IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES	Appellee	**BRIEF ON BEHALF OF APPELLANT**
v.		Docket No. ARMY 20240538
Specialist (E-4) **FRANK J. BARBOSA,** United States Army,	Appellant	Tried at Fort Campbell, Kentucky, on 10 June, 5 September, and 7 November 2024, before a general court-martial appointed by the Commander, Headquarters, Fort Campbell, Colonel John R. Maloney, military judge, presiding.

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

Assignments of Error

I. WHETHER SPECIFICATION 1 OF CHARGE II IS LEGALLY SUFFICIENT

II. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ACCEPTING APPELLANT'S PLEA TO SPECIFICIATION 1 OF CHARGE II WHEN THERE WAS A SUBSTANTIAL BASIS IN LAW TO QUESTION THE PLEA

Statement of the Case

On 7 November 2024, a military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of sexual harassment[1] and two specifications of assault consummated by a battery, in

[1] For Specification 1 of Charge II, appellant pled guilty to sexual harassment by excepting the word "pictures," and substituting the word "picture." (R. at 86).

violation of Articles 134 and 128, Uniform Code of Military Justice, 10 U.S.C. § 934, 928 (2024) [UCMJ]. (Charge Sheet; R. at 113-14).[2] The same day, the military judge sentenced appellant to 10 total months of confinement and to receive a bad conduct discharge. (R. at 148). Appellant received 253 days of credit for his time in pre-trial confinement. (R. at 115).

On 20 November 2024, the convening authority approved the findings and sentence, and disapproved appellant's request to commute the sentence. (Convening Authority Action). On 25 November 2024, the military judge entered Judgment.[3] (Judgment of the Court). This court docketed appellant's case on 2 April 2025. (Referral and Designation of Counsel).

Statement of Facts

Appellant met [redacted] sometime in early January 2023 while both were stationed at Mihail Kogalniceanu Airbase in Romania. (R. at 41; Pros. Ex. 1. (Stipulation of Fact [Stipulation]). They were in the same battalion, but not the same immediate unit, as [redacted] was a medic and appellant was an

[2] Specification 1 of Charge I was originally charged as a violation of Article 120. (Charge Sheet). Appellant pled not guilty to the original charge, but guilty to a separate offense in violation of Article 128 by constructive referral. (R. at 86).
[3] The military judge annotated that Block 34a, L3, of the Statement of Trial Results should read "no." Appellant requests this Court take corrective action as the Statement of Trial Results appears to have not been fixed.

infantryman. (R. at 42; Stipulation). They did not interact on any regular basis within their respective working environments. (R. at 42-43).

The two exchanged phone numbers and texted as casual acquaintances. (R. at 43-44). On 10 January, appellant texted a single picture of his genitalia to [redacted] in what appeared to be—utilizing context from the other charges to which he pled guilty—a poor attempt at moving the friendship toward a romantic relationship. (R. at 48; Stipulation). [redacted] told appellant that the picture was "unwelcome" and to "not send anything like that again." (R. at 48-49). Appellant complied with [redacted] request. No evidence was presented that after receiving this picture, [redacted] work environment changed or was otherwise affected in any manner.

Indeed, after appellant sent the picture, he and [redacted] continued to message and meet up in person. Just a week later, appellant accompanied [redacted] to the local town so that [redacted] could get a tattoo. (Stipulation, p. 3).

The government charged appellant with sexual harassment, alleging that appellant's act of sending the single picture *did* cause [redacted] to perceive "an intimidating, hostile, or offensive working environment." (Charge Sheet).

The military judge, during the providence inquiry, focused a large portion of the colloquy on the fact that appellant only sent a single picture, "So, it cannot be

repetitive. Neither does it appear it could be pervasive…the act itself must have been severe." (R. at 49). The military judge and appellant then speculated that an unwelcome genitalia picture, received unexpectedly, *may* be shocking and possibly severe. (R. at 49-50) (emphasis added). There was no colloquy about whether SPR L.R. did perceive it to be severe.

The military judge then utilized the fact that [redacted] could have been around appellant and Soldiers from his company to define a "working environment." (R. at 51). While it was apparently "routine" that SPR L.R. provided medical services to members of appellant's company, no evidence was produced that [redacted] was so affected by appellant's picture that she ceased providing medical services to appellant's company or had otherwise been transferred from performing her normal medic duties to anyone or any unit in the battalion. There is no evidence on the record that anyone but appellant and [redacted] knew of this picture until the subsequent investigation into appellant's assault.

The military judge finalized his questions about the work environment by asking appellant whether appellant agreed [redacted] may have been "offended" to work in the same area as the person who sent her an image that "*potentially* traumatized her." (R. at 53) (emphasis added). Appellant concurred.

The colloquy ended on several questions—long form queries from the military judge that were often met with monosyllabic agreement by appellant—about how appellant's alleged sexual harassment *could* have impacted good order and discipline and about how it *could* have been service discrediting. Without further inquiry into how appellant actually knew the answer, the military judge accepted when appellant stated, "It directly affected her, Your Honor, and it lowered her morale." (R. at 57). The military judge followed this with, "Did it, you think, impact her ability to provide medical support to your company?" (R. at 57). Like prior questions, this "you think" question was met with a "yes" and no further explanation from appellant. (R. at 57). The Stipulation of Fact did not contain evidence about how the single picture—unknown to anyone but appellant and SPC L.R.—impacted good order and discipline and was service discrediting.

I. WHETHER SPECIFICATION 1 OF CHARGE II IS LEGALLY SUFFICIENT

Standard of Review

This court reviews questions of legal sufficiency de novo. *United States v. Mendoza,* 85 M.J. 213, 217 (C.A.A.F 2024). "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. Smith,* 83 M.J. 350, 359 (C.A.A.F. 2023) (internal quotations omitted).

Law

The elements of sexual harassment under Article 134, UCMJ, are:

(1) that the accused knowingly made sexual advances, demands or requests for sexual favors, or knowingly engaged in other conduct of a sexual nature;

(2) that such conduct was unwelcome;

(3) that, under the circumstances, such conduct … was so severe, repetitive, or pervasive that a reasonable person would perceive, and a certain person did perceive, an intimidating, hostile, or offensive working environment; and

(4) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

Argument

The specification is legally insufficient because 1) the only evidence that that [redacted] did, in fact, perceive an intimidating, hostile, or offensive working environment was a single, generic line in the Stipulation of Fact, and 2) other than speculation, no testimony was elicited that tended to prove how appellant's acts prejudiced good order and discipline and brought discredit upon the armed forces.

A. No Evidence as to Whether [redacted] Did Perceive an Intimidating, Hostile, or Offensive Working Environment

The government charged appellant with sexual harassment in that [redacted] *did* "perceive an intimidating, hostile, or offensive working environment." (Charge Sheet). Thus, the third element requires proof that both: 1) a reasonable person would perceive and 2) an actual person (i.e. [redacted] did, in fact, perceive appellant's act as creating an "intimidating, hostile, or offensive working environment." The only evidence produced was a single line contained in the Stipulation, "[redacted] did perceive an offensive working environment." (p. 2). Besides speculation, appellant was unable to say precisely how [redacted] working environment became offensive. As such, the specification and charge are legally insufficient.

While it was undisputed that appellant sent a single, unsolicited picture of his genitalia, it remains unclear how this picture affected [redacted] working environment. Her response certainly indicated the picture was "unwelcome," but neither appellant's colloquy, nor the Stipulation of Fact, provided evidence that tended to show what aspect, if any, of [redacted] work life changed because of appellant's act.

Indeed, while the military judge noted that the picture could have "*potentially* traumatized [redacted] the opposite appears to be true. Only a week

later, appellant and [redacted] not only had continued to message each other, but hung out together when [redacted] brought appellant along to get a tattoo in the local town. (Stipulation, p. 3).

There is plenty of speculation as to what an unsolicited picture of genitalia could do to someone; the military judge used words like "potentially" multiple times. (R. at 49-53). Appellant also responded with words like "could have" as to how [redacted] may have perceived her work environment. (R. at 49-54). But there is no evidence of what appellant's acts *did* affect; how [redacted] work environment was diluted or changed because of appellant. "The use of conclusive presumptions to establish the elements of an offense is unconstitutional because such presumptions conflict with the presumption of innocence." *United States v. Phillips,* 70 M.J. 161, 164-65 (C.A.A.F. 2011) (citing *Sandstrom v. Montana,* 442 U.S. 510, 523 (1979)).

The closest any of the parties got to actual effect was appellant's testimony that [redacted] responded to appellant's picture with, "don't send anything like that again." (R. at 49). Appellant complied with her request. [redacted] was in the same battalion, but that is the extent to which appellant is provident to knowledge of [redacted] and her work. (R. at 42).

The government was required to prove each element beyond a reasonable doubt. *United States v. Care,* 18 C.M.A. 535, 539 (1969). The facts taken during appellant's providence inquiry did not prove that [redacted] working environment was affected by appellant's act. Therefore, the specification is legally insufficient.

B. No Evidence as to How Appellant's Act Affected Good Order and Discipline and Brought Discredit Upon the Armed Forces

The military judge's colloquy with appellant was devoid of facts as to how appellant's act—unknown to any others in the unit or the general public—actually affected good order and discipline and was service discrediting. Instead, the parties utilized speculation to fill the gaps. Speculation is not fact and most certainly is not proof beyond a reasonable doubt. The Stipulation is silent concerning the terminal element.

i. Lack of Proof as to Prejudicing Good Order and Discipline

"The use of conclusive presumptions to establish the elements of an offense is unconstitutional because such presumptions conflict with the presumption of innocence." *Phillips,* 70 M.J. at 164-65. "[E]very element of a criminal offense—including the terminal element of Article 134, UCMJ, must be proven beyond a reasonable doubt and cannot be conclusively presumed based on the accused's conduct[.]" *United States v. Richard,* 82 M.J. 473, 474 (C.A.A.F. 2022) (setting aside a conviction under Article 134 for legal insufficiency because the

government proffered no evidence as to appellant's misconduct, private acts done without knowledge of any other servicemember, actually harmed good order and discipline, and instead relied on "speculative arguments").

Under this charging theory, there must be a "direct and palpable connection" to appellant's misconduct and "the military mission." *United States v. Wilcox,* 66 M.J. 442, 448 (C.A.A.F. 2008). "If such a connection were not required, the entire universe of servicemember opinions, ideas, and speech would be held to the subjective standard of what some member of the public, or even many members of the public, would find offensive." *Id.* While *Wilcox* dealt with a servicemember's speech, the same principle applies. The government must still provide evidence that appellant's act did, in fact, have a "direct and palpable connection" on the military mission so that a member of the public's opinion of the armed forces would be affected.

Neither appellant's testimony, nor the Stipulation of Fact, produced evidence that appellant's act did affect good order and discipline. The colloquy built itself on speculation, particularly with long-form questions by the military judge that were clearly designed to get appellant to a place where he could provide more illustrative answers of how his conduct was prejudicial. And while appellant was able to note that sending an unsolicited genitalia picture is inconsistent with the

Army's sexual harassment trainings, he stopped short of providing testimony that his act *did* affect good order and discipline. (R. at 55-56).

Indeed, the fact that [redacted] working environment was seemingly unaffected supports the premise that appellant's act did *not* compromise good order and discipline. This lack of impact is made more apparent by the fact that other Soldiers in the unit were unaware of the act. Without evidence that [redacted] working life was changed in any form, or that her ability to carry on the mission was altered in even a slight way, any finding that good order was affected is speculative at best. This speculation lies in direct contravention to the holdings in *Phillips* and *Richard.*

ii. Lack of Evidence as to Service Discrediting

Further, because the government chose to charge both prejudicial to good order and discipline *and* service discrediting, they were required to provide proof of how appellant's act met both prongs. *United States v. Fosler,* 70 M.J. 225 (C.A.A.F. 2011); *Care,* 18 C.M.A. at 539. The colloquy as to the second prong was even less robust than as to the first, as the military judge posed only two questions to appellant related to "service discrediting." As well, the Stipulation is silent concerning service discrediting. (R. at 56-57). Thus, the prong was even more speculative.

Appellant's longest response to how this conduct was "service discrediting" relied on vague references to the "policies and regulations that help maintain our unit cohesion" (the military judge's words), without addressing *how* his conduct violated those specific provisions. Rather, appellant concluded, "the public would look down on this." (R. at 56).

The testimony was speculative; not even as to whether his specific misconduct was discrediting, but rather that a member would essentially be disappointed. This answer was followed by only one other question from the military judge about how appellant's act might lower the Army in the general public's esteem, and was answered simply by, "Yes." (R. at 57). This two-question colloquy is simply not enough to establish the "service discrediting" element. "The absence of . . . record development concerning the service-discrediting character of [the] conduct precludes us from engaging in that 'close examination' in the present case.'" *Wilcox* at 449 (quoting *United States v. O'Connor,* 58 M.J. 450, 455 (C.A.A.F. 2003).

The lack of evidence as to how appellant's conduct affected either prong of the terminal element means that the specification is legally insufficient. To be sure, the government was free to place in the Stipulation of Fact evidence that appellant's acts disrupted, affected, or otherwise altered the environment of the

unit. They did not. And the military judge was unable to secure any evidence that tended to suggest appellant's act, known only to have been committed by appellant against [redacted] affected good order and discipline and was discrediting to the armed forces.

II. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ACCEPTING APPELLANT'S PLEA TO SPECIFICIATION 1 OF CHARGE II WHEN THERE WAS A SUBSTANTIAL BASIS IN LAW TO QUESTION THE PLEA

Appellant relies on both the statement of facts and law sections from the first assignment of error.

Standard of Review

During a guilty plea, the military judge must determine "whether there is an adequate basis in law and fact to support the plea before accepting it." *United States v. Inabinette,* 66 M.J. 320, 322 (C.A.A.F. 2008). As such, this Court uses "the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." *United States v. Castro,* 81 M.J. 209, 211 (C.A.A.F. 2021) (quoting *Inabinette,* 66 M.J. at 322). "This Court reviews a military judge's decision to accept a guilty plea for an abuse of discretion." *Id.* (internal quotations omitted). "A military judge abuses this

discretion where he fails to obtain an adequate basis to support the plea." *Inabinette,* 66 M.J. at 322.

Argument

"A providence inquiry must establish 'not only that the accused himself believes he is guilty but also that the factual circumstances as revealed by the accused himself objectively support that plea.'" *United States v. Haygood,* 2020 CCA LEXIS 354, at *6 (Army Ct. Crim. App. 30 Sep. 2020) (quoting *United States v. Higgins,* 40 M.J. 67, 68 (C.M.A. 1994). In *Haygood*, this Court found the military judge abused his discretion when he accepted appellant's plea of guilty without establishing the necessary elements. While the appellant admitted to everything contained in the Stipulation of Fact, this Court was concerned that his basic statements to the military judge "were conclusory and were not ultimately supported by the factual basis provided to the military judge" as they pertained to certain elements, namely the appellant's *mens rea. Id.* at *8.

In the present case, there was a substantial basis to question the plea because both the military judge and appellant continuously made conclusory statements, just as this Court was concerned about in *Haygood*. There were no definitive facts that pointed to how either [redacted] work environment was altered, nor any facts elicited to show how appellant's acts affected good order and discipline and

discredited the armed services. Rather, appellant utilized words such as "*if* anyone outside of the armed services knew" about his conduct (R. at 41) (emphasis added). Appellant also answered in one-word affirmatives and negatives to the military judge's long-winded explanations of what appellant's behavior *could* have done or what his act could have affected. When appellant did expand, it was mainly about how [redacted] could have perceived his acts and how the public—if they knew of his act—may look down on the Army.

Appellant was improvident to multiple elements of Specification of Charge II. As he was unaware of how his act actually affected [redacted] work and could not point to how his act actually prejudiced good order and discipline or affected the public's perception of the military, the military judge abused his discretion in accepting appellant's plea of guilty.

Conclusion

Appellant respectfully requests this court set aside the findings and sentence for Specification 1 of Charge II. If this Court sets the specification and charge, appellant respectfully requests this Court remand the case for a sentence rehearing.



Eli M. Creighton
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division



Kelsey Mowatt-Larssen
Major, Judge Advocate
Branch Chief
Defense Appellate Division



Kyle C. Sprague
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division



Frank E. Kostik, Jr.
Colonel, Judge Advocate
Chief
Defense Appellate Division

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically filed with the Army Court and Government Appellate Division on September 29, 2025.

[redacted]
MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division