IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT**
v.	Docket No. ARMY 20210543
Specialist (E-4) **TONEY E. HENDERSON, J.R.,** United States Army Appellant	Tried at Joint Base Lewis-McChord, Washington on 6 May, 9 June and 27-2 October 2021, before a general court-martial appointed by 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

Statement of the Case

On 8 June 2023 the court issued an Amended Notice of Argument identifying two additional issues.

III.

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

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

Panel 3

Relevant Facts for Issue III

In the Specification of Charge V, appellant was charged with Disorderly Conduct, in violation of Article 134, Uniform Code of Military Justice (UCMJ). On 26 May 2021, the defense requested a bill of particulars regarding the conduct the government alleged to be disorderly. (App. Ex. LXVI). On 1 June 2021, the government notified the defense the conduct alleged was appellant provided [redacted], a minor, alcohol while parked in a public place. (App. Ex. LXVIII).

[redacted] testified that on 9 April 2019, she was fifteen years old.[1] (R. at 647). [redacted] testified appellant picked her up in his car and handed her a bottle of Hennessey, which she began to chug. (R. at 660-61). They eventually parked in front of appellant's apartment. (R. at 663)

After the government rested, the defense moved, pursuant to Rule for Court Martial (R.C.M) 917, for a finding of not guilty for the Specification of Charge V. (R. at 1070- 72). The defense argued providing a minor alcohol inside a car when no member of the public saw it is not disorderly and so appellant is not guilty. (R. at 1072).

Standard of Review

[1] Appellant disputes [redacted] ever told him her age (R. at 1247)

This court reviews questions of legal and factual sufficiency de novo. *United States v. Washington,* 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

"'The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Rosario,* 76 M.J.114 117 (C.A.A.F. 20017) (quoting *United States v. Gutierrez*, 73 M.J. 172, 175 (C.A.A.F. 2014)). "When applying this test for legal sufficiency, 'this Court is bound to draw every reasonable inference from the evidence . . . in favor of the prosecution.' *United States v. Nicola*, 78 M.J. 223, 226 (C.A.A.F. 2019) (quoting *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A.1993)).

The test for factual sufficiency is, "whether after weighing the evidence in the record of trial, and making allowances for not having personally observed the witnesses, [this Court is] convinced of [appellant's] guilt beyond a reasonable doubt."[2] *Walters*, 58 M.J. at 395. "In sum, to sustain appellant's conviction, [this Court] 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.

[2] The test for factual sufficiency changed for offenses occurring after 1 January 2021. The offenses at issue here are resolved by the old standard.

785, 793 (Army Ct. Crim. App. 2005) (*citing United States v. Roukis*, 60 M.J. 925, 930 (Army Ct. Crim. App. 2005).

In weighing factual sufficiency, this court takes "a fresh, impartial look at the evidence" applying "neither a presumption of innocence nor a presumption of guilt." *Washington*, 57 M.J. at 399. The term "reasonable doubt" does not mean the evidence must be free from conflict. *United States v. Reed*, 51 M.J. 559, 562 (N.M. Ct. Crim. App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). It does, however, mean "an honest, conscientious doubt, suggested by the material evidence, or lack of it," and that the government must prove guilt "to an evidentiary certainty" and must exclude "every fair and reasonable hypothesis of the evidence except that of guilt." (Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook para. 2-5 (29 Feb. 2020)).

The elements of the charged offense are (1) that appellant was disorderly; and (2) that, under the circumstances, the conduct of the accused was of a nature to bring discredit upon the armed forces. Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook para. 3a–65-1 (29 Feb. 2020).

"Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem. *Id.*

"Disorderly" refers to conduct which is 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. *Id.*

Disorderly conduct is not "such a catchall as to make every irregular, mischievous, or improper act a court-martial offense." *United States v. Morrow,* No. ACM 39634, 2020 CCA LEXIS 361, at *17 (A.F. Ct. Crim. App. Oct. 1, 2020) citing, *United States v. Sadinsky*, 14 C.M.A. 563, 34 C.M.R. 343, 345 (C.M.A. 1964). Violations of a state law are not per se service discrediting. *United States v. Sadler*, 29 M.J. 370, 374 (C.M.A. 1990)(finding in a case where a minor lied about her age in responding to defendant's modeling advertisement and was given wine at the photo sessions and eventually began posing nude for defendant and the two had sex constituted state court violations, but that alone was insufficient to prove service discrediting conduct).

The Air Force Court of Criminal Appeals offered examples of the types of conduct that qualify as disorderly. They found voyeurism, violence, belligerent conduct, and yelling and cursing in public are examples of disorderly conduct. *Morrow*, 2020 CCA LEXIS 361, at *17.

Argument

The government put appellant on notice that the conduct it believed "so outrage[d] public decency" was an adult providing alcohol to a minor in a car. (App. Ex. LXVI). Even given all favorable inferences, it cannot be the case that appellant's conduct constitutes disorderly conduct.

The fact that [redacted] alleged sexual assault cannot be a considered. If the government wanted that allegation to be incorporated into the disorderly conduct offense, it should have included it in the bill of particulars.

Moreover, it cannot be the case that the public will have a lower opinion of the Army because of the noticed conduct. Providing alcohol to a minor, though likely a violation of state law, cannot be *per se* service discrediting and the government put on no direct evidence of service discrediting conduct. *Sadler*, 29 M.J. at 374; *See also United States v. Gifford*, 75 M.J. 140, 145 (C.A.A.F. 2016) (in a case where CAAF decided the mens rea requirement for providing alcohol to minors charged as a violation of Article 92, UCMJ, the court found providing alcohol to a minor did not constitute a "public welfare offense").

This court should find this conduct does not rise to disorderly or service discrediting conduct. A holding otherwise would mean that nearly any conduct that may be illegal is also automatically disorderly. The Air Force CCA rejected this notion in *Morrow*. The court should find the Specification of Charge V legally and factually insufficient.

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

Relevant Facts

In the Specification of Additional Charge II, appellant is charged under Article 134 as follows:

In that Specialist 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 female engaging in sexual intercourse to [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. (Charge Sheet)

To prove the offense, the government offered the testimony of [redacted]. She testified appellant sent her videos after they discussed exchanging photos of each other. (R. at 867).

[redacted] claimed appellant promised the videos he sent would not be sexual, but appellant sent videos of him having sex with another female. (R. at 867). On cross-examination, the defense asked what was said by both parties:

Q. He then said, "I got videos, but I don't think you want to see 'cause someone--'cause somebody in it. It ain't a fucking video, though."

Q. Is that correct?

A. Yes.

Q. In response to him telling you he had a video with him and another person in it, you said, "I don't care. I want to see."

Q. Is that correct?

A. Yes.

Q. And that's when he sent you these two videos that the government attorney asked you about, right?

A. Yes (R. at. 925-26)

After receiving this video [redacted] agreed to meet appellant (R. at 928). [redacted] also sent photographs of her buttocks. (R. at 958).

The government asked no questions and put forth no evidence to support its claim appellant's conduct was illegal, impacted unit morale, or that any member of any unit was even aware appellant transmitted these videos to [redacted].

Standard of Review and Law

The standard of review, as well as the law regarding this court's analysis of factual and legal sufficiency is the same as discussed on page two and three above.

To establish appellant is guilty of Additional Charge II, the government had to establish beyond a reasonable doubt that appellant: (1) engaged in certain conduct, to wit: transmitting a video of a man and a woman having sex; (2) that the conduct was indecent; and (3) that, under the circumstances, the conduct of the

appellant was to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces. Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook para. 3a–71-1 (29 Feb. 2020).

"Conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. *United States v. Richard*, 82 M.J. 473 (C.A.A.F. 2022) (in a case involving Article 134, UCMJ, finding evidence that only *tends* to prejudice good order and discipline is not sufficient proof of that element, and suggesting it may be sufficient proof of conduct of a nature to bring discredit upon the armed forces).

"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. *Id.*

"This provision is not intended to regulate wholly private consensual sexual activity. In the absence of an aggravating circumstance, private consensual sexual activity is not punishable as indecent conduct." *Id*. "Private consensual sexual activity is not punishable as an indecent act absent aggravating circumstances." *Id.*

An example of an aggravating circumstance is if the conduct is open and notorious. *United States v. Goings*, 72 M.J. 202, 205 (C.A.A.F. 2013). Criminalizing sexual conduct between adults violates the "fundamental liberty interest to form intimate, meaningful, and personal bonds that manifest themselves

through sexual conduct, that is protected by the Due Process Clause of the Fourteenth Amendment." *Lawrence v. Texas*, 529 U.S. 558, 567 (2003).

The First Amendment protects sexually explicit conduct that is not obscene – meaning it does not violate fundamental notions of decency. *United States v. Williams,* 553 U.S. 286 (2008). Child Pornography, for example, does not get First Amendment protection. *Id.* Similarly, sexually explicit materials which have been "thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials" does not enjoy First Amendment protection. *Miller v. California*, 413 U.S. 15, 18 (1973).

When the First Amendment is at issue a "direct and palpable connection between speech and the military mission or military environment is also required for an Article 134, UCMJ, offense charged under a service discrediting theory." *United States v. Wilcox*, 66 M.J. 442, 448-49 (C.A.A.F. 2008).

Argument

The conduct at issue in the specification of Additional Charge II is not indecent. This is the private sexual communication between two adults.

Appellant and [redacted] were developing a sexual relationship. The video was sent during a course of conduct which included [redacted] sharing intimate photos of herself. (R. at 958). Further, [redacted] told appellant she "didn't care and wanted to see [it]." (R. at 925-26).

The Supreme Court recognized the Due Process concerns involved in the government regulation of private sexual conduct of two adults. *Lawrence,* 539 U.S. at 567. The Court of Appeals for the Armed Forces found that same principle applies to the conduct of military members. *Goings,* 72 M.J. at 205. The conduct here also involves the private sexual conduct of two adults. These communications remained private and were not open and notorious. Private consensual sexual activity is not punishable as an indecent act absent aggravating circumstances. Benchbook para. 3a–71-1. Therefore, they were not indecent.

Assuming *arguendo* the conduct was indecent, the specification must be dismissed because the government failed to put forward any evidence to satisfy the terminal element. The government failed to put on any evidence whatsoever of deleterious unit impact. No evidence even *tends* to suggest prejudice to good order and discipline and thus falls short even of the insufficient evidence in *Richard*.

Finally, in determining if sufficient evidence of conduct that is service discrediting exists, this court must consider that the criminalized conduct was protected by the First Amendment. Appellant is charged with transmitting sexually explicit material to [redacted]. (Charge Sheet). The specification makes no mention of the circumstances under which the material was sent. Therefore, the court can consider only if sending adult pornography to another person can be criminalized. Unlike the transmission of child pornography, adult pornography

enjoys First Amendment protection so long as it is not obscene. *Williams*, 553 U.S. 286.

Considering the circumstances under which the video was sent, the facts of the instant case, two adults engaged in private sexual conversations, is not obscene. Here, [redacted] "didn't care and wanted to see" (R. at 925-26). This is a far cry from "aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials." *Miller,* 413 U.S. at 18. [redacted] did indicate a desire to receive images from Appellant, and therefore what he sent is protected by the First Amendment.

Considering the protected nature of the communication, the government was required to offer proof of a "palpable connection" to the military mission to prove service discrediting conduct. *Wilcox,* 66 M.J. at 448-49. As stated above, no connection to the military was introduced, either through testimony or otherwise. Therefore, the service discrediting terminal element is also legally and factually insufficient.

Appellant's conduct was not indecent, and because neither terminal element was proven the Specification of Additional Charge II must be set aside.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on June 27, 2023.

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