United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Leo J.
Navarro Aguirre,
Appellant

USCA Dkt. No. 26-0100/AF
Crim.App. No. 40354

ORDER DENYING PETITION

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is by the Court, this 25th day of February, 2026,

ORDERED:

That the petition is hereby denied.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Johnson)
Appellate Government Counsel (Payne)

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40354 (rem)

UNITED STATES
Appellee

v.

Leo J. NAVARRO AGUIRRE
Airman First Class (E-3), U.S. Air Force, *Appellant*

On Remand from
the United States Court of Appeals for the Armed Forces

Decided 25 November 2025

Military Judge: Elijah F. Brown.

Sentence: Sentence adjudged 26 March 2022 by GCM convened at Joint Base Lewis-McChord, Washington. Sentence entered by military judge on 12 May 2022: Bad-conduct discharge, confinement for 2 years and 2 months, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

For Appellant: Major Frederick J. Johnson, USAF.

For Appellee: Colonel G. Matt Osborn, USAF; Major Vanessa Bairos, USAF; Mary Ellen Payne, Esquire.

Before DOUGLAS, MASON, and KUBLER, *Appellate Military Judges*.

Senior Judge DOUGLAS delivered the opinion of the court, in which Judge MASON and Judge KUBLER joined.

DOUGLAS, Senior Judge:

Appellant's case is before this court for a second time. In a general court-martial, Appellant entered mixed pleas. The trial judge accepted his pleas of guilty to one specification of failure to obey a lawful order (violating a no-contact order) and one specification of wrongful use of Oxycodone in violation of Articles 92 and 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 912a.[1] The trial judge also accepted Appellant's plea of guilty by exception to one specification of reckless driving, excepting the words "and aerosol inhalants," in violation of Article 113, UCMJ, 10 U.S.C. § 913.[2] The Government elected to go forward with the excepted language. A panel of officer and enlisted members found Appellant guilty of the specification of reckless driving, excepting the words "and aerosol inhalants." Contrary to the remainder of Appellant's pleas, the same panel of officer and enlisted members found Appellant guilty of one specification of wrongful use of Ambien[3] in violation of Article 112a, UCMJ, one specification of assault consummated by a battery (unlawfully grabbing the arms and wrists of another with his hands), and one specification of aggravated assault with a loaded weapon (repeatedly pointing a loaded firearm at the head of another)—both assaults were committed against his spouse, and were in violation of Article 128, UCMJ, 10 U.S.C. § 928.[4] The trial judge sentenced Appellant to a bad-conduct discharge, confinement for two years and two months,[5] forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand. The convening authority took no action on the findings. The convening authority suspended the first six months of the adjudged forfeiture of total pay and allowances, waived the automatic forfeitures for six months, and directed the total pay and allowances

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[1] Unless otherwise indicated, all references to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] Specifically, Appellant was charged with "physical[ ] control of [a] vehicle, to wit: a passenger car, in a reckless manner by causing the vehicle to block traffic and swerve on public roadways and by driving the vehicle after using Zolpidem (a Schedule IV controlled substance commonly referred to as Ambien) and aerosol inhalants."

[3] Charged as "Zolpidem, commonly referred to as Ambien, a Schedule IV controlled substance."

[4] One specification of wrongful use of Benzodiazepine, a Schedule IV controlled substance, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, was withdrawn and dismissed by the convening authority. Appellant was acquitted of several additional specifications and charges.

[5] The concurrent and consecutive segmented confinement lengths, for each conviction combined, totaled two years and two months. Appellant was credited with 114 days pretrial credit.

to be paid to Appellant's spouse for six months. Otherwise, the convening authority approved the remainder of the sentence and provided the language for the reprimand.

After this court affirmed the findings and sentence, *United States v. Navarro Aguirre*, No. ACM 40354, 2024 CCA LEXIS 103 (A.F. Ct. Crim. App. 11 Mar. 2024) (unpub. op.), the United States Court of Appeals for the Armed Forces (CAAF) granted Appellant's petition for review of two issues. *United States v. Navarro Aguirre*, 85 M.J. 200 (C.A.A.F. 2024). Ultimately, the CAAF found in Appellant's favor on one of those issues: whether Appellant's conviction for wrongful Ambien use is legally sufficient. *United States v. Navarro Aguirre*, __ M.J. __, No. 24-0146, 2025 CAAF LEXIS 614, at *19 (C.A.A.F. 24 Jul. 2025).

The CAAF disagreed with our opinion that Appellant's conviction for wrongful use of Ambien is legally sufficient concluding that "the inferences . . . are overly speculative and too attenuated from the evidence in the record." *Id.* Accordingly, the CAAF reversed our decision on Appellant's use of Ambien, and the sentence, but affirmed the decision with respect to the remainder of the findings. *Id.* at *27. The CAAF returned the record to The Judge Advocate General of the Air Force for remand to this court "for reassessment of the sentence or for a rehearing on the sentence, if necessary." *Id.* Thus, the affirmed findings of guilty in this case now are: violating a no contact order, wrongfully using Oxycodone, reckless driving after using Ambien, assault consummated by a battery, and aggravated assault. The trial judge sentenced Appellant to a bad-conduct discharge, forfeiture of all pay and allowances, reduction to the grade of E-1, a reprimand, and segmented confinement lengths for each conviction. The trial judge grouped the terms of confinement with respect to the offenses against Appellant's spouse to be executed concurrently with each other. The trial judge grouped the confinement for the reckless driving with the wrongful use of Ambien and Oxycodone. These corresponding segmented sentences were to be executed concurrently with each other, and the two groups of concurrent sentences were to be executed consecutively.

The segmented sentences involving Appellant's spouse were as follows.

No contact order violation – two months.

Assault consummated by a battery – one month.

Aggravated assault – two years.

The segmented sentences for the remaining offenses were as follows.

Reckless driving after using Ambien – two months.

Wrongful use of Oxycodone – two months.

Wrongful use of Ambien – two months.

On remand, the parties submitted briefs addressing whether this court should reassess the sentence or order a rehearing on the sentence. Both argued in favor of reassessment. Appellant does not propose a particular reassessed sentence. The Government proposes reassessing the sentence originally imposed. We conclude reassessment is appropriate, and except for the reprimand, we agree with the Government's proposal, and take corresponding action in our decretal paragraph.

I. DISCUSSION

A. Law

Under Article 59(a), UCMJ, 10 U.S.C. § 859(a), a court-martial sentence may not be held incorrect by virtue of legal error "unless the error materially prejudices the substantial rights of the accused." If we can conclude that absent any error, an adjudged sentence would have been at least a certain severity, "then a sentence of that severity or less will be free of the prejudicial effects of error; and the demands of Article 59(a)[, UCMJ,] will be met." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986).

We have broad discretion first to decide whether to reassess a sentence, and then to arrive at a reassessed sentence. *United States v. Winckelmann*, 73 M.J. 11, 12 (C.A.A.F. 2013). In deciding whether to reassess a sentence or return a case for a rehearing, we consider the totality of the circumstances, and the following illustrative factors announced in *Winckelmann*: (1) "Dramatic changes in the penalty landscape and exposure;" (2) "Whether an appellant chose sentencing by members or a military judge alone;" (3) "Whether the nature of the remaining offenses capture[s] the gravamen of criminal conduct included within the original offenses and . . . whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses;" and (4) "Whether the remaining offenses are of the type that judges of the [C]ourts of [C]riminal [A]ppeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial." *Id*. at 15–16 (citations omitted).

B. Analysis

First, there has not been a dramatic change in the penalty landscape or exposure. As Appellant explains in his brief, the dismissal of wrongful use of Ambien results in a two-year reduction in the total maximum confinement length, from 18 years to 16 years. Separate from maximum confinement length, the other sentence parameters remain the same. The confinement sentence imposed for the wrongful use of Ambien, two months, ran concurrently

with the confinement sentences imposed for wrongful use of Oxycodone and reckless driving. This change is not dramatic and thus favors reassessment.

Second, Appellant was sentenced by the trial judge. This factor weighs in favor of reassessment.

Third, the remaining offenses capture the gravamen of Appellant's criminal conduct from the original offenses. The use of Ambien, as charged by the Government, and litigated by the Government at trial, was a contributing factor to the reckless driving offense. Now, with the dismissal of the wrongful use of Ambien, the reckless driving offense, along with Appellant's wrongful use of Oxycodone, remains. Appellant's offenses against his spouse remain, which include violating a no contact order, assault consummated by a battery, and aggravated assault. These offenses against the spouse and in particular the aggravated assault were the most serious offenses as reflected by the weight given these offenses in the sentence originally adjudged and made up the gravamen of the offenses.

Fourth, the remaining specifications are for types of offenses with which the judges of this court have experience and familiarity.

We may reassess a sentence only if we are able to reliably determine that, absent the error, the sentence would have been "at least of a certain magnitude." *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000) (citation omitted). Having applied the *Winckelmann* factors, we can reliably make such a determination. We are convinced the sentence, excepting the reprimand, would have been at least the same as originally imposed: a bad-conduct discharge, confinement for two years and two months, forfeiture of all pay and allowances, and reduction to the grade of E-1. We find the language of the reprimand addresses some aspect of the now set-aside specification and consider it no longer an appropriate punishment.

II. CONCLUSION

The findings of guilty as to Specification 2 of Charge I and Charge I, Specification 1 of Charge II and Charge II, the Specification of Charge III and Charge III, and Specifications 1 and 4 of Charge VI and Charge VI, were previously affirmed. We affirm only so much of the sentence as provides for a bad-conduct discharge, confinement for two years and two months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The sentence, as reassessed, is correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d).

The sentence, as reassessed, is **AFFIRMED**.

FOR THE COURT

JACOB B. HOEFERKAMP, Capt, USAF
Acting Clerk of the Court

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

Leo J. NAVARRO AGUIRRE, Airman First Class
United States Air Force, Appellant

No. 24-0146
Crim. App. No. 40352

Argued February 26, 2025—Decided July 24, 2025

Military Judge: Elijah F. Brown

For Appellant: *Major Frederick J. Johnson* (argued); *Lieutenant Colonel Allen S. Abrams* and *Major Spencer R. Nelson*.

For Appellee: *Major Vanessa Bairos* (argued); *Colonel Matthew D. Talcott*, *Lieutenant Colonel Jenny A. Liabenow*, and *Mary Ellen Payne*, Esq. (on brief).

Chief Judge OHLSON delivered the opinion of the Court, in which Judge SPARKS, Judge MAGGS, and Judge HARDY joined. Judge JOHNSON filed a separate opinion, concurring in part and dissenting in part.

Chief Judge OHLSON delivered the opinion of the Court.

Appellant received from his medical provider a valid prescription for the sleep medication commonly known as Ambien. At approximately 6:00 p.m. the next day, he was seen driving erratically near his apartment complex. During an encounter with the police, Appellant acknowledged that he had recently taken Ambien, and he also admitted to "huffing" an aerosol spray at some unspecified time. He later was charged with, among other offenses, wrongful use of the controlled substance zolpidem (Ambien's chemical name), as well as reckless driving after using both zolpidem and aerosol inhalants. Appellant subsequently sought to plead guilty to the reckless driving specification. During the providence inquiry, Appellant stated that after he took his prescribed dose of Ambien, he fell asleep in his bed and the next thing he remembered was waking up behind the wheel of his car. The military judge accepted Appellant's plea.[1] Separately, and contrary to his pleas, a panel of officer and enlisted members found Appellant guilty of, among other offenses, wrongful use of zolpidem (hereinafter referred to as Ambien).

We granted review of the following issues:

> I. Whether Appellant's conviction for wrongful Ambien use is legally sufficient when: (1) he had a valid prescription for Ambien, and (2) the basis for his conviction was a medically-known side effect.
>
> II. Whether Appellant's guilty plea for reckless driving was provident when he took his prescribed dose of Ambien, fell asleep in his bed, and "the next thing [he] remembered is being behind the wheel of [his] car."

United States v. Navarro Aguirre, 85 M.J. 200 (C.A.A.F. 2024) (order granting review) (alterations in original).

[1] Appellant's plea of guilty to the reckless driving specification excepted the language concerning aerosol inhalants.

For the reasons set forth below, we conclude that Appellant's conviction for wrongful use of Ambien was not legally sufficient, but his guilty plea to reckless driving was provident.

I. Background

Appellant was stationed at Joint Base Lewis-McChord, Washington. On September 30, 2021, he received a prescription for Ambien from his medical provider. The next day (a Friday), at approximately 6:00 p.m., a witness observed Appellant driving erratically. When Appellant's vehicle stopped for an extended period in a turn lane, the witness got out of his car to check on him. The witness saw Appellant dressed in his military uniform (although without the blouse), rocking back and forth with a can in his lap and what appeared to be a smile on his face. Appellant eventually turned into his apartment complex and bumped into a lamppost, which caused him to stop for several minutes before he drove off.

Local police officers soon responded to a report of a suspected case of "driving under the influence." When they discovered Appellant partially parked in a parking stall, they asked him if he had been drinking or using drugs. Appellant responded that he had taken Ambien. One officer, who had seen aerosol cans in the back seat of Appellant's car, asked him their purpose. Appellant admitted to "huffing" them but did not say when he had done so.

A. Appellant's Guilty Plea

At his general court-martial, Appellant sought to plead guilty to reckless driving after taking Ambien. During the providence inquiry conducted in accordance with *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247 (1969), Appellant told the military judge that he had been prescribed Ambien the day before the incident to help him sleep. He further explained that on the day of the incident, he left work and arrived at his apartment around 2:30 p.m. He then took the "prescribed dose of one pill" of Ambien because he "hadn't slept in almost two days." Appellant stated that he then fell asleep in his bed and the next thing

he remembered was being in the driver's seat of his car, parked in the wrong parking spot, with his foot on the gas pedal and "revving the engine." He said that a police car was behind him and that when he spoke to the officers, he told them that he was not drunk but that he had taken Ambien.

In the course of the *Care* inquiry, Appellant told the military judge that he did not remember driving his car but that he had reviewed the statements of witnesses and the police. Having done so, he acknowledged that his car had been seen "recklessly weaving and blocking traffic" and veering on and off roads, and "that the swerving is what eventually led [him] to swerve onto the sidewalk and hit [a] lamppost." Based on his review of this evidence, Appellant admitted that he had operated his car in a reckless manner. During follow up questions from the military judge, Appellant also acknowledged that he had taken Ambien "after arriving home from work," and he agreed with the military judge that the Ambien caused him to not remember being in control of the vehicle.

The military judge questioned Appellant about his mental state during the time of the offense. Appellant said that he "was not in complete control of [his] faculties" and acknowledged that he was driving recklessly because his actions of swerving on the road, blocking traffic, riding on top of a sidewalk, and hitting a lamppost were unsafe for himself and others. He also conceded that the Ambien could have affected his ability to safely control the vehicle. He told the military judge that when his "memory came to" he recalled feeling "dazed, groggy, slow, and having a hard time understanding the police officers." Appellant specifically denied having a justification or excuse for driving his vehicle in the manner alleged, and he told the military judge that he was pleading guilty voluntarily and of his own free will.

The military judge accepted Appellant's guilty plea to reckless driving in violation of Article 113, Uniform Code

of Military Justice (UCMJ), 10 U.S.C. § 913 (2018).[2] However, the military judge told Appellant that he could seek to withdraw his plea of guilty at any time before his sentence was announced.

B. The Contested Offenses

With regard to the contested offenses (as well as to the contested language of "and aerosol inhalants" in the reckless driving specification), Appellant elected trial by members with enlisted representation. In seeking to prove Appellant's wrongful use of Ambien, the prosecution offered photos of the interior of Appellant's car. These photos were taken from outside of the car more than two months after the charged incident. One of the photos of the front passenger seat showed what appeared to be pharmacy paperwork that had accompanied Appellant's Ambien prescription. Another photo showed a small brown paper bag in the backseat.

The prosecution also offered the testimony of an expert witness in the field of forensic toxicology. He testified that a prescription for Ambien would have instructed the patient to take the medication "[j]ust before one desires to go to sleep." He also testified, among other things, to the following facts: (a) Ambien is a medication that assists a person in getting a full night's sleep, rather than sleep for a short period of time; (b) the purpose of Ambien is to put the user to sleep and to help the user stay asleep; (c) Ambien can be misused and abused if a user takes a higher dosage than prescribed or if the medication is taken with other intoxicants; and (d) Ambien is a senses suppressant which can "turn[] off pieces of your body that are quite important."

[2] Additionally, and consistent with Appellant's pleas, the military judge found Appellant guilty of one specification of violating a lawful order (a no-contact order) in violation of Article 92, UCMJ, 10 U.S.C. § 892 (2018), and one specification of wrongful use of a controlled substance (oxycodone) in violation of Article 112a, UCMJ, 10 U.S.C. § 912a (2018).

Along with other evidence, the defense offered the Food and Drug Administration (FDA) data sheet for Ambien which states that "[c]omplex sleep behaviors including . . . sleep-driving, and engaging in other activities while not fully awake, may occur following the first or any subsequent use of AMBIEN." The defense also called as a witness the nurse practitioner who had prescribed Ambien to Appellant. She testified to the following facts: (a) she prescribed Appellant Ambien on September 30, 2021; (b) she would instruct patients to take Ambien thirty minutes before bedtime and about seven to eight hours before they planned to wake up; (c) Appellant had a medical purpose and authorization to use the medication on the charged date; (d) the use of Ambien an hour or two before bedtime does not invalidate the prescription or make it "illegal"; (e) users can abuse their prescriptions for Ambien by taking Ambien "at a time when they are not trying to go to sleep, but rather trying to have some other effect"; and (f) there is a "whole list" of different effects that people might experience after taking Ambien, such as "complex sleep behaviors," but they are not common.

At the close of evidence, the defense moved for a finding of not guilty pursuant to Rule for Courts-Martial (R.C.M.) 917 (2019 ed.) on the wrongful use of Ambien specification. Defense counsel argued that the prosecution had failed to provide any evidence during its case-in-chief that Appellant had wrongfully used Ambien as he had a valid prescription for it. The military judge disagreed. He reasoned that when the evidence was viewed in the light most favorable to the prosecution, Appellant's wrongful use could be inferred from the erratic way he had been driving, the time the offense occurred (i.e., Appellant took the Ambien late in the afternoon rather than at night), his attire when he was arrested (i.e., Appellant still was partially dressed in his military uniform rather than in sleepwear), and his work schedule (i.e., Appellant was not taking the Ambien in the afternoon to accommodate "shift work").

The military judge subsequently provided the panel members with findings instructions. In doing so, he took

judicial notice that the incident occurred on a Friday. Contrary to Appellant's pleas, the panel found Appellant guilty of wrongful use of Ambien in violation of Article 112a, UCMJ. However, the panel found Appellant not guilty of the language "and aerosol inhalants" in the reckless driving specification.[3]

After the members returned their findings, the defense asked the military judge to reconsider his prior R.C.M. 917 ruling. In arguing why reconsideration was warranted, the defense asked the military judge to consider Appellant's statements during his *Care* inquiry. The military judge declined the defense's invitation and denied the request for reconsideration. The military judge emphasized that "there was evidence Ambien should be taken exactly as prescribed" right before bedtime, and that a user should not take Ambien if they cannot get a full night's sleep. The military judge concluded that "[the] manner in which [Appellant] was driving, the time of day it was, and what [Appellant] was wearing," as well as other factors, supported the inference that Appellant had not taken Ambien for its prescribed purpose.

C. Appellant's Guilty Plea Revisited

Although the military judge denied the defense's request regarding the panel's findings, he found the "subject of the motion" raised "some concerns" about the providence of Appellant's earlier guilty plea to reckless driving. Specifically, the military judge observed that Ambien's FDA information sheet referenced "sleep driving" as a known side effect of the medication. He further noted that military law recognizes "something of a defense of

[3] The panel also found Appellant guilty, contrary to his pleas, of one specification of assault consummated by a battery and one specification of aggravated assault with a loaded firearm—both committed against his wife—in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2018). However, the panel found Appellant not guilty of a specification of failing to obey a lawful general regulation that prohibited using an aerosol inhalant with the intent to alter mood or function, and two specifications of assault consummated by a battery.

automatism, so if someone has sort of an involuntary action, [like] a seizure or an involuntary act, then there's no reason for the law to criminalize that." Considering the foregoing, the military judge reopened the providence inquiry to explore whether Appellant had been "sleep driving" at the time of the incident and thus was not aware that he was operating a vehicle.

At the outset of the renewed providence inquiry, the military judge explained to Appellant that voluntarily taking a drug is not a defense to reckless driving. The military judge then asked Appellant, "Why do you think that your control of the vehicle was voluntary if you were under the influence of Ambien and have no memory of the driving?" Appellant replied with a variety of reasons. First, he said that even though he had no memory of driving, he obviously must have taken a number of actions to get into the car and then to drive it. ("I would have had to put some kind of shoes on, get my car keys, get in my car, start my car, turn music on . . . stop[] at stoplights . . . put my car in gear and pull[] out of the [parking] spot.") Second, Appellant told the military judge that from listening to witness testimony he understood that he was driving the car "somewhat normal at some points." Third, he said that when "[his] memory kick[ed] back in" it "didn't feel like waking up from sleep" but felt more like a blackout from drinking alcohol. ("Like a slide show and there are just some slides missing.") Fourth, Appellant agreed with the military judge that based on the complexity of his actions, he did not believe he was "asleep" while driving and that he believed that his actions were voluntary. Fifth, Appellant explained that "previously [he] was aware that Ambien was pretty potent stuff, and I know it . . . could have effects on your driving, operating machinery, whatnot."[4] Ultimately, Appellant agreed with the military judge that "the number of things [he] would have had to do and . . . their

[4] In response to a follow-up question from the military judge, Appellant explained that he learned this information "from [his] prescribing [nurse practitioner]."

complexity" led him to believe that he was not truly "asleep" at the time that he was driving.

Later, when asked again by the military judge why he believed he was responsible for his actions, Appellant explained that on the day of the incident his car was running low on fuel and he had been thinking about getting gas. Thus, Appellant said, although he did not remember the facts, he believed his motivation to get behind the wheel was to go to the gas station. Appellant also told the military judge that he believed he was aware of what he had been doing while driving, despite not remembering those actions, because he was aware of where he was at the stoplights, he was aware of other vehicles honking, and he was able to drive back home. Appellant stated, "I believe those are voluntary actions."

Based on Appellant's statements, the military judge affirmed his acceptance of the guilty plea to this offense. However, he once again informed Appellant that he could ask to withdraw his plea of guilty at any time before the announcement of his sentence. Appellant did not do so.

At the sentencing phase of the trial, the military judge sentenced Appellant to a bad-conduct discharge, confinement for a total of two years and two months, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand. The convening authority took no action on the findings but suspended the first six months of the adjudged forfeitures, waived automatic forfeitures for six months, and directed that the total pay and allowances be paid to Appellant's spouse for six months. Subsequently, the military judge entered judgment. The United States Air Force Court of Criminal Appeals affirmed the findings and the sentence.

II. The Legal Sufficiency of Appellant's Conviction for Wrongful Use of Ambien

A. Standard of Review

We review issues of legal sufficiency de novo. *United States v. Harman*, 68 M.J. 325, 327 (C.A.A.F. 2010).

B. Applicable Law

The elements for Article 112a (wrongful use of a controlled substance) are as follows:

> (a) That the accused used a controlled substance; and
>
> (b) That the use by the accused was wrongful.

Manual for Courts-Martial, United States pt. IV, para. 50.b.(2)(a)-(b) (2019 ed.) (*MCM*). The *MCM* defines wrongful use as "without legal justification or authorization." *Id.* para. 50.c.(5).

A conviction is legally sufficient when "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. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007) (internal quotation marks omitted) (citations omitted). Under this standard, a reviewing court must draw every reasonable inference from the evidence in favor of the prosecution. *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). The standard for legal sufficiency is "a very low threshold to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal quotation marks omitted) (citation omitted). However, if there is no rational basis for the factfinder to draw an inference from the evidence in favor of the prosecution, and if this results in a failure of proof of an essential element, this Court will set aside the corresponding conviction. *See United States v. Plant*, 74 M.J. 297, 299-300 (C.A.A.F. 2015) (setting aside findings of guilt for child endangerment where proof of the appellant's drinking excessive amounts of alcohol while caring for his young child did not substantiate a reasonable probability that the child, who was placed in his crib during ordinary bedtime hours, would experience harm).

C. Discussion

As an initial matter, we note that contrary to Appellant's argument, our legal sufficiency review of his conviction for wrongful use of Ambien is limited to the evidence that was presented to the trier of fact *during the trial*.

United States v. Bethea, 22 C.M.A. 223, 225, 46 C.M.R. 223, 225 (1973); *see also United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007) ("In a succession of early cases, we established that the review of *findings*—of guilt and innocence—was limited to the evidence presented at trial." (citations omitted)). Therefore, although we may consider all of the evidence that was admitted during the contested phase of this case (including those matters of which the military judge took judicial notice), in the course of deciding whether Appellant's conviction for wrongful use of Ambien is legally sufficient, we may not reach beyond that evidence and look at the admissions or statements made by Appellant during his guilty plea *Care* inquiry.

We also acknowledge at the outset that the standard of review to be applied for legal sufficiency is a decidedly favorable one for the government. As noted above, this Court is required to view not only the evidence, but also all the reasonable inferences that can be drawn from that evidence, in the light most favorable to the prosecution. *Young*, 64 M.J. at 407; *Barner*, 56 M.J. at 134. Therefore, although the Government in the instant case can point to no direct evidence that Appellant engaged in the wrongful use of Ambien, it properly urges this Court to consider what it characterizes as "four key reasonable inferences" and then to affirm Appellant's conviction for wrongful use of Ambien. We will review each of these proffered "reasonable inferences" directly below.

First, the Government argues that when we juxtapose (a) the trial evidence demonstrating that Appellant knew that Ambien should only be taken shortly before going to bed when the user can sleep solidly for seven to eight hours, with (b) the trial evidence demonstrating that Appellant took Ambien before 6:00 p.m. on the day of the incident, this Court should infer that Appellant was not using this sleep medication for its proper purpose but rather was using it "wrongfully." However, we are not convinced of the reasonableness of this inference. In essence, the Government is asking this Court to conclude that Appellant's conviction for wrongful use of Ambien is legally sufficient

because he took his prescribed medication a few hours before the Government feels he should have taken it. This is a thin reed upon which to base a "reasonable" inference.[5]

Second, the Government argues that because the "Ambien prescription label"[6] and a brown paper bag were observed in Appellant's car two months after the incident, Appellant must have used the Ambien while still in his car rather than at home where he could be prepared to go to sleep. Again, we are not convinced of the reasonableness of this inference. We first note that there is no evidence in the record that the prescription *bottle* was found in Appellant's vehicle. And second, as his counsel persuasively argues, there is no reason to conclude that Appellant was required to have the drug literature and brown paper bag with him in order for him to lawfully use the prescribed medication.[7]

Third, the Government argues that because Appellant was still partially in his duty uniform at the time of the police encounter, he must have taken the prescription before getting home and properly preparing for sleep. However, there is no evidence in the record that Appellant's blouse—which the Government concedes Appellant was not wearing—was anywhere in his vehicle at the time of

[5] This is particularly so in light of the fact that Appellant could have specifically chosen to take the Ambien early on a weekend with the express hope that he would be able to go to bed and have uninterrupted sleep for *more than* seven-to-eight hours.

[6] What the Government describes as the "prescription label" actually appears to be the paperwork that routinely accompanies any prescription.

[7] Further, the reasonableness of this inference is mitigated by the fact that Appellant could have merely opened and discarded the bag and the drug literature in his car while in the process of ensuring that the pharmacy had given him the correct prescription, and that he actually took the medication later in his apartment.

the police encounter, thereby undermining the Government's factual predicate.[8]

And fourth, the Government argues that because Appellant did not need to fall asleep in the late afternoon or early evening in order to get up in time to work a night shift, this shows that he must have been misusing the Ambien when he took it during that time frame. However, just as with the first "key reasonable inference," the Government's reliance on this timing is misplaced. A person who has been suffering from insomnia may certainly choose to properly take Ambien in the late afternoon or early evening on a Friday in order to get as much sleep as he or she possibly can during the weekend, completely unconnected to any need to get up to work a night shift.

In light of these points, we are compelled to conclude that what the Government cites as "four key reasonable inferences" would be better characterized as understandable—but not compelling—suspicions, speculations, and suppositions. And those types of considerations, standing alone, are not enough to sustain a conviction even though this Court remains fully committed to the "very low threshold" standard applicable during a legal sufficiency review. *King*, 78 M.J. at 221 (citation omitted).

This position is consistent with the views expressed by some federal circuit courts as laid out below.

"[W]e do not give the government the benefit of *every potential* inference but rather, only those inferences reasonably and logically flowing from the other evidence adduced at trial." *United States v. Santistevan*, 39 F.3d 250, 258 (10th Cir. 1994). An inference is unreasonable if it requires the jury "to engage in a degree of speculation and

[8] Further, the Government's position is counterbalanced by the reasonable inference that a person who is taking Ambien for the first time might not immediately and fully disrobe but rather would get comfortable and relax for a while in his apartment to see how quickly and effectively the medication really works before going through the whole process—in the late afternoon—of putting on some form of sleepwear.

conjecture that renders its findings a guess or mere possibility." *United States v. Jones*, 44 F.3d 860, 865 (10th Cir. 1995) (internal quotation marks omitted) (citation omitted). After all, "[i]nferences must stop at some point." *United States v. Crain*, 33 F.3d 480, 487 (5th Cir. 1994). To this end, at "some point along a rational continuum, inferences may become so attenuated from underlying evidence as to cast doubt on the trier of fact's ultimate conclusion." *United States v. Summers*, 414 F.3d 1287, 1295 (10th Cir. 2005); *Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 521 (10th Cir. 1987).

In applying these legal principles to the facts in this case—with special emphasis on the fact that Appellant's medical provider prescribed this medication for Appellant to take—we conclude that the inferences the Government cites in support of a legal sufficiency determination are overly speculative and too attenuated from the evidence in the record. Therefore, we hold that Appellant's conviction for wrongful use of Ambien is legally insufficient.

III. The Providence of Appellant's Guilty Plea to Reckless Driving

A. Standard of Review

We review a military judge's decision to accept a guilty plea for abuse of discretion. *United States v. Forbes*, 78 M.J. 279, 281 (C.A.A.F. 2019) (citation omitted). In reviewing the providence of a plea, a military judge abuses his or her discretion only where there is a substantial basis in law or fact for questioning the guilty plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). We "giv[e] broad discretion to military judges in accepting [guilty] pleas." *United States v. Moratalla*, 82 M.J. 1, 4 (C.A.A.F. 2021) (alterations in original) (internal quotation marks omitted) (citation omitted). However, "the military judge's determinations of questions of law arising during or after the plea inquiry are reviewed de novo." *Inabinette*, 66 M.J. at 321. An appellant "bears the burden of establishing that the military judge abused his discretion, i.e., that the record shows a substantial basis in law or fact to question the

plea." *United States v. Phillips*, 74 M.J. 20, 21-22 (C.A.A.F. 2015) (citation omitted).

B. Applicable Law

The elements for Article 113 (reckless operation of a vehicle) as relevant to this case are as follows:

> (1) That the accused was operating or in physical control of a vehicle . . . ; and
>
> (2) That while operating or in physical control of a vehicle . . . the accused—
>
> (a) did so in a wanton or reckless manner.

MCM pt. IV, para. 51.b.(1)-(2) (2019 ed.). With regard to this offense, the *MCM* defines "reckless" as "a culpable disregard of foreseeable consequences to others from the act or omission involved." *Id.* para. 51.c.(7).

A providence inquiry into a guilty plea must establish that the accused himself believes he is guilty and "the factual circumstances as revealed by the accused himself objectively support that plea." *United States v. Higgins*, 40 M.J. 67, 68 (C.M.A. 1994) (internal quotation marks omitted) (citation omitted). In reviewing the providence inquiry for a guilty plea, this Court considers an appellant's colloquy with the military judge, as well as any inferences that may be reasonably drawn from it. *United States v. Carr*, 65 M.J. 39, 41 (C.A.A.F. 2007). An appellant's inability to recall specific facts underlying his or her offense does not render the guilty plea improvident. *United States v. Jones*, 69 M.J. 294, 299 (C.A.A.F. 2011); *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977). Although "personal awareness is not a prerequisite for a plea of guilty . . . an inquiry must be made to ascertain if an accused is convinced of his own guilt. Such a conviction . . . may be predicated on an accused's assessment of the [g]overnment's evidence against him." *Moglia*, 3 M.J. at 218.

Article 45(a), UCMJ, 10 U.S.C. § 845(a) (2018), requires a guilty plea to be rejected when inconsistent matters arise that cannot be resolved. "[I]nconsistencies and apparent defenses must be resolved by the military judge or the

guilty plea[] must be rejected." *United States v. Pinero*, 60 M.J. 31, 34 (C.A.A.F. 2004) (internal quotation marks omitted) (citation omitted). The "possible defense" standard is the threshold for a military judge to inquire into potential affirmative defenses during a plea colloquy. *United States v. Hayes*, 70 M.J. 454, 458 (C.A.A.F. 2012). This standard "is a lower threshold than a prima facie showing because it is intended as a trigger to prompt further inquiry pursuant to Article 45, UCMJ," and *Care*. *Id.* Moreover, the "possible defense" standard requires that "the acceptance of a guilty plea be accompanied by certain safeguards to [e]nsure the providence of the plea, including the delineation of the elements of the offense charged and admission of factual guilt on the record" are in line with Article 45. *Id.* (internal quotation marks omitted) (citation omitted).

Military law recognizes the affirmative defense of automatism, which is "[a]ction or conduct occurring without will, purpose, or reasoned intention," "behavior carried out in a state of unconsciousness or mental disassociation without full awareness," and "[t]he physical and mental state of a person, who though capable of action, is not conscious of his or her actions." *United States v. Torres*, 74 M.J. 154, 156 n.3 (C.A.A.F. 2015) (alterations in original) (internal quotation marks omitted) (citation omitted). An accused "cannot be held criminally liable in a case where the actus reus is absent because the accused did not act voluntarily, or where the mens rea is absent because the accused did not possess the necessary state of mind when he committed the involuntary act." *Id.* at 157.

In *Torres*, we observed that previously, "[n]either the UCMJ nor this Court's precedent [had] provided definitive guidance regarding whether automatism should be viewed as negating the mens rea or the actus reus of a charged offense." *Id.* Although in *Torres* we recognized that our "predecessor [court] indicated in dicta that the mens rea approach may be the most appropriate," *Torres* conclusively resolved the issue when it held, "[i]n cases where the issue of automatism has been reasonably raised by the evidence, a military judge should instruct the panel that

automatism may serve to negate the actus reus of a criminal offense." *Id.* at 157-58.

And finally, "[i]n determining the providence of [an] appellant's pleas, it is uncontroverted that an appellate court must consider the entire record in a case." *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995) (citations omitted).

C. Discussion

In resolving this issue, we do not discount Appellant's argument that his reckless driving was the product of automatism. As discussed above, the FDA officially acknowledges that "sleep-driving" is a potential side effect of Ambien. However, in the course of reviewing the providence of Appellant's guilty plea, we place great emphasis on the fact that when the military judge reopened the *Care* inquiry for Appellant's guilty plea to this offense, he squarely addressed the issue of automatism, and Appellant affirmatively declined to avail himself of this defense.

Specifically, the military judge informed Appellant that military law recognizes the defense of automatism. Consistent with our holding in *Torres*, the military judge also explained to Appellant that the defense of automatism pertains to the actus reus element of the offense (rather than to the mens rea element). *See* 74 M.J. at 157-58. And significantly, the military judge took a break in the proceedings to give Appellant the opportunity to discuss this issue with his defense counsel. Then, when the court-martial proceedings resumed, the military judge further explored the defense of automatism to see if Appellant wished to invoke it—and yet Appellant decided not to do so. To be sure, Appellant's responses to questions posed by the military judge were not a model of clarity, but they also were not conclusory in nature or merely clipped responses to leading questions. Rather, Appellant provided moderately well-reasoned responses to the military judge's renewed questions, and these responses drew from the observations of neutral observers, *see Moglia*, 3 M.J. at 218, his own (albeit disjointed and fragmentary) memories of the event, and his

prior knowledge that Ambien could impair one's ability to safely drive a vehicle.

And so, when it comes to the actus reus of the charged offense, Appellant stated that (a) he was convinced of his own guilt, and (b) he had reached this conclusion based—in large part—on the strength of the Government's evidence against him. In regard to this second point, this basis for pleading guilty is admittedly unusual in the military justice system. Further it has a bit of a nolo contendere[9] air to it, and military law does not permit such pleas. *See United States v. Forester*, 48 M.J. 1, 3 n.2 (C.A.A.F. 1998) ("This is contrary to what can be done in the civilian federal courts, where a defendant may plead no contest, or *nolo contendere*, to an offense."). However, our case law demonstrates that such guilty pleas where an accused primarily relies on the strength of the evidence against him rather than on his own independent recollections of his actions are permissible. In *Jones*, this Court held: "If an accused is personally convinced of his guilt based upon an assessment of the government's evidence, his inability to recall the specific facts underlying his offense without assistance does not preclude his guilty plea from being provident." 69 M.J. at 299.

Turning to the issue of the mens rea of the offense, things become less clear. However, the military judge correctly defined "recklessness" and Appellant said he understood that definition. The military judge then engaged in a colloquy with him about why he believed his conduct was "reckless." To be sure, a review of the record demonstrates that Appellant's responses were not neatly tailored to the mens rea issue. He talked more about his actions than what was going through his mind at the time of those actions. However, this Court is required to draw reasonable inferences in such instances. *See Carr*, 65 M.J. at 41. And

[9] "Nolo contendere" or "no contest" means "[a] criminal defendant's plea that, while not admitting guilt, the defendant will not dispute the charge." *No Contest*, Black's Law Dictionary, (12th ed. 2024).

a reasonable inference drawn from the facts elicited during the *Care* inquiry was that Appellant knew that taking Ambien would impair his ability to safely drive his car, and that he recognized, and culpably disregarded, the foreseeable consequences to others (i.e., putting them at risk of being physically harmed) when he drove his car in such a dangerous manner after taking the medication.

In light of the foregoing, we conclude that the military judge did not abuse his discretion when he accepted Appellant's guilty pleas at issue. *See Inabinette*, 66 M.J. at 322.

IV. Decision

The decision of the United States Air Force Court of Criminal Appeals is reversed as to Specification 2 of Charge II (wrongful use of zolpidem/Ambien) and sentence. The finding of guilty with respect to this specification is set aside, and Specification 2 of Charge II is dismissed. We affirm the lower court with respect to all other findings. The record of trial is returned to the Judge Advocate General of the Air Force for remand to the Court of Criminal Appeals for reassessment of the sentence or for a rehearing on the sentence, if necessary.

Judge JOHNSON concurring in part and dissenting in part.

I join Part II of the Court's opinion in concluding Appellant's conviction for wrongful use of Ambien was legally insufficient. I part ways with the Court over its resolution of the providency of Appellant's guilty plea to reckless driving. Because I conclude the record does not support an inference Appellant acted with the requisite mens rea, I respectfully dissent from Part III of the Court's opinion.

The crux of my disagreement turns on the Court's treatment of Appellant's mens rea. The Court writes:

> And a reasonable inference drawn from the facts elicited during the *Care* inquiry was that Appellant knew that taking Ambien would impair his ability to safely drive his car, and that he recognized, and culpably disregarded, the foreseeable consequences to others (i.e., putting them at risk of being physically harmed) when he drove his car in such a dangerous manner after taking the medication.

United States v. Navarro Aguirre, __ M.J. __ (18-19) (C.A.A.F. 2025). As the majority correctly notes, consuming a lawfully prescribed medication is not a defense if the user culpably disregards the foreseeable consequences to others. But in my view, we cannot reasonably infer that Appellant culpably disregarded the risk to others by using lawfully prescribed medication, at the correct dosage, immediately prior to sleeping, as it was intended.

We review a military judge's acceptance of a plea for abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). A plea that departs from the requirements of Article 45(a), UCMJ, is harmless "if the variance does not materially prejudice the substantial rights of the accused." Article 45(c), UCMJ, 10 U.S.C. § 845(c) (2018).

In assessing whether the military judge abused his discretion in accepting a plea, "[i]t is not enough to elicit legal conclusions. The military judge must elicit facts to support the plea of guilty." *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002). "[A]n accused cannot be held criminally liable in a case where . . . mens rea is absent because

the accused did not possess the necessary state of mind." *United States v. Torres*, 74 M.J. 154, 157 (C.A.A.F. 2015). A conviction under Article 113, UCMJ, requires a mens rea of recklessness. *Manual for Courts-Martial, United States* pt. IV, para. 51.b.(2)(a). "Recklessness is not determined solely by . . . proof alone of excessive speed or erratic operation," but by considering "all the circumstances." *Id.* at para. 51.c.(7). It requires "a *culpable disregard* of foreseeable consequences to others." *Id.* (emphasis added).

Concerning Appellant's mens rea, although I agree with the Court "things become less clear," *Navarro Aguirre,* __ M.J. at __ (18), in my view, the circumstances do not suggest a culpable disregard of foreseeable consequences to others. Appellant was prescribed Ambien on September 30th, the day before the events in question. There is no evidence he had ever taken Ambien before[1] or had any personal knowledge of how it would affect him. The prescribing nurse practitioner testified that people's reactions to Ambien use differ, so people "have to govern [their] response based on [their] own knowledge after taking [it] at least once or a few times to know" how it affects them. She never testified to informing Appellant of the possibility of sleep driving as a side effect. Nor is there evidence in the record to support that Appellant was aware that "complex sleep behaviors, including . . . sleep-driving," was a known side effect, or that he may be susceptible to it.

The next day, Appellant left work and arrived at his apartment around 2:30 p.m. and decided to sleep. After all, he "hadn't slept in almost two days," so, he took "the prescribed dose of one pill." Before his memory faded, he recalled lying in bed with his blouse and shoes off. "After a little while, [he] fell asleep in bed in [his] apartment."

Appellant admitted he "was aware that Ambien was pretty potent stuff, and [he knew] it [meant] sleeping could have effects on your driving, operating machinery and whatnot." However, knowing that a medication could cause

[1] That Appellant had not slept in two days supports the inference that he did not take any Ambien on the day he picked up his prescription.

drowsiness is different from knowing that a known side effect of the medication is that it can cause sleep driving.[2] Moreover, according to his admissions, Appellant did not take the Ambien until he got home. He did not take it while expecting to get behind the wheel. And he did not take it thinking he would go for a drive. In other words, he never describes his mental state as:

> [c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash. Reckless conduct is more than mere negligence: it is a gross deviation from what a reasonable person would do.

Reckless, *Black's Law Dictionary* (12th ed. 2024). In criminal trials, recklessness contains both an objective and subjective component. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 68 n.18 (2007). The creation of a substantial and unjustifiable risk is measured against an objective standard, *id.* at 68, while the conscious disregard reflects the need for "subjective knowledge on the part of the offender." *Id.* at 68 n.18. While the Court speaks to the objective component—the nature of his driving—it does not address whether Appellant had the subjective understanding that he was culpably disregarding this risk.

Instead, the record reflects a man using his lawfully prescribed medication, at the correct dosage, immediately prior to sleeping, as it was intended. This conclusion is consistent with the Court's conclusion that the Appellant did not wrongfully use his prescription. In my opinion, neither Appellant's words nor actions demonstrate a *culpable* disregard for the foreseeable consequences.

The United States Court of Appeals for the Third Circuit came to a similar conclusion in *Government of Virgin*

[2] I agree with the Court's decision that Appellant's actus reus was appropriately resolved by the military judge's questions. Although Appellant's automatism defense addresses the actus reus of a crime, *Torres*, 74 M.J. at 157-58, Appellant still needed to show he had the reckless mens rea for his plea to be provident.

Islands v. Smith, concerning an appellant who was allegedly unconscious as the result of an epileptic seizure:

> It has been held that the operator of an automobile who is suddenly stricken by an illness which he had no reason to anticipate but which renders it impossible for him to control the car is not chargeable with negligence. On the other hand it has also been held that an operator of a motor vehicle, unconscious from illness at the time of the accident, may nonetheless be found guilty of criminal negligence in having undertaken to drive the vehicle if he knew at the time that he might black out or lose consciousness while doing so.

278 F.2d 169, 174-75 (3d Cir. 1960) (listing cases) (cited with approval in *Torres*, 74 M.J. at 157). This case resembles the former situation, rather than the latter. Nothing in the record suggests Appellant knew or disregarded the chance he would be subject to a rare side effect of Ambien.

Of course, Appellant did admit his car "was seen recklessly weaving and blocking traffic." He also agreed that he drove his vehicle voluntarily. But as the Court correctly describes, these solitary statements fail to touch on his mental state. Considering his driving "under all the circumstances" paints the picture of a man wanting to sleep, going to bed, and intending to sleep. *MCM* pt. IV, para. 51.c.(7). These statements should also be viewed in light of the military judge's instructions. Upon reopening the guilty plea, the military judge gave Appellant the voluntary intoxication instruction, saying "tak[ing] a drug voluntarily is not a defense."[3] Appellant, intending to sleep, did take Ambien voluntarily; so after being told that this could not be a

[3] Appellant did not raise instructional error on appeal, but his admissions raise the defense of *involuntary* intoxication. "[I]ntoxication is involuntary when an accused is unaware of the effect of a drug or substance on him." *United States v. MacDonald*, 73 M.J. 426, 437-48 (C.A.A.F. 2014). "Among the circumstances of intoxication said to be involuntary is the circumstance in which, as a result of a genuine mistake as to the nature or character of the liquor or drug, the drunkenness has resulted from taking something not known to be capable of producing such a result." *United States v. Ward*, 14 M.J. 950, 953 (A.C.M.R. 1982).

defense to his conduct, Appellant naturally agreed with the military judge.

Appellant's admissions fail to establish his actions were a result of a culpable disregard of any consequences. In light of this, his mental state does not rise to the reckless mens rea. Absent mens rea, I would hold Appellant was materially prejudiced by the military judge's acceptance of his guilty plea and his plea should be held improvident.

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40354

UNITED STATES
Appellee

v.

Leo J. NAVARRO AGUIRRE
Airman First Class (E-3), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 11 March 2024

Military Judge: Elijah F. Brown.

Sentence: Sentence adjudged 26 March 2022 by GCM convened at Joint Base Lewis-McChord, Washington. Sentence entered by military judge on 12 May 2022: Bad-conduct discharge, confinement for 2 years and 2 months, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

For Appellant: Major Spencer R. Nelson, USAF.

For Appellee: Lieutenant Colonel J. Peter Ferrell, USAF; Major Vanessa N. Bairos, USAF; Captain Olivia B. Hoff, USAF; and Mary Ellen Payne, Esquire.

Before RICHARDSON, DOUGLAS, and WARREN, *Appellate Military Judges*.

Judge DOUGLAS delivered the opinion of the court, in which Senior Judge RICHARDSON and Judge WARREN joined.

DOUGLAS, Judge:

In a general court-martial, Appellant entered mixed pleas. The trial judge accepted his pleas of guilty to one specification of failure to obey a lawful order (violating a no-contact order), and one specification of wrongful use of oxycodone in violation of Articles 92 and 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 912a.[1] The trial judge also accepted Appellant's plea of guilty by exception to one specification of reckless driving, excepting the words "and aerosol inhalants," in violation of Article 113, UCMJ, 10 U.S.C. § 913.[2] The Government elected to go forward with the excepted language in which a panel of officer and enlisted members found Appellant guilty of the specification of reckless driving, excepting the words "and aerosol inhalants." Contrary to the remainder of his pleas, the same panel of officer and enlisted members found Appellant guilty of one specification of wrongful use of Ambien[3] in violation of Article 112a, UCMJ, and one specification of assault consummated by a battery and one specification of aggravated assault—both against his spouse and both in violation of Article 128, UCMJ, 10 U.S.C. § 928.[4] The trial judge sentenced Appellant to a bad-conduct discharge, confinement for two years and two months, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand.[5] The convening authority took no action on the findings. The convening authority suspended the first six months of the adjudged forfeiture of total pay and allowances, waived the resulting automatic forfeitures for six months, and directed the total pay and allowances to be paid to Appellant's spouse for six months. Otherwise, the convening authority

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[1] Unless otherwise indicated, all references to the UCMJ, the Military Rules of Evidence (Mil. R. Evid.), and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] Specifically, Appellant was charged with "physical[ ] control of a vehicle, to wit: a passenger car, in a reckless manner by causing the vehicle to block traffic and swerve on public roadways and by driving the vehicle after using Zolpidem (a Schedule IV controlled substance commonly referred to as Ambien) and aerosol inhalants."

[3] Charged as "Zolpidem, commonly referred to as Ambien, a Schedule IV controlled substance."

[4] The convening authority withdrew and dismissed without prejudice one specification of wrongful use of benzodiazepine, a Schedule IV controlled substance, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Appellant was acquitted of several other specifications and charges.

[5] The concurrent and consecutive segmented confinement lengths combined for a total of two years and two months. Appellant was credited with 108 days of pretrial confinement.

approved the remainder of the sentence and provided the language for the reprimand.

Appellant raises three issues on appeal which we have reordered and reworded: whether (1) Appellant's guilty plea for reckless driving was provident, (2) Appellant's conviction for wrongful use of Ambien is legally and factually sufficient, and (3) Appellant was entitled to a unanimous verdict. We have carefully considered issue (3) and determined it warrants no discussion or relief. *See United States v. Guinn,* 81 M.J. 195, 204 (C.A.A.F. 2021) (citing *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987)). Key to the analysis of the claims on appeal is the distinction between what Appellant stated in his initial *Care*[6] inquiry and the re-opened *Care* inquiry—the details of which were not before the factfinders—versus the information admitted as evidence before them. After considering the entire record and finding no error materially prejudicial to Appellant's substantial rights, we affirm the findings and sentence.

I. BACKGROUND

While addressed separately at trial, the facts of the reckless driving and wrongful use of Ambien convictions are related. Both involve a single use of Ambien, which was a contributing factor to Appellant's reckless driving and separately charged as a wrongful use of a controlled substance. The specification alleging reckless driving charged, *inter alia*, that Appellant drove "within the state of Washington, on or about 1 October 2021 . . . in a reckless manner . . . after using" Ambien. The specification alleging wrongful use charged that Appellant "did, in or around the state of Washington, on or about 1 October 2021, wrongfully use" Ambien.

Without a plea agreement, Appellant pleaded guilty to reckless driving (except the words "and aerosol inhalants"), admitting he was under the effects of his prescribed Ambien, but he pleaded not guilty to wrongfully using this prescription medication. Appellant elected to inform the panel of his guilty pleas prior to the Government proceeding on the merits; consequently, the members knew Appellant had pleaded guilty to reckless driving after using Ambien. However, the members did not know the underlying facts of the guilty plea because the details of his plea were not introduced as evidence before the factfinders. The Government proceeded on the excepted words of the reckless driving offense, as well as all charges to which Appellant had pleaded not guilty, including wrongful use of Ambien.

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[6] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

In closing, trial defense counsel argued that Appellant's Ambien use was in accordance with his prescription, which was admitted into evidence. On appeal, Appellant's counsel continues to argue the same.

As background for purposes of our opinion, the undisputed facts common to both offenses are that sometime after work on Friday, 1 October 2021, Appellant took Ambien, which he had been prescribed the previous day, and then drove his personal vehicle.

A. Not Admitted as Evidence: First Providency Inquiry

After pleading guilty and being placed under oath, Appellant explained the following to the trial judge during the *Care* inquiry:

> On 1 October 2021, within the State of Washington, I drove my passenger car in a reckless manner after using Ambien. I was prescribed Ambien the day before on 30 September 2021. I got the prescription to help me sleep. On 1 October 2021, I took the prescribed dose of one pill. On 1 October 2021, I left work at Joint Base Lewis-McChord and went to my apartment in University Place, Washington. I got back around 1430, and I decided to take some Ambien and go to sleep, because I hadn't slept in almost two days. Earlier in the day I had been thinking that I needed to fill my car with gas. After a little while, I fell asleep in bed in my apartment. The next thing I remember is being behind the wheel of my car. My car was parked in the parking lot outside of my apartment. I remember noticing that I was in the wrong parking spot, the vehicle was running, and I had the foot on the gas pedal revving the engine, which caused the vehicle to overheat. A police car was behind me. The police officers talked with me. There were two officers there. They asked me if I was drunk and I told them no, but I said that I had taken Ambien. . . . I do not remember driving my car, but I have reviewed the statements of witnesses and police, and I am aware that my car was seen recklessly weaving and blocking traffic. I was discovered in my car with the car still running. When I woke up, the car was in a different spot than where I had left when I got home from work. I was the only one who had keys to my car. The police told me a witness saw me hit a lamppost, and when I looked at my car, I noticed fresh damage to the front bumper of my vehicle that had not been there when I parked it. I believe that I did, in fact, drive my car in a reckless manner as the evidence I have reviewed says.

Following this explanation, the trial judge questioned Appellant. During that question-and-answer colloquy, Appellant re-affirmed to the trial judge the substance of Appellant's opening explanation, to wit: that Appellant operated his vehicle within hours of taking Ambien; that he had no independent recollection of his reckless operation of the vehicle (including swerving in traffic and hitting a lamppost), but that his review of the evidence gathered in the case, including the police report containing police and witness statements, convinced Appellant that he did in fact operate his vehicle recklessly as alleged. Appellant further conceded under oath that he felt "dazed, groggy, and slow" when police confronted Appellant in his apartment complex parking lot. The question-and-answer colloquy continued:

> [Military Judge (MJ)]: The next part of the element [of physically controlling a vehicle] says that you caused the vehicle to swerve on public roadways. What do you know about, if anything, about swerving on public roadways?
>
> [Appellant]: I believe it's unsafe, Your Honor.
>
> MJ: And factually, what information do you have from your review of any of the witness statements or from what the police may have told you about any sort of swerving? Like what do you know or what do you believe you did based on that?
>
> . . . .
>
> [Appellant]: Your Honor, one witness stated that I was swerving on and off roads, switching lanes, and that the swerving is what eventually led me to swerve onto the sidewalk and hit the lamppost, Your Honor.
>
> . . . .
>
> MJ: The element continues by saying that this control of the vehicle was after using Zolpidem, a Schedule IV controlled substance commonly referred to as Ambien. Was this after using Ambien?
>
> . . . .
>
> . . . What I am trying to determine is just temporally, like how long after using the Ambien could it have been when you were driving? And I understand you might not have any sort of specific timeline, but why do you think you were controlling your vehicle after -- well, in a reckless manner part of which was after using Ambien? And it looks like your counsel is ready to speak with you.

. . . .

[Appellant]: Your Honor, I believe it was after arriving home from work that day. I was still in the same clothes that I had been wearing at work minus the blouse. There was still light out and it was the same date. And when I woke up, I had the same clothes on.

MJ: Do you believe it was the Ambien that led to your not having a memory of being in control of the vehicle?

[Appellant]: Yes, Your Honor.

. . . .

MJ: So the second element is that, you know, by causing the vehicle to block traffic, swerving on public roadways, and then by driving the vehicle after using Zolpidem, you controlled the vehicle in a reckless manner. So why do you believe this was reckless? That your control of the vehicle, rather, was reckless?

[Appellant]: Because I was not in complete control of my faculties, Your Honor.

. . . .

Your Honor, it was reckless because I was swerving on the road, blocking traffic, riding up a sidewalk and hitting the lamppost, and that is unsafe for myself and others.

MJ: So the definition -- the legal definition of reckless is that the manner of control of the vehicle was under all the circumstances of such a heedless nature that it made it actually or imminently dangerous to the occupant, so to you, or to the rights or safety of others or another. It further says that recklessness is not determined solely by reason of the happening of an injury or invading the rights of another nor solely by excessive speed or erratic operation, but these are relevant factors. So, how was it imminently -- actually imminently dangerous to yourself or to the rights or safety of others, would you say?

[Appellant]: I could have gotten into a car accident, Your Honor. Well, besides hitting the lamppost, hurting others and myself, Your Honor.

MJ: Do you think lack of memory as a result of taking Ambien, do you think the Ambien could have also impacted your ability to safely control the vehicle?

[Appellant]: Yes, Your Honor.

> . . . .
>
> Your Honor --
>
> . . . .
>
> -- in addition to when my memory came to, I remember feeling dazed, groggy, slow, and having a hard time understanding the police officers. I thought the same way I was driving that night, I could see how it could affect my ability to safely drive.
>
> MJ: Do you believe that to be the case, that you would have been experiencing affects such as being dazed, groggy and slow while driving?
>
> [Appellant]: Potentially, Your Honor.
>
> MJ: Do you think you had any legal justification or excuse for operating the vehicle in the manner alleged while under -- or after taking Ambien?
>
> [Appellant]: No, Your Honor.

Counsel for both sides responded in the negative when asked by the trial judge if they believed further inquiry was required. The trial judge found Appellant's pleas provident, accepted the pleas, and advised Appellant that he may "request to withdraw" the "guilty plea[s] at any time before sentence is announced," and the request would be granted if there was "a good reason" for the request.

B. Admitted as Evidence: Before the Court Members

After the members were impaneled, the Government presented evidence on the offenses to which Appellant pleaded not guilty. Specific to reckless driving, including the words "and aerosol inhalants," the Government called Specialist (SPC) MD. On the day in question, SPC MD was driving behind his wife, who was driving her own vehicle, and they were headed home in the same direction as Appellant. SPC MD testified that at about 1800 hours on 1 October 2021, he saw Appellant in his vehicle at a traffic light that turned green, but Appellant did not move his vehicle. As a result, "everybody started honking . . . because . . . everybody gets aggravated." He then witnessed Appellant "swerving in and out of lanes" and "slow down, speed up, slow down, and speed up again," and SPC MD thought Appellant might be trying to race with him. At one point, while SPC MD and his wife were both traveling in the left lane of two lanes, SPC MD noticed Appellant attempted to pass his wife, on the left—crossing the center line and into a lane with oncoming vehicles. At that time, Appellant returned to the right lane and sped away. When SPC MD arrived at his apartment complex, which coincidentally was the same as Appellant's, he

saw Appellant's vehicle stopped in the turning lane, not moving. At that time, SPC MD got out of his vehicle to check on Appellant. SPC MD saw Appellant in military uniform "without the top, just a shirt," "rocking back and forth," with "a can in his lap, and [Appellant] just had like a smile"—causing SPC MD to think "okay, well, he's probably high." SPC MD thought he might help by driving Appellant's vehicle, but Appellant did not roll down his window. Appellant eventually turned into the apartment complex, but then "bumped into a lamppost," causing Appellant to stop again for "like, five, ten minutes" before driving off. SPC MD did not see Appellant again.

Continuing its case-in-chief, the Government called Deputy MC, who was one of two responding local, civilian police officers. They had responded to a report of a traffic complaint with suspicions that the driver was "driving under the influence." According to Deputy MC, "a vehicle was traveling . . . driving into oncoming traffic and possibly causing an accident," and the complainant stated, "they had believed the vehicle had struck a pole, and the vehicle had left." The police officers determined the residential address from the license plate information provided by the complainant, but "could not find any damage to the pole," so they proceeded to the residential address of the license plate registration. Deputy MC "saw a vehicle that was parked in a parking stall but was not completely in the stall. It was like halfway out." Appellant was in the car at the time, and the officers "made contact." Appellant stated that "his vehicle was now broken down" and he "could not get it into the stall completely." Deputy MC continued,

> I went through [a] series of questions. Explained what had occurred. What the report was. My partner and I, you know, established a rapport, and then the conversation led to alcohol, drugs. At the conclusion what we ended up finding out is the Airman spoke about how he had been on Ambien, had been taking Ambien. I assisted to try to get the vehicle into the driveway. There was some type of damage on the undercarriage or whatever. We could not get it to function at all, and we could not move it back into the parking stall.

According to Deputy MC, they did not have probable cause to arrest Appellant, so he "made notification to [Appellant's] supervisor in the military and [Appellant] was sent on his way back to his residence." Deputy MC further described Appellant as "cooperative," "responsive," "calm," and "forthcoming." Deputy MC recalled Appellant was "in uniform" and agreed he was "ambulatory." Standardized field sobriety tests were not given because Deputy MC did not see any indications that would lead him or the other responding officer to believe they were necessary.

The Government also called Airman First Class (A1C) ASM, a paralegal assigned to the legal office responsible for prosecuting the Government's case. On 15 December 2021, approximately 75 days after Appellant was seen driving recklessly, A1C ASM went to the last known address for Appellant, found Appellant's vehicle, and took photographs. Nine photographs were admitted as Prosecution Exhibit 5. They included pictures of the outside of Appellant's vehicle, as well as the inside of his vehicle. From the outside of his vehicle, through the windows, a written prescription for Ambien was visible; the pharmacy Appellant used was Walgreens. She agreed that at the time she took the photographs, Appellant's vehicle was "fully parked in the parking spot."

Further, the Government called Dr. CS, a forensic director for a regional clinical laboratory in Philadelphia, and qualified him as an expert in forensic toxicology and criminalistics. Through their cross-examination, the Defense asked a series of questions related to Ambien use and its effects on a person, eliciting concessions as to the amnesiac side effects of Ambien (*i.e.*, that after taking Ambien a person could be capable of performing complex tasks and yet not remember them).

Upon redirect examination, the Prosecution elicited testimony as to the duration of the physiological effects of Ambien on the central nervous system, including that Ambien is a "full night's rest kind of medication" designed to induce extended periods of sleep for the user.

The Government also called Master Sergeant (MSgt) EP, Appellant's first sergeant. MSgt EP explained that Appellant worked a standard day shift on 1 October 2021—that generally, he worked from approximately 0630 until 1630. MSgt EP confirmed Appellant worked on 1 October 2021.

After the Government rested, the Defense called Dr. BW, the psychiatric nurse practitioner who prescribed Appellant Ambien. Through her testimony, the Defense admitted Defense Exhibit B, a two-page document that reflected the prescription she wrote Appellant on 30 September 2021. She agreed that as of 1 October 2021, Appellant had an active prescription for Ambien, and would have had a medical purpose and authorization to use the medicine on that day. The Defense also admitted Defense Exhibit A, a 26-page document produced by the Food and Drug Administration (FDA) to inform providers of the risks and benefits of Ambien. On the front page, highlighted by a box outline, was an advisory that indicated a warning for "complex sleep behavior." Further, in the FDA advisory, one of the complex sleep behaviors listed was "sleep-driving." Trial defense counsel questioned Dr. BW about the advisory:

> Q: All right. So[,] in the upper left-hand page -- I am sorry, the upper left-hand quadrant of the first page, it talks about complex sleep behaviors. Let's talk about complex sleep behaviors. And

> as the person providing the medication, what does the term complex sleep behavior mean to you as it relates to Ambien?
>
> A: Well, in addition to, you know, providing -- since Ambien is a hypnotic in addition to providing sleep, it can also have other sorts of side effects that can occur when a person is going to sleep or when a person is using the medication. Sometimes the complex -- well, the complex sleep issues can be like a parasomnia, which is sort of an unusual reaction to the medication, which has a whole list of different things that people could experience potentially. Not commonly, but potentially.

During cross-examination of Dr. BW, trial government counsel extracted concessions on normal patterns of prescribed Ambien use, including the fact that the normal prescription instructions include a directive for the patient to take the medication "typically" 30 minutes prior to his intended bedtime and seven to eight hours before he intends to wake up. She did not state whether she recalled informing Appellant of this specific set of instructions.

When trial defense counsel additionally asked, "[i]f a particular person who has been prescribed Ambien takes it, say, an hour before going to bed, does that somehow invalidate the prescription, make their use illegal," Dr. BW responded, "No." Dr. BW answered the same when asked about two hours.

When asked by trial government counsel if people abuse Ambien prescriptions, Dr. BW responded, "Some people do. People have." Dr. BW provided the following in response to follow-on questions by trial counsel:

> Q: And could they do that by taking more than they should take?
>
> A: They could do that.
>
> Q: And could they do that by taking that at a time when they are not trying to go to sleep, but rather trying to have some other effect?
>
> A: I mean, I have not seen that commonly, but I imagine that, yes, you could do that.

The Defense moved for a finding of not guilty under Rule for Courts-Martial (R.C.M.) 917, claiming the Government had failed to establish Appellant wrongfully used his Ambien prescription on 1 October 2021. While the Government disputed the motion, they admitted their case was based upon circumstantial evidence, rather than direct evidence. The trial judge denied the motion, finding the evidentiary standard had been met through the Government's admission of "some evidence," and cited this court's opinion in *United States v. Mull*, 76 M.J. 741, 746 (A.F. Ct. Crim. App. 2017) (en banc) (overruling a previous holding "that the use of a controlled prescription drug for an ailment

other than the one for which the drug was prescribed cannot be punished under Article 112a, [UCMJ]").

In closing argument, trial government counsel theorized Appellant misused his Ambien prescription for its mood-altering effects when he stopped at Walgreens and took the medicine in his car after leaving work but before arriving home. Conversely, the Defense argued Appellant had a prescription for Ambien which he used in accordance with its intended purpose, but the medication caused him to be sleepy while driving. They specifically argued Ambien did not cause him to be "passed out" while driving. According to the Defense, Appellant driving recklessly and while sleepy did not equate to misusing the prescription and the Government had "no proof" that Appellant took the Ambien for any other reason than to "go to sleep."

The members found Appellant guilty of reckless driving, except the words "and aerosol inhalants," as well as guilty of wrongful use of Ambien. After findings were announced, Appellant chose sentencing by the trial judge alone. The panel members were then permanently excused.

C. Not Admitted as Evidence: Second Providency Inquiry

At the beginning of the sentencing phase of the trial, the Defense moved for a finding of not guilty under R.C.M. 917 for a second time, claiming the Government had failed to prove Appellant wrongfully used his prescription Ambien on 1 October 2021. Further, the Defense argued the trial judge should consider the facts as explained by Appellant during his *Care* inquiry; specifically, that he took the Ambien after getting home because he "wanted a nap" and then "woke up in his car hours later." The trial judge denied the motion again, specifying he did not consider the *Care* inquiry. However, because of trial defense counsel's argument on this motion, and after an additional review of Defense Exhibit A (the FDA advisory), the trial judge reopened Appellant's *Care* inquiry as to the reckless driving. The trial judge was concerned that trial defense counsel had raised the legal defense of an involuntary act, or "automatism." He explained that while there was no requirement to remember criminal conduct to plead guilty to it, the criminal act must have been voluntary. The following exchange occurred between the trial judge and Appellant during the re-opened *Care* inquiry:

> MJ: . . . [O]ne thing I want to ask you about is, essentially, why you believe you are guilty of [the reckless driving] charge. Again, excepting the words "and aerosol inhalants," and essentially, it's the part of that charge that says you were in physical control of the vehicle. So I'll inform you that voluntary intoxication, so if you voluntarily take, whether it's alcohol or a drug, if you take a drug voluntarily is not a defense. That's just what the law is.

And the law also recognizes that just because you don't remember something, doesn't mean that you can't plead guilty to doing something, provided you can articulate or explain why you think you are guilty.

. . . .

Why do you think that your control of the vehicle was voluntary if you were under the influence of Ambien and have no memory of the driving?

[Appellant]: Your Honor, before my memory blacks out, I was laying in bed in my apartment with my shoes off and my blouse off. To get to the point where I was at, I would have had to put some kind of shoes on, get my car keys, get in my car, start my car, turn music on, because there was music playing, which doesn't automatically start, at least not from my phone. From witness testimony, I stopped at stoplights, right, I had to put my car in gear and pulled out of the spot. The car was also parked differently than how I left it when I got home from work. When I get home from work I usually pull in reverse to my parking spot. And when I come to with the conversation with the police officers, my car is just pulled in forward. Again, from witness testimony, I was driving somewhat normal at some points. Also, my feeling of when my memory kicks back in, it does [sic] didn't feel like waking up from sleep. It feels more like I just wasn't storing what was going on. Kind of feels like a blackout from drinking alcohol. Like a slide show and there are just some slides missing. Also, previously I was aware that Ambien was pretty potent stuff, and I know it made sleeping [—] could have effects on your driving, operating machinery and whatnot. I believe that's all, Your Honor.

. . . .

MJ: . . . Why do you believe you're responsible for your actions while driving after taking Ambien?

. . . .

[Appellant]: Your Honor, um, previously before coming to, I do remember that my car was running low on gas, and I had been thinking about getting gas, so it's possible that I went out and dr[o]ve voluntarily to prepare for the night to get gas. I think that was my motive behind driving voluntarily. I just don't remember the facts. And upon coming to, it didn't feel like I was

> asleep. Just felt more like my memory just kind of kicks back in for a period.
>
> MJ: So, although you don't have a memory of driving, do you believe that during the time you don't have a memory, that you were aware of what you were doing?
>
> [Appellant]: Yes, Your Honor.
>
> MJ: And why do you believe that?
>
> [Trial defense counsel]: May we have a moment, Your Honor?
>
> MJ: You may.
>
> . . . .
>
> [Appellant]: I believe that I was aware of where I was at stoplights. I was aware of the honking. I was able to get back home. I know music was playing. I believe those are voluntary actions. That's why, Your Honor.

Counsel for both sides responded in the negative when asked by the trial judge if they believed further inquiry was required. The trial judge again found Appellant's pleas provident, accepted the pleas, and advised Appellant that he may "request to withdraw" the "guilty plea at any time before sentence is announced," and the request would be granted if there was "a good reason" for the request.

Neither Appellant nor his trial defense counsel requested to withdraw the guilty plea prior to announcement of the sentence. After a presentencing hearing, the trial judge sentenced Appellant to a bad-conduct discharge, confinement for two years and two months, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand.

II. DISCUSSION

A. Providency of Reckless Driving Plea

1. Law

We review a military judge's decision to accept the accused's guilty plea for an abuse of discretion. *United States v. Riley*, 72 M.J. 115, 119 (C.A.A.F. 2013) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)). "An abuse of discretion occurs when there is 'something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea.'" *Id.* (quoting *Inabinette*, 66 M.J. at 322). The military judge's legal conclusion about the providency of the plea is reviewed de novo. *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005).

Appellate courts will not speculate on the existence of facts that might invalidate a plea especially where the matter raised post-trial contradicts an appellant's express admission on the record. *See United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995). "[W]hen a plea of guilty is attacked for the first time on appeal, the facts will be viewed in the light most favorable to the [G]overnment." *United States v. Arnold*, 40 M.J. 744, 745 (A.F.C.M.R. 1994) (citation omitted).

"This court must find a substantial conflict between the plea and the accused's statements or other evidence in order to set aside a guilty plea. The mere possibility of a conflict is not sufficient." *United States v. Hines*, 73 M.J. 119, 124 (C.A.A.F. 2014) (quotation marks and citation omitted). We apply a "substantial basis" test by determining "whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." *Inabinette*, 66 M.J. at 322.

In reviewing the providence of an appellant's guilty pleas, "we consider his colloquy with the military judge, as well any inferences that may reasonably be drawn from it." *United States v. Timsuren*, 72 M.J. 823, 828 (A.F. Ct. Crim. App. 2013) (quoting *United States v. Carr*, 65 M.J. 39, 41 (C.A.A.F. 2007)).

Appellant pleaded guilty to reckless driving, in violation of Article 113, UCMJ. To be found guilty, Appellant's plea inquiry must provide factual support for each element of the offense: (1) that Appellant was in physical control of a passenger car; and (2) that Appellant physically controlled the car "in a reckless manner by causing the vehicle to block traffic and swerve on public roadways[,] and by driving the vehicle after using Zolpidem." *See Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 51.b.

An Appellant "cannot be held criminally liable in a case where the actus reus is absent because [the appellant] did not act voluntarily, or where mens rea is absent because [the appellant] did not possess the necessary state of mind when he committed the involuntary act." *United States v. Torres*, 74 M.J. 154, 157 (C.A.A.F. 2015). "However, even if the military judge did not abuse his discretion in accepting the plea, we still may set aside the plea if we find a substantial conflict between the plea and [an appellant's] statements or other evidence in the record." *United States v. Rothenberg*, 53 M.J. 661, 662 (A.F. Ct. Crim. App. 2000) (citing *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996)).

2. Analysis

Appellate defense counsel asks us "whether [Appellant's] guilty plea for reckless driving was provident when he took his prescribed dose of Ambien,

fell asleep in his bed, and 'the next thing [he] remember[ed] is being behind the wheel of [his] car.'" We answer in the affirmative.

This assignment of error questions whether, despite his plea at trial, Appellant committed an involuntary act when he drove his vehicle recklessly on 1 October 2021. Whether the Ambien caused involuntary "actus reus" on Appellant's part was not raised by *evidence* introduced at trial and was explicitly denied by Appellant.

Appellant explained he was driving his vehicle after work, and before speaking with police officers. He had the keys, he was seated in the driver's seat, and no one else was with him. These facts were not disputed or contradicted. Appellant explained he understood he was witnessed driving recklessly by causing his vehicle to block traffic at a stop light when the light turned green, and when he stopped his vehicle in a turning lane instead of turning into his apartment complex, and by hitting a lamppost. Appellant explained that he understood he was seen swerving between lanes by at least one witness while on public roadways in the state of Washington. He had discussed his case with his trial defense counsel and had been told of the evidence gathered in this investigation. He admitted under oath that he took his prescription dose of Ambien and intended to "take a nap" but later found himself behind the wheel of his vehicle.

Appellant asserted to the trial judge that he acted voluntarily and had a lack of memory—not a lack of awareness of all his actions while driving. Appellant admitted that he heard "honking" from other vehicles while he was stopped, remembered hearing his music playing, and knew he must have put his "shoes" back on, procured his keys, and drove his vehicle most likely to "get gas for the evening." Appellant believed his loss of memory, while attributed to the Ambien, did not "feel" like sleep. Comparing Appellant's statements in his first *Care* inquiry to his statements in his second *Care* inquiry, we do not find conflicts, but additional details.

On appeal, Appellant highlights evidence presented in findings that is inconsistent with his guilty plea. The Defense admitted the FDA advisory on Ambien, which included a reference to sleep-driving. The Defense cross-examined the Government's toxicologist who agreed Ambien could cause sleep-driving. The Defense called the provider who prescribed Appellant Ambien, who agreed involuntary acts while on Ambien were documented, though "not common." What was not demonstrated at trial, however, was that *Appellant* was sleep-driving. The witness testimony strongly supported an inference that Appellant was awake while driving. Moreover, during the *Care* inquiries, Appellant disavowed that he was asleep while driving. Appellant never withdrew his guilty plea, despite being specifically advised by the trial judge that he could do so before sentencing, twice.

We will not speculate on the existence of facts that might invalidate a plea especially where the matter raised post-trial contradicts an appellant's expressed admission on the record. *See Johnson*, 42 M.J. at 445. Further, we do not find a substantial conflict between Appellant's guilty plea and other evidence because the record lacks evidence Appellant was sleep-driving. *See Rothenberg*, 53 M.J. at 662. We find the trial judge did not abuse his discretion.

B. Sufficiency of Wrongful Use of Ambien Conviction

1. Law

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). "Our assessment of legal and factual sufficiency is limited to the evidence produced at trial." *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citation omitted).

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). "The term reasonable doubt, however, does not mean that the evidence must be free from conflict." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018). "[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). The evidence supporting a conviction can be direct or circumstantial. *See United States v. Long*, 81 M.J. 362, 368 (C.A.A.F. 2021) (citing R.C.M. 918(c)) (additional citation omitted). "[A] rational factfinder[ ] could use his 'experience with people and events in weighing the probabilities' to infer beyond a reasonable doubt" that an element was proven. *Id.* at 369 (quoting *Holland v. United States*, 348 U.S. 121, 140 (1954)). As a result, "the standard for legal sufficiency involves a very low threshold to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (alteration and citation omitted).

"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." *Rodela*, 82 M.J. at 525 (alterations in original) (quotation marks and citation omitted). "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.'" *Wheeler*, 76 M.J. at 568 (alteration in original) (quoting *Washington*, 57 M.J. at 399).

To convict Appellant of wrongful use of Zolpidem (Ambien), the Government was required to prove four elements beyond a reasonable doubt: (1) Appellant used Zolpidem, a Schedule IV controlled substance, in or around the state of Washington on or about 1 October 2021; (2) he actually knew he used the substance; (3) he actually knew that the substance he used was Zolpidem; and (4) Appellant's use was wrongful. *See MCM*, pt. IV, ¶ 50.b.(2).

Use of a controlled substance is wrongful if it is without legal justification or authorization. *See id.* Use of a controlled substance is not wrongful if the controlled substance is prescribed by a doctor and the use of the substance is for the medical purpose prescribed. *See id.* However, if a prescribed substance is used for a purpose other than that for which it is prescribed, it is wrongful. *Mull*, 76 M.J. at 746.

This court

> may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as [this court] finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, [this court] may weigh the evidence, judge the credibility of witness[es], and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1).

"A guilty plea and related statements to one offense cannot be admitted to prove any element of a separate offense." *United States v. Flores*, 69 M.J. 366, 369 (C.A.A.F. 2011) (footnote omitted). "A military judge who advises [an appellant] that [he] is waiving [his] right against self-incrimination only to the offenses to which [he] is pleading guilty must not later rely on those statements as proof of a separate offense." *Id.* at 369–70 (citing *United States v. Resch*, 65 M.J. 233, 237 (C.A.A.F. 2007)). However, in circumstances where an accused pleads guilty to a lesser included offense, that accused's statements during his guilty plea may be used to establish facts and elements common to both the greater and lesser offense within the same specification. *See United States v. Grijalva*, 55 M.J. 223, 227–28 (C.A.A.F. 2001) (citations omitted).

2. Analysis

At trial, and on appeal, Appellant submits the Government could not, and did not, provide sufficient evidence to prove wrongful use of Ambien. We find the evidence presented on the merits supports a finding that Appellant used Ambien wrongfully, that is, not for the purpose of sleep.

Although Appellant chose to inform the members of his guilty pleas at the onset of the litigated findings, neither the Defense nor the Government admitted as evidence before the court the details described by Appellant of his Ambien use during his providency inquiries. Specifically, his explanation of taking the prescribed dose while in his apartment after arriving home from work, for the purposes of taking a nap, were facts not in evidence before the panel as to the offense of wrongful use of Ambien.

The facts that were admitted into evidence and before the court-martial members include that Appellant was prescribed Ambien on 30 September 2021. According to his first sergeant, Appellant normally worked from 0630 to 1630. On 1 October 2021, a work day for Appellant, he was seen driving recklessly in his car, on the public roadways, driving in the direction leaving the base, after normal hours but before the sun went down, wearing his uniform (except for his outer blouse). In addition to being seen rocking back and forth in the driver's seat and appearing to have a smile on his face, he was observed swerving on the road, blocking traffic, driving up on a sidewalk, hitting a lamppost, and then attempting to park in a parking stall near his apartment building. When confronted by the police, Appellant told them that he had taken Ambien. A receipt from Walgreen's pharmacy filling Appellant's prescription was seen in his car, face up on the front passenger seat. In his interactions with the police, he was calm, responsive to their questions, cooperative, and ambulatory.

As to legal sufficiency of this specification, after a thorough review of the evidence and evaluating it in the light most favorable to the Prosecution, we find any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Robinson*, 77 M.J. at 297–98. While the evidence admitted is circumstantial, reasonable inferences drawn from it establish the trier-of-fact could find beyond a reasonable doubt that Appellant ingested the Ambien wrongfully. *See Barner*, 56 M.J. at 134.

As to factual sufficiency, we have taken "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." *Wheeler*, 76 M.J. at 568 (alteration in original) (quotation marks and citation omitted). SPC MD witnessed Appellant driving his personal vehicle in the state of Washington, on 1 October 2021, and Appellant informed the responding police officers that he used Ambien (element one). One police officer testified Appellant stated he actually knew he used Ambien (element two). The prescription receipt was found in Appellant's vehicle, which demonstrates Appellant knew the substance he used was Ambien (element three). And Appellant took the Ambien sometime during the day, before driving home, while still in uniform,

without preparing himself for a full seven to eight hours rest, which demonstrates that Appellant's use was not consistent with preparing for sleep within 30 minutes and for seven to eight hours, which was not in accord with his prescription and was therefore, wrongful (element four). *See MCM*, pt. IV, ¶ 50.b.(2).

Appellant would have us consider his statements during the *Care* inquiry to find his conviction for wrongful use of Ambien legally and factually insufficient. Appellant misapprehends the boundaries of the law. Consistent with the principles articulated in *Flores*, Appellant is not entitled to rely upon *Care* inquiry statements as substantive proof in an effort to refute the evidence actually admitted at findings. While the United States Court of Appeals for the Armed Forces in *Flores* found error in the Government's invocation of that appellant's *Care* inquiry statements to support proof of a separate offense, 69 M.J. at 370, the *Flores* opinion does not suggest an accused may use this "shield" as a "sword" and endeavor to use *Care* inquiry statements for his own purposes of challenging a separate offense.

We are convinced of Appellant's guilt beyond a reasonable doubt. *See Rodela*, 82 M.J. at 525. We find Appellant's conviction for wrongful use of Ambien is both legally and factually sufficient.

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and the sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court