UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class NICHOLAS T. BURNS
United States Air Force

ACM S32084

18 December 2013

Sentence adjudged 18 July 2012 by SPCM convened at McConnell Air Force Base, Kansas. Military Judge: Natalie D. Richardson.

Approved Sentence: Bad-conduct discharge, confinement for 35 days, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Nicholas D. Carter.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

WEBER, Judge:

Contrary to his pleas, the appellant was convicted by a panel of officer members at a special court-martial of one specification of willfully and wrongfully discharging a firearm under circumstances such as to endanger human life, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The members acquitted the appellant of the remaining Charge and its specifications, which alleged that he assaulted a civilian man by pointing a loaded firearm at him and unlawfully struck, grabbed, and pushed a civilian woman. The members sentenced the appellant to a bad-conduct discharge, 35 days of confinement, and reduction E-1. The convening authority approved the sentence as adjudged.

The appellant now alleges three errors: 1) The military judge insufficiently instructed the members on the definition of "wrongful" concerning the alleged willful and wrongful discharge; 2) His conviction is legally and factually insufficient; and 3) He received ineffective assistance of counsel when his trial defense counsel's sentencing argument conceded his guilt.

Background

The appellant's conviction stems from a confrontation with a civilian man in the Wichita, Kansas, area sometime after 0200 hours on 6 April 2012. Witness accounts vary significantly, but the most relevant facts are well established. After a running argument with a civilian male, the appellant retrieved his loaded .380-caliber handgun from his apartment, chambered a round, fired a round into the air while standing in the parking lot in front of the appellant's apartment building, and then removed the ammunition clip and cleared the chamber. The building was one of several in an apartment complex. No one was hurt. The little eyewitness testimony that was presented about the appellant's act of firing the weapon was that the appellant fired "into the air." Police responded to a 9-1-1 call and arrested the appellant. They found a spent shell casing and one live round in the parking lot, and the appellant's handgun inside his apartment. The discharged bullet was not found.

Legal and Factual Sufficiency

We first address the legal and factual sufficiency of the appellant's conviction. The appellant asks this Court to set aside the findings of guilt as to Charge II and its Specification because the evidence was not factually or legally sufficient to support his conviction. He specifically argues that the Government failed to prove that the discharge of his weapon was under circumstances such as to endanger human life.

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *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." *Turner*, 25 M.J. at 324 (citation omitted). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). Our assessment of factual and legal sufficiency is limited to the evidence presented at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

> The elements of the charged offense are as follows:
>
> (1) That the accused discharged a firearm;
>
> (2) That the discharge was willful and wrongful;
>
> (3) That the discharge was under circumstances such as to endanger human life; and
>
> (4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces.[1]

Manual for Courts-Martial, United States (*MCM*), Part IV, ¶ 81.b. (2008 ed.). The *Manual* states that: "'Under circumstances such as to endanger human life' refers to a reasonable potentiality for harm to human beings in general. The test is not whether the life was in fact endangered but whether, considering the circumstances surrounding the wrongful discharge of the weapon, the act was unsafe to human life in general." *MCM*, Part IV, ¶ 81.c.

The *Manual's* definition originates from *United States v. Potter*, 35 C.M.R. 243 (C.M.A. 1965). In that case, Airman Third Class Potter got involved in an altercation with a fellow Airman at the Travis Air Force Base mess hall. Potter returned to his barracks room, retrieved a pistol, and returned to the mess hall to confront the other Airman. Potter was unable to find the Airman. However, Potter fired a shot into the mess hall floor, which ultimately formed the basis of a conviction for careless discharge of a firearm.[2] He proceeded to the Airman's barracks area and fired five shots through the door to the Airman's room. The five rounds came to rest in the Airman's room or in a parking lot beyond the room. *Id.* at 244. These shots formed the basis for a conviction

[1] The Government charged the appellant in the conjunctive, meaning it needed to prove that his conduct met both terminal elements of the General Article.

[2] Potter was initially charged with and convicted of willful and wrongful discharge of a firearm under such conditions as to endanger human life for the shot fired in the mess hall. However, the Air Force Court of Military Review found the evidence insufficient to sustain this conviction, and instead affirmed a finding of guilty as to the lesser included offense of careless discharge of a firearm (the forerunner to today's offense of negligent discharge of a firearm). *United States v. Potter*, 35 C.M.R. 243, 244 (C.M.A. 1965).

of willful and wrongful discharge of a firearm under such circumstances as to endanger human life. Although Potter did not know it at the time, his intended victim was not in the room, and at trial there was no showing that anyone was in the parking lot or immediate area who was actually endangered by the barracks shooting. *Id.*

Our superior court held that the Government need not demonstrate actual danger to specific human lives, but rather need only demonstrate "a reasonable potentiality for harm to human beings in general." *Id.* at 245. Reasoning that servicemembers often have ready access to weapons, and that the charge at issue fell under the General Article, the Court held as follows:

> To say [firearms'] indiscriminate discharge is not conduct directly prejudicial to good order and discipline unless human life is actually endangered is to ignore the realities of the situation and the dangers which would flow from their being fired in the thickly inhabited complexes which make up our modern military installations. Enforcement of military order and discipline is not so narrowly bound that the Government need prove actual danger to human life in order to punish wrongful discharge of firearms. Military barracks are not to be converted into unofficial ranges and their inhabitants required to undergo the risk of falling victim to stray bullets unless risk is shown. The correct standard is, as alleged and proven here, "under circumstances such as to endanger human life," that is, not that such life was in fact endangered, but that, from the circumstances surrounding the wrongful discharge of the weapon, it may be fairly inferred that the act was unsafe to human life in general.

Id.

Under *Potter*, the Government has a minimal burden to demonstrate that the act was unsafe to human life. However, some burden remains, and the Government must prove – through inference or otherwise – that the act was unsafe to human life in general. Here, the Government failed to demonstrate that the appellant's act of firing a single shot into the air was unsafe to human life in general. The Government's evidence on this element rested almost entirely upon one witness's testimony about the act itself along with an aerial photograph depicting that the appellant fired his shot in the midst of a multi-building apartment complex. Under the facts of this case, this is an insufficient basis to conclude that human life was endangered by the appellant's actions. The one eyewitness who testified as to the gunshot clearly and repeatedly stated that the appellant fired "into the air." This same witness also testified that the appellant did not shoot at buildings, people, or cars.

In addition, the Government produced no evidence to demonstrate that the lone gunshot into the air caused residents to experience any risk to life. This may be

unnecessary in cases where a servicemember fires toward a building or a car, as the danger to human life in such situations may be self-evident. Where the shot was aimed in the air, however, some evidence was necessary to demonstrate a risk to human life. It may seem obvious that, as the Government claims on appeal, "What goes up must come down," but there appears to be some scientific dispute as to whether bullets falling from the sky present any appreciable threat to human life.[3] We pass no judgment on the scientific principles involved in falling bullets, but the idea that a bullet shot into the air presents a safety threat to human life is not so self-evident that the Government did not need to introduce any evidence on this point.

The Government also introduced little to no evidence about the manner in which the appellant handled the weapon. Had the evidence indicated that the appellant handled the weapon in a careless manner, waving it around before discharging it, or discharging it quickly without ensuring his weapon was pointed to empty sky, our analysis might be different. We also recognize that the gunshot took place at around 0200 hours, in conjunction with an argument, and after the appellant had consumed some amount of alcohol. However, the Government introduced no evidence to establish how much alcohol the appellant consumed and no witness testified that the appellant was acting erratically due to alcohol consumption or the heat of the moment. Instead, the one eyewitness[4] simply testified that the appellant fired the weapon into the air only after the civilian male exited his vehicle. This same eyewitness testified that the appellant racked the slide, fired one shot into the air, dropped the ammunition clip, re-racked the slide (clearing the chamber), and returned to his apartment. We simply have insufficient evidence before us to indicate the appellant's actions were anything but controlled.

Additionally, we note that the Government presented little evidence as to how many nearby human beings were outdoors at the time. The appellant's actions took place sometime after 0200 hours, and what little information can be discerned from the record of trial indicates few people were outside.[5] The Government presented no evidence about the population in the area immediately surrounding the apartment complex, and testimony elicited by the defense on cross-examination indicated that no residential areas existed around the complex in three directions.

To be clear, we do not hold that the Government may never meet its burden of proof when a military member discharges a weapon into the air in a residential area. We

[3] For a study by a historical military firearms expert, see Julian S. Hatcher, HATCHER'S NOTEBOOK 510 (3d ed. 1962) (generally concluding that falling .30-caliber bullets do not attain sufficient velocity to break the skin).

[4] Only one witness testified to seeing the appellant fire the weapon. Two other witnesses, including the civilian male, testified that before the gunshot, the appellant pointed the weapon at the civilian male. However, the members acquitted the appellant of that specification.

[5] For example, after the shooting, the civilian male departed and performed several "donuts" in his car on what was described as a normally busy street during waking hours. The transcript of a 9-1-1 call referred to "a whole bunch of us outside," but that call took place at some point after the appellant fired the shot, and presumably the sound of the gunshot drew some people out of their apartments.

simply hold that the Government wholly failed to introduce any substantial evidence as to this element in this case. The Government's burden of proof beyond a reasonable doubt is not met when the Government asks the members to simply assume that: 1) a falling bullet from the sky is sufficiently lethal to endanger human life; 2) the appellant's actions were careless as a result of temper or alcohol consumption; or 3) some human beings were sufficiently exposed in the vicinity to be at risk. We also do not condone the appellant's conduct. Indeed, his actions in firing a weapon in a residential area were ill-advised and undoubtedly service-discrediting and prejudicial to good order and discipline. His conduct likely could have formed the basis for a charge of a breach of peace or drunk and disorderly conduct (if testimony had been provided that the appellant was drunk). However, the Government chose to charge the appellant with willfully and wrongfully discharging a firearm under such circumstances as to endanger human life. That decision carries with it a burden of proof as to the element of endangerment to human life, as words have meaning. The Government then elected not to introduce any evidence that might satisfy this burden. After reviewing the record, weighing the evidence in the record of trial, and making allowances for not having personally observed the witnesses, we are not convinced of the appellant's guilt beyond a reasonable doubt. We therefore need not address legal sufficiency.

Our conclusion that the appellant's conviction is not factually sufficient appears to be consistent with precedent. We have reviewed every appellate decision available involving a similar charge since the UCMJ's enactment.[6] Of more than 60 cases reviewed, we found none in which a servicemember was convicted of this offense merely for firing a single shot into the air outdoors. Nearly every case contained facts far more egregious than the appellant's behavior, involving either horizontal shooting toward occupied areas or indiscriminate shooting indoors. We find this case sufficiently distinguishable from *Potter*. In *Potter*, human beings could have been endangered but for the fact that no one happened to be in the barracks room or in the adjacent parking lot where Potter's bullets came to rest. It is self-evident that firing a weapon toward a barracks room generally endangers human life, even if by fortune no one was present at the time of the firing. The Government cannot rely on the same inference in this case. The appellant fired toward no one when apparently few people were even outside.

However, we are not precluded from considering the appellant's guilt on any lesser included offense that may exist, even where the lesser included offense was not considered or instructed upon at trial. *United States v. Upham*, 66 M.J. 83, 87-88 (C.A.A.F. 2008). We find that the appellant's conduct satisfies the elements of

[6] Article 134, UCMJ, 10 U.S.C. § 934, has referred to a substantially identical offense since it was enacted in 1950, though it was not specifically listed as an enumerated offense in early versions of the Code. Appellate decisions referencing convictions for this offense date back to 1952. *See United States v. Simmons*, 5 C.M.R. 119, 125 (C.M.A. 1952).

discharging a firearm through negligence, as enumerated in Article 134, UCMJ.[7] The elements of this offense are:

> (1) That the accused discharged a firearm;
>
> (2) That such discharge was caused by the negligence of the accused; and
>
> (3) 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, ¶ 80.b.

The *Manual* lists this offense as a lesser included offense of the charged offense, and we find that it is in fact a charged offense under the test prescribed by *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010).[8] The appellant's conduct meets all three elements of the lesser included offense. He discharged a firearm and the Government demonstrated at trial that this was prejudicial to good order and discipline and was of a nature to bring discredit upon the armed forces. Concerning the second element, the appellant intentionally discharged the weapon. In this sense his actions were not caused by his negligence (as may be the case in an accidental discharge) but by his intentional conduct. However, since the appellant met the higher threshold of intentionally discharging the weapon, he may be held liable under the lower threshold of negligently discharging it. The gravamen of this Article 134 offense is that the appellant discharged a weapon under circumstances such as to prejudice good order and discipline in the armed forces or to bring discredit upon the armed forces. The Government easily met that burden here. The fact that he discharged the weapon intentionally rather than through an accident should not relieve him from criminal liability.

---

[7] We recognize that we may not "affirm 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) (quoting *Chiarella v. United States*, 445 U.S. 222, 236 (1980)). In this case, the two offenses are sufficiently similar that the Government's theory behind each offense would have been nearly identical.

[8] The first and third elements of negligent discharge of a firearm are identical to the first and forth elements of the greater offense. The second element – that the discharge was caused by the negligence of the accused – is subsumed within the greater offense's elements of willful and wrongful discharge, and that the discharge was under circumstances such as to endanger human life. The lesser offense's second element simply carries a lesser degree of culpability. *Cf. United States v. Dalton*, 72 M.J. 446 (C.A.A.F. 2013) (affirming the decision of the United States Navy-Marine Corps Court of Criminal Appeals that involuntary manslaughter is a lesser included offense of unpremeditated murder, but disagreeing with the service court that comparison of the elements between the two offenses must be conducted or "viewed in the light of human experience"); *United States v. Girouard*, 70 M.J. 5, 9 (C.A.A.F. 2011) (assuming without deciding that the simple negligence element of negligent homicide is subsumed within the premeditation element of premeditated murder but finding that negligent homicide was not a lesser included offense of premeditated murder on other grounds).

Our decision on the lesser included offense is also supported by the *Manual*. The *Manual* refers to the enumerated offense of negligent homicide for an explanation of the term "negligent." That discussion states:

> Simple negligence is the absence of due care, that is, an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care of the safety of others which a reasonably careful person would have exercised under the same or similar circumstances. Simple negligence is a lesser degree of carelessness than culpable negligence.

MCM, Part IV, ¶ 85.c.(2).[9] The appellant's actions were negligent in that he displayed a lack of due care for the safety of others. The Government did not prove that the appellant's actions met the higher standard of being under circumstances such as to endanger human life, but the appellant nonetheless generally displayed an unreasonable lack of care for the safety of others. As demonstrated at trial, a Wichita ordinance prohibited discharging a firearm within corporate limits except in certain circumstances not applicable to the appellant.[10] Cities enact such ordinances precisely because discharging a weapon in populated urban areas represents an unacceptable risk to the safety of others. We find the appellant's actions negligent, and therefore affirm a finding of guilty to the lesser included offense of discharging a firearm through negligence. We reassess the appellant's sentence below.

Instruction Defining "Wrongfully"

The appellant also asserts that the military judge abused her discretion by failing to provide a more detailed instruction regarding the definition of "wrongfully." He specifically avers that the military judge should have referenced his claim of self-defense.

This Court reviews a military judge's decisions concerning non-mandatory instructions for an abuse of discretion. *United States v. Barnett*, 71 M.J, 248, 249 (C.A.A.F. 2012).

Trial defense counsel asked the military judge to instruct the members that the appellant had a right to fire his weapon in self-defense based on a reasonable apprehension of death or grievous bodily harm from the civilian male. The request was made in the context of the military judge's proposed instructions as to whether the appellant's actions were wrongful. The military judge noted that Rule for Courts-Martial 916(e) does not include the charged offense among the listed offenses to which self-

[9] In addition, we note that in *Potter*, the service court affirmed the lesser included offense of careless discharge of a firearm for the shot fired in the mess hall, even though Potter's discharge was by all indications intentional. *Potter*, 35 C.M.R. at 244. Our superior court did not disturb that finding. *Id*. at 246.

[10] *See* WICHITA CITY, KAN., CODE § 5.88.020 (2013). At trial, an Air Force Office of Special Investigations Agent testified that a version of this ordinance was in effect at the time of the appellant's actions.

defense applies. After extensive discussion, the military judge proposed some language further defining "wrongful," but neither party agreed with the proposal. Ultimately, the military judge simply defined a wrongful act as one "done without legal justification or authorization." Trial defense counsel then used this definition to argue that the appellant's actions were not wrongful because he acted in self-defense.

Because we have found the appellant's conviction for the greater offense factually insufficient, the military judge's instructions concerning the term "wrongful" are now moot. The lesser included offense of which the appellant was convicted – negligent discharge of a firearm – contains no element of wrongfulness, and therefore the military judge need not have instructed on this term. As to the appellant's claim of self-defense and its effect on the lesser included offense, we find that even if the military judge would have been required to instruct the members on this matter, any such error would be harmless. A person may act in self-defense yet do so in a negligent way, and the members would have been free to consider the totality of the circumstances that evening in analyzing the reasonableness of the appellant's conduct without any instruction from the military judge. Analyzing the totality of the circumstances in this case ourselves, including the appellant's claim of self-defense, we find that the appellant's claim of self-defense does not affect the sufficiency of his conviction as to the lesser included offense.

Assistance of Counsel

The appellant lastly alleges that his trial defense counsel was ineffective by conceding his guilt in sentencing argument. We find no merit in this allegation.

We review claims of ineffective assistance of counsel de novo, applying the two-pronged test the Supreme Court set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007). Under *Strickland*, an appellant must demonstrate: (1) a deficiency in counsel's performance that is so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment;[11] and (2) that the deficient performance prejudiced the defense through errors so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Tippit*, 65 M.J. at 76 (internal quotation marks and citations omitted).

The deficiency prong requires that an appellant show that the performance of counsel fell below an objective standard of reasonableness, according to the prevailing standards of the profession. *Strickland*, 466 U.S. at 688. The prejudice prong requires a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000)

[11] U.S. CONST. amend. VI.

(citing *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)). Evidentiary hearings are required if there is any dispute regarding material facts in competing declarations submitted on appeal which cannot be resolved by the record of trial and appellate filings. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

In response to this Court's Order, the appellant's trial defense counsel addressed the appellant's allegations submitted an affidavit. The affidavit generally asserts that his sentencing argument was intended to minimize the appellant's culpability and portray him as something other than a hardened criminal. He further asserts that he did not perceive this argument as a concession of guilt, particularly since the defense's strategy in findings was not to contest that the appellant fired the weapon, but rather to contend that the Government failed to meet its burden on the remaining elements.

Although there are factual differences between the declarations of the appellant and his counsel, we need not order an evidentiary hearing pursuant to *Ginn* since these issues can be resolved based on the "appellate filings and the record." *Ginn*, 47 M.J. at 248. The filings and record "compellingly demonstrate" the improbability of the appellant's allegations that he received ineffective assistance of counsel. *Id.* The appellant's assertion that his trial defense counsel conceded his guilt is baseless. Our review of trial defense counsel's sentencing argument revealed nothing that could reasonably be considered as conceding the appellant's guilt. Trial defense counsel zealously and competently represented the appellant, and he did not suffer from ineffective assistance of counsel.

Sentence Reassessment

Because we find the appellant's conviction of the greater offense of willful and wrongful discharge of a firearm under circumstances such as to endanger human life factually insufficient, and instead affirm a finding of guilt as to the lesser included offense of negligent discharge of a firearm, we must reconsider whether sentence reassessment without a rehearing is appropriate. In so doing, our task is to determine to our satisfaction whether, absent any error, the sentence adjudged would have been of at least a certain severity. *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). Our decision is guided by factors such as: 1) whether there are changes in the penalty landscape, including instances where charges with significant exposure or aggravating circumstances are taken off the table; 2) whether an appellant chose sentencing by members instead of by military judge alone; and 3) the nature of the remaining offenses. *United States v. Moffeit*, 63 M.J. 40, 43 (C.A.A.F. 2006) (Baker, J., concurring).

Our finding that the appellant's conviction on the greater offense is factually insufficient does significantly change the penalty landscape. The greater offense at this special court-martial carried a maximum punishment of a bad-conduct discharge, forfeiture of pay, and confinement for one year. *MCM*, Part IV, ¶ 81.e. The maximum

punishment for the lesser included offense of discharging a firearm through negligence includes no punitive discharge and confinement for only three months. *MCM*, Part IV, ¶ 80.e. Nonetheless, we are confident that we can determine that the sentence adjudged would have been of at least a certain severity. By far the most severe aspect of the adjudged sentence was the bad-conduct discharge. Since the lesser included offense includes no possibility of a punitive discharge, it is inconceivable that the members would have adjudged any less confinement or not adjudged the reduction in rank when the punitive discharge was the primary aspect of their sentence. All the evidence introduced at trial would have properly been considered by the members in sentencing had they found him guilty of the lesser included offense, and the nature of the two offenses is quite similar. Under these circumstances, we are confident that had the members convicted the appellant of the lesser included offense of negligent discharge of a firearm, they would have imposed a sentence of at least confinement for 35 days and reduction to the grade of E-1.

Conclusion

We set aside the finding of guilty to the Specification of Charge II, and affirm a guilty finding to the lesser included offense of negligent discharge of a firearm, in violation of Article 134, UCMJ. The findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

HELGET, Senior Judge (dissenting):

Considering all of the facts and circumstances in this case, I find the appellant's conviction for Charge II and its Specification is factually and legally sufficient.

On the night of 6 April 2012, the appellant and three civilians, Ms. HK, Ms. IS, and Mr. MP, went to a local nightclub called Doc Howard's. They met beforehand for a pre-party at the appellant's apartment in the Cherry Hills apartment complex. Everyone except Ms. IS consumed alcohol. While they were at Doc Howard's, Ms. HK ran into an acquaintance, Mr. CK. The appellant and Mr. CK briefly met for the first time at the club. At approximately 0200 the following morning, Mr. CK left the club with Ms. HK. The appellant, Ms. IS, and Mr. MP returned to the appellant's apartment.

Ms. IS was supposed to get a ride home that night from Ms. HK who had left her vehicle at the Cherry Hills apartment complex. After returning to his apartment, the appellant called Ms. HK and told her it was her responsibility to take Ms. IS home. He

indicated that he had been drinking that night and could not take her home. At the time, was Mr. CK was driving Ms. HK back to the appellant's apartment. Ms. HK hung up on the appellant so he kept calling. Eventually, Mr. CK grabbed the phone and engaged in a verbal altercation with the appellant.

When Mr. CK and Ms. HK arrived at the apartment complex, the appellant came out of his apartment and confronted Mr. CK who was still in his vehicle. The appellant had his gun with him. Both Mr. CK and Ms. HK testified that the appellant pointed the gun at Mr. CK.[12] At some point, Mr. CK put his vehicle in reverse and started backing up. When he started to drive forward in an apparent attempt to leave the scene, the appellant, who was standing in the vicinity of the parking lot near Mr. CK's vehicle, fired a shot into the air. The appellant then ran back to his apartment. Immediately after the shot, another resident contacted 9-1-1 and reported that somebody had shot a car.

The majority holds that the Government did not prove that the appellant's actions were under circumstances to endanger human life, which is defined as "a reasonable potentiality for harm to human beings in general." *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 81.c. (2008 ed.). During closing argument, the trial counsel argued that anger, alcohol, and ammunition do not mix. I concur. Although the Government did not present evidence of the appellant's blood alcohol content, it is apparent from the testimony that he was intoxicated to a point where he felt it was not safe to drive. Further, the appellant was in a heightened emotional state with someone he had just met and the conflict was over a relatively minor issue concerning giving a friend a ride home. Upon Mr. CK's and Ms. HK's arrival, the appellant immediately came out of his apartment and confronted Mr. CK with his gun in hand. Then, when Mr. CK attempted to leave, the appellant fired his weapon in the parking lot in the middle of his apartment complex. Although he shot the weapon in the air and fortunately no one was injured, either someone outside or in one of the apartments, the appellant was not in complete control of his faculties. Under these circumstances, a reasonable potentiality for harm to human beings clearly existed.

After weighing the evidence in this case and making allowances for not having personally observed the witnesses, I am convinced of the appellant's guilt beyond a reasonable doubt.

[12] The appellant was acquitted of assault by pointing a loaded firearm. However, this does not necessarily mean the members did not believe the appellant pointed the gun, only that it wasn't loaded. We note the Military Judge asked the Government if it wanted an instruction on the lesser included offense of assault with an unloaded weapon, which the Government declined.

Further, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all of the essential elements beyond a reasonable doubt.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court