was going to shoot him. Even applying the plain error standard of a "clear" or "obvious" error, CC's testimony simply does not support what trial counsel said.

However, we find no material prejudice to Appellant's substantial rights, particularly in view of the slight nature of the error. This comment was a fleeting exaggeration in a lengthy closing argument, and it was not particularly relevant or impactful regarding the point trial counsel was attempting to make. In addition, Appellant was tried by a military judge alone. We presume the military judge filtered improper argument and based his findings on the evidence, absent indications to the contrary. Nothing in the record suggests the military judge failed to do so, or that Appellant was materially prejudiced by the error.

b. Expressing Personal Opinions

During his rebuttal argument, trial counsel stated the following:

> [I]t's the combination of the knife, and then the gun. And the knife is still in **[*38]** front of [CC's] face. And that [Appellant] essentially responded to [CC] in that moment. And [Appellant] saw that [CC] wasn't afraid. So what does he do, he put the gun to his belly, to make sure that he was afraid. *If that's not specific intent, I don't know what is, Your Honor*.
>
> . . . .
>
> What do we know, what did you hear the testimony was. [CC] was told to turn around and walk out with his hands up. *If that's not specific intent to -- to use that object [the gun] for a specific purpose, I don't know what it is*, but there is no break here, Your Honor. . . .
>
> . . . .
>
> Your Honor, these Security Forces members put their lives on the line, put their bodies in that situation where they knew he had a weapon. And now [GM] was the one who took that chance in that moment, and as he was pulling [Appellant] to the ground he[ ] hears knife, knife, knife. Your Honor, *if that's not a reasonable apprehension I don't know what is. And if [Appellant's] conduct isn't criminal, I don't know what it is*.

(Emphasis added).

Appellant contends trial counsel improperly relied on "his own personal judgment" in attempting "to resolve the most contentious points of litigation." *See* Sewell, 76 M.J. at 18 (stating trial counsel "may not . **[*39]** . . inject his personal opinion into the [ ] deliberations") (citation omitted). Appellant points to trial counsel's use of the expression that he "'did not know' what else could qualify to meet the respective required elements *but* that evidence the Government submitted." Appellant cites *United States v. Horn*, explaining that the injection of trial counsel's personal opinions risks introducing "a form of unsworn, unchecked testimony [that] tend[s] to exploit the influence of his office and undermine the objective detachment which should separate a lawyer from the cause for which he argues." 9 M.J. 429, 430 (C.M.A. 1980) (per curiam); *see also* Fletcher, 62 M.J. at 179-80 (quoting Horn).

Assuming without deciding that trial counsel's reference to his own knowledge or lack thereof—albeit in a colloquial expression—was a clear error, Appellant has not demonstrated material prejudice. As above, we find the severity of the error to be slight; and as above, the fact this was a judge-alone trial is significant. The military judge is presumed to filter out improper arguments and to base his findings on the evidence, absent clear evidence to the contrary. We find nothing in the record suggests the contrary in this case. To begin with, potentially unlike **[*40]** court members, we find it highly improbable the military judge was impressed by trial counsel's personal authority or opinions. Furthermore, the first two passages Appellant cites relate to trial counsel's argument that CC's testimony demonstrates Appellant had the specific intent to cause apprehension of bodily harm. If the military judge believed CC's testimony that Appellant pointed a gun at CC and held it against him, as the military judge evidently found, it is no great inferential leap to conclude Appellant did so with the intent to cause CC to fear imminent bodily harm. As to the third passage relating to the charged aggravated assault against GM, as described above in relation to legal and factual sufficiency, the evidence supports the military judge having convicted Appellant of an attempt-type lesser included offense of simple assault. In contrast, an offer-type assault theory—such as the theory trial counsel argued here—fails for the reasons described above. Accordingly, we may presume the military judge did not rely on trial counsel's argument in this respect, and Appellant was not prejudiced by it.

c. Characterizing the Law

Trial counsel's closing argument included the following **[*41]** explanation:

> But to be clear, Your Honor, about what the -- if you were giving the member[s] an instruction, what that would require. "An offer to do bodily harm is an unlawful demonstration of violence by an intentional act or omission which creates in the mind of another, or a reasonable apprehension that proceeded [sic] immediate regard for harm." Your Honor, *the other is [SrA AA] watching the accused attempt to stab [GM].*

(Emphasis added).

Appellant contends trial counsel misstated the law in the passage quoted above. We agree that trial counsel's argument was incorrect as a matter of law. As discussed above in our analysis of legal and factual sufficiency, the evidence is insufficient to support Appellant's conviction of an assault against GM on an offer-type theory, because GM was not aware at the time of Appellant's attempt to stab him and therefore did not apprehend bodily harm from the demonstration of violence. *See* MCM, pt. IV, ¶ 77.c.(2)(b)(ii). Trial counsel's argument that Appellant created apprehension in SrA AA fails because, *inter alia*, SrA AA was not the named victim of the assault, and because Appellant's demonstration of violence did not cause SrA AA to reasonably apprehend **[*42]** imminent bodily harm to himself. Trial counsel's argument that the military judge could properly find Appellant guilty on such a theory was incorrect. Although trial counsel was arguably making a good faith attempt to explain how the evidence supported conviction, and not every weak or deficient argument amounts to prosecutorial misconduct, trial counsel are of course not permitted to misrepresent legal principles. *Cf.* United States v. Bodoh, 78 M.J. 231, 237 (C.A.A.F. 2019) ("When examining witnesses, trial counsel . . . cannot misstate legal principles.") (citations omitted). Accordingly, for purposes of our analysis, we will assume without holding that trial counsel's argument was clearly and obviously erroneous.

However, once again we find Appellant cannot demonstrate material prejudice. Again, the military judge is presumed to know the law, to disregard improper arguments, and to base his findings on the evidence, absent a clear indication to the contrary. Once again, the record does not indicate the contrary. The military judge found Appellant not guilty of the charged aggravated assault with a dangerous weapon which, as discussed above, had to be based on an offer-type theory. Instead, the military judge found Appellant guilty of **[*43]** a lesser included offense of simple assault which, under an attempt-type theory, was both legally and factually sufficient. Accordingly, we presume the military judge disregarded trial counsel's flawed argument, and therefore Appellant suffered no material prejudice.

C. Convening Authority's Denial of Deferment Request

On 16 May 2021, ten days after Appellant was sentenced, one of Appellant's trial defense counsel submitted a memorandum for the convening authority's consideration pursuant to R.C.M. 1106. The memorandum primarily consisted of a brief summary of the findings and sentence, a description of two defense motions the military judge denied, and what was equivalent to a two-page unsworn statement by Appellant to the convening authority through counsel. At the conclusion of the memorandum, trial defense counsel requested the convening authority "grant any and all relief in accordance with the Rules for Courts-Martial, the Uniform Code of Military Justice (UCMJ), and all applicable case law."

On 28 June 2021, the convening authority issued a memorandum in which he took no action on the findings or sentence. The convening authority interpreted Appellant's 16 May 2021 request for "any and all **[*44]** relief" to include *inter alia* requests that he defer Appellant's adjudged confinement, adjudged reduction in grade, and automatic forfeiture of pay and allowances until entry of judgment. *See* Articles 57(b)(1) and 58b, UCMJ, 10 U.S.C. §§ 857(b)(1), 858b. The convening authority's memorandum stated that each of these three requests was "hereby denied" without stating a reason for the denial. The convening authority did waive automatic forfeiture of pay and allowances for six months for the benefit of Appellant's dependent child. Appellant received notice of the convening authority's decision on 29 June 2021; trial defense counsel received notice on 5 July 2021. The record discloses no indication the Defense objected or moved for correction of the convening authority's denial of the deferment request.

We review a convening authority's denial of a deferment request for an abuse of discretion. *United States v. Sloan, 35 M.J. 4, 6 (C.M.A. 1992)*, *overruled on other grounds by United States v. Dinger, 77 M.J. 447, 453 (C.A.A.F. 2018)*; R.C.M. 1103(d)(2). "When a convening authority acts on an [appellant]'s request for deferment of all or part of an adjudged sentence, the action must be in writing (with a copy provided to the [appellant]) and must include the reasons upon which the action is based." *Id. at 7* (footnote omitted); *see also* R.C.M. 1103 (providing procedures for deferment). **[*45]** "A motion to correct an error in the action of the convening authority shall be filed within five days after the party receives the convening authority's action." R.C.M. 1104(b)(2)(B).

Because Appellant did not object or move to correct an error in the convening authority's decision on action, we review the convening authority's decision on action for plain error. *See United States v. Ahern, 76 M.J. 194, 197 (C.A.A.F. 2017)* (citations omitted) (noting appellate courts review forfeited issues for plain error). Under the longstanding precedent of *Sloan*, the convening authority's failure to state his reasons for denying the requested deferments was an error. *See 35 M.J. at 7*. For purposes of our analysis, we will assume without holding the error was clear or obvious. However, under the circumstances of this case, we find no material prejudice to Appellant. Appellant bore "the burden of showing that the interests of [himself] and the community in deferral outweigh[ed] the community's interests in imposition of the punishment on its effective date." R.C.M. 1103(d)(2). However, Appellant only impliedly requested deferment of his punishments, and offered no specific justification for any deferment. We further note Appellant not only forfeited the issue at the time, but he has not alleged on appeal **[*46]** prejudicial error by the convening authority. In the absence of any indication the convening authority entertained an improper rationale for denying the deferments, we find Appellant's material rights were not substantially prejudiced by the convening authority's failure to state his reasons.

III. Conclusion

The finding of guilty as to assault with a dangerous weapon in Specification 3 of Charge I is **SET ASIDE**. The words "dangerous" and "loaded" are excepted from Specification 3 of Charge I and the excepted words are **SET ASIDE**; as to the remaining language of Specification 3 of Charge I, the lesser included offense of simple assault is affirmed. We reassess the sentence to a bad-conduct discharge, confinement for seven months, and reduction to the grade of E-1. The findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no additional error materially prejudicial to the substantial rights of Appellant occurred. *Articles 59(a)* and *66(d), UCMJ*, *10 U.S.C. §§ 859(a)*, *866(d)*. The findings, as modified, and the sentence, as reassessed, are **AFFIRMED**.

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