UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JEROME A. JONES, JR.
United States Air Force

ACM 37528

29 January 2013

Sentence adjudged 23 January 2009 by GCM convened at Little Rock Air Force Base, Arkansas. Military Judge: Nancy J. Paul.

Approved sentence: Dishonorable discharge, confinement for 1 year and 10 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Major Shannon A. Bennett; and Major Nicholas W. McCue.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Jeremy S. Weber; Major Michael T. Rakowski; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and HECKER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HECKER, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of one specification of aggravated assault (as a lesser included offense (LIO) of involuntary manslaughter); two specifications of conspiracy; and one specification each of wrongfully endeavoring to influence another's actions, participating in gang initiation rituals, using marijuana, and failing to obey a lawful general regulation, in violation of Articles 128, 81, 134, 112a and 92, UCMJ, 10 U.S.C.

§§ 928, 881, 934, 912a, 892. He was acquitted of two specifications of involuntary manslaughter and one specification of being an accessory after the fact, under Articles 119 and 78, UCMJ, 10 U.S.C. §§ 919, 878. The adjudged sentence consisted of a dishonorable discharge, confinement for 2 years, and reduction to E-1. During clemency, the convening authority dismissed the marijuana use specification, after finding the evidence insufficient, and then approved only so much of the sentence as provided for a dishonorable discharge, confinement for 1 year and 10 months, and reduction to E-1.

On appeal, the appellant assigns the following errors: (1) his conviction for aggravated assault must be set aside, because it is not an LIO of involuntary manslaughter by culpable negligence; (2) the evidence is factually and legally insufficient to sustain his conviction for aggravated assault; (3) the language of the specifications alleging he violated an Air Force instruction and conspired to do so is unconstitutionally vague and overbroad, the conspiracy specification constitutes a violation of Wharton's Rule regarding conspiracy charging, and the military judge's instructions on that specification impermissibly allowed the panel to find him guilty without proof he participated in an unauthorized organization; and (4) the military judge improperly prevented him from cross-examining a key Government witness.[1] We also considered an additional issue not raised by the appellant: whether the specification alleging he "wrongfully endeavor[ed] to influence the actions" of others, charged under Article 134, UCMJ, fails to state an offense because it does not expressly allege the terminal element. Finding no error that prejudiced a substantial right of the appellant, we affirm.

Background

On the night of July 3, 2005, the appellant and others drove to a pavilion in the woods outside Kaiserslautern, Germany, to initiate a prospective member, Army Sergeant (SGT) JJ, into the local faction of the Gangster Disciples, also known as the Brothers of the Struggle. Formed in 2001, this group was comprised of current and former enlisted personnel from the Air Force and Army stationed near Kaiserslautern and used the same gang symbols, clothing and rituals as a criminal street gang from Chicago called Gangster Disciples Nation. These symbols included a six pointed star called the "Star of David" after the founder of the Chicago gang, David Barksdale.

To become a member of this group, a prospective member would be "jumped in," meaning he was required to stand inside a circle of group members who then hit him continuously for six minutes while he passively endured the beating. The appellant was "jumped in" during 2003 and participated in several subsequent initiations. After joining, he assumed a leadership role in the group.

[1] The appellant also contended the record of trial was incomplete where it did not include a document reviewed in camera by the military judge at trial. We subsequently granted the Government's request to submit that document for inclusion in the record of trial.

On the night of his initiation, SGT JJ stood in the pavilion, following the group's procedures by holding a black bandanna (known as the group's "flag") with his arms crossed over his chest and in a stance designed to signify a six-pointed star. The group members gathered in a half circle around him while RW, the group's "Governor," stood in front of him. As soon as SGT JJ said he was ready to join, he was knocked unconscious by a blow to his face from RW. After he stood up, SGT JJ hesitantly told the group he was again ready. RW struck him again in the same place on his face, and SGT JJ again fell down. He resumed his feet and all nine individuals began striking him on the head and torso. SGT JJ fell down several more times, and some group members kicked him while he was on the ground. Several eyewitnesses testified that the appellant hit SGT JJ multiple times, including after he fell to the ground.

Consistent with the rules of the initiation, SGT JJ did not defend or protect himself. He ultimately had to be held upright by two people so others could continue hitting him. In addition to falling down during the incident, SGT JJ displayed clear signs of physical distress, including heavy breathing and grunting, bleeding from his mouth, jerking movements of his head, involuntary defecation, and loss of consciousness.

SGT JJ's initiation differed from prior ones. More individuals participated in the beating, they struck and kicked him when he was down on the ground, they did not stop when he exhibited signs he was being injured, and they went beyond the six minute time limit. Although SGT JJ was conscious and able to talk after the beating, he had difficulty walking without assistance and had to be helped to his car. Due to his injuries, he was unable to go to a local bar to celebrate with the rest of the group, as was the custom. Several members of the group drove him to the Army base and he was found dead inside his barracks room approximately ten hours later.

According to the medical examiner, SGT JJ died of "multiple blunt force trauma injuries," with his autopsy revealing multiple recently-inflicted fist-sized bruises and abrasions on his head, the front and back of his torso, his arms and upper legs. He suffered a subarachnoid hemorrhage on the top of his brain, indicating bleeding within the brain that was highly suggestive of an underlying brain injury caused by a movement of the brain within the cranial cavity following a blunt force impact. The neurological symptoms that SGT JJ exhibited during the beating were consistent with him suffering a brain injury. His autopsy also revealed a subendocardial hemorrhage on the left ventricle of his heart in an area containing many of the electrical fibers that control the pumping of the heart. The medical examiner testified this injury could have been caused by a blow to the chest that pushes the heart forcefully against the spine and causes the bruising.

Aggravated Assault as a Lesser Included Offense of Involuntary Manslaughter

The appellant was charged with three specifications relating to the death of SGT JJ – two specifications of involuntary manslaughter and one specification of conspiracy to

commit an aggravated assault. Both involuntary manslaughter specifications alleged the appellant unlawfully killed SGT JJ. The first specification contended he did so while "perpetuating an offense directly affecting the person of [SGT JJ], to wit: an aggravated assault . . . by striking SGT [JJ] on the body and head with [his] fists." The second alleged he did so "by culpable negligence . . . by striking SGT [JJ] on the body and head with [his] fists." The appellant was also charged with conspiring with members or associates of the Gangster Disciples to "commit an offense under the UCMJ, to wit: commit an assault upon [SGT JJ] by striking him multiple times with a means likely to produce death or grievous bodily harm, to wit: their fists, and in order to effect the object of the conspiracy, [the accused and the others] did strike the body and head of [SGT JJ] multiple times with their fists and feet."

Finding this to be a case of "charging in the alternative," the military judge instructed the panel that the appellant could be found guilty of only one involuntary manslaughter specification, or, if acquitted of both greater offenses, of only one of the specifications' LIOs of aggravated assault (namely assault with a force likely to cause death or grievous bodily harm), assault consummated by a battery,[2] or negligent homicide. When instructing on the offense of involuntary manslaughter while perpetuating an aggravated assault, the military judge informed the members about the elements of aggravated assault.[3] The members were instructed on these elements again when the military judge informed them aggravated assault was an LIO of both manslaughter specifications and, for a third time, when she instructed them on the conspiracy charge. The defense did not object to any of these instructions.

In response to several questions raised by the panel, the military judge further instructed the members they should decide which involuntary manslaughter specification to consider first and, if the appellant was acquitted of the greater offense in that specification, the panel should then move to the LIOs for that specification. She further advised them, if they found the appellant guilty of any such LIO of the initial specification, the panel was to automatically acquit him of the other involuntary manslaughter specification.

The appellant was acquitted of the conspiracy specification. The panel also found the appellant not guilty of both involuntary manslaughter specifications, but convicted him of aggravated assault, as an LIO of the culpable negligence specification. Given the military judge's procedural instructions, it appears the panel elected to first vote on the offense of involuntary manslaughter by culpable negligence, acquitted him of that offense, convicted him of its LIO of aggravated assault, and then acquitted him of the

[2] An instruction on this lesser-included offense (LIO) was specifically requested by the defense.

[3] Specifically, the military judge described the elements as follows: that the appellant did bodily harm to Army Sergeant (SGT) JJ, that he did so by striking SGT JJ on the body and head with his fists, that the bodily harm was done with unlawful force or violence, and that the force was used in a manner likely to produce death or grievous bodily harm.

other involuntary manslaughter specification. On appeal, the appellant contends his conviction for aggravated assault must be set aside because it is not an LIO of involuntary manslaughter by culpable negligence under the elements test set forth in *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010).

Whether an offense is an LIO is a question of law we review de novo. *United States v. Arriaga*, 70 M.J. 51, 54 (C.A.A.F. 2011). We apply the elements test to determine whether one offense is an LIO of another. *Jones*, 68 M.J. at 468. When, as here, an accused does not object to the instruction at trial, this Court reviews for plain error. *Arriaga*, 71 M.J. at 54. Under a plain error analysis, the appellant has the burden of demonstrating that: (1) there was error, (2) the error was plain or obvious, and (3) the error materially prejudiced a substantial right of the appellant. *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011). Whether there is plain error is a question of law we review de novo. *United States v. McMurrin*, 70 M.J. 15, 18 (C.A.A.F. 2011).

The "substantial right" in the LIO context is tethered to the Fifth and Sixth Amendments[4] which both "ensure the right of an accused to receive fair notice of what he is being charged with." *Girouard*, 70 M.J. at 10. "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 convicted." *Jones*, 68 M.J. at 468; *McMurrin*, 70 M.J. at 18-19. A military member can be convicted of an uncharged LIO "precisely because [he is] deemed to have notice" of that offense when all the elements of the purported LIO would necessarily be proven by proving the elements of the charged offense. *Jones*, 68 M.J. at 468, 470; *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010). In certain situations involving LIOs, the accused can also receive such constitutionally required notice through the language of a specification listed on the charge sheet. *United States v. Rauscher*, 71 M.J. 225, 226-27 (C.A.A.F. 2012); *United States v. Wilkins*, 71 M.J. 410 (C.A.A.F. 2012).

Even if an accused is convicted of an offense that, as a matter of law, is not an LIO of the charged offense, this does not necessarily constitute plain error. *See McMurrin*, 70 M.J. at 18. Incorrectly instructing a panel that an offense is an LIO may be error that is clear and obvious, thus meeting the first two prongs of the test, but may not cause the accused to suffer prejudice to a substantial right. *See id.*; *Girouard*, 70 M.J. at 11. Instead, "under the totality of the circumstances . . . the Government's error . . . [must] result[] in material prejudice to [his] substantial, constitutional right to notice." *United States v. Humphries*, 71 M.J. 209, 215 (C.A.A.F. 2012).

Here, we need not determine whether there was plain or obvious error as no material prejudice to a substantial right of the appellant could have occurred under the

[4] U.S. CONST. amend. V and VI, respectively.

circumstances. The appellant cannot establish prejudice to his ability to defend against the offense he was convicted of or to his right to notice.

Two of the three specifications involving the death of SGT JJ explicitly allege the appellant committed "assault . . . with a means likely to cause death or grievous bodily harm" (the conspiracy specification) or "aggravated assault" (involuntary manslaughter "while perpetuating . . . an aggravated assault"). The appellant had adequate opportunity to prepare for and defend against the allegation[5] that he caused bodily harm to SGT JJ by striking SGT JJ's body and head with his fists or that he did so unlawfully and in a manner likely to produce death or grievous bodily harm. The record makes clear the defense team all along was defending against the allegation the appellant was involved in an aggravated assault of SGT JJ, and thus his substantial right to fair notice was not prejudiced. The appellant's actual notice and the lack of confusion or surprise were further demonstrated by his failure to object to the findings instructions.

In reaching this conclusion, we recognize the appellant was acquitted of both specifications that explicitly referenced aggravated assault. We further recognize that his aggravated assault conviction arose through the military judge's instruction to the panel that aggravated assault was an LIO of involuntary manslaughter by culpable negligence, a specification that did not itself reference "aggravated assault" and which may not include aggravated assault as an LIO under the elements test.[6] We decline, however, to set aside the appellant's conviction for aggravated assault because, under the totality of the circumstances, we are satisfied the appellant had the requisite fair notice of that offense and the elements he was required to defend against at his trial. The charge sheet in this case specifically described the Government's theory of the appellant's guilt with such factual specificity that the appellant was able to defend himself against the theory, and the Government then presented specific evidence supporting the theory described. As such, the appellant knew in advance the specific offense and legal theory under which he was ultimately convicted, and there was no abridgement of his Fifth Amendment right to due process or his Sixth Amendment right to be informed of the nature of the aggravated assault charge. *Wilkins*, 71 M.J. at 410. We therefore find the appellant has suffered no material prejudice to his substantial rights, regardless of whether aggravated

[5] Article 128(b), UCMJ, 10 U.S.C. § 928(b), states one is guilty of "aggravated assault" if he commits an assault with (1) a dangerous weapon, or (2) other means or force likely to produce death or grievous bodily harm, or (3) the intent to inflict grievous bodily harm with or without a weapon. The second theory served as the gravamen of the allegations against the appellant relating to SGT JJ's death.

[6] Our superior court has noted "aggravated assault is not necessarily a lesser-included offense of involuntary manslaughter by culpable negligence . . . in this case but rather is just a different offense." *United States v. Emmons*, 31 M.J. 108, 112 n.4 (C.M.A. 1990); *United States v. McGhee*, 32 M.J. 322, 325 (C.M.A. 1991) (expressing some reservations with the legal status of aggravated assault as an LIO of involuntary manslaughter by culpable negligence). The *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 44.d.(2) (2008 ed.) does not list aggravated assault as an LIO with respect to involuntary manslaughter, although the listing of such offenses is "not all-inclusive." *See United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010).

assault is an LIO of involuntary manslaughter by culpable negligence under the *Jones* elements test.

Legal and Factual Sufficiency of Aggravated Assault Conviction

The appellant argues the evidence is factually and legally insufficient to sustain the aggravated assault conviction because the appellant's role in the incident was minimal and because the risk of SGT JJ suffering grievous bodily harm was not a natural and probable consequence of the initiation ritual. We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2003).

The test for factual sufficiency is "whether, after weighing the evidence and making allowances for not having observed the witnesses, [we ourselves are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), *quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). 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." *Washington*, 57 M.J. at 399.

"The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F 2002) (quoting *Turner*, 25 M.J. at 24). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

As alleged in this case, assault with a means or force likely to produce death or grievous bodily harm required the Government to prove beyond a reasonable doubt that (1) the appellant did bodily harm to SGT JJ, (2) the appellant did so with a certain means—by striking SGT Jones on the head and body with his fists, (3) the bodily harm was done with unlawful force or violence, and (4) the means was used in a manner likely to produce death or grievous bodily harm. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 54.b(4)(a) (2008 ed.).

Here, the appellant unlawfully used his fists to strike SGT JJ on his head and body while participating in a group beating where multiple men repeatedly struck SGT JJ over the course of at least six minutes, continuing even after the victim exhibited signs he was suffering significant harm and experiencing physical distress. SGT JJ, who had been directed to not defend himself against the group's blows, suffered grievous bodily harm,

later dying of his injuries. *See United States v. Bygrave*, 46 M.J. 491, 493 (C.A.A.F. 1997) (a victim cannot consent to an act which is likely to produce grievous bodily harm or death).

We further find the appellant's actions constitute a means "likely to produce death or grievous bodily harm." *See* Article 128(b)(1), UCMJ, 10 U.S.C. § 928(b)(1). This concept "has two prongs: (1) the risk of harm and (2) the magnitude of the harm." *United States v. Weatherspoon*, 49 M.J. 209, 211 (C.A.A.F. 1998) (citations omitted). Here, the risk of harm is not in issue as the appellant engaged in intentional, unlawful physical contact with SGT JJ. *Id.* As to the second prong, under the circumstances of this situation, we find the appellant's actions were performed in such a manner that "the natural and probable consequences" were death or grievous bodily harm. *Id*. at 211-12.

We therefore find the evidence both legally and factually sufficient to support the appellant's conviction for aggravated assault.

Constitutional Challenge

Air Force Instruction (AFI) 51-903, *Dissident and Protest Activities* (1 February 1998), was issued by Major General Bryan Hawley, then The Judge Advocate General of the Air Force, in order to implement Department of Defense Directive (DoDD) 1325.6, *Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces* (1 October 1996), issued by the then-Deputy Secretary of Defense. According to the preamble of the AFI, it:

> provides prohibitions and guidance regarding dissident and protest activities involving Air Force installations or Air Force members. It applies to all Air Force military personnel serving on active duty or active duty for training. Military members who violate the prohibitions contained in paragraphs … 5., 5.1., … are subject to disciplinary action under Article 92, [UCMJ,] or other applicable articles of the [UCMJ].
>
> It notes that:
>
> Air Force commanders have the inherent authority and responsibility to take action to ensure the mission is performed and to maintain good order and discipline [which] includes placing lawful restrictions on dissident and protest activities. Air Force commanders must preserve the service member's right of expression, to the maximum extent possible, consistent with good order, discipline and national security.

Id. at ¶ 1.

The portion of the AFI which governs certain prohibited activities by Air Force members reads:

> 5. Prohibited Activities. Military personnel must reject participation in organizations that espouse supremacist causes; attempt to create illegal discrimination based on race, creed, color, sex, religion, or national origin; advocate the use of force or violence; or otherwise engage in the effort to deprive individuals of their civil rights.[7]
>
> 5.1. Active participation, such as publicly demonstrating or rallying, fund raising, recruiting and training members, organizing or leading such organizations, or otherwise engaging in activities in relation to such organizations or in furtherance of the objectives of such organization that the commander concerned finds to be detrimental to good order, discipline, or mission accomplishment, is incompatible with military service and prohibited.[8] Members who violate this prohibition are subject to disciplinary action under Article 92, [UCMJ,] in addition to any other appropriate articles of the [UCMJ].
>
> 5.1.1. Mere membership in the type of organization enumerated is not prohibited, however, membership must be considered in evaluating or assigning members (AFI 36-2701, *Social Actions Operating Procedures*; AFI 36-2403, *The Enlisted Evaluation System*; AFI 36-2402, *Officer Evaluation System*; and AFI 36-2706, *Military Equal Opportunity and Maltreatment Program*).

Id. at ¶ 5.

It further states that "[t]he policy on prohibited activities shall be included in initial active duty training . . . professional military education . . . and other appropriate Air Force programs." *Id*. at ¶ 6.

The appellant was convicted of two specifications relating to this AFI, based on his involvement with the Gangster Disciples between 2003 and 2005, although the military judge merged them for sentencing purposes. These specifications alleged he:

> Did . . . fail to obey a lawful general regulation, to wit AFI 51-903 . . . paragraph 5.1 by actively participating in a group, to wit: the Gangster Disciples, an organization that advocates the use of force or violence, by fundraising, recruiting and training members, organizing or leading such organization.

[7] This language is verbatim from Department of Defense Directive (DoDD) 1325.6, *Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces*, ¶ 3.5.8 (1 October 1996).
[8] This language is verbatim from DoDD 1325.6, ¶ 3.5.8.

> Did . . . conspire with members or associates of the Gangster Disciples to commit an offense under the UCMJ, to wit: fail to obey AFI 51-903 . . . paragraph 5.1, by actively participating in a group, the Gangster Disciples, an organization that advocates the use of force or violence, and in order to effect the object of the conspiracy, [he] and members or associates of the Gangster Disciples did fundraise, recruit and train members, organize or led such organization.

The appellant raises three issues relative to these specifications: (1) they fail to state an offense because their language is unconstitutionally vague; (2) charging him with both conspiracy and the underlying offense constitutes a misuse of Article 81, UCMJ; and (3) the military judge's instructions impermissibly allowed the members to find him guilty without a finding he had actually participated in the relevant organization. We disagree on all three issues and affirm his convictions under both specifications.

1. *Failure to State an Offense*

As he did unsuccessfully at trial, the appellant argues that both specifications relating to the AFI fail to state a cognizable offense and are unconstitutional, as their wording prohibiting participation with an "organization that advocates the use of force or violence" is too vague and ambiguous. He contends that subjecting him to criminal sanction for violating the AFI impugns his due process rights because the AFI's language is vague and open to many different interpretations, thus he lacked fair notice that his activities could be subject to criminal sanction. Lastly, he claims the AFI improperly criminalizes behavior protected by his First Amendment[9] right to assembly. We disagree.

Whether a specification states an offense is a question of law which we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). "Specifications which are challenged immediately at trial will be viewed in a more critical light than those which are challenged for the first time on appeal." *United States v. French*, 31 M.J. 57, 59 (C.M.A. 1990) (citations omitted).

"[D]ue process requires that a person have fair notice that an act is criminal before being prosecuted for it." *United States v. Saunders*, 59 M.J. 1, 6 (C.A.A.F. 2003) (citation omitted). To withstand a challenge on vagueness grounds, an instruction must provide "sufficient notice so that a service member can reasonably understand that his conduct is proscribed." *United States v. Pope*, 63 M.J. 68, 73 (C.A.A.F. 2006) (citations omitted); *Parker v. Levy*, 417 U.S. 733, 757 (1974) ("Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his or her contemplated conduct is proscribed."). Notice is determined by "application of an objective test as to whether a person could reasonably understand that

[9] U.S. CONST. amend. I.

his contemplated conduct is proscribed." *Saunders*, 59 M.J. at 10 (internal quotation marks and citations omitted). Possible sources of "fair notice" include military regulations and military case law, as well as training materials. *Pope*, 63 M.J. at 73.

Here, paragraphs 5 and 5.1 of the AFI define the prohibitions with sufficient clarity that a person could reasonably understand what conduct is proscribed. The AFI expressly states "active participation" in activities relating to an organization that advocates using force or violence is "incompatible with military service and prohibited." It goes on to provide examples of conduct that would violate the AFI, to include serving as an organizer or leader of the organization, conducting fund raising for it, and recruiting and training its members. Therefore, the instruction itself serves as a source of notice. Furthermore, it expressly states that violating its prohibitions makes one subject to disciplinary action under the UCMJ (including Article 92, UCMJ) and compliance with its terms is mandatory. *See Pope*, 63 M.J. at 74. In our view, the operative language of the AFI, especially when considered in its entirety, provided ample information of the types of behavior it prohibited and what types of groups were covered. Thus, a reasonable person would have been on notice that the Gangster Disciples/Brothers of the Struggle constituted a group that advocated the use of force or violence and that conduct of the type engaged in by the appellant on its behalf was subject to criminal sanction.[10] *See United States v. Johnston*, 24 M.J. 271, 273 (C.M.A. 1987) ("Terms in a regulation must be interpreted in light of the regulatory context in which they are found and in view of the purpose of the regulation as a whole.").

Notice is also provided through military case law, which has previously upheld convictions for service members who actively participate in organizations such as the one in this case, even in the face of a First Amendment challenge. *See United States v. Hooper*, 4 M.J. 830 (A.F.C.M.R. 1978) (rejecting a legal sufficiency challenge to Air Force Regulation 35-15, the predecessor to AFI 51-903); *United States v. Billings*, 58 M.J. 861 (A. Ct. Crim. App. 2003) (a soldier's conviction under Article 134, UCMJ, for engaging in "organized criminal activity" as the regional chief of a criminal gang did not violate her First Amendment right of freedom of association).

We also reject the appellant's argument that the AFI impermissibly curtails "activities that are constitutionally protected, such as the freedom to assemble." While service members do enjoy First Amendment protections, "the different character of the military community and of the military mission requires a different application of those protections." *Parker*, 417 U.S. at 758. "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Id.* The

[10] The actions taken by the appellant and others to destroy evidence of their affiliation with this group after the death of SGT JJ constitutes evidence they recognized the unlawful nature of that affiliation.

First Amendment rights of service members must be balanced against the military mission, ensuring good order and discipline and protecting national security.

Accordingly, military authorities may curtail a service member's communication and association with other individuals—and thus burden the service member's freedom of speech and association—provided the authorities act with a "valid military purpose" and issue a "clear, specific, narrowly drawn mandate." *United States v. Moore*, 58 M.J. 466, 468 (C.A.A.F. 2003) (citation omitted). Here, the Department of Defense and the Air Force have published lawful general regulations which expressly state that service members' right of expression should be preserved "to the maximum extent possible, consistent with good order and discipline and the national security." This recognizes a commander's authority and responsibility to place lawful restrictions on those rights of expression, for the valid military purposes of ensuring good order and discipline and protecting national security. Such lawful restrictions include curtailing activities by members of the armed forces undertaken on behalf of criminal gangs, even assuming citizens have a First Amendment right to participate in such activity. The resulting restrictions in the AFI are clear, specific and narrowly drawn, and the appellant can properly be charged with and convicted of violating them.

2. *Wharton's Rule*

For the first time, the appellant contends the Government's charging of the conspiracy offense was a misuse of Article 81, UCMJ, as contemplated by *United States v. Crocker*, 18 M.J. 33, 40 (C.M.A. 1984), based on an alleged violation of Wharton's Rule. We disagree.

Typically, both conspiracy and the substantive crime that is the object of that conspiracy may be separately charged and punished. *Iannelli v. United States*, 420 U.S. 770, 777-78 (1975) (citations omitted); *Crocker*, 18 M.J. at 36; *MCM*, Part IV, ¶ 5.c.(8) ("A conspiracy to commit an offense is a separate and distinct offense from the offense which is the object of the conspiracy, and both the conspiracy and the consummated offense which was its object may be charged, tried, and punished."). This principle recognizes that criminal conspiracies involve concerted group activity which poses serious dangers distinct from those of the substantive offense, including deliberate plotting to subvert the law, educating and preparing the conspirators for further and habitual criminal practices, and difficulty in detection. *See Pinkerton v. United States*, 328 U.S. 640, 644 (1946); *Iannelli*, 420 U.S. at 778; *United States v. Rabinowich*, 238 U.S. 78, 88 (1915). As our superior court has noted:

> [C]ollective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will

> depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. *In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise*.

United States v. Collier, 14 M.J. 377, 379 (C.M.A. 1983) (alteration in original) (quoting *Callanan v. United States*, 364 U.S. 587, 593-94 (1961)).

A limited exception to this general principle has been carved out by courts through the doctrine known as Wharton's Rule.[11] According to this rule, "[a]n agreement by [certain] persons to commit a particular crime cannot be prosecuted as a conspiracy when th[at] crime is of such a nature as to necessarily require the participation of [those] persons for its commission." *United States v. Simmons*, 34 M.J. 243, 245 (C.M.A. 1992) (quoting *Iannelli*, 420 U.S. at 773-74 n. 5). This rule was designed to eliminate the danger of defendants receiving two punishments for activity that constitutes a single transaction unless that result is consistent with legislative intent. *Iannelli*, 420 U.S. at 773; *Crocker*, 18 M.J. at 37. Accordingly, offenses covered by Wharton's Rule are "characterized by the general congruence of the agreement and the completed substantive offense [where t]he parties to the agreement are the only persons who participate in commission of the substantive offense, and the immediate consequences of the crime rest on the parties themselves rather than on society at large." *Iannelli*, 420 U.S. at 782-83 (footnotes and citation omitted).

The rule has long been recognized in military law and is captured in the guidance on conspiracy contained in the *Manual*: "Some offenses require two or more culpable actors acting in concert [and t]here can be no conspiracy where the agreement exists only between the persons necessary to commit such an offense." *Id*. at Part IV, ¶ 5.c.(3). *See also* Drafter's Analysis, *MCM*, A23-2; *United States v. Yarborough*, 5 C.M.R. 106, 116 (C.M.A. 1952). Dueling, bigamy, incest, adultery and bribery are classic examples of offenses covered by the rule. *Iannelli*, 420 U.S. at 782; *MCM*, Part IV, ¶ 5.c.(3).

Given the purposes behind Wharton's Rule, there are exceptions to its application. First, since this Rule is a judicial presumption applied in the absence of legislative intent to the contrary, courts must defer to a discernible legislative judgment that the Rule applies. *Iannelli*, 420 U.S. at 782, 786; *Crocker*, 18 M.J. at 38. Here, the substantive offense involves violation of a lawful general regulation under Article 92, UCMJ, which

[11] Wharton's Rule is named after Francis Wharton, whose treatise on criminal law first recognized the doctrine and its essential rationale. 2 F. Wharton, Criminal Law § 1604, p. 1862 (12th ed. 1932).

is not one of the five offenses Congress listed as inappropriate for charging as both a conspiracy and a substantive offense. *See MCM*, Part IV, ¶ 5.c.(3). Additionally, Congress took no action to modify this list after our Court upheld a conviction for both conspiring to violate this AFI's predecessor regulation and for violating that regulation. *See Hooper*, 4 M.J. 830. Without a clear manifestation of legislative intent that Wharton's Rule should apply to the kind of offenses prosecuted in this case, the appellant can be convicted of both offenses. *See United States v. Wood*, 7 M.J. 885, 887-88 (A.F.C.M.R. 1978).

Furthermore, Wharton's Rule does not apply when the immediate consequences of the conspiracy are not limited to the co-conspirators, but affect "society at large," as that situation poses the very threat to *society* the law of conspiracy seeks to deter. *Iannelli*, 420 U.S. at 782-83; *Wood*, 7 M.J. at 887 (holding Wharton's Rule did not bar conviction of conspiracy to violate a regulation prohibiting black-market trade and actual black-market trade, because "[t]he societal harm attendant upon the violation of the regulation is not restricted to the parties to the agreement"). Here, the conspiracy entered into by the appellant and other members or associates of the Gangster Disciples affected people outside the conspiracy and society at large, including SGT JJ and his family, as well as the Air Force and the Army. Accordingly, Wharton's Rule did not preclude conviction of conspiracy to violate a lawful regulation as well as the underlying conviction.

3. *Instructions on Conspiracy*

The conspiracy specification regarding AFI 51-903 alleged the appellant conspired with members or associates of the Gangster Disciples to commit the UCMJ offense of failing to obey that AFI. In instructing the panel on the elements of that offense, the military judge, without defense objection, advised on the two standard elements of a conspiracy charge – that the appellant and members or associates of the Gangster Disciples entered into an agreement to commit an offense under the UCMJ (failure to obey paragraph 5.1 of AFI 51-903), and then, to bring about the object of that agreement, one or more of them performed one or more of the enumerated overt acts (fundraising, recruiting, training, organizing or leading the organization). Consistent with the settled concept that a conspiracy can occur even when the intended underlying offense is not committed, the military judge further advised that "proof that the offense of failure to obey a regulation actually occurred is not required." The appellant is now challenging this second instruction for the first time, arguing it impermissibly allowed the members to find him guilty of the conspiracy without finding beyond a reasonable doubt that he actually participated in an organization that advocated the use of force or violence.

Whether a jury was properly instructed is a question of law reviewed de novo. *United States v. Schroeder*, 65 M.J. 49, 54 (C.A.A.F. 2007). Failure to object to a given instruction waives the objection absent plain error. Rule for Courts-Martial 920(f). This "standard is met when: (1) an error was committed; (2) the error was plain, or clear, or

obvious; and (3) the error resulted in material prejudice to substantial rights." *United States v. Pope*, 69 M.J. 328, 333 (C.A.A.F. 2011) (citation omitted). Here, we find no error in the military judge's decision to instruct the panel members in this manner. Furthermore, even if there was error, there was ultimately no material prejudice to any substantial right of the appellant, since the panel found beyond a reasonable doubt that he violated the AFI.

Limitation on Cross-Examination

We review for abuse of discretion a military judge's decision to limit repetitive cross-examination or to prohibit cross-examination that may cause confusion. *United States v. James*, 61 M.J. 132, 136 (C.A.A.F. 2005). "[T]rial judges retain wide latitude . . . to impose reasonable limits on [the] cross-examination" of witnesses, including on "issues such as bias or motive to fabricate," "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *United States v. Gaddis*, 70 M.J. 248, 256 (C.A.A.F. 2011). In evaluating whether an appellant was deprived of a fair opportunity for cross-examination, we consider whether "'[a] reasonable jury might have received a significantly different impression of [the witness]'s credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination.'" *Id.* (alteration in original) (quoting *Delaware v. Van Arsdall*, 475 U.S. 633, 680 (1986)).

The appellant alleges he was improperly prevented from cross-examining a key Government witness by use of extrinsic evidence of her multiple prior inconsistent statements. During the defense's cross-examination of Army Specialist LE, who was an eyewitness to SGT JJ's initiation, she testified she did not recall aspects of her prior testimony at the Article 32, UCMJ, 10 U.S.C. § 832, investigation and the military judge refused to allow the defense to show her that prior testimony to refresh her recollection. After Specialist LE admitted she had lied to investigators in a prior written statement, the military judge refused to allow the defense to go through each line of the prior statement with the witness. The military judge denied a defense mistrial motion, stating Specialist LE's motive to lie and her "considerable lies" had already been adequately established during her testimony.

Considering the totality of Specialist LE's testimony, we find the military judge simply imposed "reasonable limits" on the cross-examination and left open an "opportunity for effective cross-examination." *Id*. (citation omitted). The defense was able to present its theory that she had changed her version of events on multiple occasions and had a motive to implicate the appellant in criminal activity. The members were also informed she had received immunity for her role in SGT JJ's death, and a summary court-martial for making a false official statement. Once an accused **"**has been allowed to expose a witness's motivation in testifying, it is of peripheral concern to the Sixth Amendment how much opportunity defense counsel gets to hammer that point

home to the jury." *James*, 61 M.J. at 136 (citation and internal quotation marks omitted). Furthermore, a reasonable panel would not have received "a significantly different impression" of Specialist LE's credibility had the appellant been permitted to cross-examine her regarding the details of her false statements. Accordingly, the military judge did not abuse her discretion in limiting the cross-examination, and those limitations did not impermissibly infringe on the appellant's Sixth Amendment rights.

Failure to State an Offense under Article 134, UCMJ

Whether a specification is defective and the remedy for such error are questions of law, which we review de novo. *United States v. Ballan*, 71 M.J. 28, 32 (C.A.A.F.), *cert. denied*, 133 S. Ct. 43 (2012) (mem.). When defects in specifications are not raised at trial, we analyze for plain error.[12] *Humphries*, 71 M.J. at 215; *United States v. Fosler*, 70 M.J. 225, 230-31 (C.A.A.F. 2011); *Ballan*, 71 M.J. at 33.

When the Government fails to allege the terminal element of Article 134, UCMJ, in a specification, it is plain and obvious error. *Humphries*, 71 M.J. at 215. Whether there is a remedy for this error will depend on whether the defective specification resulted in material prejudice to the appellant's substantial right to notice pursuant to the Fifth and Sixth Amendments. *Id.* To determine whether the defective specification resulted in material prejudice to a substantial right, this Court "look[s] to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is "essentially uncontroverted." *Humphries*, 71 M.J. at 215-16 (citing *United States v. Cotton*, 535 U.S. 625, 633 (2002); *United States v. Johnson*, 520 U.S. 461, 470 (1997)).

Specification 1 of Charge III charged the appellant with "wrongfully endeavor[ing] to influence the actions of Staff Sergeant [TS] or other members of the Gangster Disciples by telling him, "Make sure that you put the word out that everybody better shut up, don't be talking and anybody that talks can cancel Christmas," or words to that effect, in violation of Article 134, UCMJ.[13] Although this offense was based on the general article of Article 134, UCMJ, it did not contain language referencing the article's terminal element.

[12] The appellant has also not raised this issue on appeal.

[13] According to the evidence adduced at trial, following SGT JJ's death, investigators began looking into rumors that he had been involved in a gang initiation. About 30 days after SGT JJ died, the appellant told Staff Sergeant (SSgt) TS, a fellow member of the Gangster Disciples who had been present at the initiation, to "Make sure that you put the word out that everybody better shut up, don't be talking and anybody that talks can cancel Christmas." He said this twice and, at the same time, he was hitting his hands together in a threatening manner. SSgt TS testified he felt intimidated and threatened by the appellant's actions and words and, as a result, he did not discuss the events further. Another individual present, Airman Basic Sims, testified the tone and substance of the conversation was more benign, and he believed the appellant was simply acting out of fear and paranoia.

Under *Humphries*, this was plain and obvious error. Thus, we must determine whether this defective specification resulted in material prejudice to the appellant's substantial right to notice, by closely reviewing the record to determine: (1) whether notice of the missing element is extant in the record, or (2) whether the element is essentially uncontroverted.

In *Humphries*, our superior court found the missing element to be controverted,[14] and that notice of the missing element was not extant in the record where: (1) the Government did not mention the Article 134, UCMJ, charge in its opening statement; did not present any specific evidence or call a single witness to testify as to why the accused's conduct satisfied either Clause 1, Clause 2, or both clauses of the terminal element of Article 134, UCMJ; and made no attempt to tie any of the evidence to the Article 134, UCMJ, charge; (2) the military judge's panel instructions correctly listed and defined the terminal element of Article 134, UCMJ, as an element of the specification but did not do so until the close of evidence; (3) the Government's closing argument did not reference the terminal element when arguing the accused was guilty of the offense; and (4) the defense counsel argued in closing that the Government had failed to present evidence that the accused's conduct was service discrediting or prejudicial to good order and discipline. *Humphries*, 71 M.J. at 216-17. Under the totality of these circumstances, our superior court found material prejudice to the accused's substantial right to notice and that dismissal of the specification was the appropriate remedy. *Id.* at 217.

In this case, the first three facts are the same as in *Humphries*.[15] However, unlike *Humphries*, the defense counsel here did not controvert the terminal element. The defense counsel in *Humphries* specifically referenced the Government's burden to prove the terminal element and listed the elements for the members, verbally and via a written slide, to include both clauses of the terminal element.

Unlike the counsel in *Humphries* (who simply asserted the Government had failed to meet that particular burden), the defense counsel in this case disputed the Government's proof on the first element of the offense while not challenging the proof on the terminal element, thus leaving that element "essentially uncontroverted." Without any discussion of the terminal element, she argued the appellant's entire defense to this specification – that "wrongfully endeavoring" in this context required an intentional action on the appellant's part, that he had no wrongful intent when he made this statement as he was simply panicking due to SGT JJ's death, and that SSgt TS was lying when he said he was intimidated by the appellant's action. She also argued the Government

[14] To controvert means to dispute or contest; especially to deny (as an allegation in a pleading) or oppose in argument. Black's Law Dictionary 354 (8th ed. 2004).

[15] During closing argument, the trial counsel did briefly mention the terminal element relative to the other Article 134, UCMJ, 10 U.S.C. § 934, specification, arguing that it was prejudicial to good order and discipline for the appellant to participate in gang initiation rituals where "senior airmen hit[] sergeants."

presented no evidence on what "cancel[ing] Christmas" even meant, and that trial counsel was improperly asking the members to make assumptions about its meaning.

This is not a situation where the defense controverted the terminal element simply by pleading not guilty to the specification. Instead, the defense clearly decided not to controvert the terminal element, and to instead dispute the facts underlying the other element of the offense. This was not accidental or unknowing.[16] The defense was clearly aware of how to controvert this element, as revealed by the defense counsel's argument regarding another Article 134, UCMJ, specification.[17] This immediately followed her argument that the Government's proof on Specification 1 had failed:

> "Again, the [G]overnment didn't do their job. Our Constitution gives them the burden but where is the evidence that [participating in initiation rituals] is prejudicial to good order and discipline? Where is the evidence that it is service discrediting? You cannot just assume it. They could have brought someone in here and put them on the stand and said 'it's prejudicial, it's service discrediting' but they didn't. They want you to assume . . . if a group of young African-American men get together and consent to punching each other, [it] is a crime? You may not like it. You might find it distasteful. You might even think it is stupid but it is not a crime. The [G]overnment has the burden to prove each and every element of the offense and they failed to do so here. . . . [I]f you find Sergeant Jones guilty of this offense and don't hold the [G]overnment to proving that it is either prejudicial or service discrediting, then all promotion rituals are at risk for becoming crimes. You cannot convict Sergeant Jones of this offense beyond a reasonable doubt. What they want you to do is make a value judgment and that is not what you are here to do."

Our conclusion that the defense intentionally elected to leave the terminal element uncontroverted while knowing the Government had the burden of proving one or both clauses of that element is bolstered by other actions taken by the defense counsel. This defense team aggressively defended the appellant, raising multiple motions to both the

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[16] This decision was likely made because the evidence supporting the terminal element was "overwhelming." *See United States v. Cotton*, 535 U.S. 625, 633 (2002) (finding "[t]he evidence [introduced at trial that supported a fact missing from the indictment] was 'overwhelming' and 'essentially uncontroverted'"), and *United States v. Johnson*, 520 U.S. 461, 470 (1997) (the evidence supporting the element not presented to the jury was "overwhelming . . . . [The element] was essentially uncontroverted at trial and has remained so on appeal"). Here, the Government alleged that the appellant wrongfully tried to prevent others, including a fellow Airman, from talking about SGT JJ's death, by speaking and acting in a manner that intimidated the other Airman. The panel found the appellant guilty of communicating that language. Under the circumstances of this case, the evidence is overwhelming that such conduct is both prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces. The appellant has not argued otherwise on appeal.

[17] Specification 2 of Charge III charged the appellant was also charged with participating in Gangster Disciples initiation rituals, in violation of Article 134, UCMJ. That specification, also based on the general article, *did* allege that the conduct was prejudicial to good order and discipline.

military judge and the panel, that the Government must meet its burden of proof for the charges in the case. Additionally, the defense asked the prosecution for a bill of particulars on every specification except this one and the manslaughter specifications, contending factual information on the circumstances underlying the allegations was needed to adequately prepare for trial.[18] When the Government refused to provide the information, the defense filed a successful motion with the military judge, asking for the same information and stating it was necessary to provide the appellant with adequate notice of these offenses. Throughout this process, the defense did not ask for a bill of particulars on the terminal element of either Article 134, UCMJ, offense. Furthermore, the defense moved to dismiss the other Article 134, UCMJ, offense based on it being preempted by Article 128, UCMJ, for being multiplicious with the Article 92, UCMJ, specification, and for using unconstitutionally vague language.

Given our review of the entire record, it is clear the defense team knew about the Government's burden to prove the terminal element in advance of trial and how to seek relief if they had any question about the Government's theory of criminality for any specification. Under those circumstances, the defense's decision to not seek such relief for this specification demonstrates they had adequate notice regarding it. Since the appellant then affirmatively decided to leave the terminal element "essentially uncontroverted," the Government's failure to provide him with notice through the specification or its actions at trial did not result in material prejudice to the appellant's substantial right to notice.

Appellate Delay

Through supplemental assignments of error raised on 27 December 2012, the appellant contends his due process rights have been violated, where more than 120 days elapsed between his court-martial and action by the convening authority, and more than 18 months have elapsed between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court. He requests relief in the form of disapproval of the dishonorable discharge, citing *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006) and *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002).

We note that these delays are facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Moreno*, 63 M.J. at 136. When we assume error but are able to directly conclude it was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See*

[18] This defense made this decision after being made aware, via the Article 32, UCMJ, 10 U.S.C. § 832, investigation, that although the "wrongfully endeavoring" specification failed to allege the terminal element, the Government would have to prove it at trial.

United States v. Allison, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Although the convening authority's action was taken more than 120 days after sentence was announced in the appellant's case, the appellant received sentence relief through that process and the action was promulgated in time for that relief to be implemented. The record contains no evidence that the post-action delay has had any negative impact on the appellant beyond the normal anxiety experienced by any individual awaiting an appellate decision. *Moreno*, 63 M.J. at 139-40. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt, and relief is not otherwise warranted. *United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006).

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and the sentence are

AFFIRMED.

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