IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S, Appellee	BRIEF ON BEHALF OF APPELLEE
v.	**Docket No. ARMY 20200623**
Private (E-2) **CAMERON M. MAYS,** United States Army, Appellant	Tried at Fort Drum, New York, on 19 June, and 8, 13, and 19–22 October 2020, before a general court-martial convened by the Commander, Fort Drum, Lieutenant Colonel Teresa L. Raymond and Lieutenant Colonel William C. Ramsey, Military Judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignment of Error[1]

WHETHER APPELLANT'S CONVICTION OF ATTEMPTED INDECENT VIEWING IS LEGALLY AND FACTUALLY SUFFICIENT WHEN THE GOVERNMENT ONLY PRESENTED EVIDENCE THAT APPELLANT ATTEMPTED TO VIEW A VISUAL RECORDING OF NAKED PEOPLE.

[1] The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits they lack merit. The government respectfully requests notice and an opportunity to supplement its brief should this court consider any of those matters meritorious.

PANEL NO. 2

Statement of the Case

On 19 October 2020, a military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of making a false official statement, one specification of wrongful use of a controlled substance, one specification of wrongful possession of a controlled substance, one specification of wrongful introduction of a controlled substance, one specification of larceny, and one specification of assault upon a person in the execution of law enforcement duties, in violation of Articles 107, 112a, 121, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 912a, 921, and 928 (2019) [UCMJ]. (Charge Sheet, R. at 298). On 22 October 2020, the military judge convicted appellant, contrary to his pleas, of two specifications of attempted indecent viewing, one specification of insubordinate conduct toward a non-commissioned officer, one specification of sexual assault, one specification of assault upon a commissioned officer, and one specification of assault upon a non-commissioned officer, in violation of Articles 80, 91, 120, and 128, UCMJ, 10 U.S.C. §§ 880, 891, 920, and 928 (2019).[2] (Charge Sheet, R. at 243, 1029). The military judge sentenced appellant to reduction to the grade of E-1, confinement for 48 months, and a dishonorable discharge. (R. at 1080). The military judge credited appellant with six months and

[2] The military judge found appellant not guilty of one specification of sexual assault and two specifications of indecent recording in violation of Articles 120 and 120c, UCMJ, 10 U.S.C. §§ 920 and 920c (2019). (Charge Sheet, R. at 1029).

four days of pretrial confinement credit. (R. at 1031–32). On 20 November 2020, the convening authority approved the adjudged sentence. (Action). On 23 November 2020, the military judge entered judgment. (Judgment).

Statement of Facts

Specifications 1 and 2 of Charge III alleged that appellant attempted to view the private area of fellow soldiers without their consent and under circumstances when they had a reasonable expectation of privacy. (Charge Sheet). This occurred on 8 and 9 November 2018 while appellant's unit was deployed to Kandahar, Afghanistan. (Charge Sheet).

When appellant's unit deployed to Afghanistan, they lived in modular houses that the soldiers referred to as "mods." (R. at 668). Each "mod" had one bathroom for the soldiers to share. (R. at 669). The bathroom contained four sinks and three shower stalls with curtains along the same wall as the entrance and exit to the bathroom as best shown in Prosecution Exhibit 11. (Pros. Ex. 11; R. at 728). The shower stall dividers in between each shower stood roughly six feet tall. (R. at 673).

A. Appellant attempted to view the private area of Specialist [redacted] while he was showering on 8 November 2018.

On 8 November 2018, Sergeant (SGT) KW[3] walked into the "mod" bathroom and went to the first sink closest to the door to brush his teeth. (R. at 669; Pros. Ex. 10). He noticed someone else in the bathroom who he later identified as appellant. (R. at 669, 682). Appellant appeared to be "looking for a signal on his cell phone" because he was "holding the phone up in the air" near the first shower stall closest to the sinks. (R. at 669–70, 686–87; Pros. Ex. 10). As he was brushing his teeth, SGT KW realized that there was no cell phone service given their location in Afghanistan. (R. at 671). Consequently, SGT KW looked at appellant, who was still holding his phone up in the air, and he saw the phone's picture screen. (R. at 671, 696). The phone's camera function appeared to be open on the screen, and SGT KW saw "a grayish blue fuzziness," which SGT KW later thought "could have been water." (R. at 671). The lighting in the bathroom at the time "was bright as day." (R. at 695). Appellant was standing on his "tiptoes" at the time and "lean[ing] up and over the shower stall" with the phone "angled downwards." (R. at 672, 682). In fact, appellant angled his cell phone over the other side of the shower stall divider. (R. at 696, 698).

After realizing what was occurring, SGT KW stated, "hey man." (R. at 674). Appellant immediately "turned around and looked at [SGT KW] out of the corner of his eye and then just started washing his hands." (R. at 674–75). Before

[3] Sergeant KW was a specialist at the time of the event. (R. at 668).

SGT KW could say anything else, appellant quickly stopped washing his hands, and "made a beeline straight towards the door, rushing past" SGT KW. (R. at 675, 683). Specialist (SPC) [redacted] was in the first shower stall at the time while SPC [redacted] (formerly known as SPC [redacted]) was in the middle shower stall. (R. at 680). Prosecution Exhibit 10 visually demonstrated the relevant locations of SGT KW, appellant, SPC [redacted], and SPC [redacted] at the time, and appellant's route when he abruptly left the bathroom. (Pros. Ex. 10).

Specialist [redacted] testified that he was showering in the first shower stall closest to the sinks on 8 November 2018 when he heard SGT KW exchange words with someone. (R. at 700–01). After hearing SGT KW say something, SPC [redacted] next "heard water run really quick from the sink and then the bathroom door open and close." (R. at 702). Specialist [redacted] confirmed that he was naked while he was showering on 8 November 2018. (R. at 705). Specialist [redacted] did not see a phone or appellant while he showered. (R. at 706).

B. Appellant attempted to view the private area of Specialist [redacted] while he was showering the very next day on 9 November 2018.

On 9 November 2018, SPC [redacted] was showering in the shower located the furthest from the entrance to the bathroom when he noticed a cell phone extended about two to three inches over the shower stall divider. (R. at 725–26). Specialist [redacted] was naked at the time, and seeing the phone caused him to curse and call out the occupant of the middle stall where the cell phone came from. (R. at 726–27).

After getting out of the shower, SPC [redacted] noticed that appellant "was standing in the second shower with the curtain slightly open." (R. at 728). Specialist [redacted] confronted appellant, and then he left the bathroom to get his leadership to report the situation. (R. at 728–29). Later the same evening, SPC [redacted] saw appellant with his cell phone, and it appeared to be the same phone as the one extended over the shower divider that SPC [redacted] noticed while he was showering earlier. (R. at 734).

Mr. JW was also in the bathroom on 9 November 2018, as he previously served in the same unit as appellant and SPC [redacted] before he left the military. (R. at 718–19). Mr. JW was in the first shower stall closest to the sinks when he heard SPC [redacted] cry out. (R. at 720–21). Mr. JW poked his head out, saw SPC [redacted] who had also poked his head out of the shower furthest from the entrance, and SPC [redacted] asked Mr. JW if he knew who was in the middle shower. (R. at 721). Specialist [redacted] reported to Mr. JW that he saw a cell phone extended over the shower stall divider and was concerned that somebody was recording him. (R. at 721). Ultimately, Mr. JW saw appellant leave the middle shower stall, and appellant left the bathroom "in a rush" and "as quick[ly] as he could." (R. at 722). Appellant "was pretty quiet" and "did not really talk" as he left the bathroom. (R. at 723).

Sergeant LN was also a member of the same unit who was using the bathroom on 9 November 2018. (R. at 708–10). Sergeant LN was brushing his teeth at the second sink from the left when he heard someone cry out and curse.

(R. at 711–12). Soldiers then "started jumping out of the shower." (R. at 712). Specialist [redacted], who seemed angry and excited at the time, walked up to SGT LN and told him not to let appellant go anywhere. (R. at 712–13). Appellant seemed "worried," "confused," and "shocked" at the time. (R. at 713). After SPC [redacted] left the bathroom, appellant "looked like he really wanted to get out of [the bathroom]," and "[h]e just grabbed up all of his things and then he left in a hurry." (R. at 713).

C. The government did not recover any images or videos of Specialist [redacted] or Specialist [redacted] after seizing and searching appellant's phone.

Captain MK, appellant's company commander, seized appellant's cell phone on 10 November 2018. (R. at 746–47). Captain MK noticed that appellant was on his phone when CPT MK took it. (R. at 749). Special Agent (SA) WH, a digital forensic examiner with the Army Criminal Investigative Command, attempted to extract data from appellant's cell phone. (R. at 755–56, 759). When SA WH attempted to do so, he received "a warning on the phone that indicated . . . it had water and moisture damage." (R. at 760). Special Agent WH received similar error messages in the past when he examined and attempted to extract data from cell phones that had water damage. (R. at 765). Ultimately, SA WH was unable to perform a "physical extraction" of appellant's cell phone, which would have extracted the most amount of data from the phone, including any "deleted images or deleted information." (R. at 762–63). Instead, SA WH was only able to

perform a "logical extraction," which only extracts "the live information off of the device" and not any deleted information. (R. at 762–63). A review of the logical extraction of appellant's cell phone did not reveal any images or videos of SPC [redacted] or SPC [redacted]. (R. at 780).

D. The military judge properly denied appellant's motion under Rule for Courts-Martial (R.C.M.) 917 for a finding of not guilty since appellant attempted to view the private area of his fellow soldiers under circumstances when they had a reasonable expectation of privacy.

Appellant moved for a finding of not guilty under R.C.M. 917 as to both Specifications of Charge III. (R. at 785). Appellant argued as follows:

> [T]here is no evidence that [appellant] viewed or attempted to view, in person, [SPC [redacted]], and there is no evidence that he recorded anything on his phone and attempted to subsequently view it later. All the witnesses testified to the possibility of a recording. With respect to Specification 2 of Charge III, . . . it is very similar. The witnesses there testified that they saw a phone, but [appellant] did not attempt to view [SPC [redacted]] and with no evidence of a recording, there is no evidence that he subsequently attempted to view [SPC [redacted]] by means of phone or in person.

(R. at 785–86). In response, the government pointed out the evidence indicating that appellant could have viewed the private area of both victims through his cell phone's camera:

> With respect to Charge III, and its Specification starting with Specification 1, the evidence introduced was that [appellant] on or about 8 November 2018, had his phone opened to a camera view, that from the testimony of Sergeant [KW], he believed that it was pointing generally

> into the shower area. [Appellant] absolutely could have had an opportunity to see what was present on that screen and therefore a reasonable inference derived from that evidence would be that he attempted to view into the private area, that is the shower, to view the private area of [SPC [redacted]] under conditions in which [SPC [redacted]] would have an expectation of privacy to wit: he was taking a shower. Further, the evidence is very similar as it relates to Specification 2 of Charge III, again the evidence suggests that [appellant] was using his phone to attempt to view into that private area, this time where [SPC [redacted]] was located, and neither witness indicated that they consented to this viewing. And the government's position is that there is a reasonable inference to infer that [appellant] either did see into those areas, or at least attempted to see into those areas as he positioned his phone in a way to record those areas.

(R. at 787–88).

Ultimately, the military judge denied appellant's R.C.M. 917 motion as it related to both Specifications of Charge III. As to Specification 1 of Charge III, the military judge found that SPC [redacted] was "unclothed in the shower area" and did not consent "to any sort of visual conduct and/or viewing [as] alleged in the [S]pecification." (R. at 796). As to Specification 2 of Charge III, the military judge similarly found that SPC [redacted] "was in the shower area and did not consent at any time to any sort of allegations of viewing or conduct of this nature." (R. at 796).

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Standard of Review

This Court conducts a de novo review of a record of trial for legal and factual sufficiency. *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003). This Court also reviews questions of statutory interpretation de novo as well. *United States v. Vargas*, 74 M.J. 1, 5 (C.A.A.F. 2014).

Summary of the Argument

When appellant attempted to view in real time the private area of SPC [redacted] and SPC [redacted] through the camera function on his cell phone while they were showering, he attempted to commit indecent viewing as prescribed in Article 120c(a)(1), UCMJ. The term "views" as used in Article 120c(a)(1), UCMJ, includes both directly viewing the private area of another as well as indirectly viewing another's private area in real time through the camera feature of one's cell phone while being a mere step away. Appellant's restrictive interpretation of the term "views" is inconsistent both with the statutory text and the broader statutory context of Article 120c(a), UCMJ. Lastly, appellant's interpretation would lead to

absurd results, and the authorities he relies upon are factually and legally distinguishable from the instant case.

Law and Argument

Findings of guilt are legally sufficient when "any rational fact-finder could have found all essential elements of the offense beyond a reasonable doubt." *United States v. Nicola*, 78 M.J. 223, 226 (C.A.A.F. 2019) (citations omitted). When this court conducts a legal sufficiency review, it is obligated to draw "every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Robinson*, 77 M.J. 294, 298 (C.A.A.F. 2018) (citations omitted). "As such, 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) (citation and internal quotation marks omitted).

For factual sufficiency, this court takes "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The court may not affirm a conviction unless, "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," it is personally convinced beyond a reasonable doubt of appellant's guilt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The degree of deference this court affords the trial court for having seen and heard the witnesses will typically reflect

the materiality of witness credibility to the case. *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015).

A. Appellant's conduct satisfied the elements for Attempted Indecent Viewing.

The elements of Attempted Indecent Viewing are the following: (1) appellant did a certain act; (2) the act was done with specific intent to commit the offense of indecent viewing; (3) the act amounted to more than mere preparation, that is, it was a substantial step and a direct movement toward the commission of the intended offense; and (4) the act apparently tended to bring about the commission of the offense of indecent viewing, that is, the act apparently would have resulted in the actual commission of the offense of indecent viewing except for an unexpected intervening circumstance which prevented completion of that offense. 10 U.S.C. § 880; Dep't of Army, Pam. 27–9, Legal Services: Military Judges' Benchbook (Benchbook), para. 3–4–1(c) (29 Feb. 2020). Indecent viewing requires the government to meet the following elements: (1) appellant knowingly and wrongfully viewed the private area of the victims; (2) appellant did so without the consent of the victims; and (3) the viewing took place under circumstances in which the victims had a reasonable expectation of privacy. 10 U.S.C. § 920c; Benchbook, para. 3–45c–1(c).

Here, appellant did a certain act with the specific intent to commit the offense of indecent viewing—namely, he attempted to indirectly view in real time

through the camera function on his cell phone the private area of soldiers while they were showering. (R. at 671–72, 680, 682–87, 701–02). Appellant's actions were more than mere preparation, as appellant likely would have viewed the private area of the victims if not for SGT KW's intervention on 8 November 2018 and SPC [redacted]'s observation on 9 November 2018. (R. at 674–75, 725). Appellant did not have the consent of the victims to view their private area, and the victims had a reasonable expectation of privacy while they were showering. (R. at 705, 725–26). It appears that appellant concedes all of the elements of the offense were met with the exception that appellant "viewed" the private area of the victims, which is addressed in the next section. (Appellant's Br. 8–10).

B. Appellant attempted to view the private area of his victims in contravention of Article 120c(a)(1), UCMJ.

Article 120c(a)(1), UCMJ, prohibits appellant's actions in using the camera function of his cell phone to view in real time the private area of two soldiers as they showered. The ordinary meaning of the verb "views" includes seeing and observing, *infra* p. 16, which captures what appellant was attempting to do at the time through his cell phone's camera function. Moreover, the broader statutory context of Article 120c(a), UCMJ, indicates congressional intent to prosecute the indecent viewing of the private area of one's fellow soldiers in real time and while within the victim's presence. A contrary reading would lead to absurd results and create situations where the government would be unable to prosecute offenders

under Article 120c(a), UCMJ. Thus, like its Air Force brethren, this court should "find that Congress intended to proscribe the knowing and wrongful viewing, by direct or indirect means, of the private area of another person, without that other person's consent during the existence of circumstances in which that other person has a reasonable expectation of privacy." *United States v. Shea*, ACM S32220, 2015 CCA LEXIS 236, at *9 (A.F. Ct. Crim. App. 4 Jun. 2015).

1. The ordinary and natural meaning of the verb "views" encompasses observing and seeing through the camera function of one's cell phone.

The statutory language of Article 120c(a)(1) proscribes "knowingly and wrongfully view[ing] the private area of another person, without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy." Article 120c, UCMJ, does not define the term "views" as it is used in Article 120c(a)(1), UCMJ, and nothing in the statutory language modifies the word "views" other than the mens rea requirement. Since Article 120c, UCMJ, does not define the term "views" as it is used in the statute, the "plain and unambiguous meaning" of the term "will control unless is it ambiguous or leads to an absurd result." *United States v. Williams*, 75 M.J. 663, 666 (Army Ct. Crim. App. 2016) (citing *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007)).

Here, the statutory language does not dictate one way or the other whether the prohibited viewing must be done "directly" or "indirectly," such as through a

mirror or a technological aid. *See Shea*, 2015 CCA LEXIS 236, at *6 (finding that the statutory language of Article 120c(a)(1), UCMJ, could prescribe viewing the private area of a victim both through "a recorded image of the person as well as viewing that person directly"). Similarly, Black's Law Dictionary does not define the verb "views." *Black's Law Dictionary* (11th ed. 2019). Nonetheless, the ordinary meaning of the verb "views" actually better supports a reading encompassing appellant's actions in this case. Merriam-Webster defines the verb "views" to mean the following: "(1) to look at attentively: scrutinize, observe // *view* an exhibit; (2)(a) see, watch; 2(b) to look on in a particular light: regard // doesn't *view* himself as a rebel; (3) to survey or examine mentally: consider // *view* all sides of a question." *Merriam–Webster's Online Dictionary*, https://www.merriam-webster.com/dictionary/views (last visited Feb. 15, 2022) (emphasis in original); *see also United States v. Schmidt*, __ M.J. __, slip op. at 13 (C.A.A.F. 11 Feb. 2022) (Ohlson, J., concurring) (stating that "when a word has an easily graspable definition outside of a legal context, authoritative lay dictionaries may . . . be consulted") (citation omitted).[4]

Thus, the ordinary definition of the verb "views" in this context

[4] Appellant did not petition the court to reconsider its decision in accordance with Rule 31; thus, the court has issued its mandate under Rule 43A. *See* Rules of Practice and Procedure, United States Court of Appeals for the Armed Forces (Feb. 27, 1996, as amended through Jun. 22, 2017).

encompasses exactly what appellant did in this case—he attempted to observe and see the private area of two unsuspecting victims through the camera function of his cell phone. *See Smith v. United States*, 508 U.S. 223, 228 (1993) (recognizing that courts should construe undefined statutory words "in accord with its ordinary or natural meaning"); *United States v. Uriostegui*, 75 M.J. 857, 863 (N.M. Ct. Crim. App. 2016) (recognizing that "the ordinary meaning of 'view' includes watching an indecent visual recording").

2. The broader statutory context of Article 120c(a), UCMJ, indicates congressional intent to prosecute the indirect indecent viewing of the private area of one's fellow soldiers in real time and within the victim's presence.

In addition to considering the dictionary definition of the term "views," this Court should consider "the specific context in which that language is used, and the broader context of the statute as a whole." *Williams*, 75 M.J. at 666 (citations omitted). The overall statutory scheme of Article 120c(a), UCMJ, indicates congressional intent to prosecute all forms of indecent viewing, especially those that occur in real time and within the victim's presence. As an initial matter, appellant's attempted indecent viewing of the two victims in this case occurred in real time with his attempt to observe them through the camera function of his cell phone while he was in close proximity to them. In contrast, appellant's argument is based upon a flawed assumption, as appellant believes "[t]he government presented no evidence that appellant attempted to view any person's 'private

area[,] [and] [i]nstead . . . simply presented evidence that appellant attempted to record naked people." (Appellant's Br. 10 n.2).

First, appellant's argument presumes that he was simply recording the victims for later viewing, which ignores the fact that appellant could have viewed the victims in real time through his camera function without ever recording them. For example, SGT KW testified that he saw the camera function on appellant's cell phone screen while appellant was on his "tiptoes . . . leaned up and over the shower stall." (R. at 671–72, 696). Sergeant KW saw "grayish blue fuzziness" on the screen of appellant's cell phone, which he later realized "could have been water," as it was "angled downwards." (R. at 671, 682). If SGT KW could see the images shown on appellant's cell phone in real time while SPC [redacted] was showering, the natural implication is that appellant could as well. *See United States v. Bright*, 66 M.J. 359, 365 (C.A.A.F. 2008) (noting the court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution" when "resolving questions of legal sufficiency") (citations and internal quotation marks omitted). Regardless, these facts only highlight that appellant's actions went beyond mere preparation and that appellant would have completed the crime but for SGT KW's intervention.

Second, both victims testified that they were naked when they were showering (R. at 705, 726). Since Article 120c(d)(2) broadly defines "private

area" as "the naked or underwear-clad genitalia, anus, [or] buttocks," appellant naturally could have seen the victims' naked private area while they showered by viewing the images being shown in real time through his cell phone's camera function as appellant positioned his cell phone above the shower stall divider. This inference is made even more reasonable given SGT KW's testimony that appellant angled his cell phone downwards into the shower stall and SPC [redacted]'s testimony that he saw a cell phone camera pointed at him. (R. at 682, 727).

In a situation such as this case where there is only evidence that the accused viewed the private area of another in real time through a cell phone camera but did not photograph or film the other person, the government could only prosecute soldiers under Article 120c(a)(1), UCMJ. While Article 120c(a)(2), UCMJ, prohibits knowingly photographing, filming, or recording the private area of another without their consent in circumstances where they have a reasonable expectation of privacy, it would not apply to situations where the accused merely viewed the private area of another through a cell phone without also recording it. Further, Article 120c(a)(3), UCMJ, also would not apply in this case since there was no evidence appellant broadcasted or distributed any recording since there was insufficient evidence he recorded anything to begin with.

Thus, appellant's restrictive reading of Article 120c(a)(1), UCMJ, would unnecessarily prevent the government from prosecuting "indirect" indecent

viewing cases where the accused viewed the victim's private area in real time and in the victim's presence. Both the statutory language and the broader statutory context of Article 120c(a)(1), UCMJ, indicates congressional intent to proscribe the indecent viewing, in whatever form that may take, of another. In contrast, appellant's interpretation would unnecessarily restrict the context of the statutory language, defeat the broader statutory context, and create absurd exceptions, as discussed further in the next section.

3. Appellant's restrictive interpretation of the term "views" as it is used in Article 120c(a)(1), UCMJ, would lead to absurd results.

At its core, appellant argues that Article 120c(a)(1), UCMJ, requires the government to prove that an accused directly viewed a person's private area with their own eyes and not through the assistance of any high or low technological aid. (Appellant's Br. 9–14). According to appellant, one is not actually "viewing" an item if they are looking at a visual representation of the item on their cell phone. (Appellant's Br. 14). Appellant's interpretation strains the ordinary meaning of the verb "views" as discussed above, and two examples highlight how appellant's reading would lead to absurd results and prevent the government from prosecuting patently criminal conduct proscribed by Article 120c(a), UCMJ.

First, imagine that appellant used a mirror instead of his cell phone in this case as he was in the bathroom and his fellow soldiers were showering. Appellant presumably would argue that this conduct could not be prosecuted under Article

120c(a)(1), UCMJ, since he was not "peek[ing] into a shower stall with *his own eyes*." (Appellant's Br. 9) (emphasis in original). Appellant's reading of Article 120c(a)(1), UCMJ, requires directly viewing the private area of another and leaves no room for indirectly viewing the private area of another through a low-tech option like a mirror. Future violators could simply escape criminal liability under Article 120c(a)(1), UCMJ, by using mirrors to wrongfully view the private area of their fellow soldiers while they showered.[5]

Second, imagine that appellant waited until his victims were out of the shower and were drying themselves off outside of the shower curtain.[6] Further imagine that appellant was inside one of the bathroom stalls, such as the one closest to the bench as depicted in Prosecution Exhibit 11. (Pros. Ex. 11). Since most bathroom stall dividers do not go fully down to the floor, it could be entirely possible for appellant to position his cell phone under the stall divider while he could sit on the toilet and use the camera function on his cell phone to surreptitiously view the private area of his victims while they dried off with a

[5] This hypothetical is not far-fetched since such a fact pattern has come up before. *See*, *e.g.*, *United States v. Walker*, ACM S31788, 2011 CCA LEXIS 352, at *3 (A.F. Ct. Crim. App. 11 Mar. 2011) (involving an accused who "used a mirror to watch other Airmen shower" in order "to relieve sexual frustration in a deployed environment . . . [in] Qatar").

[6] For purposes of this hypothetical, the government will assume that it can meet the reasonable expectation of privacy element, such as a victim who believes he is alone in the bathroom.

towel. The risk of being directly confronted or observed by the victims is low, and a savvy criminal would know not to videotape or broadcast any recording since it could be found on their phone and/or increase their chances of being caught. In this hypothetical example, the government could not prosecute indecent viewing under Article 120c(a)(1), UCMJ, under appellant's interpretation, and neither Article 120c(a)(2), UCMJ, nor Article 120c(a)(3), UCMJ, would provide an avenue for prosecution either.

Moreover, a criminal who does not mind direct confrontation could simply open a shower curtain and view the private area of fellow soldiers while they are showering and not fear prosecution under appellant's interpretation of Article 120c(a)(1), UCMJ, as long as they were merely viewing the other person's private area indirectly through the camera function of their smartphone and not directly with their own eyes. Again, under appellant's flawed analysis, the government could not prosecute such conduct under Articles 120c(a)(2) or 120c(a)(3), UCMJ, as long as the criminal does not record anything. Soldiers would be free to peer into showers and bathroom stalls to view the private area of others and escape legal consequences by simply placing their smartphone in between their eyes and their victim and opening their camera function. These are just a few examples of circumstances that could not be prosecuted under Article 120c(a), UCMJ, based upon appellant's restrictive interpretation, which would be absurd and contrary to

the statutory language and broader context Congress created in Article 120c(a), UCMJ.

4. Appellant's reliance on *United States v. Quick* is inappropriate since it is factually distinguishable and rests on questionable assumptions.

Appellant's reliance on *United States v. Quick*, 74 M.J. 517 (N.M. Ct. Crim. App. 2014), is misplaced. (Appellant's Br. 14–15). First, *Quick* is factually distinguishable from appellant's case because the appellant in *Quick* viewed a surreptitiously recorded video of a sexual encounter after the fact that he did not view in real time through his own cell phone. *Id*. at 519. It is also unclear from the opinion whether the appellant viewed the sex video in the presence of the victim, although the facts seem to indicate that he did not since the appellant saw the video sometime after the sexual encounter. *Id*.

Second, *Quick* found that the express provisions regarding visual recordings in the second and third paragraphs of Article 120c(a), UCMJ, meant that the absence of such a provision in the first paragraph "implie[d] that the viewing of indecent visual recordings is not proscribed." *Id*. at 521. This is a questionable inference because while the absence of visual recordings from Article 120c(a)(1), UCMJ, "may indicate Congress intended to exclude viewing a recording from the reach of that section, it does not reasonably exclude the possibility Congress intended" to also proscribe such conduct within the ambit of Article 120c(a)(1), UCMJ. *Shea*, 2015 CCA LEXIS 236, at *7. More importantly, neither the

statutory language nor the broader statutory context limits anything other than a reading that "Congress intended to prohibit all wrongful, nonconsensual viewing of a person's private area in [Article 120c(a)(1)]." *Shea*, 2015 CCA LEXIS 236, at *7.

Third, *Quick* was concerned that "[i]nterpreting Article 120c to criminalize the mere viewing *of a recording* of indecent material would raise serious concerns about the statute's constitutionality under the First Amendment's overbreadth doctrine." *Quick*, 74 M.J. at 521 (emphasis added). However, "[a]pplying the statutory requirement of knowledge to both the consent and expectation of privacy elements would abate the concern raised in the *Quick* decision that the statute would criminalize 'the mere viewing of a recording of indecent material.'" *Shea*, 2015 CCA LEXIS 236, at *7–8. Moreover, that concern is not present here where appellant used a cell phone to view the private area of another in real time and in the victim's presence *without also recording it*.

Similarly, appellant's reliance on *United States v. Williams*, 75 M.J. 663 (Army Ct. Crim. App. 2016), is misplaced. (Appellant's Br. 15–16). *Williams* involved a different provision of Article 120c, UCMJ; specifically, Article 120c(c), UCMJ, and the meaning of the verb "exposes" as it is used in that statute. *See id.* at 666 (framing the issue as "whether the term 'exposed' under . . . Article 120c(c), UCMJ, encompasses showing a person a photograph or digital image of one's

genitalia"). Moreover, indecent exposure under Article 120c(c), UCMJ, is more restrictive than indecent viewing under Article 120c(a)(1), UCMJ, since one has to expose "the genitalia, anus, buttocks, or female areola or nipple," whereas indecent viewing broadly encompasses "the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple." *Compare* Article 120c(c), UCMJ, *with* Article 120c(a)(1), UCMJ, and Article 120c(d)(2), UCMJ. The court ultimately imposed "a temporal and physical presence" requirement in concluding that "the display of digital images or photographs of a person's genitalia within the term 'expose' does not clearly support the underlying purpose of criminalizing indecent exposure." *Williams*, 75 M.J. at 666. This is because "indecent exposure traditionally criminalizes certain exposures performed live before some potential audiences—and not the publication of a previous lawful exposure which is captured in a photograph." *Uriostegui*, 75 M.J. at 865.

Here, even though indecent exposure and the meaning of the verb "exposes" is not at issue, appellant's conduct satisfies any sort of temporal and physical presence requirement. First, appellant was attempting to view the private area of the victims in real time, and not after the fact, as he was attempting to view their private area via his cell phone's camera function. Next, appellant was merely a step away—at most—from his victims as he attempted to view their private area. Further, the factual circumstances of this case, where there was insufficient

evidence that anything was recorded, along with the examples contained in the previous section, indicate settings supporting the enforcement of indecent viewing as it was enacted into law. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541c, 125 Stat. 1298, 1409 (2011). Finally, while appellant certainly gets the benefit of any ambiguity in a criminal statute under the rule of lenity, this court "may not manufacture ambiguity in order to defeat" congressional intent. *Albernaz v. United States*, 450 U.S. 333, 342 (1981).

Conclusion

WHEREFORE, the government respectfully requests that this honorable court affirm the findings and sentence.

[redacted]

MATTHEW T. GRADY
LTC, JA
Appellate Attorney, Government
Appellate Division

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BRETT A. CRAMER
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Certificate of Filing and Service

I certify that a copy of the foregoing was electronically submitted to this Honorable Court and to Defense Appellate Division ***usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@mail.mil*** on 22 March 2022.

[redacted]

Paralegal Specialist
Government Appellate Division

APPENDIX

United States v. Shea

United States Air Force Court of Criminal Appeals

June 4, 2015, Decided

ACM S32220

Reporter

2015 CCA LEXIS 235 *

UNITED STATES v. Staff Sergeant MICHAEL R. SHEA JR., United States Air Force

Notice: THIS OPINION IS ISSUED AS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 18.4.
NOT FOR PUBLICATION

Prior History: [*1] Sentence adjudged 13 December 2013 by SPCM convened at Luke Air Force Base, Arizona. Military Judge: Joseph S. Kiefer (sitting alone). Approved Sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of $500.00 dollars pay per month for 3 months, and reduction to E-1.

Counsel: For the Appellant: Major Nicholas D. Carter and Major Isaac C. Kennen.

For the United States: Major Daniel J. Breen; Captain Richard J. Schrider; and Gerald R. Bruce, Esquire.

Judges: Before ALLRED, HECKER, and TELLER, Appellate Military Judges.

Opinion by: TELLER

Opinion

OPINION OF THE COURT

TELLER, Judge:

The appellant was convicted, after mixed pleas, at a special court-martial composed of a military judge sitting alone, of two specifications of attempted indecent visual recording and one specification of indecent visual recording and indecent viewing, in violation of Articles 80 and 120c, UCMJ, *10 U.S.C. §§ 880*, *920c*. The court sentenced him to a bad-conduct discharge, 3 months of confinement, forfeiture of $500.00 pay per month for 3 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

The appellant argues that the conviction for indecent viewing should be reversed because the *Article 120c(a)(1), UCMJ*, proscription on knowingly **[*2]** and wrongfully viewing the private area of another does not criminalize viewing a recording of a person's private area. While we do not reach the issue of whether viewing such a recording can ever violate *Article 120c(a)(1), UCMJ*, we agree that the appellant's viewing of the recording did not violate the statute. Accordingly, we dismiss Specification 1 of Charge II and reassess the appellant's sentence below.

Background

On 19 August 2013, the appellant placed a small digital video camera in a bathroom of the squadron building, hoping to record a female Airman while she changed her clothes. The recording briefly showed the appellant setting up the camera, and then captured the female

Airman as she changed from her uniform into physical fitness apparel. The images met the legal definition for a recording of the Airman's private area. At the time of the recording, the Airman had a reasonable expectation of privacy in the bathroom and she did not consent to being viewed or being recorded. While the appellant had no means of observing the recording as the victim was changing, he recovered the video camera and later watched the video on his wife's laptop computer.

In addition to the successful **[*3]** recording on 19 August, the appellant tried to record the same female Airman on two other occasions, in December 2012 and August 2013. During the final attempt, the victim spotted the camera and, due to her suspicions related to the previous incident, confronted the appellant via text message. The appellant denied involvement. After unsuccessfully trying to see what was on the camera, the victim turned it over to her first sergeant. An investigation ensued and after some initial denials, the appellant made a full confession.

The appellant pled guilty to one specification of attempted indecent visual recording for the incident where the victim seized the camera and one specification of making an indecent visual recording for the 19 August incident. He pled not guilty to, but was convicted of, attempted indecent visual recording for the December 2012 incident and indecent viewing of the 19 August recording.

Legal Sufficiency

The appellant argues that the conviction for indecent viewing is legally insufficient because that offense does not encompass the viewing of a recording of someone's private area.[1] We review issues of legal sufficiency de novo. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*.

"The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)*, *as quoted in United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002)*. "[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)*. Our assessment of legal sufficiency is limited to the evidence admitted at trial. *United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)*.

Our analysis of the legal sufficiency of the evidence **[*5]** turns upon the meaning of the word "views" in *Article 120c, UCMJ,* which is a question of statutory construction.

> As in all statutory construction cases, we begin with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the

---

[1] Although the appellant phrases the issue **[*4]** presented as whether this court "should adopt the position taken by the United States Navy-Marine Corps Court of Criminal Appeals in *United States v. Quick, 74 M.J. 517 (N.M. Ct. Crim. App. 2014)*", we note that the court resolved *Quick* on the basis of whether the specification in that case failed to state an offense. The specification in *Quick* used language that differed materially from Article 120c, UCMJ, *10 U.S.C. § 920c*. *Id. at 520*. Because the specification at issue here mirrors the statutory language exactly, we construe the appellant's argument as challenging the legal sufficiency of the evidence admitted at trial to prove a violation of the statute. The analysis section of the appellant's brief takes that approach.

statutory scheme is coherent and consistent.

Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002), *as quoted in United States v. McPherson, 73 M.J. 393, 395 (C.A.A.F. 2014)*. "Whether the statutory language is ambiguous is determined 'by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *McPherson, 73 M.J. at 395* (quoting *Robinson v. Shell Oil Co., 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997)*).

Article 120c(a), UCMJ, reads:

> *Indecent Viewing, Visual Recording, or Broadcasting*. Any person subject to this chapter who, without legal justification or lawful authorization—
>
> (1) knowingly and wrongfully views the private area of another person, without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy;
>
> (2) knowingly photographs, videotapes, films, or records by any means the private area of another person, without that other person's consent **[*6]** and under circumstances in which that other person has a reasonable expectation of privacy; or
>
> (3) knowingly broadcasts or distributes any such recording that the person knew or reasonably should have known was made under the circumstances proscribed in paragraphs (1) and (2);
>
> is guilty of an offense under this section and shall be punished as a court-martial may direct.

Manual for Courts-Martial, United States (*MCM*), Part IV, ¶ 45c.a.(a) (2012 ed.).

Here, the parties argue two different meanings of the word "views" in *Article 120c(a)(1), UCMJ*. The appellant argues that viewing a person does not include viewing a recording (and presumably any indirect visual representation) of a person. The government argues a broader interpretation, that viewing includes viewing a recorded image of the person as well as viewing that person directly. Since both are plausible interpretations of the word "view" in the context of this statute, we find that the term is ambiguous and proceed to an examination of the overall statutory scheme to derive congressional intent.

The appellant, in support of his interpretation, adopts two lines of reasoning from the recent United States Navy-Marine Corps Court of Criminal Appeals decision **[*7]** in *United States v. Quick, 74 M.J. 517 (N.M. Ct. Crim. App. 2014)*. First, he argues the explicit proscription of making and broadcasting visual recordings suggests that the absence of any similar proscription of viewing a recording indicates congressional intent not to proscribe such conduct. *See id. at 520-21*. Second, without application to the facts of this case, the appellant quotes *Quick*'s discussion of the potential that any construction of *Article 120c, UCMJ*, that criminalizes viewing a visual recording would be so overbroad that it would render the statute constitutionally infirm. *See id. at 521*.

We are not convinced by the appellant's first argument. While its absence from *Article 120c(a)(3), UCMJ*, may indicate Congress intended to exclude viewing a recording from the reach of that section, it does not reasonably exclude the possibility Congress intended it to be covered by an earlier section of the same statute. Indeed, the government argues that Congress intended to prohibit all wrongful, nonconsensual viewing of a person's private area in *Subsection (1)*. If so, there would be no need to include a redundant proscription in *Subsection (3)*. We find both potential interpretations

plausible. Accordingly, we must turn to other analytical tools to determine Congress' intent.

We are similarly **[*8]** unconvinced by the appellant's argument that we must interpret *Article 120c(a)(1), UCMJ*, to exclude viewing of a recorded image to avoid giving the statute an unconstitutionally overbroad reach. Applying the statutory requirement of knowledge to both the consent and expectation of privacy elements would abate the concern raised in the *Quick* decision that the statute would criminalize "the mere viewing of a recording of indecent material." *Id. at 521*.

We are also unconvinced by the government's argument that Congress intended to criminalize the appellant's viewing of the recorded image no matter how far removed in time such viewing occurred from the underlying breach of privacy. The statute proscribes "knowingly and wrongfully view[ing] the private area of another person, without that other person's consent and *under circumstances in which that other person has a reasonable expectation of privacy." MCM*, Part IV, ¶ 45c.a.a(1) (emphasis added). We find it significant that the statute specifies the circumstances under which the viewing must occur.[2] In order to credit the government interpretation of the statute, we would not only have to interpret the term "view" to include direct and indirect viewing, but **[*9]** also read into the statute words that are not there. We would have to find, despite the lack of any such language, that Congress intended to say "under circumstances in which that other person has, *or at the time of the making of an image or recording had*, a reasonable expectation of privacy." Congress explicitly used such language in *Subsection (3)*, and we therefore decline to read such an intent into *Subsection (1)*.[3]

Reading the language of *Article 120c(a)(1), UCMJ*, in the context of the remainder of *Article 120c, UCMJ*, we find that Congress intended to proscribe the knowing and wrongful viewing, by direct or indirect means, of the private area of another person, without that other person's consent during the existence of circumstances in which that other person has a reasonable expectation of privacy.[4] All of the evidence at trial indicated that the appellant did not view the recording until later that

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[2] Although not dispositive, we note that the standard *Benchbook* element concerning the victim's expectation of privacy reads: "That under the circumstances at the time of the charged offense, (state the name of the alleged victim) had a reasonable expectation of privacy." Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 3-45c-1 (1 January 2010).

[3] Even if we adopted the interpretation advanced by the government, the conviction would still be legally insufficient. Although the government offered evidence the appellant viewed the recording during the evening of 29 August 2015, they produced no evidence at trial of the victim's expectation of privacy at the time the appellant viewed the recording. Accordingly, no reasonable finder of fact could have found that the appellant viewed the **[*10]** recording "under circumstances in which [the victim] has a reasonable expectation of privacy" because no evidence of the victim's circumstances at the time of the viewing was admitted. *Article 120c(a)(1), UCMJ*. We concede that expecting such evidence seems absurd. The absurdity, however, illustrates the improbability that Congress intended the language of *Subsection (1)* to criminalize viewing such recordings after the invasion of privacy ended.

[4] While making a recording **[*11]** under circumstances in which the victim has a reasonable expectation of privacy would also violate the plain language of *Article 120c(a)(3), UCMJ*, there may be circumstances where the contemporaneous viewing of a recorded image constitutes a separately punishable offense. For example, viewing may entail a larger risk of discovery and confrontation, or in a case where the recording is constantly overwritten or not otherwise retained, the contemporaneous viewing may constitute the more harmful breach of privacy than the transitory recording itself.

evening. Accordingly, even though we consider the evidence in the light most favorable to the prosecution and draw every reasonable inference in their favor, we find Specification 1 of Charge II legally insufficient and dismiss the specification.

Sentence Reassessment

This court has "broad discretion" when reassessing sentences. *United States v. Winckelmann, 73 M.J. 11, 12 (C.A.A.F. 2013)*. However, before reassessing a sentence, we must be confident "that, absent the error, the sentence would have been of at least a certain magnitude." *United States v. Doss, 57 M.J. 182, 185 (C.A.A.F. 2002)* (citing *United States v. Sales, 22 M.J. 305, 307 (C.M.A. 1986))*.

In this case, the military judge merged Specification 1 and Specification 2 of Charge II for sentencing purposes. Since our findings do not affect Specification 2 of Charge II, we can be confident that the military judge would have imposed the same sentence. Accordingly, we reassess the sentence to the adjudged and approved sentence.

Conclusion

We find the conviction of Specification 1 of Charge II legally **[*12]** insufficient, and we set aside that finding. The remainder of the findings and the sentence, as reassessed, are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, *10 U.S.C. §§ 859(a)*, *866(c)*. Accordingly, the approved findings and sentence are **AFFIRMED**.

United States v. Walker

United States Air Force Court of Criminal Appeals

March 30, 2011, Decided

ACM S31788

Reporter

2011 CCA LEXIS 352 *; 2011 WL 6010813

UNITED STATES v. Staff Sergeant O'MARSHARIF K. WALKER, United States Air Force

Notice: THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL RELEASE.

Prior History: [*1] Sentence adjudged 15 December 2009 by SPCM convened at Al Udeid Air Base, Qatar. Military Judge: William E. Orr, Jr. (sitting alone). Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Counsel: For Appellant: Lieutenant Colonel Gail E. Crawford, Lieutenant Colonel Frank R. Levi, and Major Darrin K. Johns.

For United States: Colonel Don M. Christensen, Major Charles G. Warren, Captain Scott C. Jansen, and Gerald R. Bruce, Esquire.

Judges: Before BRAND, GREGORY, and ROAN, Appellate Military Judges.

Opinion by: GREGORY

Opinion

OPINION OF THE COURT

GREGORY, Senior Judge:

Before a special court-martial composed of military judge alone, the appellant entered mixed pleas of (1) guilty to one specification of committing indecent acts on divers occasions by surreptitiously viewing the genitalia of others while they were showering and (2) not guilty to one specification of indecent exposure in violation of Article 120, UCMJ, *10 U.S.C. § 920*. The military judge rejected the appellant's plea to indecent acts but accepted a modified plea of guilty to attempted indecent acts in violation of Article 80, UCMJ, *10 U.S.C. § 880*. The government went forward on the greater offense as well as the indecent exposure **[*2]** specification. The military judge found the appellant guilty of attempted indecent acts in accordance with his plea and guilty of indecent exposure contrary to his plea. He sentenced the appellant to a bad-conduct discharge, confinement for six months, and reduction to the grade of E-1. The convening authority approved the bad-conduct discharge, confinement for four months, and reduction to E-1. The appellant argues that the evidence does not support the finding of guilty of indecent exposure. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

In accordance with Article 66(c), UCMJ, *10 U.S.C. § 866(c)*, we review issues of legal and factual sufficiency de novo. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*. The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002)* (quoting

United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987). In resolving questions of legal sufficiency, we are "bound to draw every reasonable **[*3]** 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)*. Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)*. 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 accused's guilt beyond a reasonable doubt." *Turner, 25 M.J. at 325*. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea, 22 C.M.A. 223, 46 C.M.R. 223, 224-25 (C.M.A. 1973)*. With these standards in mind we turn to the evidence in this case.

The appellant confessed to law enforcement investigators that to relieve sexual frustration in the deployed environment at Al Udeid Air Base, Qatar, he used a mirror to watch other Airmen shower. On one of those occasions, the victim, Staff Sergeant (SSgt) TM, saw "a black hand with a mirror come over my shower." He screamed, grabbed his towel, put on **[*4]** his shorts, and checked all the shower stalls for the perpetrator. Of five occupied shower stalls, only one had a black male. SSgt TM waited in the sink area for the individual to exit the shower stalls. When the appellant approached, SSgt TM asked if he had a mirror he could borrow. The appellant replied, "No, you can check my bag if you want." SSgt TM searched the bag and a toiletry kit but found no mirror. The appellant then pulled the waistband of his shorts out about four to five inches and said, "You can check here if you want." SSgt TM testified that he was only "a sink away" from the appellant and could see that the appellant was not wearing underwear under his shorts but averted his gaze so as not to see the appellant's exposed genitalia. During argument on findings, the military judge clarified with counsel that the issue is not whether the victim actually saw the genitalia of the perpetrator but whether the victim *could* have done so.[1]

The appellant argues that the evidence is legally and factually insufficient to support his conviction of indecent exposure, focusing his argument on the requirement that the exposure be indecent. Here, he claims, the exposure occurred in a male shower facility where "communal male nudity is expected and not considered indecent." As appellant correctly notes, the surrounding circumstances must be considered in determining whether certain conduct is indecent. *United States v. Graham, 54 M.J. 605, 610 (N.M. Ct. Crim. App. 2000)*, *aff'd*, *56 M.J. 266 (C.A.A.F. 2002)*. Here, when confronted by an Airman who the appellant had just tried to see naked in the shower in order to relieve his sexual frustrations, the appellant exposed his genital area to the Airman and offered him a look. Contrary to the appellant's argument, this is not a case of unclothed persons simply passing one another in a common shower facility. Rather, the circumstances clearly show that, motivated by sexual desire, **[*6]** the appellant deliberately exposed himself to a targeted victim in a manner that was vulgar, obscene, and repugnant to common propriety or was, in a word, indecent.[2] Viewed

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[1] Indecent exposure requires that the exposure occur in a place where it could "reasonably be expected to be viewed." *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 45.a.(n) (2008 ed.); *United States v. Griggs, 51 M.J. 418, 420 (C.A.A.F. 1999)* **[*5]** (evidence is sufficient to sustain conviction of indecent exposure where victim averted her gaze so as not to see perpetrator's genitalia but perpetrator positioned his body so that genitalia could be seen).

[2] Indecent conduct is "that form of immorality relating to sexual

in the light most favorable to the prosecution, the evidence is legally sufficient to support the findings of guilt. We also find the evidence factually sufficient: having considered the evidence in the record with particular attention to issues highlighted by the appellant, we are convinced of the appellant's guilt beyond a reasonable doubt.

Conclusion

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

Accordingly, the approved findings and the sentence are

AFFIRMED.

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impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." *MCM*, Part IV, ¶ 45.a.(t)(12).