

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Docket No. ARMY 20220660

Staff Sergeant (E-6)
JEFFERY L. BUHL,
United States Army,
Appellant

Tried at Fort Bragg,¹ North Carolina
on 19 and 20 December 2022, before
a special court-martial convened by
Commander, Headquarters, 1st
Special Forces Command, Lieutenant
Colonel Tyler Heimann, Military
Judge, presiding.

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

Assignment of Error

**WHETHER THE EVIDENCE PRESENTED AT
TRIAL PERTAINING TO THE THIRD AND
FINAL ELEMENT OF THE SPECIFICATION OF
THE SOLE CHARGE BEFORE THE COURT,
WHICH REQUIRED PROOF BEYOND A
REASONABLE DOUBT THAT THE ALLEGED
MISCONDUCT, UNDER THE CIRCUMSTANCES,
WAS OF A NATURE TO BRING DISCREDIT
UPON THE ARMED FORCES, WAS SUFFICIENT
TO SUSTAIN A CONVICTION OF THE ACCUSED
FOR EXTRAMARITAL SEXUAL CONDUCT**

¹ At the time of trial, the installation was named Fort Bragg. On 2 June 2023, the installation was officially renamed to Fort Liberty.

Statement of the Case

On 20 December 2022, a military judge sitting as a special court-martial convicted appellant, contrary to his plea, of one specification of extramarital sexual conduct in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 [UCMJ]. (Statement of Trial Results (STR); Charge Sheet; R. at 172). The military judge sentenced appellant to a reprimand. (STR; R. at 234). On 5 January 2023 the convening authority approved appellant's sentence. (Action). On 6 January 2023, the military judge entered judgment. (Judgment).

Statement of Facts

A. Appellant met Ms. [REDACTED] at a bar while TDY to Fort Carson.

On 31 October 2020, appellant was on temporary duty (TDY) for an exercise at Fort Carson in Colorado Springs, Colorado. (R. at 65–66). Appellant was a part of a four-soldier psychological operations team that consisted of appellant, Staff Sergeant (SSG) [REDACTED], SSG [REDACTED], and Captain (CPT) [REDACTED]. (R. at 68). On the evening of 31 October 2020, appellant and the other three soldiers walked to a local bar from their hotel. (R. at 68–69). At the bar, appellant and the soldiers began talking to a group of three women. (R. at 67–69, 109). The group of women was comprised of Ms. [REDACTED], Ms. [REDACTED], and Ms. [REDACTED]. (R. at 119).

As the evening progressed the soldiers and the three women left the bar together and walked to the hotel the soldiers were staying at. (R. at 69). Shortly

thereafter, the group left the hotel and walked to Ms. ■■■'s personal residence in Colorado Springs. (R. at 69). After spending some time at Ms. ■■■'s residence, SSGs ■■■ and ■■■ returned to the hotel. (R. at 69, 93). CPT ■■■ fell asleep on the couch and left Ms. ■■■'s house after he woke up between 0130–0200. (R. at 69). When CPT ■■■ left, appellant was still at Ms. ■■■'s house. (R. at 69).

B. Appellant had sexual intercourse with a woman other than his wife.

On the morning of 1 November 2020, appellant returned to the hotel in which he and his team were staying. (R. at 69-70). When appellant met his team in the lobby that morning, he told CPT ■■■ that he had sex with one of the women there that night. (R. at 70). Ms. ■■■ testified that when she awoke on the morning of 1 November 2020, she was in her bed with Ms. ■■■ and the appellant, and appellant's penis was inside of her vagina. (R. at 123). On 28 February 2022, appellant submitted an affidavit wherein he admitted that he engaged in vaginal sexual intercourse with Ms. ■■■ on both the evening of 31 October 2020, and again on the morning of 1 November 2020. (Pros. Ex. 3). Appellant acknowledged when he had sex with Ms. ■■■ on the morning of 1 November 2020, Ms. ■■■ was asleep next to them in the bed. (Pros. Ex. 3).

The other soldiers on appellant's team knew that he was married at the time of the misconduct. (R. at 67, 92). Ms. ■■■ stated appellant never mentioned being married, and that she did not learn appellant was married until she was in the

police station on 1 November 2020. (R. at 119, 135). Mrs. ■ testified at trial that she and appellant got married on 15 May 2015. (R. at 143). Mrs. ■ further offered that on the date her testimony, 20 December 2020, she was still married to appellant. (R. at 143). Mrs. ■ clarified that at no point in their marriage had she and appellant ever been legally separated. (R. at 143). Appellant's marriage certificate was also admitted into evidence. (R. at 65; Pros. Ex. 6).

C. Appellant's conduct impacted Ms. ■'s and Ms. ■'s opinions of the armed services.

Appellant told Ms. ■ that he was a member of the armed services while the group was still at the bar. (R. at 123). Ms. ■ was asked at trial how appellant's conduct impacted her opinion of the armed services, and she described how her opinion had transformed from one that was entirely positive. (R. at 123–24).

[TC]: Prior to 31 October and 1 November, did you have a perception of the military and its reputation?

[Ms. ■]: Yes, I did.

[TC]: What was that perception?

[Ms. ■]: I had a very high regard for the military. Like I said, I lived in Colorado Springs since 2005. It's a military heavy area. And so, growing up, my parents taught us to respect the military. We then adopted between the years of 2001 and 2017, six Air Force Cadets. When I was living at home with them and we had our first round and then a second round because we respected the military and appreciated the work they were doing and it was a way that

we could give back. And so I had a very high regard for the military prior to this.

[TC]: And based on the accused's misconduct for why we're here today, the extramarital sexual conduct. Has that misconduct changed your opinion of the military?

[Ms. ■■■]: Absolutely. It has completely shifted the way that I view the military and its service members. Again, also living in Colorado Springs, I see military people regularly. I don't want to be anywhere near them. I look at them with disgust. I think the individuals that make up the military are trash and not to be trusted. And I apologize, I know I'm in a room full of military people, but that's how I see them when I see them walking down the street. You know, I'm a single woman on dating apps. There is a lot of military guys in the area. And I don't care if they're attracti[ve], or if we have similar interests. The first thing I look for is to truly is what they do for work and if they are military it's an automatic no for me. Its just not people that I want to associate myself with or the people I love and care about to be associated with.

[TC]: And why specifically that?

[Ms. ■■■]: Because of the actions of military people on the 1st of November and the 31st of October 2020.

(R. at 124–25). Ms. ■■■ further explained the details of how she learned appellant was married, and how it immediately impacted her. (R. at 135).

[TC]: When did you find out he was married?

[Ms. ■■■]: After he had been arrested.

[TC]: Do you remember when that was?

[Ms. ■■■]: I was at the police station.

[TC]: After ----

[Ms. ■■■]: Yes.

[TC]: ----After, the 911 call?

[Ms. ■■■]: Yes, ma'am.

[TC]: And how did learning that he was married change your opinion of the military?

[Ms. ■■■]: I had flipped a switch and immediately said he was trash - was actually the first words that came out of [my] mouth when I found out he was married. Oh, and "what a piece of shit" - I'm sure was also said in there.

[TC]: Thank you. No further questions, Your Honor.

(R. at 135).

Ms. ■■■, who was also present on the evening of 31 October 2020 and the morning of 1 November 2020, testified about how appellant's conduct impacted her view of the armed services. (R. at 110).

[TC]: Prior to 1 November 2020, what was your opinion of the military and its reputation?

[Ms. ■■■]: Very high. Much respect, trust, these are the people that are supposed to be protecting us, our country.

[TC]: And as it relates to the charged offense, the extramarital sexual conduct, what's your opinion of the military now?

[Ms. ■■■]: Its different. It has changed significantly. Not as trusting. I have lost a bit of respect. I mean because if something like that is going to happen, how can I hold

military officials to such a high standard to be able to protect our country.

[TC]: And you said, "something like that," can you define what that means?

[Ms. ■■■]: Cheating on a spouse or significant other.

[TC]: Thank you. I have no further questions, but the defense might.

(R. at 110–11).

Assignment of Error

WHETHER THE EVIDENCE PRESENTED AT TRIAL PERTAINING TO THE THIRD AND FINAL ELEMENT OF THE SPECIFICATION OF THE SOLE CHARGE BEFORE THE COURT, WHICH REQUIRED PROOF BEYOND A REASONABLE DOUBT THAT THE ALLEGED MISCONDUCT, UNDER THE CIRCUMSTANCES, WAS OF A NATURE TO BRING DISCREDIT UPON THE ARMED FORCES, WAS SUFFICIENT TO SUSTAIN A CONVICTION OF THE ACCUSED FOR EXTRAMARITAL SEXUAL CONDUCT

Standard of Review

The “Courts of Criminal Appeals have a statutory mandate to ‘conduct a de novo review of both legal and factual sufficiency of a conviction.’” *United States v. Rosario*, 76 M.J. 114 (C.A.A.F. 2017) (citation omitted). Questions of factual and legal sufficiency are reviewed de novo. *United States v. Bright*, 66 M.J. 359, 363 (C.A.A.F. 2008).

Law

This court reviews legal and factual sufficiency of court-martial convictions and only affirms findings of guilty that are correct in law and fact. Article 66(d)(1), UCMJ; 10 U.S.C. § 866(d). This court employs an extremely deferential test when evaluating legal sufficiency. Under the test, “evidence is legally sufficient if, viewed in the light most favorable to the [g]overnment, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Winckelmann*, 70 M.J. 403, 406 (C.A.A.F. 2011) (emphasis added). This court is “bound to draw every reasonable inference from the evidence of record in favor of the prosecution.” *United States v. Craion*, 64 M.J. 531, 534 (Army Ct. Crim. App. 2006); *Bright*, 66 M.J. at 365.

“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, this court is convinced of appellant’s guilt beyond a reasonable doubt.” *Craion*, 64 M.J. at 534 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). To sustain appellant’s conviction, a court of criminal appeals “must find that the government has proven all essential elements and, taken together as a whole, the parcels of proof credibly and coherently demonstrate that appellant is guilty beyond a reasonable doubt.” *United States v. Gilchrist*, 61 M.J. 785, 793 (Army Ct. Crim. App. 2005). Under this analysis, “[r]easonable doubt . . . does not

mean the evidence must be free from conflict.” *United States v. Rankin*, 63 M.J. 552, 557 (N.M. Ct. Crim. App. 2006).

A court applies “neither a presumption of innocence nor a presumption of guilt,” but “must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.” *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). While weighing the evidence, a reviewing court must be mindful that it did not personally observe and hear the witnesses. Article 66, UCMJ; *Turner*, 25 M.J. at 325.

Factfinders “are expected to use their common sense in assessing the credibility of testimony as well as other evidence presented at trial.” *United States v. Frey*, 73 M.J. 245, 250 (C.A.A.F. 2014). “In weighing and evaluating the evidence, [the factfinder is] expected to use [his] own common sense and [his] knowledge of human nature and the ways of the world. In light of all the circumstances in the case, [the fact finder] should consider the inherent probability or improbability of the evidence.” Dep’t of Army, Pam. 27-9, Legal Services: Military Judges’ Benchbook, para. 2-5-12 (29 February 2020) [Benchbook].

The elements of extramarital sexual conduct are:

- (i) That the accused wrongfully engaged in extramarital sexual conduct;
- (ii) That, at the time, the accused was married to someone else, which he knew; and,

(iii) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces [or] of a nature to bring discredit upon the armed forces [or] to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces.

Manual for Courts-Martial, United States [MCM], pt. IV, ¶99b.(1).

To prove the service-discrediting nature of the charged conduct, the government need not present evidence of public awareness. *United States v. Phillips*, 70 M.J. at 163 (“[T]he statute, which requires proof of the ‘nature’ of the conduct, does not require the government to introduce testimony regarding views of ‘the public’ or any segment thereof.”). The government is also not “required to specifically articulate how the conduct is service discrediting.” *Id.* In *Phillips*, the government met its burden, despite not presenting any witness testimony as to the service-discrediting nature of appellant’s possession of child pornography, nor “any direct evidence that the public was aware or could have become aware of the appellant’s conduct.” *Id.* at 166.

The military judge in a bench trial has the express authority to modify the charges and specifications during deliberations on findings to make “exceptions and substitutions.” *United States v. Parker*, 59 M.J. 195, 197 (C.A.A.F. 2003); Rules for Courts-Martial (R.C.M.) 918(a)(1). The authority to do so is limited to changes that do not substantially change the nature of the offense. *Id.*

Argument

This court can be confident in affirming the conviction as it is legally and factually sufficient. When every reasonable inference from the evidence of record is viewed in favor of the prosecution it is clear the conviction is legally sufficient. *Craion*, 64 M.J. at 534; *Bright*, 66 M.J. at 365. Further, this court's independent review of the evidence, as described below, will show beyond a reasonable doubt that appellant's conviction is factually sufficient. *Turner*, 25 M.J. at 325.

A. Appellant engaged in extramarital sexual conduct with Ms. [REDACTED].

Ms. [REDACTED] testified at trial that when she awoke on the morning of 1 November 2020, appellant's penis was in her vagina. (R. at 123). CPT [REDACTED] testified at trial that when appellant returned to their hotel on the morning of 1 November 2020 the soldiers all met in the lobby, and when they met appellant told CPT [REDACTED] that he had sex with one of the women they met the previous evening. (R. at 70). Additionally, Appellant freely admits to engaging in vaginal sex with Ms. [REDACTED] in a 28 February 2022 affidavit that was entered as evidence during trial. (Pros. Ex. 3; R. at 46–47).

Mrs. [REDACTED] testified that she and appellant got married on 15 May 2015 and were still married at the time she testified on 20 December 2022. (R. at 143). Mrs. [REDACTED] stated she and appellant were never legally separated. (R. at 143). The government also provided appellant's marriage certificate as a prosecution exhibit

in support of this element. (Pros. Ex. 6; R. at 65). CPT [REDACTED] and SSG [REDACTED] each testified they knew appellant was married at the time of the charged offense. (R. at 67, 92).

B. Appellant's misconduct was service discrediting.

As the C.A.A.F. outlined in *Phillips*, in a case such as this the government has no obligation to present evidence that appellant's conduct was service discrediting. *Phillips*, 70 M.J. at 163–66. Nonetheless, the government here questioned both Ms. [REDACTED] and Ms. [REDACTED] about how appellant's conduct impacted their view of the armed forces. (R. at 110–11, 124–25, 135). Both Ms. [REDACTED] and Ms. [REDACTED] indicated they had shifted from a very positive view of the armed services, to a very negative one, because of appellant's conduct on 31 October 2020 and 1 November 2020. (R. at 110–11, 124–25, 135).

Appellant first relies on *Davis* in asserting the government failed to establish his conduct was service discrediting. (Appellant's Br., p. 8, citing *United States v. Davis*, ARMY 20170561, 2019 CCA LEXIS 217 (Army Ct. Crim. App. 7 May 2019)). In *Davis*, this court found the appellant failed to articulate how his own misconduct was service discrediting during his guilty plea. *Davis*, 2019 CCA LEXIS 217 at 3. This court held, “[t]o be clear, it is not this court's opinion that discrete adultery cannot be service discrediting. Rather, this court finds the factual predicate articulated during appellant's providence inquiry insufficient to

establish the requirements for service discrediting conduct as defined for this specific Article 134 offense.” *Id.* at 3–4.

Unlike *Davis*, the instant case is not predicated on a private or discrete act of extramarital sexual conduct. By appellant’s own admission, he and Ms. ■ had sex on the morning of 1 November 2020 while Ms. ■ was asleep in the same bed. (Pros. Ex. 3). Beyond that, there was testimony that when appellant returned to the hotel, he told other soldiers that he had sex with one of the women they met the previous evening. (R. at 70). This court should find the evidence before the military judge was both legally and factually sufficient to support finding appellant’s conduct was of a nature to bring discredit upon the armed services.

C. The military judge properly found appellant guilty by exception.

Appellant suggests the instant case and *Fosler* are analogous. (Appellant’s Br., p. 10, citing *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). In *Fosler*, the CAAF held the appellant was deprived of constitutionally sufficient notice when the government failed to allege any terminal element in its specification of adultery. *Fosler*, 70 M.J. at 233. The CAAF noted the government failed both “to allege the terminal element expressly or by necessary implication.” *Id.* The instant case is easily distinguishable from *Fosler*, as the government here expressly charged the terminal element. (Charge Sheet).

In *Straker*, this court examined an appellant's conviction where the military judge found the appellant's conduct was both prejudicial to good order and discipline and service discrediting. *United States v. Straker*, No. ARMY 20160476, 2018 CCA LEXIS 425, at *12-13 (A. Ct. Crim. App. 24 Aug. 2018)(mem. op.).

To determine whether a general verdict on a specification alleging multiple theories of liability is proper, we must first determine if the relevant statute creates separate elements, or merely different theories of liability. In *United States v. Medina*, our superior court held that the three clauses of Article 134, UCMJ's terminal element are alternative theories of criminality. 66 M.J. 21, 26-28 (C.A.A.F. 2008).

In this case, therefore, a general finding of guilty under Article 81 was not dependent on the military judge finding the appellant guilty under both theories, but rather at least one theory. *See, e.g. United States v. Williams*, 78 M.J. 543, 2018 CCA LEXIS 401 (Army Ct. Crim. App. 21 Aug. 2018). It was not necessary for the military judge to return a verdict as to only those *theories* of liability proven beyond a reasonable doubt, as long as the Government [*13] proved all of the *elements* of the offense. *See United States v. Vidal*, 23 M.J. 319, 325 (C.M.A. 1987).

This court, of course, is bound to review the facts of this case not just for legal sufficiency, but also for factual sufficiency under Article 66(c), UCMJ. In this case, while there was overwhelming evidence that appellant's conduct was service discrediting, we agree that there is insufficient evidence that appellant's conduct was prejudicial to good order and discipline.

This does not change the form of the verdict, however “A factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence supports at least one of the means beyond a reasonable doubt.” *Brown*, 65 M.J. at 359. Accordingly, we affirm the trial court's general verdict as it stands.

Id.

The government properly charged appellant with a terminal element alleging multiple theories of liability. The military judge, while serving as the factfinder, considered all theories of liability charged and found appellant guilty by exception of the only theory of liability which he believed was supported by the evidence.²

² Contrary to appellant's assertion, the military judge properly found guilty by exception of the charge, and his finding did not amount to convicting appellant of a lesser included offense. (Appellant's Br., p. 10).

Conclusion

WHEREFORE, the government respectfully requests this honorable court deny appellant's request for relief and affirm the findings and sentence.



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APPENDIX



User Name: Stewart Miller

Date and Time: Wednesday, August 16, 2023 11:00:00AM EDT

Job Number: 203666260

Document (1)

1. [United States v. Davis, 2019 CCA LEXIS 217](#)

Client/Matter: -None-

Search Terms: 2019 CCA LEXIS 217

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
-None-



Caution

As of: August 16, 2023 3:00 PM Z

United States v. Davis

United States Army Court of Criminal Appeals

May 7, 2019, Decided

ARMY 20170561

Reporter

2019 CCA LEXIS 217 *; 2019 WL 2096538

UNITED STATES, Appellee v. Staff Sergeant KERI L. DAVIS, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review granted by *United States v. Davis*, 79 M.J. 182, 2019 CAAF LEXIS 482 (C.A.A.F., July 8, 2019)

Review granted by *United States v. Davis*, 79 M.J. 209, 2019 CAAF LEXIS 554 (C.A.A.F., July 29, 2019)

Review denied by [*United States v. Davis*, 2019 CAAF LEXIS 823 \(C.A.A.F., Nov. 22, 2019\)](#)

Prior History: [*1] Headquarters, Fort Stewart. David Robertson, Military Judge, Colonel Michael D. Mierau, Jr., Staff Judge Advocate.

Core Terms

discredit, adultery, military, sexual intercourse, sentence, armed forces, guilty plea, Specification, adulterous, step-daughter, admit, maximum punishment, finding of guilt, sexual assault, factual basis, circumstances, confinement, reputation, civilian, married, soldier

Case Summary

Overview

HOLDINGS: [1]-A servicemember admitted that he engaged in sexual intercourse with an adult civilian, a former friend of his step-daughter (SD), while he was married to someone else, in the privacy of the servicemember's home; [2]-The servicemember's admission that people looked up to soldiers as heroes did not evince his understanding, knowing, and voluntary admission that his conduct was of a nature to bring discredit upon the armed forces; [3]-While discrete adultery could be service discrediting, the factual predicate articulated here did not establish service discrediting adultery under Unif. Code Mil. Justice art. 134, [10 U.S.C.S. § 934](#); [4]-The dismissal of the adultery conviction did not change the penalty landscape since the gravamen of the servicemember's misconduct was his repeated sexual assault of his minor SD, and the fathering of her child.

Outcome

Findings set aside and dismissed, in part, and affirmed, in part. Approved sentence affirmed.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Pleas

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

[HN1](#) Trial Procedures, Pleas

The appellate court reviews a military judge's decision to accept a guilty plea for an abuse of discretion. A guilty plea will only be set aside if we find a substantial basis in law or fact to question the military judge's acceptance of the plea.

Military & Veterans Law > Military Offenses > General Article > Adultery, Bigamy & Related Crimes

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Pleas

[HN2](#) General Article, Adultery, Bigamy & Related Crimes

To properly plead guilty to adultery in violation of Unif. Code Mil. Justice art. 134, [10 U.S.C.S. § 934](#), an appellant is required to admit: (1) he wrongfully had sexual intercourse with another; (2) either he or the other person were married to someone else; and (3) that, under the circumstances, his conduct was of a nature to bring discredit upon the armed services. Manual Courts-Martial pt. IV, para. 62.(b), Manual Courts-Martial. "Discredit," in the context of an adultery charge, means to injure the reputation of the armed forces and includes adulterous conduct that has a tendency, because of its open or notorious nature, to bring the service into disrepute, make it subject to public ridicule, or lower it in public esteem. para. 62.c.(2). Although an appellant is not required to admit his adulterous conduct actually damaged the reputation of the military, adulterous conduct that is private and discreet in nature may not be service discrediting by this standard. para. 62.c.(2).

Counsel: For Appellant: Captain Steven J. Dray, JA; William E. Cassara, Esquire (on brief and reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Eric K. Stafford, JA; Major Hannah E. Kaufman, JA; Major Marc B. Sawyer, JA (on brief).

Judges: Before SALUSSOLIA, SALADINO, and ALDYKIEWICZ Appellate Military Judges.

Opinion

SUMMARY DISPOSITION

Per Curiam:

On appeal, appellant contends he was improvident to adultery, Specification 1 of Charge III, because the military judge did not elicit an adequate factual basis to establish appellant's adulterous encounter with SH was of a nature to bring discredit upon the armed forces.¹ We agree.

HN1^[↑] We review a military judge's decision to accept a guilty plea for an abuse of discretion. [United States v. Inabinette](#), 66 M.J. 320, 322 (C.A.A.F. 2008). A guilty plea will only be set aside if we find a substantial basis in law or fact to question the military judge's acceptance of the plea. See *id.* at 322. (citing [United States v. Prater](#), 32 M.J. 433, 436 (C.M.A. 1991)).

HN2^[↑] To properly plead guilty to adultery with SH, in violation of [Article 134, UCMJ](#), appellant was required to admit: (1) he wrongfully had sexual intercourse with SH; (2) either he or SH were married to someone else; **[*2]** and (3) that, under the circumstances, his conduct was of a nature to bring discredit upon the armed services. *MCM*, pt. IV, ¶ 62.(b). "Discredit," in the context of an adultery charge, means "to injure the reputation of the armed forces and includes adulterous conduct that has a tendency, *because of its open or notorious nature*, to bring the service into disrepute, make it subject to public ridicule, or lower it in public esteem." *MCM*, pt. IV, ¶ 62.c.(2) (emphasis added). Although appellant was not required to admit his adulterous conduct actually damaged the reputation of the military, see [United States v. Phillips](#), 70 M.J. 161, 166 (C.A.A.F. 2011); [United States v. Saunders](#), 59 M.J. 1, 11 (C.A.A.F. 2003), adulterous conduct that is "private and discreet in nature may not be service discrediting by this standard . . ." *MCM*, pt. IV, ¶ 62.c.(2).

During appellant's providence inquiry, he admitted engaging in sexual intercourse with SH, a former friend of his step-daughter. Appellant admitted that the sexual act occurred while he was married to someone else, not SH. Appellant explained that he and SH had sexual intercourse, while she was an adult civilian, in the privacy of appellant's home. Appellant did not indicate that any soldier or civilian knew he engaged in sexual intercourse with SH. Rather, **[*3]** the factual basis for admitting that his conduct was service discrediting rested on appellant's agreement with the military judge's statement that appellant's adultery would bring discredit upon the armed forces, "[i]f a member of the public became aware that [appellant was] having sexual intercourse

¹ Following mixed pleas, a military judge sitting as a general court-martial convicted appellant of one specification of willfully disobeying a lawful order, two specifications of aggravated sexual assault of a child over the age of twelve, two specifications of sodomy of a child under the age of sixteen, and two specifications of adultery, in violation of [Articles 92, 120, 125, and 134](#), Uniform Code of Military Justice [UCMJ], [10 U.S.C. §§ 892, 920, 925, and 934](#). The military judge sentenced appellant to a dishonorable discharge and confinement for seven years. The convening authority approved the sentence as adjudged, waiving automatic forfeitures of pay and allowances for six months from the date of action.

After due consideration, appellant's other assigned errors and matters personally submitted pursuant to [United States v. Grostefon](#), 12 M.J. 431 (C.M.A. 1992), do not merit discussion nor relief.

with an eighteen-year-old girl that was a high school friend of [appellant's] stepdaughter." When asked by the military judge why he felt his conduct was service discrediting, appellant replied, "[P]eople see soldiers as the light of the—you know, they see us as a hero. They see us as someone to look up to, and for someone to find out something like that, that would bring discredit."

We are not satisfied appellant's descriptions of the circumstances surrounding his adultery and his conclusory statement evinced his understanding, knowing, and voluntary admission that his conduct was of a nature to bring discredit upon the armed forces. See, e.g., [United States v. Care, 18 U.S.C.M.A. 535, 539, 40 C.M.R. 247 \(1969\)](#) (guilty plea not truly voluntary unless defendant possesses an understanding of the law in relation to the facts). To be clear, it is not this court's opinion that discrete adultery cannot be service discrediting. Rather, this court finds the factual [*4] predicate articulated during appellant's providence inquiry insufficient to establish the requirements for service discrediting conduct as defined for this specific [Article 134](#) offense. Accordingly, we set aside appellant's adultery conviction, in Specification 1 of Charge III, in our decretal paragraph.

CONCLUSION

On consideration of the entire record, the finding of guilty to Specification 1 of Charge III is SET ASIDE and DISMISSED. The remaining findings of guilty are AFFIRMED.

We reassess the sentence in accordance with the principles of [United States v. Winckelmann, 73 M.J. 11, 15-16 \(C.A.A.F. 2013\)](#) and [United States v. Sales, 22 M.J. 305, 307-08 \(C.M.A. 1986\)](#). Appellant's affirmed offenses are of the type that this court has the experience and familiarity with to reliably determine what sentence the military judge would have imposed absent appellant's conviction for adultery. The gravamen of appellant's misconduct is his repeated sexual assault of his minor step-daughter, SA, resulting in him fathering SA's child. For the sexual assaults and sodomy of SA alone, appellant's maximum punishment was eighty years of confinement. Additionally, appellant remains convicted of another specification of adultery and failure to obey a lawful order from his company commander. We find the dismissal of appellant's [*5] conviction for adultery with SH, an offense carrying a maximum punishment of one year of confinement, does not constitute a dramatic change in the penalty landscape. We are confident the military judge would have adjudged a sentence at least as severe as the approved sentence absent appellant's conviction for adultery with SH. Accordingly, we AFFIRM the approved sentence.

All rights, privileges, and property of which appellant has been deprived by virtue of that portion of the findings set aside by this decision, are ordered to be restored. See [UCMJ art. 58b\(c\)](#) and [75\(a\)](#).



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1. [United States v. Straker, 2018 CCA LEXIS 425](#)

Client/Matter: -None-

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United States v. Straker

United States Army Court of Criminal Appeals

August 24, 2018, Decided

ARMY 20160476

Reporter

2018 CCA LEXIS 425 *; 2018 WL 4055812

UNITED STATES, Appellee v. Sergeant LEROY STRAKER, JR., United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by [United States v. Straker, 2018 CAAF LEXIS 745 \(C.A.A.F., Nov. 29, 2018\)](#)

Prior History: [*1] Headquarters, United States Army Alaska. Sean F. Mangan, Military Judge (arraignment). Kenneth W. Shahan, Military Judge (trial). Lieutenant Colonel Rana D. Wiggins, Acting Staff Judge Advocate (pretrial). Colonel Roseanne M. Bennett, Staff Judge Advocate (post-trial).

Core Terms

military, prostitution, variance, specification, sentence, substitutions, procure, armed forces, general verdict, good order, conspiracy, discipline, convicted, hire, sexual intercourse, disorder, beyond a reasonable doubt, legal sufficiency, confinement, wrongfully, discredit, pandering, engaging, reward, sexual, fatal

Counsel: For Appellant: Lieutenant Colonel Tiffany M. Chapman, JA; Captain Benjamin A. Accinelli, JA (on brief); Lieutenant Colonel Tiffany M. Chapman, JA; Captain Patrick G. Hoffman, JA; Captain Benjamin A. Accinelli, JA (on reply brief).

For Appellee: Colonel Tania M. Martin, JA; Major Cormac M. Smith, JA; Captain Cassandra M. Reposo, JA (on brief).

Judges: Before MULLIGAN, FEBBO, and LEVIN¹ Appellate Military.

Opinion by: LEVIN

Opinion

MEMORANDUM OPINION

LEVIN, Judge:

¹ Judge Levin decided this case while on active duty.

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of conspiring to commit prostitution and one specification of a general disorder for assisting another in engaging in sexual intercourse with another for hire, in violation of [Articles 81](#) and [134](#), Uniform Code of Military Justice [UCMJ], [10 U.S.C. §§ 881, 934 \(2012\)](#). The military judge sentenced appellant to a bad-conduct discharge, eight months confinement, and reduction to the grade of E-1. The [*2] military judge granted appellant 261 days credit against confinement pursuant to [Article 13](#), UCMJ, and [United States v. Allen, 17 M.J. 126 \(C.M.A. 1984\)](#). The convening authority approved seven months of confinement and otherwise approved the sentence as adjudged.

This case comes before us for review under *Article 66*, UCMJ. First, appellant asserts that the military judge erred, creating a fatal variance by excepting and substituting words in the [Article 134](#) offense. We disagree, but we grant relief on other grounds. Appellant's second assignment of error, challenging the legal and factual sufficiency of the conspiracy offense, deserves discussion but not relief.²

BACKGROUND

A. Sergeant Straker's Misconduct

Between about March 2014 and about July 2014, appellant conspired with LM to engage in prostitution. Among other things, appellant provided security and handled finances for LM while she worked as a prostitute. On one occasion in April 2014, LM met a client in a Fairbanks hotel. The client was LM's ex-boyfriend, CC, and he made unwanted sexual contact with LM before she called appellant for assistance. Appellant ran to the room and confronted CC with a gun in his waistband. Appellant and CC struggled, and the gun fired once in the hotel [*3] hallway before an off-duty police officer stopped the altercation and held both parties at gunpoint until Alaska State Troopers arrived at the scene.³

B. Sergeant Straker's Court-Martial

On 6 July 2016, appellant proceeded to trial on a charge of, among others, pandering by procuring an act of prostitution:

[In that he] "did, at or near Fairbanks, Alaska, between on or about 20 March 2014 and 30 July 2014, wrongfully *procure Ms. [LM] to engage in* acts of sexual intercourse for hire and reward *with persons to be directed to her by the accused*, such conduct being to the

²We have reviewed the matters personally raised by appellant pursuant to [United States v. Grostefon, 12 M.J. 431 \(C.M.A. 1982\)](#), and find they merit no relief.

³Appellant was charged with wrongful discharge of a firearm, negligent discharge of a firearm, and assault with a dangerous weapon. The military judge acquitted appellant of these charges.

prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces," (emphasis added).

At trial, appellant maintained that he was LM's boyfriend, not her panderer, and his financial support and protection were part of his duties as a suitor. At the conclusion of the government's case, appellant moved for a finding of not guilty to several of the charges pursuant to Rule for Court-Martial (R.C.M.) 917. Relevant to this appeal, the military judge partially granted appellant's R.C.M. 917 motion to the pandering charge, finding appellant not guilty of the language "with persons to be directed to her by the accused."

Later, [*4] the military judge announced findings, substituting the words "assist [LM] in engaging," for the excepted words "procure Ms. [LM] to engage in," as shown below:

[In that he] "did, at or near Fairbanks, Alaska, between or on about 20 March 2014 and 30 July 2014, wrongfully procure Ms. L.M. to engage in *assist LM in engaging* in acts of sexual intercourse for hire and reward with persons to be directed to her by the accused, such conduct being to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces," (emphasis added to show substitutions).

The military judge announced that he considered the revised offense to be that of a general disorder and neglect offense under [Article 134](#).

LAW AND DISCUSSION

A. Fatal Variance and Failure to State an Offense

The Rules for Courts-Martial authorize findings by exceptions and substitutions. "Minor variances that do not change the nature of the offense are not necessarily fatal." [United States v. Lovett, 59 M.J. 230, 235 \(C.A.A.F. 2004\)](#) (citing [United States v. Hunt, 37 M.J. 344, 347-48 \(C.M.A. 1993\)](#)). However, a variance "may not be used to substantially change the nature of the offense." R.C.M. 918(a)(1). If it does so, such a variance is material. [United States v. Finch, 64 M.J. 118, 121 \(C.A.A.F. 2006\)](#).

When, as here, defense counsel does not object to the exceptions and [*5] substitutions at trial, appellant must show that the variance was material and that it substantially prejudiced him. [Hunt, 37 M.J. at 347](#). We review whether there was a fatal variance *de novo*. [United States v. Treat, 73 M.J. 331, 335 \(C.A.A.F. 2014\)](#).

In *Lovett*, our superior court found a fatal variance when the court members, by exceptions and substitutions, found the appellant guilty of a "general disorder" offense, under [Article 134](#), UCMJ. Lovett had been charged with wrongfully soliciting, under [Article 134](#), UCMJ, the murder of his wife in violation of [Article 118](#), UCMJ, to prevent her from testifying against him. [Lovett, 59 M.J. at 236](#). Our superior court found the appellant's defense team "channeled its efforts in the direction of solicitation of premeditated murder" and the appellant "could not have anticipated

conviction for a lesser-included offense of soliciting a person to wrongfully prevent [his wife] from appearing in a judicial proceeding." *Id.*

Appellant argues the finding by exceptions and substitutions resulted in his being convicted of a different offense involving a different theory than that described in the specification upon which he was arraigned. Appellant was charged with pandering by procuring, which, as he points out, contemplates wrongful actions by a principal. [*6] He was convicted of assisting, which involves the actions of an accomplice. Accordingly, the defense channeled its efforts at trial to raise doubt about any business arrangement wherein appellant persuaded others to have sexual intercourse with LM.

The excepted and substituted finding did not increase the seriousness of the offense and did not increase the maximum punishment.⁴ Appellant's conviction for assisting another in prostitution was, however, a conviction of a crime different from that against which he defended. The charged offense alleged that appellant persuaded others to pay for the services of a prostitute. The offense of which appellant was convicted, however, only alleged he otherwise assisted the prostitute. We conclude the findings by exceptions and substitutions constituted a material variance.

"Even where there is a variance in fact, the critical question is one of prejudice." [*United States v. Lee*, 23 C.M.A. 384, 1 M.J. 15, 16, 50 C.M.R. 161 \(C.M.A. 1975\)](#) (citing [*United States v. Craig*, 8 U.S.C.M.A. 218, 24 C.M.R. 28 \(1957\)](#); [*United States v. Hopf*, 1 U.S.C.M.A. 584, 5 C.M.R. 12 \(1952\)](#)). Prejudice from a material variance can arise by "(1) putting '[the appellant]' at risk of another prosecution for the same conduct,' (2) misleading him 'to the extent that he has been unable adequately to prepare for trial,' or (3) denying him 'the opportunity to defend against the [*7] charge.'" [*United States v. Marshall*, 67 M.J. 418, 420 \(C.A.A.F. 2009\)](#) (quoting [*United States v. Tefteau*, 58 M.J. 62, 67 \(C.A.A.F. 2002\)](#)). Under the framework articulated in *Marshall*, the variance in this case did not prejudice appellant.

First, there is no risk that appellant will be prosecuted again for the same offense. The double jeopardy protection has attached to the offense involving prostitution. See *Article 44(c)*, *UCMJ*, 10 U.S.C. § 844(c); [*United States v. Easton*, 71 M.J. 168, 170 \(C.A.A.F. 2012\)](#).

Second, appellant was able to prepare adequately for trial on the general disorder offense of assisting LM in engaging in sexual acts for hire and reward. Appellant was also charged—and convicted—of conspiracy to engage in prostitution. This charge necessarily put appellant on notice prior to trial that he needed to prepare for allegations involving an agreement with LM to engage in prostitution.

Third, the record reveals appellant's defense theory included an innocent explanation for appellant's actions, which were those of a boyfriend rather than someone involved in sexual acts for hire. Appellant's defense necessarily included defending against the allegations that he had an agreement with LM to engage in sexual acts for hire and reward and further defending against an overt act in furtherance of that agreement.

⁴ Appellant's maximum punishment for the general disorder offense included four months of confinement, whereas the maximum punishment for pandering by procuring an act of prosecution included confinement for five years and a dishonorable discharge.

Our discussion, however, does not end with our finding no [*8] prejudice from the variance. Though not raised by either party, the Government may not charge a "novel" offense if the offense is otherwise listed as an [Article 134](#), UCMJ, offense. [United States v. Reese, 76 M.J. 297, 302 \(C.A.A.F. 2017\)](#). In other words, if an offense is "already listed inside [[Article 134](#)]'s framework," it may not be charged as a "novel" general disorder that reduces the government's burden of proof. *Id.* See also [United States v. Guardado, 77 M.J. 90, 95 \(C.A.A.F. 2017\)](#). Here, the specification of which appellant was convicted required a lower burden of proof than that with which he was originally charged.

The elements of pandering by procuring an act of prostitution are as follows:

- (a) That the accused . . . procured a certain person to engage in an act of sexual intercourse for hire and reward with a person to be directed to said person by the accused;
- (b) That this . . . procuring was wrongful; and
- (c) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Manual for Courts-Martial, United States (2012 ed.) [MCM], pt. IV, ¶ 97.b.(3).

As discussed above, the charged offense alleged that appellant wrongfully persuaded someone to engage in a sexual [*9] act. The general disorder offense of which appellant was convicted involved only an allegation that he assisted someone who was engaging in such conduct. The novel offense lessened the government's burden and involved conduct that is already listed inside the article's framework. Consequently, the offense is barred from prosecution. See [Guardado, 77 M.J. at 95](#).

We therefore conclude that Specification 1 of Charge III fails to state an offense under the UCMJ and must be dismissed.

B. Factual and Legal Sufficiency

Next, appellant contends that the evidence was factually and legally insufficient to prove that his conduct was prejudicial to good order and discipline.⁵ As a remedy, appellant requests that we strike the offending language from the specification and reassess his sentence. Notwithstanding the Government's concession to the first request, we decline to do either.

The military judge found appellant guilty of conspiracy to commit prostitution in violation of [Article 81](#), UCMJ. Specifically, the court found that appellant:

Did, at or near Fairbanks, Alaska, between on or about 20 March 2014 and 30 July 2014, conspire with Ms. L.M. to commit an offense under the Uniform Code of Military Justice, to wit: prostitution, [*10] and in order to effect the object of the conspiracy[,] Ms. [LM] did

⁵ In light of the relief granted to appellant in his first assignment of error, we address this issue only with respect to the [Article 81](#) offense.

procure persons to engage in sexual intercourse with Ms. [LM] for money, such conduct being to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

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 "convinced of the accused's guilt beyond a reasonable doubt." [*United States v. Turner*, 25 M.J. 324, 325 \(C.M.A. 1987\)](#).

The test for legal sufficiency is "whether considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt." [*United States v. Humpherys*, 57 M.J. 83, 94 \(C.A.A.F. 2002\)](#) (citations and internal quotation marks omitted). Weighing questions of legal sufficiency, this 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 \(C.A.A.F. 2001\)](#) (citations omitted).

Here, the government charged appellant with conspiracy. A criminal conspiracy pled under [*Article 81*](#), UCMJ, requires: "[t]hat, while the agreement continued to exist, and while the accused remained a party to the agreement, [*11] the accused or at least one of the conspirators performed an overt act for the purpose of bringing about the object of the conspiracy." *MCM*, pt. IV, ¶ 5.b.(2).

Although the Government need not have charged the terminal element, it did so here. See [*United States v. Norwood*, 71 M.J. 204, 205 \(C.A.A.F. 2012\)](#) ("in order to state the elements of an inchoate offense under [*Articles 80*](#) and [*81*](#), UCMJ, a specification is not required to expressly allege each element of the predicate offense."). Consequently, appellant frames this issue as a challenge to the factual and legal sufficiency of his conviction, arguing that the evidence failed to prove that his conduct was to the prejudice of good order and discipline.

"The crux of the issue is whether a fact constitutes an element of the crime charged, or a method of committing it." [*United States v. Brown*, 65 M.J. 356, 358-59 \(C.A.A.F. 2007\)](#). If a fact is a theory of liability and not an element, then general verdicts are allowed when multiple theories of liability are alleged:

With minor exceptions for capital cases, a 'court-martial panel, like a civilian jury, returns a general verdict and does not specify how the law applies to the facts, nor does the panel otherwise explain the reasons for its decision to convict or acquit.' In returning such a general verdict, [*12] a court-martial panel resolves the issue presented to it: did the accused commit the offense charged, or a valid lesser included offense, beyond a reasonable doubt? A factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence supports at least one of the means beyond a reasonable doubt.

[*Brown*, 65 M.J. at 359](#) (quoting [*United States v. Hardy*, 46 M.J. 67, 73 \(C.A.A.F. 1997\)](#) (other internal citation omitted)).

To determine whether a general verdict on a specification alleging multiple theories of liability is proper, we must first determine if the relevant statute creates separate elements, or merely different theories of liability. In *United States v. Medina*, our superior court held that the three clauses of [Article 134](#), UCMJ's terminal element are alternative theories of criminality. [66 M.J. 21, 26-28 \(C.A.A.F. 2008\)](#).

In this case, therefore, a general finding of guilty under [Article 81](#) was not dependent on the military judge finding the appellant guilty under both theories, but rather at least one theory. See, e.g. [United States v. Williams, 78 M.J. 543, 2018 CCA LEXIS 401 \(Army Ct. Crim. App. 21 Aug. 2018\)](#). It was not necessary for the military judge to return a verdict as to only those theories of liability proven beyond a reasonable doubt, as long as the Government [*13] proved all of the elements of the offense. See [United States v. Vidal, 23 M.J. 319, 325 \(C.M.A. 1987\)](#).

This court, of course, is bound to review the facts of this case not just for legal sufficiency, but also for factual sufficiency under *Article 66(c)*, UCMJ. In this case, while there was overwhelming evidence that appellant's conduct was service discrediting, we agree that there is insufficient evidence that appellant's conduct was prejudicial to good order and discipline.

This does not change the form of the verdict, however. "A factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence supports at least one of the means beyond a reasonable doubt." [Brown, 65 M.J. at 359](#). Accordingly, we affirm the trial court's general verdict as it stands.⁶

CONCLUSION

Appellant's conviction of Specification 1 of Charge III and Charge III are SET ASIDE. Specification 1 of Charge III and Charge III are DISMISSED. The finding of guilty as to Charge IV and its specification is AFFIRMED.

We are able to reassess the sentence on the basis of the errors noted and do so after conducting a thorough analysis of the totality of circumstances presented by appellant's case and in accordance with the principles [*14] articulated by our superior court in [United States v. Sales, 22 M.J. 305 \(C.M.A. 1986\)](#) and [United States v. Winckelmann, 73 M.J. 11, 15-16 \(C.A.A.F. 2013\)](#).

Appellant faced a maximum sentence of sixteen months confinement, total forfeiture of all pay and allowances, reduction to the grade of E-1, and a dishonorable discharge. In evaluating the *Winckelmann* factors, we first find no significant change in the penalty landscape that might cause us pause in reassessing appellant's sentence, as the potential maximum sentence includes one year confinement and a dishonorable discharge, a sentence greater than that which the military judge imposed, and greater still than that which the convening authority approved. Second, we note appellant elected to be tried by a military judge sitting alone, so we

⁶ The general verdict neither exaggerates nor misrepresents appellant's criminality. Appellant is guilty of conspiracy to commit prostitution. The theory under which appellant was found guilty is irrelevant to the general verdict, so long as at least one valid theory was charged and at least one valid theory charged was proven.

are confident the sentence would not have changed had appellant been found not guilty of Specification 1 of Charge III and Charge III. Third, we find the remaining offense captures the gravamen of appellant's criminal conduct. Finally, based on our experience as judges on this court, we are familiar with the remaining offense so that we may reliably determine what sentence would have been imposed at trial.

Having conducted this reassessment, we AFFIRM the sentence as approved. All rights, privileges, and property, [*15] of which appellant has been deprived by virtue of that portion of the findings set aside by this decision are ordered restored. See UCMJ arts. [58a\(b\)](#), [58b\(c\)](#), and [75\(a\)](#).

Senior Judge MULLIGAN and Judge FEBBO concur.

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CERTIFICATE OF SERVICE, U.S. v. BUHL (20220660)

I hereby certify that a copy of the foregoing was sent via electronic submission to Mr. Patrick J. McClain, civilian appellate defense counsel, at [REDACTED] and the Defense Appellate Division, at [REDACTED] on the 24th day of August, 2023.

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