

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
D.O. VOLLENWEIDER, J.E. STOLASZ, V.S. COUCH
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**WILLIAM C. THOMPSON
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 200600807
GENERAL COURT-MARTIAL**

Sentence Adjudged: 19 August 2005.

Military Judge: LtCol John Schum, USMC.

Convening Authority: Commanding General, 1st Marine
Aircraft Wing, Okinawa, Japan.

Staff Judge Advocate's Recommendation: LtCol D.S. Jump,
USMC.

For Appellant: Maj Richard Belliss, USMC.

For Appellee: LT Derek Butler, JAGC, USN.

11 December 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

COUCH, Judge:

After entering mixed pleas, the appellant was convicted by a general court-martial composed of officer and enlisted members of unauthorized absence, violation of a military protective order, assault consummated by a battery, breaking restriction, kidnapping, and wrongful possession of child pornography, in violation of Articles 86, 90, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 890, 928, and 934. The appellant was sentenced to confinement for 7 years, reduction to

pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved 5 years of confinement and the rest of the sentence as adjudged.

The appellant initially submitted this case alleging three assignments of error.¹ Upon review of the record of trial, we specified an additional issue addressing whether the evidence in this case is legally and factually sufficient to support the appellant's conviction for kidnapping his wife. Having considered the record of trial, the written submissions of the parties, and the oral arguments of counsel, we conclude that the appellant's conviction for kidnapping must be set aside and his sentence modified. We find that the findings and sentence, as modified, are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Legal and Factual Sufficiency of Kidnapping Charge

The appellant was convicted of kidnapping his wife by means of carrying her away and holding her against her will. The Government contends that the appellant held his wife in his car as he accelerated down the street, and that this "holding" was more than momentary or de minimis. We disagree.

The record of trial reflects the alleged kidnapping occurred in the midst of an ongoing series of marital problems between the appellant and his young wife. Immediately prior to the alleged offense, the appellant broke restriction, rode to his apartment on a bicycle, and found his wife accompanied by their roommate and his friend, Mike Davis. An argument between the appellant and his wife ensued when she attempted to leave the apartment with Mr. Davis. According to the appellant's wife, she struck the appellant several times with her purse before the appellant pulled her into their car by her purse after her wrist became entangled in the straps. Record at 390. She testified the appellant pulled her across his lap and then

¹ I. THE MILITARY JUDGE ERRED IN DENYING THE DEFENSE MOTION TO SUPPRESS APPELLANT'S CONFESSION TO INVESTIGATOR RUSSOMANO.

II. THE DEFENSE COUNSEL TEAM'S PERFORMANCE DURING THE MERITS AND SENTENCING PORTION OF THE TRIAL WAS BELOW PROFESSIONAL NORMS AND DENIED APPELLANT HIS RIGHT TO EFFECTIVE REPRESENTATION UNDER THE SIXTH AMENDMENT.

III. A SUPPLEMENTAL COURT-MARTIAL ORDER IS WARRANTED BECAUSE THE CONVENING AUTHORITY'S ACTION AND PROMULGATION ORDER INCORRECTLY STATE THE FINDINGS TO ADDITIONAL CHARGE I.

accelerated the car with the door still open and her legs dangling outside. *Id.*

Mr. Davis testified that the appellant and his wife argued about their car keys and that Mr. Davis was going to give her a ride because she wanted to leave. *Id.* at 497-98. Mr. Davis recalled seeing the following events occur in the parking lot:

Q. ...[T]his [argument] was going on for what period of time?

A. It went on for a little while. They were bickering. And then, like, someone ... I don't know who - - I remember the car was on the side of the street. And somehow somebody was in the driver's side. And the car ended up in the middle of the street. And it was there for a while. They were still arguing in the street. And then, like, towards the final stage of it, I mean, they both were in the car; and the car was down the street.

Q. Did you see how they got into the car when the car went down the street?

A. I can't really say that I seen (sic) actually what happened. All I seen (sic) was just two bodies went flying into the car, and the car sped off down the street.

Id. at 500. On cross-examination, Mr. Davis admitted "I can't say that she was pulling him or he was pulling her. I don't know." *Id.* at 503.

The appellant testified that his wife attempted to prevent his departure by jumping into the car on the driver's side. Her back was towards him and she was facing the steering wheel as he accelerated down the street. *Id.* at 618-19. He claims that he stopped the car and told her "either get in or get out." She then crawled across his lap and into the back seat. *Id.* at 619.

The appellant and his wife both testified that after they left the vicinity of their apartment, they drove to get gas at a nearby Navy Exchange. They then rode together to Makapuu Beach, the site of their wedding, where they kissed and walked on the beach and later engaged in sexual intercourse in their car. *Id.* at 392-94. They left the beach and stopped for food at a Burger King drive-thru. They then drove to a deserted industrial park where they again had sexual intercourse and spent the night

inside the car. *Id.* at 394-96. After making another stop at Burger King the next morning where the wife went inside to purchase food, she and the appellant returned to their apartment where they had sexual intercourse. *Id.* at 396-98.

This court may not affirm the findings and sentence of a court-martial unless we find them to be both factually and legally sufficient. *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007)(citing Art. 66(c), UCMJ). Our standard of review for both legal and factual sufficiency is *de novo*. *Id.* at 459 (citing *United States v. Najera*, 52 M.J. 247, 249 (C.A.A.F. 2000)). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Id.* at 325.

The elements of kidnapping under Article 134, UCMJ, are:

- 1) That the accused seized, confined, inveigled, decoyed, or carried away a certain person;
- 2) That the accused then held such person against that person's will;
- 3) That the accused did so willfully and wrongfully;
and
- 4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 92b. To satisfy the element that the victim was held against their will, the Government must prove that the victim was held for something more than a momentary or incidental detention. *Id.* at ¶ 92c(2). Further, the victim must be held involuntarily, which could result from force, mental or physical coercion, or from other means. *Id.* at ¶ 92c(3). The appellant must have specifically

intended to hold the victim against her will, and an accidental detention will not suffice. *Id.* at ¶ 92c(4).

To determine whether the detention of an individual is more than incidental or momentary, we consider the following six factors:

- 1) The occurrence of an unlawful seizure, confinement, inveigling, decoying, kidnapping, abduction or carrying away and a holding for a period. Both elements must be present.
- 2) The duration thereof. Is it appreciable or *de minimis*? The determination is relative and turns on the established facts.
- 3) Whether these actions occurred during the commission of a separate offense.
- 4) The character of the separate offense in terms of whether the detention/asportation is inherent in the commission of that kind of an offense, at the place where the victim is first encountered, without regard to the particular plan devised by the criminal to commit it. . . .

- 5) Whether the asportation/detention exceeded that inherent in the separate offense and, in the circumstances, evinced a voluntary and distinct intention to move/detain the victim beyond that necessary to commit the separate offense at the place where the victim was first encountered. . . .
- 6) The existence of any significant additional risk to the victim beyond that inherent in the commission of the separate offense at the place where the victim is first encountered. It is immaterial that the additional harm is not planned by the criminal or that it does not involve the commission of another offense.

United States v. Seay, 60 M.J. 73, 80-81 (C.A.A.F. 2004)(quoting *United States v. Santistevan*, 22 M.J. 538, 543 (N.M.C.M.R. 1986), *aff'd*, 25 M.J. 123 (C.M.A. 1987))(ellipsis in original) (hereinafter "Santistevan factors"); see also *United States v. Newbold*, 45 M.J. 109, 112 (C.A.A.F. 1996).

As a predicate matter, we note that the alleged kidnapping by the appellant occurred as a "stand alone" offense; in other words, the appellant was not engaged in a separate offense at the time the asportation occurred.² While a conviction for a "stand alone" kidnapping is unusual, it is not unprecedented or impermissible under military law. See *United States v. Dickey*, 41 M.J. 637, 643 (N.M.Ct.Crim.App. 1994), *aff'd*, 46 M.J. 123 (C.A.A.F. 1996)(summary disposition)(independent crime of kidnapping can be committed without other criminal activity when there is more than momentary detention or movement, and the requisite intent).

The fact that the alleged kidnapping by the appellant was a "stand alone" offense is significant for two reasons. First, the lack of a separate offense in conjunction with the appellant's acts involving his wife and their car resolves *Santistevan* factors 3, 4, 5, and 6, and makes clear the appellant's alleged holding of [his wife] was not a detention incidental to another crime. This leaves for us to determine whether the alleged holding was more than a momentary detention.

² The appellant was charged with raping his wife earlier in the day before the alleged kidnapping occurred, but was acquitted of this offense by the members. Other than breaking restriction and his unauthorized absence, there is no evidence that the appellant was engaged in a separate offense (such as robbery or rape) immediately before or after he allegedly absconded with his wife in the car. See MCM, Part IV, ¶ 92c(2).

MCM, Part IV, ¶ 92c(2). Second, the lack of a separate offense calls into question the fairness of charging a serious crime like kidnapping in the context of a domestic dispute between a feuding couple like the one presented in this case. See *United States v. Corrales*, 61 M.J. 737, 749 (A.F.Ct.Crim.App. 2005), rev. denied, 63 M.J. 191 (C.A.A.F. 2006).

Applying the *Santistevan* factors to these facts, we cannot conclude beyond a reasonable doubt that the appellant's alleged carrying away of his wife was more than a momentary detention. First, assuming the appellant's operation of the car with his wife hanging out of the door constitutes a "carrying away" of her, we find there was no "holding for a period," both of which elements must be present. *Seay*, 60 M.J. at 80. While the appellant's wife testified that the appellant pulled her into the car by her purse straps against her will, the appellant testified that she was attempting to pull the keys out of the ignition or put the car in park. Record at 390, 618. Mr. Davis' testimony does not indicate which of the two actors pulled the other into the car because he "doesn't know." *Id.* at 503. The record demonstrates that the car immediately stopped in the middle of the street, and the wife testified she crawled across the appellant's lap and into the back seat. *Id.* at 391. Given the state of the evidence, we cannot conclude the appellant involuntarily held his wife as required by Article 134. MCM, Part IV, ¶¶ 92c(2) and (3). This conclusion is supported by the conduct of the couple after they left the vicinity of their apartment until they returned the following day.

Second, based upon the established facts, we find that the duration of the appellant's alleged detention of his wife was nothing more than *de minimis*. Because the Government charged the alleged kidnapping under the first two clauses of Article 134, the victim's asportation must be more than momentary. *United States v. Jeffress*, 28 M.J. 409, 413-14 (C.M.A. 1989). While the actions of the appellant and his wife regarding how she entered the car are in dispute, it is clear that the car did not travel far before it stopped and she climbed into the back seat. Even if we were to assume the appellant held his wife against her will, which we do not, we find the detention was momentary and therefore *de minimis* under the circumstances.

While we do not approve of the appellant's misconduct related to his operation of the car and the safety of his wife, we do have grave reservations in affirming a conviction for kidnapping under these facts because "we cannot overlook judicial precedent clearly signaling disapproval of this type of

overzealous prosecution." *Corrales*, 61 M.J. at 749. If we were to allow the appellant's misconduct and unsafe driving to be characterized as kidnapping, punishable by confinement for life without eligibility for parole, we would perpetuate a "careless concept of the crime" of kidnapping that has long been condemned as a misuse of the offense and sought to be avoided. *Id.* at 748 (quoting *Chatwin v. United States*, 326 U.S. 455, 464 (1946)).

Considering the evidence in the light most favorable to the prosecution, we hold that a reasonable factfinder could not find beyond a reasonable doubt that the elements of kidnapping were satisfied. *Seay*, 60 M.J. at 81; see also *United States v. Dobson*, 63 M.J. 1, 21 (C.A.A.F. 2006)(citing *Jackson*, 443 U.S. at 319). As for the factual sufficiency of the charge, we have assessed the evidence in the entire record without regard to the findings reached by the trial court. Taking into account the fact that the trial court saw and heard the witnesses and we did not, we are not convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

We conclude that the evidence was both factually and legally insufficient to support the appellant's conviction for kidnapping. This court has the authority to set aside a finding of guilty and affirm only a finding of guilty to a lesser included offense. Art. 59(b), UCMJ. A conviction for the lesser included offense of a simple disorder under Article 134 clause 1 or 2 is permissible when the record does not support a finding of guilty for the greater offense. *United States v. Sapp*, 53 M.J. 90, 92 (C.A.A.F. 2000). We may not, however, affirm a finding of guilty to an included offense on a theory not presented to the trier of fact. *United States v. Riley*, 50 M.J. 410, 415 (C.A.A.F. 1999)(citations omitted).

The evidence is both factually and legally sufficient to support a finding of guilty to the closely related offense of reckless endangerment under Article 134.³ MCM, Part IV, ¶ 100a. In that the elements for Article 134 offenses of kidnapping and reckless endangerment both prohibit conduct that is either prejudicial to good order and discipline or is service

³ The elements to prove reckless endangerment are: (1) that the accused did engage in conduct; (2) that the conduct was wrongful and reckless or wanton; (3) that the conduct was likely to produce death or grievous bodily harm to another person; and (4) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. MCM, Part IV, ¶ 100a.

discrediting, we find that the appellant was clearly on notice of the crime he needed to defend against at trial. *Cf. United States v. Fuller*, 54 M.J. 107, 112 (C.A.A.F. 2000); *Sapp*, 53 M.J. at 92; and *United States v. Foster*, 40 M.J. 140, 147 (C.M.A. 1990). The appellant's misconduct as testified to at trial meets all of the elements of reckless endangerment. *Sapp*, 53 M.J. at 92. Reckless endangerment most accurately describes the appellant's misconduct and provides a fair result in this case. *Foster*, 40 M.J. at 144, n.4. Accordingly, we will take corrective action in our decretal paragraph by amending Specification 2 of Charge V, and reassessing the sentence. *United States v. Augustine*, 53 M.J. 95, 96 (C.A.A.F. 2000).

Suppression of the Appellant's Confession

The appellant claims that the military judge erred by denying a motion to suppress his confession given to a Criminal Investigation Division (CID) agent on 7 February 2005. The appellant asserts that despite being represented by a detailed defense counsel, the CID agent conducted a custodial interrogation that was not initiated by the appellant and without notifying the detailed defense counsel. The Government claims that this case is controlled by *United States v. Hanes*, 34 M.J. 1168 (N.M.C.M.R. 1992), and that the appellant's request for the assistance of counsel at a pretrial confinement hearing held pursuant to RULE FOR COURTS-MARTIAL 305, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), did not trigger the appellant's Fifth Amendment right to counsel.

We review a military judge's ruling on a motion to suppress--like other decisions to admit or exclude evidence--for an abuse of discretion. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)(citations omitted). However, we will only give deference to the military judge's ruling when he or she indicates on the record an accurate understanding of the law and its application to the relevant facts. *United States v. Briggs*, 64 M.J. 285, 287 (C.A.A.F. 2007)(citing *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)). Our resolution of this assignment of error in this case is complicated by the military judge's failure to make findings of fact and conclusions of law for the record. Therefore, we will accord no deference to the military judge's ruling which denied the appellant's motion to suppress his confession.

We have reviewed the pertinent case law regarding an appellant's Fifth Amendment right to counsel during custodial interrogations re-initiated by law enforcement agents. See

Davis v. United States, 512 U.S. 452 (1994); *McNeil v. Wisconsin*, 501 U.S. 171 (1991); *Minnick v. Mississippi*, 498 U.S. 146 (1990); *Arizona v. Roberson*, 486 U.S. 675 (1988); *Edwards v. Arizona*, 451 U.S. 477 (1981); *United States v. Finch*, 64 M.J. 118 (C.A.A.F. 2006). Assuming, without deciding, that the statement was obtained in violation of the appellant's Fifth Amendment right to counsel and MILITARY RULE OF EVIDENCE 305(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), we must still determine whether such error is harmless beyond a reasonable doubt. *United States v. Walker*, 57 M.J. 174, 178 (C.A.A.F. 2002)(citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

We examine all the circumstances to determine whether the error was harmless beyond a reasonable doubt. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)("Whether such an error is harmless in a particular case depends upon a host of factors.") Our focus is not on whether the members were right in their findings but, rather, on whether the error had or reasonably may have had an effect upon the members' findings. *United States v. Bins*, 43 M.J. 79, 86 (C.A.A.F. 1995)(citing *Kotteakos v. United States*, 328 U.S. 750, 764 (1946)).

We question the lawfulness of the CID agent's decision to interrogate the appellant when (1) the interrogation was not initiated by the appellant, (2) the CID agent knew the appellant had been to an IRO hearing with counsel present, and (3) at the time of the interrogation the CID agent knew the appellant was represented by detailed defense counsel. Record at 126-27. We also doubt that the military justice officer was correct when he advised the CID agent could initiate a reinterrogation of the appellant without notifying his detailed defense counsel. *Id.* at 77; Appellate Exhibit XXVI. However, because none of the admissions made by the appellant in his confession relate to any of the offenses of which the members found him guilty, we find that the admission of the appellant's confession of 7 February 2005 was harmless error beyond a reasonable doubt. *United States v. Bahr*, 33 M.J. 228, 231 (C.M.A. 1991)(citing *Van Arsdall*, 475 U.S. at 684).

Conclusion

We have carefully considered the appellant's claim of ineffective assistance of counsel, and specifically find that the appellant has failed to meet his burden to show that his defense counsel's performance "fell below an objective standard of reasonableness." *United States v. Edmond*, 63 M.J. 343, 345 (C.A.A.F. 2006)(citing *Strickland v. Washington*, 466 U.S. 668

(1984), and *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005)). The remaining assignment of error is rendered moot by our decision in this case.

Specification 2 of Charge V is amended to read as follows:

In that Private William C. Thompson, U.S. Marine Corps, did, on the island of Oahu, Hawaii, on or about 9 January 2005, wrongfully and recklessly engage in conduct, to wit: drive his car with the driver's side door open and the legs of [his wife] extended outside the car, conduct likely to cause death or grievous bodily harm to [his wife].

The findings, as amended, are affirmed.

As a result of our action on the findings, we reassess the sentence in accordance with the principles of *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006); *United States v. Eversole*, 53 M.J. 132, 133 (C.A.A.F. 2000); *United States v. Cook*, 48 M.J. 434 (C.A.A.F. 1998); *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). We affirm a sentence of confinement for 3 years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. Considering the offenses of which the appellant was found guilty, the fact that his wife suffered a ruptured eardrum as a result of his assault on her, and his three prior nonjudicial punishments, we are convinced that absent the error, the members would have imposed a sentence of at least this

severity. We direct that the supplemental court-martial order reflect this court's actions on the findings and the sentence.

Senior Judge VOLLENWEIDER and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court

Judge STOLASZ participated in the decision of this case prior to detaching from the court.