

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Docket No. ARMY 20230024

Specialist (E-4)
ANDRES F. CUESTA,
United States Army,
Appellant

Tried at Kaiserlautern, Germany, on
23 September 2022 and 17-20
January 2023, before a special court-
martial convened by the Commander,
U.S. Army Garrison, Fort Meade,
Maryland, Colonel Adam Kazin,
Military Judge, presiding.

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

Assignment of Error¹

**WHETHER APPELLANT'S CONVICTION FOR
THE SPECIFICATION OF CHARGE III IS
FACTUALLY SUFFICIENT.**

Statement of the Case

An enlisted panel,² sitting as a general court martial, convicted appellant,
contrary to his pleas, of one specification of violating a lawful general regulation;

¹ The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. Should this court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

² To the extent this Court considers appellant's footnoted argument that the panel was improperly constituted, appellant has forfeited this claim, and any review

two specifications of sexual assault; and one specification of unlawful entry, in violation of Articles 92, 120, and 129, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920, and 929 [UCMJ]. (R. at 622; Statement of Trial Results [STR]). The military judge sentenced appellant to confinement for 13 years and 80 days, reduction to the grade of E-1, and a dishonorable discharge. (R. at 693; STR). The military judge sentenced appellant to six and seven years, respectively, for the two Article 120 specifications and 80 days for the Article 129 specification.³ (STR). The military judge did not sentence appellant to confinement for violating a lawful regulation. *Id.*

On 13 March 2023, the convening authority took no action on the findings and sentence. (Action). On 17 March 2023, the military judge entered judgment. (Judgment).

should be for plain error. *United States v. King*, 83 M.J. 115, 120 (C.A.A.F. 20023), *cert. denied*, 144 S. Ct. 190, 217 L. Ed. 2d 77 (2023). Even assuming this was plain error, which the government does not concede, appellant suffered no prejudice. In his forum selection, appellant requested a panel with at least one-third enlisted representation. (App. Ex. XIII). Following voir dire and excusals, the eight-member panel that heard appellant's case was comprised of five enlisted soldiers and three commissioned officers, thus meeting the one-third enlisted composition requirement. (R. at 214-15); R.C.M. 903(a)(1)(A)(i); Article 25(c)(2)(B); *see also King*, 83 M.J. at 124 (no prejudice from administrative error); *see also United States v. Easton*, 71 M.J. 168, 176 (C.A.A.F. 2012) (noting that military accused do not have the right to have their cases tried by a particular court).

³ The military judge sentenced appellant to serve the segmented confinement sentences consecutively. (STR).

Statement of Facts

On the night of 16 December 2020, several soldiers, including appellant and Specialist (SPC) [REDACTED] attended a barracks party hosted by another soldier. (R. at 428-29). Specialist [REDACTED] knew everyone at the party except appellant, whom she later observed walking into his own room once the party ended. (R. at 429-30, 449). Following the party, SPC [REDACTED] verified that her room was locked and spent the night in a friend's room. (R. at 430). Later that night, appellant entered SPC [REDACTED]'s room without permission and apparently remained there overnight.⁴ (R. at 431). Specialist [REDACTED] returned to her own room at 1030 the next morning to find the door open and appellant asleep in her bed. (R. at 408, 430-31, 440).

Appellant refused SPC [REDACTED]'s requests that appellant leave, even after she provided appellant Aleve and water. (R. at 409, 431-32, 441). Instead, appellant indicated he was “embarrassed” and asked SPC [REDACTED] to “help him,” at which point “gestured downwards” by nodding and looking down towards his penis. (R. at 432). Specialist [REDACTED] testified that she understood that appellant was requesting she perform oral sex on him. *Id.* Specialist [REDACTED] said “no”, left her room, and sought help from a friend, who successfully assisted her in getting appellant to leave. (R. at 409-10, 432-33, 442, 453). Specialist [REDACTED]'s friend, Sergeant (SGT) DM,

⁴ This was the basis for appellant's conviction for unlawful entry. (STR).

testified that when SPC ■■■ contacted him for assistance, SPC ■■■ “was crying and seemed like she was on the verge of having a panic attack.” (R. at 452).

Assignment of Error

WHETHER APPELLANT’S CONVICTION FOR THE SPECIFICATION OF CHARGE I IS FACTUALLY SUFFICIENT.

Standard of Review

Military courts review questions of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Craion*, 64 M.J. 531, 534 (Army Ct. Crim. App. 2006).

Law and Argument

The test for factual sufficiency review for this court 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 a reasonable doubt.” *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (citing *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)).

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 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).

Article 66(d)(1)(B), UCMJ specifically provides that, “[i]n considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.”

A. The elements of the Article 86, UCMJ offense and applicable regulation.

The elements of an Article 92, UCMJ violation are as follows: (a) that there was in effect a certain lawful general order or regulation; (b) that the accused had a duty to obey it; and (c) that the accused violated or failed to obey the order or regulation. *Manual for Courts-Martial*, United States (2019 ed.) [MCM], pt. IV, para. 18.b.1.

Appellant was found guilty of sexually harassing SPC [REDACTED] when appellant violated paragraph 7-7 of Army Regulation 600-20, Army Command Policy (24 July 2020). (R. at 622; STR); Army Reg. 600-20, para. 7-7 (“This paragraph is punitive, and violations may be punished under UCMJ, Art. 92.”). Under this regulation, “Sexual harassment” is defined by Title 10, United States Code Section 1561, as any of the following:

(1) Conduct that involves unwelcome sexual advances, requests for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature when-

(a) Submission to such conduct is made either explicitly or implicitly a term

or condition of a person's job, pay, or career; or

(b) Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or

(c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment; and

(d) It is so severe or pervasive that a reasonable person would perceive, and the alleged victim does perceive, the environment as hostile or offensive.

(2) Any deliberate or repeated unwelcome verbal comment or gesture of a sexual nature by any member of the Armed Forces or Civilian employee of the DoD.

...

A hostile environment, to include the work environment, can occur when Soldiers or DA Civilians are subjected to offensive, unwanted and unsolicited comments, or conduct of a sexual nature. An abusive or hostile environment need not result in concrete psychological harm to the victim, but rather need only be so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the environment as hostile or offensive.

Army Reg. 600-20, para. 7-7 (citing 10 U.S.C. § 1561).

B. The evidence is factually sufficient to sustain appellant's conviction.

Appellant challenges the factual sufficiency of his Article 92, UCMJ, conviction. He does not dispute SPC [REDACTED]'s testimony (R. at 432) that appellant refused to leave SPC [REDACTED]'s room and asked SPC [REDACTED] to "help him" as appellant nodded and looked down towards his own penis. Rather, appellant disputes that that he was expressing a desire for SPC [REDACTED] to touch his penis and argues that a

reasonable person would not construe appellant's comments as sexually related. (App. Br. at 5-6).

The relevant punitive regulation in appellant's case specifically includes "gestures" in the definition of sexual harassment. Army Reg. 600-20, para. 7-7(a)(1). This Court and other courts have affirmed convictions involving gestures of a sexual nature in the context of sexual harassment, and this Court should affirm appellant's conviction as well. In *United States v. Carson*, 55 M.J. 656, 659 (A. Ct. Crim. App. 2001), *aff'd*, 57 M.J. 410 (C.A.A.F. 2002), this Court concluded the evidence was legally and factually sufficient for an Article 93 maltreatment charge. In *Carson*, the accused maltreated the victim when he sexually harassed her by exposing his penis to her, which was a "deliberate . . . offensive . . . gesture[] of a sexual nature." *Id.* (alterations in original). In affirming, the Court noted that under the *Manual for Courts-Martial*, sexual harassment could constitute maltreatment, and that such harassment included "deliberate or repeated offensive comments or *gestures* of a sexual nature." *Id.* (citing *MCM*, pt. IV, para. 17.c.2) (emphasis added). This language is consistent with the governing statutory definition of sexual harassment, the regulation the appellant was convicted of violating, and the panel's findings instructions. 10 U.S.C. § 1561; Army Reg. 600-20, para. 7-7(a)(1); (STR); (App. Ex. XLII).

Moreover, our sister Air Force court affirmed an Article 134, UCMJ indecent conduct charge wherein the appellant requested sexual favors via a gesture when told the victim (the housekeeper at the hotel where he was staying) that “he needed her help, and then undeniably demonstrate[d] to her via *sexual gestures* that the help he needed was for her to masturbate his penis.” *United States v. Rogers*, No. ACM S32545, 2020 CCA LEXIS 113, at *6 (A.F. Ct. Crim. App. Mar. 31, 2020) (emphasis added). In that case, the victim interpreted the perpetrator’s “gesture” of moving his fist up and down as a request for her to touch his penis. *Id.*; *see also United States v. Jones*, No. NMCM 200000845, 2003 LEXIS 4, at *5 (N-M. Ct. Crim. App. Jan. 16, 2003) (accused made gestures about the victim’s breasts and “even when he did not use explicit language, the other Marines would know just by the connotation and the conversation, the use of his eyebrows—how he was always blinking and snickering and smiling and grinning and that sort—that it had to do with” the victim’s body.) (internal quotations omitted).

While appellant now disputes both the nature of his conduct in SPC [REDACTED]’s barracks room and the effect it had upon SPC [REDACTED] or would have on a reasonable person, “[i]n considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.” Article 66(d)(1)(B), UCMJ; *King*,

78 M.J. at 223. This court should “trust that a reasonable person” was capable of resolving testimonial conflicts, weighing the evidence, and drawing reasonable inferences. *King*, 78 M.J. at 223 (citing *Oliver*, 70 M.J. at 68). Here, the panel heard SPC [REDACTED] testify that she found appellant uninvited in her room and in her bed, that appellant requested “help” as he nodded towards his genital area, and that she interpreted this as a request (which she declined) for oral sex. (R. at 409, 431-32, 441).

Moreover, appellant said nothing when SPC [REDACTED] told him “no” and left her own room in response to his request for “help” as he nodded downwards. And more specifically, appellant said nothing to disabuse SPC [REDACTED] of any notion that appellant was soliciting a sexual act, or to clarify that he was referring to something else, such as medical assistance beyond the Aleve and water SPC [REDACTED] had already provided him. The panel also heard SGT DM testify that when SPC [REDACTED] contacted him for assistance with the situation, she “was crying and seemed like she was on the verge of having a panic attack.” (R. at 452). As such, the evidence is factually sufficient to sustain appellant’s Article 92, UMCJ Charge and Specification for sexually harassing SPC [REDACTED]. Article 66(d)(1)(B), UCMJ; *King*, 78 M.J. at 223.

Conclusion

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



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CERTIFICATE OF SERVICE

UNITED STATES v. ANDRES F. CUESTA, ARMY 20230024

I hereby certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [REDACTED] [REDACTED] on the __th day of April, 2024.

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CERTIFICATE OF SERVICE, U.S. v. CUESTA (20230024)

I hereby certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division, at [REDACTED]

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