

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

**SUPPLEMENTAL BRIEF ON
BEHALF OF APPELLEE**

v.

Docket No. ARMY 20210543

Specialist (E-4)
TONY E. HENDERSON, JR.,
United States Army,
Appellant

Tried at Joint Base Lewis-McChord,
Washington, on 6 May, 9 June, and
27 September–2 October 2021, before
a general court-martial convened by
the Commander, 7th Infantry
Division, Lieutenant Colonel Larry A.
Babin, Military Judge, presiding.

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

Issue III

**CONSIDERING THE TERMINAL ELEMENT ALLEGED,
WHETHER THE FINDING OF GUILTY FOR THE
SPECIFICATION OF CHARGE V IS LEGALLY AND
FACTUALLY SUFFICIENT.**

Issue IV

**CONSIDERING THE FIRST AMENDMENT, AND THE
TERMINAL ELEMENTS ALLEGED, WHETHER THE
FINDING OF GUILTY FOR THE SPECIFICATION OF
ADDITIONAL CHARGE II IS LEGALLY AND
FACTUALLY SUFFICIENT.**

On 8 June 2023, this court amended the notice of hearing and added two issues for oral argument, which is scheduled for 5 July 2023. (Amended Notice of Hearing (8 June 2023)).¹ The government’s responses to the additional issues are below.

Issue III

CONSIDERING THE TERMINAL ELEMENT ALLEGED, WHETHER THE FINDING OF GUILTY FOR THE SPECIFICATION OF CHARGE V IS LEGALLY AND FACTUALLY SUFFICIENT.

Additional Facts

In the Specification of Charge V, appellant was charged with: “In that Specialist (E-4) Toney E. Henderson, U.S. Army, was, at or near Lakewood, WA, on or about 5 May 2019, disorderly, which conduct was of a nature to bring discredit upon the armed forces.”²

¹ The statement of the case and the statement of facts are contained in appellee’s original reply brief, dated 3 May 2023.

² The government, pursuant to appellant’s request, provided a Bill of Particulars on 1 June 2021. (App. Ex. LXVII). The Bill of Particulars states that: “The Accused, on or about 5 May 2019, at or near Lakewood, Washington, engaged in conduct to include, but not limited to, providing alcohol to a minor, while in a vehicle, and in a public location. (App. Ex. LXVII). Additionally, the military judge included the language of “in that he provided alcohol to a minor while in a vehicle and in a public location” when he provided the panel instructions. (R. at 1493, 1577).

Standard of Review

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

Law

A. Legal and factual sufficiency.

The standard for legal sufficiency 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, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In resolving questions of legal sufficiency, the court is “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). During its legal sufficiency review, the court considers all available facts within the record and is “not limited to the appellant’s narrow view of the record.” *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996).

Regarding factual sufficiency, the test is “whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the service court are themselves convinced of appellant's guilt beyond reasonable doubt.” *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (citations and internal quotation marks omitted). In its

factual sufficiency review, this court “in considering the record . . . may weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard witnesses.” UCMJ art. 66(d)(1). When assessing the credibility of witness testimony, “[o]ur system of justice rests on the general assumption that the truth is not determined merely by the number of witnesses on each side of the controversy . . . [t]he touchstone is always credibility; the ultimate measure of testimonial worth is quality and not quantity.” *Weiler v. United States*, 323 U.S. 606, 608 (1945).

This court has explained that where “witness credibility plays a critical role in the outcome of trial this court should hesitate to second-guess the trial court’s findings.” *United States v. Stanley*, 43 M.J. 671, 674 (Army Ct. Crim. App. 1995). Further, this court has stated: “[W]e are required to make credibility determinations on appeal, but those determinations . . . recognize the trial court’s superior position in making those determinations [o]ur assessment of the evidence must be sifted through a filter that recognizes our inferior fact-finding viewpoint.” *United States v. Feliciano*, ARMY 20140766, 2016 CCA LEXIS 512, at *8 (Army Ct. Crim. App. 22 Aug. 2016) ([mem. op.](#)) (citing *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)), *aff’d*, 76 M.J. 237 (C.A.A.F. 2017). Additionally, 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), *aff'd*, 76 M.J. 224 (C.A.A.F. 2017) ; *see also United States v. Jimenez-Victoria*, 75 M.J. 768, 771 (Army Ct. Crim. App. 2012), *aff'd*, 76 M.J. 354 (C.A.A.F. 2017) (affirming where the findings turned on witness credibility).

B. Disorderly conduct (The Specification of Charge V).

To convict appellant of disorderly conduct, the government was required to prove beyond a reasonable doubt: (1) that appellant was disorderly in that he provided alcohol to a minor while in a vehicle and in a public location; and (2) that under the circumstances, appellant's conduct was of a nature to bring discredit upon the armed forces. (R. at 1493, 1577–78; App. Ex. LXVII); UCMJ art. 134; *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*], pt. IV, ¶ 98.b. “Disorderly” conduct is “conduct of such a nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment thereby. It includes conduct that endangers public morals or outrages public decency and any disturbance of a contentious or turbulent character.” *MCM*, pt. IV, ¶ 98.c.(2). “Discredit means to injure the reputation of it. This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem.” *MCM*, pt. IV, ¶ 91.c.(3).

C. Terminal elements.

“The terminal element is merely the expression of one of the clauses under Article 134.” *MCM*, pt. IV, ¶ 91.a. Discussion. “More than one clause may be alleged and proven; however, proof of only one clause will satisfy the terminal element.” *MCM*, pt. IV, ¶ 91.a. Discussion. “Clause 1 offenses involve disorders and neglects to the prejudice of good order and discipline in the armed forces. Clause 2 offenses involve conduct of a nature to bring discredit upon the armed forces.” *MCM*, pt. IV, ¶ 91.c.(1).

“The terminal element in a clause 1 or 2 Article 134 case is an element of the offense like any other. Conduct need not be violative of any other criminal statute to violate clause 1 or 2.” *United States v. Phillips*, 70 M.J. 161, 165 (C.A.A.F. 2011) (citing *United States v. Davis*, 26 M.J. 445, 448 (C.M.A. 1988)). “The terminal element must be proved beyond a reasonable doubt like any other element. Whether any given conduct violates clause 1 or 2 is a question for the trier of fact to determine, based upon all the facts and circumstances; it cannot be conclusively presumed from any particular course of action.” *Id.*

“The focus of clause 2 is on the ‘nature’ of the conduct, *whether the accused’s conduct would tend to bring discredit on the armed forces if known by the public*, not whether it was in fact so known.” *Id.* at 165–66 (emphasis in original). In proving the “nature” of the conduct, the government is not required to

introduce testimony regarding views of “the public” or any segment thereof. *Id.* at 166. Instead, “[t]he responsibility for evaluation of the nature of the conduct rests with the trier of fact.” *Id.* Although “the degree to which others became aware of the accused’s conduct may bear upon whether the conduct is service discrediting . . . the statute does not establish a requirement that the accused’s conduct must in every case be in some respect public knowledge.” *Id.* “In general, the government is not required to present evidence that anyone witnessed or became aware of the conduct. Nor is the government required to specifically articulate how the conduct is service discrediting.” *Id.*

In conducting the service discrediting analysis, the Court of Appeals for the Armed Forces has noted:

Whether conduct is of a “nature” to bring discredit upon the armed forces is a question that depends on the facts and circumstances of the conduct, which includes facts regarding the setting as well as the extent to which [a]ppellant’s conduct is known to others. The trier of fact must consider all the circumstances, but such facts—including the fact that the conduct may have been wholly private—do not mandate a particular result unless no rational trier of fact could conclude that the conduct was of a “nature” to bring discredit upon the armed forces.

Id.

“‘[P]roof of the conduct itself *may* be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that, under all the circumstances, it was of a nature to bring discredit upon the armed forces.’ . . . [A] factfinder may

permissibly conclude that the same piece of evidence proves more than one element of a charged crime, so long as this conclusion is reached independently with respect to each element.” *United States v. Norman*, 74 M.J. 144, 146 (C.A.A.F. 2015) (citing *Phillips*, 70 M.J. at 163) (emphasis in original).

Argument

A. Appellant’s conviction is legally sufficient.

Here, the panel had to “determine beyond a reasonable doubt that the conduct alleged actually occurred” and “evaluate the nature of the conduct and determine beyond a reasonable doubt that [a]ppellant’s conduct would tend to bring the service into disrepute if it were known.” *Phillips*, 70 M.J. at 166. The “government’s obligation [was] to introduce sufficient evidence of [appellant’s] allegedly service discrediting conduct to support a conviction.” *Id.*

■ and appellant’s testimony at trial provided direct evidence to satisfy every element of service discrediting disorderly conduct. ■ testified that when she was fifteen years old, appellant picked her up in his vehicle and provided her with a “fresh bottle” of Hennessy and Coca-Cola as he started driving. (R. at 647, 661). Appellant then drove them to his apartment complex’s parking lot and parked his vehicle. (R. at 663–64). Once parked, appellant and ■ “listened to music and continued to drink” as appellant encouraged her to drink more. (R. at 663–64). ■ further testified that, while appellant was raping her, a person walked

out and “came by” appellant’s car. (R. at 680–81). ■■■’s testimony was corroborated by appellant, who testified that he brought her Hennessy and that they started drinking together after he parked his vehicle outside of his apartment complex. (R. at 1245, 1248–49, 1312, 1314).

Under the “facts and circumstances” of this case, appellant’s conduct was undoubtedly of a “nature” to bring discredit upon the armed forces. *Phillips*, 70 M.J. at 166. Appellant provided a 15-year-old girl with alcohol and marijuana. He encouraged her to drink, and then forcibly raped her in his vehicle in a public parking lot. (R. at 657, 662–64, 1244–45, 1248–49, 1312–1314); *cf. United States v. McFall*, NMCM 98 01173, 1991 CCA LEXIS 291, at *6–7 (N.M. Ct. Crim. App. 19 Nov. 1999) (finding no error in charging the appellant with disorderly conduct for providing a minor with marijuana and the means and opportunity to smoke it).

Based upon the evidence, a rational trier of fact could reason that appellant’s conduct would have “a tendency to bring the service into disrepute or . . . lower it in public esteem.” *MCM*, pt. IV, ¶ 91.c.(3). Even though “the government is not required to present evidence that anyone witnessed or became aware of the conduct,”³ ■■■—the child appellant gave alcohol to—is a member of the public and obviously witnessed and was aware of the misconduct. Furthermore, “[g]iven that

³ *Phillips*, 70 M.J. at 166.

the members were properly instructed and may permissibly consider evidence of the charged conduct when evaluating the terminal element,”⁴ the government met its “obligation . . . to introduce sufficient evidence of [appellant’s] allegedly service discrediting conduct to support a conviction.” *United States v. Norman*, 74 M.J. 144, 151 (C.A.A.F. 2015); *Phillips*, 70 M.J. at 166.

Thus, “draw[ing] every reasonable inference from the evidence of record in favor of the prosecution,” and “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. King*, 78 M.J. 218, 221 (C.A.A.F. 2019). Appellant’s conviction is therefore legally sufficient.

B. Appellant’s conviction is factually sufficient.

There was no dispute that appellant provided ■■■, a fifteen-year-old runaway at the time, with alcohol, in a public parking lot. (R. at 647, 657, 661, 663–64, 680–81, 1244–45, 1248–49, 1312, 1314). Although appellant disputed that he raped ■■■, the panel members found ■■■ to be more credible. (R. 678, 1251); *see*

⁴ The military judge provided the panel members with the standard instruction in the Military Judges’ Benchbook verbatim, advising them that in order to convict appellant, they must find “that, under the circumstances, the conduct of the accused was of a nature to bring discredit upon the armed forces.” (R. at 1493); Dep’t of Army, Pam. 27-9, Legal Services: Military Judges’ Benchbook, para. 3A-65-1(c)(2) (29 Feb. 2020) [Benchbook].

Davis, 75 at 546 (“We note that the degree to which we ‘recognize’ or give deference to the trial court’s ability to see and hear the witnesses will often depend on the degree to which the credibility of the witness is at issue.”). In addition to ■■■’s credible testimony, there was supporting circumstantial evidence. ■■■’s friend, ■■■, testified that ■■■ was “incoherent” when she returned from meeting appellant. (R. at 728). ■■■ also described how ■■■ seemed “very stressed” the next morning and how ■■■ told her “she felt like something was wrong.” (R. at 729). ■■■’s mother, ■■■, further testified about ■■■’s uncharacteristic demeanor the day after the rape and how ■■■ told her about the rape less than twenty-four hours after it occurred. (R. at 711–13). ■■■ also described how, when they went to the scene of the crime that day, ■■■ “was frantic,” “visibly afraid,” “almost like she was faint,” and how ■■■ “just kept crying and begging” for ■■■ not to go to the scene of the crime. (R. at 715–16).

However, even if forcible rape had not been part of the circumstances, appellant would still have committed sexual assault of a child because ■■■ was under sixteen years old and therefore under the age of consent. (R. at 1545); *MCM*, pt. IV, ¶ 62.b.(2). Appellant himself admitted that he had sex with ■■■ in his vehicle.⁵ (R. at 1251). With appellant’s admissions, the panel found beyond a

⁵ Appellant raised a mistake of fact defense as to ■■■’s age, which the panel rejected. (R. at 1312); see *United States v. Nicola*, 78 M.J. 223, 227 (C.A.A.F.

reasonable doubt, that “based upon all the facts and circumstances,” appellant’s act of providing alcohol to a minor in a public place was disorderly and service discrediting. *United States v. Phillips*, 70 M.J. at 165; *see also United States v. Vega*, No. ARMY 20190009, 2020 CCA LEXIS 206, at *12-13 (Army Ct. Crim. App. June 8, 2020) ([mem. op.](#)), pet. denied, 80 M.J. 331 (C.A.A.F. 2020) (finding that the appellant’s open and notorious adultery, where the sexual conduct amounted to rape of an underaged runaway, whom he had plied with alcohol, was service discrediting under the facts and circumstances of the conduct); *United States v. Hearn*, 66 M.J. 770, 778 (Army Ct. Crim. App. 2008), pet. denied, 67 M.J. 245 (C.A.A.F. 2009) (finding that the appellant’s sexual activity with a fourteen-year-old minor in a public place constituted indecent conduct and was both prejudicial to good order and discipline and service discrediting).

Therefore, after this court’s independent review of the record and making allowances for not personally observing the witnesses, this court should be convinced beyond a reasonable doubt of appellant’s guilt and affirm appellant’s conviction.

2019) (“But one risk of testifying, recognized long ago, is that the trier of fact may disbelieve the accused’s testimony and then use the accused’s statements as substantive evidence of guilt in connection with all the other circumstances of the case.”) (citation and internal quotation marks omitted).

Issue IV

**CONSIDERING THE FIRST AMENDMENT, AND THE
TERMINAL ELEMENTS ALLEGED, WHETHER THE
FINDING OF GUILTY FOR THE SPECIFICATION OF
ADDITIONAL CHARGE II IS LEGALLY AND
FACTUALLY SUFFICIENT.**

Additional Facts

In the Specification of Additional Charge II, appellant was charged with:

“In that Specialist (E-4) Toney E. Henderson, U.S. Army, did, at or near Lakewood, WA, on or about 9 February 2020, commit indecent conduct, to wit: digitally transmitted a visual recording of a male and a female engaging in sexual intercourse to Ms. [REDACTED], and that such conduct was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces.”

Standard of Review

Questions of legal and factual sufficiency are reviewed de novo.
Washington, 57 M.J. at 399.

Law

A. Legal and factual sufficiency.

The applicable law for legal and factual sufficiency is the same as Additional Issue III, Law, para. A.

B. Indecent conduct (The Specification of Additional Charge II).

To convict appellant of indecent conduct, the government was required to prove beyond a reasonable doubt: (1) that appellant digitally transmitted a video recording of a male and female engaging in sexual intercourse to ■■■■; (2) that the conduct was indecent; and (3) that under the circumstances, appellant's conduct was to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces. (R. at 1497); UCMJ art. 134; *MCM*, pt. IV, ¶ 104.b. "Indecent" means "that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." *MCM*, pt. IV, ¶ 104.c.(1).

C. Terminal elements.

As discussed above in Issue III, "[c]ause 1 offenses involve disorders and neglects to the prejudice of good order and discipline in the armed forces." *MCM*, pt. IV, ¶ 91.c.(1). "To the prejudice of good order and discipline refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense." *MCM*, pt. IV, ¶ 91.c.(2).(a).

D. First Amendment.

The First Amendment to the United States Constitution states that, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const.

amend. I. However, “it is well-settled law that obscenity is not speech protected by the First Amendment, regardless of the military or civilian status of the ‘speaker.’” *United States v. Meakin*, 78 M.J. 396, 401 (C.A.A.F. 2019) (citing *United States v. Williams*, 553 U.S. 285, 288 (2008)). Although the Supreme Court, in *United States v. Stanley*, created a narrow exception for possessing obscene materials inside the privacy of one’s home, the Court has also “consistently declined to extend First Amendment protection where obscenity is physically taken outside of the home, even where it is intended for private, noncommercial purposes.” 394 U.S. 557 (1969); *see also United States v. Meakin*, 78 M.J. 396, 402 (C.A.A.F. 2019). Furthermore, the “constitutional right protected in *Stanley* does not automatically apply to servicemembers. Conduct that is constitutionally protected for civilians could still qualify as prejudicing good order and discipline or bringing discredit upon the military.” *United States v. Byunggu Kim*, __ M.J. __, 2023 CAAF LEXIS 292, at *7 (C.A.A.F. 2023) (citing *United States v. Moon*, 73 M.J. 382, 388 (C.A.A.F. 2014)).

Argument

A. Appellant’s conviction is legally sufficient.

█’s testimony at trial provided direct evidence to satisfy every element of indecent conduct. █ testified that appellant, after telling her “it ain’t a fuckin video,” sent her “sexual videos of him . . . with other females” and that it made her

“[u]ncomfortable.” (R. at 867, 941–42; Pros. Ex. 1; Def. Ex. P, p. 53–54).

Furthermore, there was no dispute that appellant sent those videos to ■■■. (R. at 835–38, 867, 941–42, 1550).

Under the facts and circumstances of this case, there was insufficient evidence to demonstrate that appellant’s indecent conduct was prejudicial to good order and discipline in the armed forces.⁶ However, appellant’s conduct was clearly of a “nature” to bring discredit upon the armed forces. *Phillips*, 70 M.J. at 166. Appellant started messaging ■■■ in 2018, when she was fifteen years old. (R. at 857–58; Pros. Ex. 11). After continuing to message her on social media for two years, appellant moved to text messaging her. (R. at 864–65). A few days after ■■■’s seventeenth birthday, appellant sent ■■■—a high school student—two unsolicited videos of himself having sexual intercourse with another woman. (R. at 865–67; Pros. Ex. 1; Def. Ex. P, p. 53–54). In the first video, a woman is facing forward, away from the camera, as she straddles appellant. (Pros. Ex. 1). Both appellant and the woman are naked from the waist down. (Pros. Ex. 1). As the woman straddles appellant, she rubs her buttocks and vagina, which are clearly visible in the video, against appellant’s erect penis. (Pros. Ex. 1). In the second

⁶ Since appellant was charged with both clause 1 and clause 2, this court can still affirm appellant’s finding of guilt after excepting out the words “was to the prejudice of good order and discipline in the armed forces and.” *See MCM*, pt. IV, ¶ 91.a. Discussion (“More than one clause may be alleged and proven; however, proof of only one clause will satisfy the terminal element.”).

video, the same woman, in the same position, holds appellant's erect penis and inserts it into her vagina. (Pros. Ex. 1).

Since “[w]hether given conduct violates clause 1 or 2 is a question for the trier of fact to determine, based upon all the facts and circumstances,” a rational trier of fact could reason that appellant's conduct would have “a tendency to bring the service into disrepute or . . . lower it in public esteem.” *Phillips*, 70 M.J. 165; *MCM*, pt. IV, ¶ 91.c.(3); see *United States v. Carlile*, ACM 40053, 2022 CCA LEXIS 542, at *36–38 (A.F. Ct. Crim. App. 21 Sep. 2022) ([unpub.](#)), pet. denied, 2023 CAAF LEXIS 158 (C.A.A.F. 2023) (holding the appellant's conviction to be legally and factually sufficient after finding that, under the circumstances, a rational factfinder could conclude that the appellant's act of sending unsolicited pictures of his penis to sixteen-year-old high school students was service discrediting). “Given that the members were properly instructed and may permissibly consider evidence of the charged conduct when evaluating the terminal element,” the government met its “obligation . . . to introduce sufficient evidence of [appellant's] allegedly service discrediting conduct to support a conviction.” *Norman*, 74 M.J. at 151; *Phillips*, 70 M.J. at 166.

In summary, the government's case surpassed the “very low” legal sufficiency threshold to sustain appellant's conviction on appeal. *King*, 78 M.J. at 221. Appellant's conviction is therefore legally sufficient insofar as it relates to

clause 2. Therefore, this court should affirm the finding of guilty after dismissing the language “was to the prejudice of good order and discipline in the armed forces and” from the Specification of Additional Charge II. *See, e.g., United States v. Key*, ARMY 20170030, 2018 CCA LEXIS 146, at *3 (Army Ct. Crim. App. 23 Mar. 2018) ([summ. disp.](#)), pet. denied, 78 M.J. 49 (C.A.A.F. 2018); *United States v. Walker*, ARMY 20160540, 2017 CCA LEXIS 786, at *4 (Army Ct. Crim. App. 26 Dec. 2017) ([summ. disp.](#)), pet. denied, 77 M.J. 327 (C.A.A.F. 2018); *United States v. Sanders*, ARMY 20160716, 2017 CCA LEXIS 588, at *4–5 (Army Ct. Crim. App. 31 Aug. 2017) ([summ. disp.](#)), pet. denied, 77 M.J. 120 (C.A.A.F. 2017) (dismissing or excepting out the words “was to the prejudice of good order and discipline in the armed forces and,” reassessing the sentence in accordance with *United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013), and affirming the sentences as adjudged).⁷

B. Appellant’s conviction is factually sufficient.

There was no dispute that appellant started talking to ■■■ on Facebook since she was fifteen years old, that he sent ■■■ videos of himself having sexual intercourse with another woman, and that appellant “show[ed] off a gun” to ■■■ while talking about being in the Army. (R. at 835–38, 854–58, 867, 941–42,

⁷ Since appellant was adjudged no confinement for this charge, this court can affirm the sentence as adjudged. (R. at 1686).

1549–51; Pros. Ex. 1; Pros. Ex. 11; Def. Ex. P, p. 53–54). Although appellant attempted to portray his sexual misconduct against ■■■ as “trying to determine if they were going to have a relationship,” appellant’s text messages corroborated ■■■’s already credible testimony. (Def. Ex. P, p. 145–48). The messages confirmed that ■■■ told appellant that she wanted to “take it slow,” that she didn’t want to “fuck the first night,” and how she “kept sayin[g] chill.” (Def. Ex. P, p. 145–48).

Moreover, ■■■ testified that appellant’s videos made her “uncomfortable” and “confused” because she was not expecting appellant to send her “fucking” videos, especially after he explicitly told her that “[i]t ain’t a fuckin video tho.” (R. at 867; Def. Ex. P, p. 53–54). In *Carlile*, the Air Force Court of Criminal Appeals held that the appellant’s conduct of sending pictures of his genitalia to two sixteen-year-old girls were indecent conduct. 2022 CCA LEXIS 542, at *36–37. The *Carlile* court found that the appellant’s conduct was indecent because the pictures were unsolicited and unwanted, the girls’ young age, the lack of a dating relationship between appellant and either girl, and that appellant accessed the girls through social media so that they could be reached in the privacy of their own homes. *Id.* Similarly, the explicit videos that appellant sent to ■■■ were unsolicited, ■■■ was a high schooler who had just turned seventeen years old,

appellant and [REDACTED] were not in a dating relationship, and appellant accessed [REDACTED] via text messages. (R. at 865–67; Pros. Ex. 1; Def. Ex. P, p. 53–54).

Therefore, “after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this court should be] convinced of the Appellant’s guilt beyond a reasonable doubt.” *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *see Carlile*, 2022 CCA LEXIS 542, at *38–39 (finding appellant’s conviction for indecent conduct legally and factually sufficient where appellant sent pictures of his penis to sixteen-year-old high school students whom he contacted over Snapchat and with whom he had little other interactions except for his social media communications).

C. Appellant’s conduct was not protected under the First Amendment.

Appellant’s indecent conduct was not constitutionally protected under the First Amendment because it was obscene and not private. “The determination of whether an act is indecent requires examination of all the circumstances, including the age of the victim, the nature of the request, the relationship of the parties, and the location of the intended act.” *United States v. Rollins*, 61 M.J. 338, 344 (C.A.A.F. 2005) (citation omitted). Based on all the facts and circumstances of this case, appellant’s conduct of sending two videos to [REDACTED], which displayed appellant’s erect penis and another woman’s buttocks, anus, and vagina in the midst of sexual intercourse, was indecent. (Pros. Ex. 1). The sexually explicit

nature of these videos was unsolicited, and appellant led ■■■ to believe the videos would not be sexually explicit in nature. *Cf. United States v. Graham*, 56 M.J. 266, 270 (C.A.A.F. 2002) (affirming conviction of indecent exposure under Article 134, UCMJ, when a service member intentionally exposed his penis to his child's babysitter). Not only were the videos unsolicited, but appellant sent the videos as part of his plan to meet with ■■■, a seventeen-year-old girl he had been messaging since she was fifteen years old. (R. at 858, 867).

The Court of Appeals for the Armed Forces “has long held that ‘indecent’ is synonymous with obscene. Obscenity can consist of visual images or language: there is no distinction as to the medium of the expression when dealing with obscene material. Obscenity can manifest itself in conduct or in the written and oral description of conduct.” *Meakin*, 78 M.J. at 401 (cleaned up). Since appellant's conduct was indecent, i.e., obscene, and “[i]t is well-settled law that obscenity is not speech protected by the First Amendment,” appellant's conduct does not implicate the First Amendment. *Id.* Even if appellant's videos were filmed in the privacy of his home, and he sent the videos to ■■■ while he was physically home, his conduct still falls outside the First Amendment's protection because appellant distributed the videos to ■■■, thus taking it outside of his home. *See Meakin*, 78 M.J. at 402 (rejecting the appellant's argument that transmitting obscenity, from his home computer to anonymous third parties via online instant


messages and emails, is analogous to having a private discussion within the seclusion of his home and thus protected under *Stanley*); *see also United States v. Caver*, 41 M.J. 556, 561 n.4 (N.M. Ct. Crim. App. 1994), *pet. denied*, 43 M.J. 151 (C.A.A.F. 1995) (“[T]he definition of ‘indecent language’ is not constrained by decisions interpreting the application of the First Amendment to obscenity laws applicable in the civilian community. Rather, what is indecent language is delimited by Congress and the President, and if the elements and definitions are satisfied, so, too, is the First Amendment as applied to servicemembers.”); *United States v. Reyes*, ARMY 20170198, 2019 CCA LEXIS 10, at *5 (Army Ct. Crim. App. 7 Jan. 2019) ([mem. op.](#)), *pet. denied*, 79 M.J. 201 (C.A.A.F. 2019) (citing *Caver* approvingly for the proposition that the location and audience of a communication is relevant to determining whether it was indecent).

“In any case, even if his conduct were subject to the heightened standard of review applicable to First Amendment claims in civilian society, the armed forces may prohibit service-discrediting conduct under Article 134 so long as there is a reasonable basis for the military regulation of [a]ppellant’s conduct.” *Rollins*, 61 M.J. at 345. “The military has a legitimate interest in deterring and punishing sexual exploitation of young persons by members of the armed forces because such conduct can be prejudicial to good order and discipline, service discrediting, or both.” *Id.* Here, appellant sent the videos as part of his ongoing sexual


exploitation of [REDACTED] and plan to induce her to meet him in-person. Once appellant met [REDACTED] in-person, he committed abusive sexual contact upon [REDACTED] while they were in his vehicle on a public street. (R. at 861–67, 871). “Accordingly, [a]ppellant had no right under the First Amendment to exchange pornographic materials with a young person as part of a plan or scheme to stimulate a sexual act in a public place.” *Id.*; *cf. United States v. Williams*, ACM 38677, 2016 CCA LEXIS 149, at *25 (A.F. Ct. Crim. App. 7 Mar. 2016) ([unpub.](#)) (finding a reasonable basis for the armed forces to regulate indecent exposure where appellant publicly exposed his penis in a department store while standing behind a woman).

Conclusion


WHEREFORE, the government respectfully requests this Honorable Court affirm the findings⁸ and the sentence and deny relief.



LISA LIMB
CPT, JA
Appellate Attorney, Government
Appellate Division



ANDREW M. HOPKINS
MAJ, JA
Acting Branch Chief, Government
Appellate Division



CHRISTOPHER B. BURGESS
COL, JA
Chief, Government
Appellate Division

⁸ For the Specification of Additional Charge II, the government requests this court affirm after excepting out the words “was to the prejudice of good order and discipline in the armed forces and.”

APPENDIX



Neutral

As of: June 26, 2023 4:48 PM Z

United States v. Byunggu Kim

United States Court of Appeals for the Armed Forces

February 7, 2023, Argued; May 5, 2023, Decided

No. 22-0234

Reporter

2023 CAAF LEXIS 292 *; ___ M.J. ___

UNITED STATES, Appellee v. Byunggu KIM, Sergeant
First Class, United States Army, Appellant

Notice: THIS OPINION IS SUBJECT TO EDITORIAL
CORRECTION BEFORE FINAL PUBLICATION

Prior History: [*1] Military Judges: Mary Catherine
Vergona and Troy A. Smith. Crim. App. No. 20200689.

[United States v. Kim, 2022 CCA LEXIS 321, 2022 WL
1717933 \(A.C.C.A., May 26, 2022\)](#)

Case Summary

Overview

HOLDINGS: [1]-Where appellant was convicted of sexual abuse of a child and of making an indecent recording, assault consummated by a battery, and indecent conduct, the military judge abused his discretion by failing to abide by the heightened plea inquiry requirements under U.S. v. Hartman as to whether appellant's internet search queries for "drugged sleep" and "rape sleep" were indecent conduct; [2]-Specifically, the plea colloquy should have established why possibly constitutionally protected material could still be service discrediting and the military judge's examination of appellant did not rise to the level of the detailed inquiry required under Hartman whenever there was the potential to criminalize constitutionally protected conduct since the military judge did not discuss appellant's First Amendment rights or any of the constitutional implications of his situation.

Outcome

Decision reversed; case remanded in part.

Counsel: For Appellant: Captain Carol K. Rim (argued);
Colonel Michael C. Friess, Lieutenant Colonel Dale C.

McFeatters, and Major Bryan A. Osterhage (on brief);
Major Julia M. Farinas, Major Rachel P. Gordienko, and
Jonathan F. Potter, Esq.

For Appellee: Captain Joshua A. Hartsell (argued);
Colonel Christopher B. Burgess, Lieutenant Colonel
Jacqueline J. DeGaine, and Major Pamela L. Jones (on
brief).

Judges: Judge SPARKS delivered the opinion of the
Court, in which Chief Judge OHLSON, Judge MAGGS,
Judge HARDY, and Judge JOHNSON joined.

Opinion by: SPARKS

Opinion

Judge SPARKS delivered the opinion of the Court.

This case arises out of the conviction of Sergeant First Class Byunggu Kim (Appellant), in accordance with his pleas, of four specifications of sexual abuse of a child and one specification each of making an indecent recording, assault consummated by a battery, and indecent conduct in violation of Articles 120b, 120c, 128, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920b, 920c, 928, 934 (2018). The military judge sentenced Appellant to a dishonorable discharge, 130 months of confinement, and reduction to grade E-1. In keeping with the plea agreement, the convening authority reduced the confinement to six years and [*2] otherwise approved the sentence.

The United States Army Court of Criminal Appeals affirmed the findings and sentence in a summary disposition. Appellant then petitioned this Court and his petition was granted on November 7, 2022.

This Court granted oral argument to resolve three

questions,¹ including whether the military judge abused his discretion by failing to abide by the heightened plea inquiry requirements under [United States v. Hartman, 69 M.J. 467 \(C.A.A.F. 2011\)](#). For the reasons set forth below, we conclude that the military judge did abuse his discretion. Because of our resolution of this issue, we need not address the remaining issues.

I. Background

The relevant charge in this case stemmed from Appellant's sexual abuse of his twelve-year-old stepdaughter, AK, which unfolded over an approximately two-year period starting in 2018. The abuse usually [*3] took place late at night in the living room or AK's bedroom. At first, Appellant would wait until AK started falling asleep and then massage her on the leg, the upper thigh, and the buttocks area. Eventually the massages migrated to her genital area, both over and under her clothing. AK was taking medication that could cause hallucinations and Appellant would flash lights and pound on the walls late at night to exacerbate this side effect. Appellant also began setting up his cell phone to film AK in the shower. He then edited these clips into sexually explicit videos he stored on his phone. In addition, in early 2019, Appellant conducted multiple searches on a pornographic website using the terms "rape sleep" and "drugged sleep" because watching such videos reminded him of abusing AK. In April 2019, AK reported Appellant's actions to law enforcement.

Appellant pled guilty to four specifications of sexual abuse of a child and several other offenses including one specification of indecent conduct by searching for the pornographic videos. The specification stated that Appellant "did . . . commit indecent conduct, to wit: conducting an internet search for 'rape sleep' and 'drugged sleep,' [*4] and that said conduct was of a nature to bring discredit upon the armed forces." During

the plea colloquy, Appellant told the military judge that he sought out videos "depicting simulated vulgar sex scenes involving sleep or sex with an individual that was pretending to be asleep" and that watching the videos reminded him of sexually abusing AK. The colloquy of the military judge on this offense is at issue.

II. Discussion

We review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo. [United States v. Inabinette, 66 M.J. 320, 322 \(C.A.A.F. 2008\)](#). "During a guilty plea inquiry the military judge is charged with determining whether there is an adequate basis in law and fact to support the plea before accepting it." [Id. at 321-22](#) (citing [United States v. Prater, 32 M.J. 433, 436 \(C.M.A. 1991\)](#)). A military judge abuses his or her discretion by "fail[ing] to obtain from the accused an adequate factual basis to support the plea—an area in which we afford significant deference" or if his or her ruling is based on an erroneous view of the law. [Id. at 322](#).

We give the military judge broad discretion in the decision to accept a guilty plea because the facts are undeveloped in such cases. *Id.* In reviewing the military judge's decision, this Court applies [*5] a substantial basis test: "Does the record as a whole show a substantial basis in law and fact for questioning the guilty plea." *Id.* (internal quotation marks omitted) (quoting [Prater, 32 M.J. at 436](#)). "[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." [United States v. Care, 18 C.M.A. 535, 539, 40 C.M.R. 247, 251 \(1969\)](#) (quoting [McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 \(1969\)](#)).

The [First Amendment to the United States Constitution](#) states that, "Congress shall make no law . . . abridging the freedom of speech." [U.S. Const. amend. I](#). Though servicemembers are not excluded from [First Amendment](#) protection, it is important to remember that: the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

¹ The actual granted issues were:

I. Whether a guilty plea to an offense waives a challenge that the conduct is not a cognizable offense under the Uniform Code of Military Justice.

II. Whether, in this case, internet search queries for "drugged sleep" and "rape sleep" are indecent conduct; in the alternative, whether the military judge abused his discretion by failing to abide by the heightened plea inquiry requirements under [United States v. Hartman, 69 M.J. 467 \(C.A.A.F. 2011\)](#).

Parker v. Levy, 417 U.S. 733, 758, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974).

"When a charge against a servicemember may implicate both criminal and constitutionally protected conduct, the distinction between what is permitted and what is prohibited constitutes a matter of critical significance." Hartman, 69 M.J. at 468 (internal quotation marks omitted) (quoting United States v. O'Connor, 58 M.J. 450, 453 (C.A.A.F. 2003)). In a guilty plea situation, [*6] "the colloquy between the military judge and an accused must contain an appropriate discussion and acknowledgment on the part of the accused of the critical distinction between permissible and prohibited behavior." *Id.* "The fundamental requirement of plea inquiry . . . involves a dialogue in which the military judge poses questions about the nature of the offense and the accused provides answers that describe his personal understanding of the criminality of his or her conduct." *Id.* at 469.

In *Hartman*, this Court was troubled by the fact that the military judge failed to ask the appellant whether he understood the relationship between certain sections of the colloquy and the distinction between constitutionally protected behavior and criminal conduct. *Id.* We determined that "[i]n the absence of a dialogue employing lay terminology to establish an understanding by the accused as to the relationship between the supplemental questions and the issue of criminality, we cannot view [an appellant's] plea as provident." *Id.*

Hartman involved a conviction for sodomy under Article 125, UCMJ, 10 U.S.C. § 925 (2006). 69 M.J. at 467. As such, it implicated the Supreme Court's decision in Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), protecting consensual sodomy in the privacy of one's own home. The First Amendment right [*7] implicated in the present case was established by the Supreme Court in Stanley v. Georgia, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969). In that case, investigators acting upon a search warrant for evidence of illegal bookkeeping seized three reels of eight-millimeter film they deemed obscene. *Id.* at 558. The appellant challenged his conviction for possession of obscene matter, asserting his First Amendment rights had been violated. *Id.* at 559. The Supreme Court agreed, stating that "the mere private possession of obscene matter cannot constitutionally be made a crime." *Id.* The Court upheld a constitutional right "to be free, except in very limited circumstances, from unwanted governmental intrusion into one's privacy." *Id.* at 564.

If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

Id. at 565.

This constitutional right protected in Stanley does not automatically apply to servicemembers. Conduct that is constitutionally protected for civilians could still qualify as prejudicing good order and discipline or bringing discredit upon the military. United States v. Moon, 73 M.J. 382, 388 (C.A.A.F. 2014) (quoting United States v. Barberi, 71 M.J. 127, 131 (C.A.A.F. 2012)). However, images viewed for [*8] sexual gratification do not necessarily lose their First Amendment protection. *Id.* at 389. Appellant's behavior here occupies a constitutional gray area similar to that at issue in *Hartman*. As a result, the plea colloquy should have established why possibly constitutionally protected material could still be service discrediting in the military context. See *id.* (stating that "[w]ithout a proper explanation and understanding of the constitutional implications of the charge, [a]ppellant's admissions in his stipulation and during the colloquy regarding why he personally believed his conduct was service discrediting and prejudicial to good order and discipline do not satisfy *Hartman*").²

Appellant argues that the military judge's examination of Appellant did not rise to the level of the detailed inquiry required under *Hartman* whenever there is the potential to criminalize constitutionally protected conduct. The Government counters that the military judge engaged in a detailed colloquy that included a thorough explanation of the charges and demonstrated Appellant's understanding of the criminality of his actions, and that this was sufficient to meet the heightened standard required by *Hartman*.

The record shows that [*9] the military judge conducted a thorough plea colloquy with regard to the elements of the offense. He stated the elements and definitions relevant to the charged offense and questioned Appellant in detail about his behavior. Appellant was clear about the nature of the videos he searched for and watched and about why he watched them, as well as the service discrediting nature of his actions. The

² Moon involved an appellant charged with possession of images of nude minors. 73 M.J. at 383.

military judge explored Appellant's motivation in searching for and viewing pornographic videos related to the terms "rape sleep" and "drugged sleep." Appellant confirmed with the military judge the connection between the videos and abusing his stepdaughter. Appellant appeared to understand why his conduct was criminal. See [Care](#), 18 C.M.A. at 541, 40 C.M.R. at 253.

However, the military judge did not discuss Appellant's [First Amendment](#) rights or any of the constitutional implications of his situation. In *Hartman*, this Court set aside a guilty plea because the military judge failed to discuss with the appellant the relevant distinction between constitutionally protected behavior and criminal conduct. [69 M.J. at 469](#). If we adhere to the heightened standard outlined in *Hartman*, the military judge should have discussed with Appellant the existence of constitutional [*10] rights relevant to his situation and made sure Appellant understood why his behavior under the circumstances did not merit such protection.

Given our decision in [Hartman](#), we cannot view this plea colloquy as sufficient. We have been clear that the colloquy between the military judge and an accused "must contain an appropriate discussion and acknowledgment on the part of the accused of the critical distinction between permissible and prohibited behavior." [Id. at 468](#) (emphasis added). In [Moon](#), we further clarified that such discussion is required in situations where an [Article 134, UCMJ](#), charge implicates constitutionally protected conduct. [73 M.J. at 388](#). Because such a discussion did not occur here, there is a substantial basis in law for questioning the plea. We therefore conclude that the military judge abused his discretion and that Appellant's guilty plea to the charge of indecent conduct was improvident.

III. Decision

The decision of the United States Army Court of Criminal Appeals is reversed as to Charge VI and its specification and the sentence, but affirmed in all other respects. The findings of guilty with respect to this charge and specification are set aside, and Charge VI and its specification are dismissed without [*11] prejudice. The decision is affirmed as to the remaining findings. The case is returned to the Judge Advocate General of the Army for remand to that court for reassessment of the sentence.



Positive

As of: June 26, 2023 4:40 PM Z

United States v. McFall

United States Navy-Marine Corps Court of Criminal Appeals

November 19, 1999, Decided

NMCM 98 01173

Reporter

1999 CCA LEXIS 291 *; 1999 WL 1076791

UNITED STATES v. Dustin P. MCFALL Aviation
Boatswain's Mate (Fuels) Airman Apprentice (E-2), U.S.
Navy

Notice: [*1] AS AN UNPUBLISHED DECISION, THIS
OPINION DOES NOT SERVE AS PRECEDENT.

Prior History: Sentence adjudged 1 October 1997.
Military Judge: K.A. Krantz. Review pursuant to Article
66(c), UCMJ, of General Court-Martial convened by
Commander, Naval Base Jacksonville, Naval Air
Station, Jacksonville, FL.

Disposition: Findings and sentence affirmed.

Case Summary

Procedural Posture

Defendant serviceman appealed decision of military
judge, sitting as general court-martial, convicting him,
pursuant to his pleas, of underage drinking, use and
possession of marijuana, use of cocaine, and disorderly
conduct in violation of arts. 92, 112a, and 134 Unif.
Code Mil. Justice, [10 U.S.C.S. §§ 892, 912a](#), and [934](#).

Overview

Defendant serviceman convicted of underage drinking,
use and possession of marijuana, use of cocaine, and
disorderly conduct in violation of arts. 92, 112a, and 134
Unif. Code Mil. Justice, [10 U.S.C.S. §§ 892, 912a](#), and
[934](#). Defendant appealed decision alleging that (1) his
conviction for disorderly conduct should be set aside
because his guilty plea was not provident; (2) his
conviction for disorderly conduct should be set aside
because it represented an unreasonable multiplication
of charges; (3) his sentence was inappropriately severe.
The court affirmed the judgment as correct in law and
fact and devoid of error materially prejudicial to the

substantive rights of defendant. Defendant's guilty plea
was provident as substantiated in law and fact. The
offenses comprised of distinct and separate acts
warranted multiplication of charges. Defendant's
sentence was appropriate, resulting from individualized
consideration based on the nature and seriousness of
the offenses and the character of defendant.

Outcome

Findings and sentence were affirmed. Defendant's guilty
plea to disorderly conduct was provident as
substantiated in law and fact. The multiplication of
charges was reasonable because the offenses were
distinct and separate acts. Defendant's sentence was
appropriate since defendant was afforded the
individualized consideration contemplated in military
law.

Counsel: Capt. CURTIS M. ALLEN, USMC, Appellate
Defense Counsel.

LT MARGARET E. JOLLY, JAGC, USNR, Appellate
Government Counsel.

Judges: BEFORE CHARLES Wm. DORMAN, R.H.
TROIDL, JOHN W. ROLPH. Senior Judge TROIDL and
Judge ROLPH concur.

Opinion by: CHARLES Wm. DORMAN

Opinion

DORMAN, Senior Judge:

A military judge sitting as a general court-martial
convicted appellant, pursuant to his pleas, of underage
drinking, use and possession of marijuana, use of
cocaine, and disorderly conduct. These offenses are in
violation of Articles 92, 112a, and 134, Uniform Code of
Military Justice, [10 U.S.C. §§ 892, 912a](#), and [934](#)
(1994). The appellant was sentenced to confinement for

10 months, forfeiture of \$ 500 per month for 6 months, reduction to pay grade E-1, and a bad-conduct discharge.

We have carefully reviewed the record of trial, the appellant's three assignments [*2] of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Providence

In his first assignment of error the appellant contends that his conviction for disorderly conduct should be set aside because his guilty plea to that specification is not provident. The Specification under Charge IV alleges that the appellant engaged in disorderly conduct at or near Jacksonville, Florida, on 26 February 1997. The Specification does not detail how the appellant's conduct was disorderly.

A military judge may not accept a guilty plea to an offense without inquiring into its factual basis. [*United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 \(1969\)](#); Art. 45(a), UCMJ. Before accepting a guilty plea, the military judge must explain the elements of the offense and ensure that a factual basis for the plea exists. [*United States v. Faircloth*, 45 M.J. 172, 174 \(1996\)](#); [*United States v. Davenport*, 9 M.J. 364, 367 \(C.M.A. 1980\)](#). Mere conclusions of law recited by the accused [*3] are insufficient to provide a factual basis for a guilty plea. [*United States v. Outhier*, 45 M.J. 326, 331 \(1996\)](#) (citing [*United States v. Terry*, 21 U.S.C.M.A. 442, 45 C.M.R. 216 \(1972\)](#)). The accused "must be convinced of, and able to describe all the facts necessary to establish guilt." RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.). Acceptance of a guilty plea requires the accused to substantiate the facts that objectively support his plea. [*United States v. Schwabauer*, 37 M.J. 338, 341 \(C.M.A. 1993\)](#); R.C.M. 910(e).

A military judge may not "arbitrarily reject a guilty plea." [*United States v. Penister*, 25 M.J. 148, 152 \(C.M.A. 1987\)](#). The standard of review to determine whether a plea is provident is whether the record reveals a substantial basis in law or fact for questioning the plea. [*United States v. Prater*, 32 M.J. 433, 436 \(C.M.A. 1991\)](#). Such rejection must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty, and the only exception to the general

rule of waiver arises when an error prejudicial to the substantial [*4] rights of the appellant occurs. R.C.M. 910(j); Art. 59(a), UCMJ.

In our review of the record, we determined that the military judge accurately listed the elements and defined the terms contained in the elements for the offense of disorderly conduct. Record at 15. We also determined that the appellant indicated an understanding of the elements of the offenses and the legal definitions, and stated that the elements correctly described the offense. *Id.* at 15-16. In acknowledging the factual basis for his guilty plea to this offense the appellant entered into a stipulation of fact. Paragraph 7 of the stipulation reads as follows:

On or about 26 February 1997, the accused was [sic] acted in a disorderly fashion by engaging in conduct that endangered public morals and decency. Specifically, ABFAA McFall gave marijuana to a sixteen year old girl and watched her smoke it by inhaling it into her lungs through a beer can which the accused had fabricated into a pipe-like inhaling device. The disorderly conduct of the accused was of a nature to bring discredit upon the Armed Forces because such conduct tends to bring the Armed Forces into disrepute and lowers the Armed Services in public [*5] esteem.

Stipulation of Fact of 1 Oct 97 at 2. Furthermore, the appellant informed the military judge that he provided marijuana to the 16-year-old, that his conduct endangered public morals as had been defined by the military judge, and that it was service-discrediting. Record at 19-20. Accordingly, we find that his guilty plea to disorderly conduct was provident.

Unreasonable Multiplication of Charges

The appellant's second assignment of error also attacks his conviction for disorderly conduct. The appellant claims that his conviction for disorderly conduct should be set aside because it represents an unreasonable multiplication of charges. Specifically he contends that his conviction for disorderly conduct for providing marijuana to a 16-year-old and distribution of marijuana to that same individual is essentially one transaction for which he should not be twice-punished. We do not find an unreasonable multiplication of charges.

Initially, we note that the appellant failed to raise the issue of an unreasonable multiplication of charges at trial. Because the issue was not raised at trial, we

normally apply waiver. United States v. Denton, 50 M.J. 189 (1998) [*6] (summary disposition); United States v. Tollinchi, 50 M.J. 874, 878 (N.M.Ct.Crim.App. 1999); United States v. Erby, 46 M.J. 649, 652 (A.F.Ct.Crim.App. 1997). We find it appropriate to do so in this case.

Even if we did not apply waiver we would not grant relief in this case. In United States v. Quiroz 52 M.J. 510 (N.M.Ct.Crim.App. 1999) we set out four criteria to guide us in resolving these issues. We look to see if the specifications address distinctive criminal acts, whether they misrepresent or exaggerate the appellant's criminality, whether the separate specifications unfairly expose the appellant to greater punishment, and whether there is evidence of prosecutorial overreaching. Quiroz, slip opinion at 3-4. It is also appropriate to consider that the standard of review in this case is whether there has been an abuse of discretion. Erby, 46 M.J. at 652.

Applying that standard of review, and the Quiroz guidelines, we find that it was not unreasonable to charge the appellant with both the distribution of marijuana to a minor, as well as disorderly conduct in providing her the marijuana and the [*7] means and the opportunity to smoke it. Clearly the concern here was not just the fact that the appellant had distributed marijuana, but that the recipient was a minor, and that he assisted her in using the drug. To that extent, the offenses are distinct and separate acts. See United States v. Neblock, 45 M.J. 191, 197 (1996). We also do not find that by charging the appellant with these two separate offenses that he was either unfairly exposed to the risk of greater punishment, or that his criminality was exaggerated. Even if the appellant had not been charged with disorderly conduct, it would have been appropriate for the military judge to consider the age of the recipient of the marijuana and that the appellant had assisted her in smoking it, as matters in aggravation. R.C.M. 1001(b)(4). Finally, in light of these considerations and the sentence imposed by the military judge, we find no error that materially prejudiced the substantial rights of the appellant. Art. 59(a), UCMJ.

Sentence Appropriateness

In his final assignment of error the appellant summarily argues that his sentence was inappropriately severe. We disagree.

We "may affirm only such findings [*8] of guilty and the

sentence or such part or amount of the sentence, as [we find] correct in law and fact and [determine], on the basis of the entire record, should be approved." Art. 66(c), UCMJ. "Generally, sentence appropriateness should be judged by individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender." United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982)(quoting United States v. Mamaluy, 10 U.S.C.M.A. 102, 106-07, 27 C.M.R. 176, 180-81 (1959))(internal quotes omitted). Furthermore, appellate courts "should not disturb the sense of justice of the community where the crime was committed unless the harshness of the sentence is so disproportionate as to cry out for sentence equalization." United States v. Usry, 9 M.J. 701, 704 (N.M.C.M.R. 1980).

The appellant's argument appears to be more appropriately styled as a plea for clemency, which involves the act of bestowing mercy. Clemency is the sole prerogative of the convening authority. United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988); R.C.M. 1107(b). The convening [*9] authority considered the appellant's clemency petition and decided that the sentence should be approved as adjudged. Nothing presented to us in this appeal suggests that the appellant's sentence is inappropriate. The appellant was afforded the individualized consideration contemplated in military law. Accordingly, we find this assignment of error to be without merit.

Conclusion

The findings and sentence, as approved by the convening authority, are affirmed.

Senior Judge TROIDL and Judge ROLPH concur.

End of Document

CERTIFICATE OF SERVICE U.S. v. HENDERSON (20210543)

I certify that a copy of the foregoing was sent via electronic submission to
the Defense Appellate Division at [REDACTED]
[REDACTED] on this 26th day of June, 2023.

[REDACTED]
DANIEL L. MANN
Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
[REDACTED]