# United States Navy–Marine Corps Court of Criminal Appeals

Before
DEERWESTER, STEWART, and HACKEL
Appellate Military Judges

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**UNITED STATES**
*Appellee*

**v.**

**Ethan J. HELEMS**
Hospitalman Apprentice (E-2), U.S. Navy
*Appellant*

**No. 202100278**

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Decided: 10 February 2023

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judges:
Derek D. Butler (arraignment)
Eric A. Catto (trial)

Sentence adjudged 17 June 2021 by a general court-martial convened at Joint Base Charleston, South Carolina, consisting of officer and enlisted members. Sentence in the Entry of Judgment: reduction to E-1, confinement for thirty months, and a bad-conduct discharge.[1]

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[1] The accused was credited with 135 days of judicially ordered confinement credit. In addition, on 23 July 2021, automatic forfeiture of all pay and allowances was deferred from the date that automatic forfeitures would otherwise become effective until

For Appellant:
*Captain Jasper W. Casey, USMC*

For Appellee:
*Captain Tyler W. Blair, USMC*
*Major Kerry E. Friedewald, USMC*

Senior Judge DEERWESTER delivered the opinion of the Court, in which Senior Judge STEWART and Judge HACKEL joined.

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**This opinion does not serve as binding precedent but may be cited as persuasive authority under NMCCA Rule of Appellate Procedure 30.2.**

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DEERWESTER, Senior Judge:

Appellant was convicted, contrary to his pleas, of one specification of false official statement, one specification of leaving the scene of an accident, one specification of reckless driving resulting in injury, one specification of negligent homicide, and one specification of involuntary manslaughter, in violation of Articles 107, 111, 113, 119, and 134, Uniform Code of Military Justice [UCMJ], for conduct arising from an episode of erratic and dangerous driving that occurred in the early morning hours of 1 January 2020 near Joint Base Charleston, South Carolina.[2] After the findings were announced, the military judge conditionally dismissed the negligent homicide (Article 134, UCMJ) upon the condition that the involuntary manslaughter charge (Article 119, UCMJ) survived appellate review.

Appellant asserts five assignments of error (AOEs): (1) does Charge II (Article 111, UCMJ – leaving the scene of an accident) fail to state an offense when it does not allege that Appellant's vehicle struck anyone, nor does it allege that anyone other than a passenger in Appellant's vehicle was injured; (2) is the evidence legally and factually insufficient to sustain Appellant's conviction to

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the date of the Entry of Judgement. Automatic forfeiture of all pay and allowances was waived thereafter for a period of 6 months to be paid to the Appellant's dependent spouse.

[2] 10 U.S.C. §§ 907, 911, 913, 919, 934.

Charge II, when there is no evidence that Appellant's vehicle struck anyone or that he injured anyone other than a passenger in his own vehicle; (3) did the military judge err by denying the defense motion to dismiss Charge II raised pursuant to Rule for Courts-Martial 917;(4) did the military judge fail to properly instruct the members on the elements and limitations of Charge II; and (5) is the evidence legally and factually insufficient to sustain Appellant's conviction to Charge III (Article 113, UCMJ – reckless driving resulting in personal injury) and Charge IV (Article 119, UCMJ – involuntary manslaughter) when the Government failed to prove that rapid acceleration was the proximate cause of the accident.[3] We find, and the Government concedes, merit in Appellant's first AOE. Because we grant relief in Appellant's first AOE, we find that Appellant's second, third and fourth AOEs are moot. We find no other prejudicial error and take action in our decretal paragraph.

## I. BACKGROUND

In the early morning hours of 1 January 2020, Appellant and eight other Sailors drove to a river bank near Joint Base Charleston, South Carolina, where Appellant consumed six to eight beers and volunteered to drive all eight Sailors in his truck. Due to the number of passengers, three Sailors rode in the uncovered bed of Appellant's pickup truck. As the truck was leaving the river bank that evening, Appellant yelled, "hold on boys," or words to that effect, and rapidly accelerated the truck, at times reaching a speed of over eighty miles per hour. As the truck approached a curve, Appellant applied the brakes and lost control. The vehicle left the road and collided with the adjacent trees at approximately thirty miles per hour. As a result, two Sailors were ejected from the truck's cab. One Sailor, HN Lima,[4] was knocked unconscious. Another Sailor, HN Charlie, suffered a brain injury that proved to be fatal. After the collision, several of the remaining Sailors, including Appellant, ran away once they realized a military patrol vehicle would arrive shortly to the accident scene. Appellant returned to his barracks room where he ate, showered, and attempted to sleep. Due to the remote location of the accident scene and the holiday, emergency medical response did not arrive for over 45 minutes. The

[3] This fifth AOE is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[4] All names in this opinion, other than those of Appellant, the judges, and appellate counsel, are pseudonyms.

responding patrol officers provided aid to HN Charlie, but the doctors at the hospital were unable to save HN Charlie's life.

At trial, the Government charged Appellant, *inter alia*, with a violation of Article 111, UCMJ, for leaving the scene of an accident. The Specification of Charge II alleged, in relevant part:

> In that [Appellant] … the driver of a vehicle at the time of an accident in which said vehicle was involved, and having knowledge of said accident … did…wrongfully leave the scene of the accident without providing assistance to Hospitalman [Charlie], U.S. Navy, who had been injured by said vehicle.[5]

At trial, the Defense challenged the sufficiency of the Government's evidence supporting Charge II under Rule for Courts-Martial [R.C.M.] 917. The Defense argued that based on this Court's prior decision in *United States v. Littleton*,[6] the Government had insufficient evidence to meet its burden to show either that there was personal injury to "someone other than the accused or a passenger in the vehicle," or that there was damage to "property other than the accused's own vehicle."[7] The Government argued at trial that *Littleton* only applied to the prior Article 134, UCMJ, offense at issue in *Littleton*. The Defense argued that, although *Littleton* interpreted the offense of fleeing the scene of an accident under Article 134, UCMJ, the current elements of the new leaving the scene of an accident offense under Article 111, UCMJ, is identical to the prior Article 134 version, minus the terminal element. In addition, the Defense argued that the "nature of offense" in the President's explanation section, which this Court relied upon in *Littleton*, is identical between the two offenses.

The military judge denied Appellant's R.C.M. 917 motion. The military judge found that the Government has "introduced some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every element of the offense charged."[8] The military judge relied upon the military judge's bench book for his legal findings:

> The [Benchbook] instruction does not cite [*Littleton*] when providing the additional language of accident in the definitions

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[5] The charge sheet, 16 December 2020.

[6] *United States v. Littleton*, 60 M.J. 753 (N-M. Ct. Crim. App. 2004).

[7] R. at 1321.

[8] R. at 1336-37.

> section, which leads the Court to the conclusion that it was not contemplating the restraints of [*Littleton*] when it included that language. . . The Court holds the ruling from [*Littleton*] does not apply to the post 1 January 2019 Article 111 language, and the 'accident includes those situations' language [from the Benchbook definitions] is intended to widen the kind of accidents covered rather than reduce the type of accidents covered by Article 111.[9]

Additional facts necessary to resolve Appellant's assignments of error are explained further, below.

## II. DISCUSSION

### A. The Specification of Charge II Fails to State an Offense

Whether a charge fails to state an offense is a question of law reviewed de novo.[10] If not raised at trial, a claim that a charge fails to state an offense is reviewed for plain error.[11] Under a plain error analysis, Appellant bears the burden to demonstrate that: (1) there was an error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused.[12] This Court reviews questions of statutory interpretation de novo.[13]

In the instant case, we agree, and the Government concedes, that Appellant has met his burden and that we can reassess the sentence.[14] However, a brief analysis of our holding is necessary in this case.

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[9] R. at 1337.

[10] *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006).

[11] *United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F. 2012).

[12] *United States v. Turnstall*, 72 M.J. 191, 193-94 (C.A.A.F. 2013).

[13] *United States v. Alkazahg*, 81 M.J. 764, 778 (N-M. Ct. Crim. App. 2021).

[14] Gov't Brief at 14-26.

(1) There was an Error

A specification sufficiently states an offense if it "alleges every element of the charged offense expressly or by necessary implication."[15] This rule encompasses the due process requirement to provide an accused with notice.[16] Article 111, UCMJ, is based on the prior offense under Article 134, UCMJ,[17] and took effect on 1 January 2019.

Article 111, UCMJ, itself criminalizes conduct when the accused:

> (1) who is the driver of a vehicle that is involved in an accident that results in personal injury or property damage; and
>
> (2) who wrongfully leaves the scene of the accident
>
> (A) without providing assistance to an injured person; or
>
> (B) without providing personal identification to others involved in the accident or to appropriate authorities.[18]

However, the President's "Elements" section corresponding to Article 111 clarifies that the Government must prove, in relevant part, that the accused "left the scene of the accident without (providing assistance to the victim who had been struck (and injured) by the said vehicle) or (providing identification)."[19] The "Explanation" section further states that the offense covers situations "where there is damage to property other than the driver's vehicle or injury to someone other than the driver or a passenger in the driver's vehicle."[20] This understanding is identical to the conclusion reached by this Court in *United States v. Littleton* when we interpreted the predecessor Article 134 offense. There we stated:

> This court need go no further than a plain reading of the language in the MCM … [t]hat language requires that there be injury to some person other than the driver or a passenger in the

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[15] Rule for Courts- Martial [R.C.M.] 307(c)(3).

[16] *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011).

[17] *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*], pt. IV, para 48.c.(1), at IV-64.

[18] 10 U.S.C. § 911 (2016).

[19] *MCM*, pt. IV, para. 48.b.(1)(d) at IV-64.

[20] *MCM*, pt. IV, para. 48.c.(1) at IV-64.

> driver's vehicle or damage to some property other than the driver's vehicle in order for the appellant to commit the crime of fleeing the scene of an accident.[21]

"The President's interpretation of the elements of an offense are not binding on [military courts], [but] absent a contrary intention in the Constitution or a statute, this Court should adhere to the Manual's elements of proof."[22] We will defer to the President's "narrowing construction" of an offense which limits "conduct subject to prosecution" when it (1) is "favorable to the accused" and (2) "not inconsistent" with the statutory language.[23] Here we find, and the Government concedes, that the President's narrowing of the elements does not contradict the statutory language of the offense and is favorable to the Appellant.[24] We find that Appellant has met his burden of demonstrating error.

(2) The Error was Plain and Obvious

Under the doctrine of plain error, we cannot correct an error "unless the error is clear under current law."[25] While Article 111, UCMJ, is a new offense, the precedent regarding application of the President's explanation of the elements is well settled. An error cannot be plain nor obvious where the state of the law is "murky," but here we find that the explanation section of the President's narrowing is clear and limits the conduct subject to prosecution under the statute.[26]

(3) The Error Resulted in Material Prejudice

"An error in charging an offense is not subject to automatic dismissal, even though it affects constitutional rights."[27] "Appellant must show that under the totality of the circumstances in this case, the Government's error … resulted

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[21] *Littleton*, 60 M.J. at 754-55.

[22] *United States v. Guess*, 48 M.J. 69, 71 (C.A.A.F. 1998).

[23] *United States v. Davis*, 47 M.J. 484, 486 (C.A.A.F. 1998).

[24] Gov't Brief at 19-20.

[25] *United States v. Olano*, 507 U.S. 725, 734 (1993).

[26] *See United States v. Sweeney*, 226 F.3d 43, 46 (1st Cir. 2000).

[27] *United States v. Wilkins*, 71 M.J. 410, 413 (C.A.A.F. 2012).

in material prejudice to [his] substantial, constitutional right to notice."[28] At trial, Appellant's theory of the case was that his actions amounted to an accident and he never challenged the fact that he left the scene of the crash and did not aid HN Charlie.[29] Under the President's narrowing construction, Appellant would have had an opportunity to present evidence and argument that HN Charlie was not struck by Appellant's vehicle, as Article 111, UCMJ, actually requires. Proper statutory interpretation would have put Appellant on notice as to the exact elements he had to defend against.[30] We find that Appellant suffered prejudice due to the lack of appropriate notice resulting from the failure of Charge II to state an offense.

(4) Remedy

If a specification fails to state an offense, the appropriate remedy is dismissal of that specification unless the Government can demonstrate that this constitutional error was harmless beyond a reasonable doubt.[31] We find that the Government cannot meet that burden and take action to dismiss the specification in our decretal paragraph. We note that even if we did not grant relief on Appellant's first AOE, the Government concedes, and we agree, that relief would be warranted on Appellant's second AOE, as well.[32] As we have already ordered that the Specification of Charge II be dismissed, Appellant's second, third, and fourth AOEs are moot in any event because any relief on those AOEs "would have no further practical effect on the outcome of this appeal."[33]

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[28] *United States v. Oliver*, 76 M.J. 271, 275 (C.A.A.F. 2017) (quoting *United States v. Humphries*, 71 M.J. 209, 215 (C.A.A.F. 2012) (internal quotation omitted).

[29] R. at 1394-1401.

[30] *See Wilkins*, 71 M.J. at 414-15.

[31] *United States v. Humphries*, 71 M.J. 209, 213 n.5 (C.A.A.F. 2012).

[32] Gov't Brief at 26-29.

[33] *United States v. Dedolph*, No. 202100150, 2022 CCA LEXIS 658, at *35 (N-M. Ct. Crim. App. Nov. 15, 2022).

**B. Appellant's Convictions for Reckless Driving Resulting in Personal Injury (the Specification of Charge III) and Involuntary Manslaughter (the Specification of Charge IV) are Legally and Factually Sufficient.**

Appellant asserts that the evidence is legally and factually insufficient to support his convictions. We review such questions de novo.[34]

To determine whether the evidence was legally sufficient to support a conviction, we ask whether, "considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt."[35] In conducting this analysis, we must "draw every reasonable inference from the evidence of record in favor of the prosecution."[36]

To evaluate factual sufficiency, we determine "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."[37] In conducting this unique appellate function, 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."[38] Proof beyond a "[r]easonable doubt, however, does not mean the evidence must be free from conflict."[39]

(1) Article 113 – Reckless Driving Resulting In Personal Injury

In order to prove the offense of reckless driving as charged, the Government was required to prove that Appellant: (1) physically controlled a vehicle; (2)

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[34] Article 66(d)(1); *United States v. Keago*, No. 202100008, 2022 CCA LEXIS 397, at *23 (N-M. Ct. Crim. App. July 5, 2022) (citing *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)).

[35] *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

[36] *United States v. Gutierrez*, 74 M.J. 61, 65 (C.A.A.F. 2015) (citation and internal quotation marks omitted).

[37] *Keago*, No. 202100008, 2022 CCA LEXIS 397, at *16 (quoting *Turner*, 25 M.J. at 325) (cleaned up).

[38] *Washington*, 57 M.J. at 399.

[39] *United States v. Rankin*, 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006).

controlled the vehicle in a reckless manner; and (3) caused the vehicle to injure HN Lima.[40] As used in the offense, "controlling a vehicle in a reckless manner" means control of a vehicle that:

> exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. . . . the ultimate question [is] whether, under all the circumstances, the accused's manner of operation . . . was of that heedless nature which made it actually or imminently dangerous to the occupants.[41]

As used in the offense, "causation" means that:

> The accused's drunken or reckless driving must be a proximate cause of injury. To be proximate, the accused's actions need not be the sole cause of the injury, nor must they be the immediate cause of the injury, that is, the latest in time and space preceding the injury. A contributing cause is deemed proximate only if it plays a material role in the victim's injury.[42]

(2) Article 119 – Involuntary Manslaughter

Article 119, UCMJ, criminalizes unlawfully killing another person "without an intention to kill or inflict great bodily harm" while perpetrating an offense directly affecting the person.[43] In order to prove the offense of involuntary manslaughter as charged, the Government was required to prove that: (1) HN Charlie was dead; (2) the death resulted from Appellant's "reckless operation of a vehicle while under the influence of alcohol and quickly accelerating while HN Charlie was in the bed of the truck;" (3) the killing was unlawful, and; (4) [Appellant's] reckless operation of the vehicle constituted culpable negligence."[44] "Culpable negligence" is defined as:

> [A] degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. Thus, the basis of a charge of involuntary manslaughter

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[40] *MCM*, pt. IV, para. 51.b. at IV-70.

[41] *MCM*, pt. IV, para, 51.c.(7) at IV-70.

[42] *MCM*, pt. IV, para. 51.c.(9) at IV-70.

[43] Article 119, UCMJ.

[44] The charge sheet, 16 December 2020; *see MCM*, pt. IV, para. 57.b.(2) at IV-78-9.

> may be a negligent act or omission which, when viewed in the light of human experience, might foreseeably result in the death of another, even though death would not necessarily be a natural and probable consequence of the act or omission.[45]

(3) Factual and Legal Sufficiency

At trial, the Government put on extensive and detailed evidence regarding the vehicle collision which resulted in injury to HN Lima and the death of HN Charlie. The Government called an expert witness, Sergeant Juliet from the South Carolina Highway Patrol Collision Reconstruction Unit, to testify as to his findings after he reviewed the crash data retrieval report from the event data recorder in Appellant's truck and computer-generated drawings of the collision. Sergeant Juliet was able to testify that approximately five seconds before impact, Appellant had engaged the accelerator pedal at one hundred percent, causing the truck to reach between eighty-two and eighty-eight miles per hour. Appellant applied the brakes four-point-three seconds before impact. Sergeant Juliet further testified that Appellant began to turn the vehicle one-point-seven seconds before impact and then the truck's stability control engaged one second prior to impact as it tried to slow down. The Government's expert concluded that, based on the conditions of the dirt road, Appellant "was going too fast for conditions to negotiate" the curve of the road where he attempted to turn left.

The Government also presented evidence regarding the scene of the collision: a dirt road after dark. Appellant was aware that the area provided little indication or signage for upcoming turns because he had driven the route to arrive at the river bank only hours earlier.[46] Appellant also consumed more than six beers that evening and instructed his passengers to "hang on" before rapidly accelerating the vehicle. The Government put on evidence from passengers and law enforcement regarding Appellant's rapid acceleration of his vehicle. HN Lima testified to the extent of the injuries he sustained as a result of the collision. First responders and treating physicians from the hospital explained during trial that HN Charlie's cause of death was severe traumatic brain injury sustained from the collision.

After weighing the evidence in the record of trial, and making every reasonable inference in favor of the prosecution, we are satisfied a reasonable fact-

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[45] *MCM*, pt. IV, para. 57.c.(2)(a)(i) at IV-79.

[46] *See* R. at 704, 769, 826.

finder could have found all of the essential elements of both charges and specifications beyond a reasonable doubt. Furthermore, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt and find that the evidence is factually sufficient to support Appellant's convictions.

**C. Sentence Reassessment**

Having set aside and dismissed Charge II, we must determine whether we can reassess the sentence or remand to the trial court for a rehearing on sentence. We do so by analyzing: (1) whether there have been dramatic changes in the penalty landscape or exposure; (2) whether sentencing was by members or military judge alone; (3) whether the nature of the remaining offenses captures the gravamen of the criminal conduct within the original offenses, and whether or not significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses; and (4) whether the remaining offenses are of the type with which appellate judges should have experience and familiarity to determine what sentence would have been imposed at trial.[47]

Appellant was originally sentenced by members to be reduced to pay grade E-1, to be confined for thirty months, and to be discharged with a bad-conduct discharge. Appellant remains convicted of one specification of false official statement, one specification of reckless driving resulting in injury, and one specification of involuntary manslaughter.[48] His overall punitive exposure – a total of sixteen-and-one-half years of confinement and a dishonorable discharge – remains well above the sentence he received.

The facts pertinent to Charge II revealed that Appellant left the scene of the accident, leaving behind injured shipmates – one of whom later perished. We find that the particular facts relating to this abandonment are significant. While the remaining offenses do not quite capture the gravamen of Appellant's decision to leave the scene of the accident that night, we note that the facts relevant to the dismissed offense were still admissible as aggravating factors in sentencing for the remaining offenses. Though Appellant was sentenced by

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[47] *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013).

[48] Articles 107, 113, & 119, UCMJ.

members, the remaining offenses are offenses that we have sufficient experience and familiarity with to reliably determine what sentence would have been imposed at trial. Accordingly, we conclude that we can reassess the sentence.

The record is clear that Appellant's reckless conduct resulted in injury to another Sailor, as well as the tragic death of a fellow servicemember. Reviewing the sentence with the "individualized consideration" of the particular accused based on the "nature and seriousness of the offense and the character of the offender," we find unitary punishment consisting of reduction to E-1, and a bad-conduct discharge to be appropriate.[49] In dismissing the Specification of Charge II, we reduced the total possible confinement from seventeen years to sixteen-and-one-half years. Based on the entirety of the record, we hold that a sentence of thirty months of confinement is a just and appropriate sentence.[50]

## III. CONCLUSION

After careful consideration of the record, the offense of leaving the scene of an accident, charged in the Specification of Charge II is **DISMISSED WITH PREJUDICE**. The remaining findings of guilt and the sentence as reassessed are **AFFIRMED**.

FOR THE COURT:

Mark K. Jamison

MARK K. JAMISON
Clerk of Court

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[49] *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (internal quotation omitted).

[50] At the trial level, Appellant was credited with 135 days of judicially ordered confinement credit. Our holding here does not disturb that credit.