**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman First Class JESSE J. CALDWELL**
**United States Air Force**

**ACM 35463**

**18 April 2005**

Sentence adjudged 24 October 2002 by GCM convened at Eielson Air Force Base, Alaska. Military Judge: Anne L. Burman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Andrew S. Williams, and Major Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Lieutenant Colonel David N. Cooper.

Before

STONE, GENT, and SMITH
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

STONE, Senior Judge:

In accordance with his pleas, a military judge sitting alone convicted the appellant of four specifications of absence without leave, one specification of failure to obey an order, three specifications of assault consummated by a battery, and one specification of communicating a threat. Articles 86, 90, 128, and 134, UCMJ, 10 U.S.C. §§ 886, 890, 928, 934. The military judge sentenced him to a bad-conduct discharge, confinement for 28 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority reduced the confinement to 18 months, but otherwise approved the adjudged sentence.

The appellant asserts his plea to communicating a threat was improvident. We disagree and affirm.

*Background*

The appellant was married to CNC. The couple married soon after graduating from high school, and they both immediately enlisted in the Air Force. They were jointly assigned to Eielson Air Force Base, Alaska. Prompted by rumors his wife had been unfaithful to him while she attended basic and technical training, the appellant began a pattern of physically abusing his wife. During one of their arguments, the appellant asked CNC, "Are you ready to die?" This communication forms the basis of the Additional Charge and its Specification, which the appellant now challenges. This Specification alleges the appellant:

> [D]id, at or near Eielson Air Force Base, Alaska, between on or about 8 May 2002 and on or about 15 May 2002, wrongfully communicate to Airman First Class [CNC] a threat to kill Airman First Class [CNC] by saying to her "Are you ready to die?" or words to that effect.

At trial, the military judge correctly described the elements of communicating a threat and provided appropriate definitions. The appellant acknowledged he understood the judge's definitions. The military judge then conducted an extended and thorough discussion of this offense with the appellant. During this colloquy, the appellant explained some of the facts and circumstances surrounding the threat he made to his wife. He advised the military judge that he and his wife were discussing whether to part ways and initiate a divorce. He said this discussion turned into an argument. The appellant noted that in earlier arguments when they had talked about remaining married, CNC had told him "she would rather die" than leave him. Thus, during the argument involving the threat, he explained, "she was basically telling me that she didn't want to be with me no more" and "I just asked her, so basically then, you're ready to die."

In challenging his guilty plea to communicating a threat, the appellant focuses on that element of the offense requiring the communicated language to express "a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future." *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 110b(1) (2002 ed.). The appellant notes that at several points during the inquiry, he told the military judge he did not intend to make a threat. For example, at one point the military judge asked the appellant how his wife reacted to his words, and he responded, "She took it differently than the way that I intended to say it. I said it meaning one thing, and she took it another way." On another occasion, he told the military judge, "By the way I intended to say it, I wasn't really looking for her to be scared or anything." The appellant avers the military judge addressed this element only

through leading questions on issues of law. *See United States v. Jordan*, 57 M.J. 236, 239 (C.A.A.F. 2002) (agreement to conclusions of law alone does not satisfy the requirements of Article 45, UCMJ, 10 U.S.C. § 845, or Rule for Courts-Martial 910(e)). *See also United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996) (a military judge must elicit facts to establish a plea of guilty).

*Law*

A military judge's acceptance of a guilty plea is reviewed for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). A plea of guilty should not be set aside on appeal unless there is a "'substantial basis' in law and fact for questioning the guilty plea." *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). To sustain the guilty plea in this case, the military judge must have elicited objective "factual circumstances" from the appellant himself to support each element of the offense. *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980).

The appellant asks us to focus on whether he provided a sufficient factual basis to establish he had the requisite intent to sustain his conviction for communicating a threat. We first note that communicating a threat is not a specific intent crime, and it was not necessary for the military judge to elicit facts indicating the appellant intended to harm his wife. *MCM*, Part IV, ¶ 110c. Indeed, our superior court has long held:

> The intent which establishes the offense is that expressed in the language of the declaration, not the intent locked in the mind of the declarant. United States v Humphrys, 7 USCMA 306, 307, 22 CMR 96 [C.M.A. 1956]. Thus, the presence or absence of an actual intention on the part of the declarant to effectuate the injury set out in the declaration does not change the elements of the offense. This is not to say the declarant's actual intention has no significance as to his guilt or innocence. A statement may declare an intention to injure and thereby ostensibly establish this element of the offense, but the declarant's true intention, the understanding of the persons to whom the statement is communicated, and the surrounding circumstances may so belie or contradict the language of the declaration as to reveal it to be a mere jest or idle banter.

*United States v. Gilluly*, 32 C.M.R. 458, 461 (C.M.A. 1963).

*Discussion*

The military judge conducted more than a bare bones inquiry on this charge and specification. Indeed, she spent a great deal of time on that element of the offense requiring the communicated language to express "a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the

future." Adhering to the standard instruction provided for in the Department of the Army Pamphlet (D.A. Pam.), *Military Judges' Benchbook*, ¶ 3-110-1 (1 Apr 2001), she first advised the appellant, "Proof that you actually intended to harm another is not required, but the language used, on its face, must convey the intention to injure another immediately or in the future." She then engaged in an extended colloquy with the appellant:

> MJ: Okay, on the face of the words, if you just think about somebody who's yelling at you, who's upset, who yells at you, are you ready to die, or words to that effect, would you agree that that, just on its face, not knowing what's going on in somebody's head, but that, just on its face, it presents and amounts to a clear and present determination or intent to injure?
>
> ACC: Yes, Ma'am.
>
> MJ: Okay. So, if somebody was on the receiving end of those words, just hearing those words, in the context that you were upset and you were yelling and it's an argument, there's no doubt in your mind that that could be perceived as a threat?
>
> ACC: Yes, Ma'am.
>
> MJ: Even though what you're telling me is that you didn't intend to really threaten her, right?
>
> ACC: Yes, Ma'am.
>
> MJ: So, you weren't joking when you said it, right?
>
> ACC: No, Ma'am.
>
> MJ: And, there was no legal or legitimate purpose that you were trying to serve by telling her, quote, are you ready to die, end quote, or words to that effect, right?
>
> ACC: No, Ma'am.
>
> MJ: So, this is in the course of a heated argument between you?
>
> ACC: Right.
>
> MJ: In the TLF [Temporary Lodging Facility] again, right?

ACC: That's right.

MJ: After you said the words, were you aware that that language amounted to a clear and present determination or intent to injure your wife?

ACC: Yes, Ma'am. After I said it, you know, I kind of realized what I said. I think I apologized, I'm not sure. But, after I said it, you know, it's just like one of those things you realized you shouldn't have said. I couldn't take it back because I had already said it.

MJ: All right. Okay, so basically, during the course of the argument, you realized that the words that had come out of your mouth were probably different than what you were trying to do?

ACC: Yes, Ma'am.

MJ: And the words coming out of your mouth amounted to a threat?

ACC: Yes, Ma'am. The argument never became physical at any time, but it was just something that I shouldn't have said.

MJ: Got it. Do you agree that your communication was wrongful?

ACC: Yes, Ma'am.

MJ: Why is that?

ACC: Because you don't . . . you shouldn't say stuff like that to people just simply because of the fact that I didn't . . . you know, she didn't know whether or not I meant it, was serious or not, you know, even though I didn't. It was just . . . I see how she could have felt very threatened by what I said and it was something that I shouldn't have done.

We have no doubt, based on this inquiry, that the appellant himself admitted to more than adequate facts and circumstances to establish all of the elements of communicating a threat. *Jordan*, 57 M.J. at 239. A review of the entire record of trial does not provide any basis for this Court to conclude the language the appellant directed at his wife was "mere jest or idle banter." *Gilluly*, 32 C.M.R. at 461. We do not find any suggestion from the record that his words were made for an innocent or legitimate purpose. *MCM*, Part IV, ¶ 110c. Nor was it a simple lovers' quarrel. *See United States v. Hill*, 48 C.M.R. 6, 8 (C.M.A. 1973). Finally, nothing about the facts and circumstances surrounding the offense contradicted the expressed intent of the appellant to commit the act. *Id.* Indeed, the appellant's pleas to having brutally assaulted his

wife on three occasions in the weeks preceding the threat only reinforce a conclusion that the appellant's words would convey a "present determination or intent to wrongfully injure" CNC. Therefore, we do not find a substantial basis in law or fact for questioning the appellant's guilty plea to communicating a threat. *Prater*, 32 M.J. at 436. His pleas to the Additional Charge and its Specification were provident.

*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 findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court