

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
CAMPANELLA, SALUSSOLIA, and FLEMING¹
Appellate Military Judges

UNITED STATES, Appellee
v.
Private E1 STEVEN M. TUCKER
United States Army, Appellant

ARMY 20150634

Headquarters, United States Army Cadet Command and Fort Knox
S. Charles Neill, Military Judge
Colonel E. Edmond Bowen, Jr., Staff Judge Advocate

For Appellant: Captain Timothy G. Burroughs, JA (argued); Colonel Mary J. Bradley, JA; Major Julie L. Borchers, JA; Captain Timothy G. Burroughs, JA (on brief).

For Appellee: Captain Cassandra M. Resposo, JA (argued); Lieutenant Colonel Eric K. Stafford, JA; Major Cormac M. Smith, JA; Captain Cassandra M. Resposo, JA (on brief).

27 March 2018

OPINION OF THE COURT ON REMAND

CAMPANELLA, Senior Judge:

In this case, we find the military judge did not err in accepting appellant's guilty plea to a general disorder and neglect offense under Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 (2012), clauses 1 and 2, for negligently providing alcohol to a person under the age of twenty-one. In this case, the appellant's admitted *mens rea* of simple negligence, *when combined* with the requirement that appellant's conduct was "to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed

¹ Pursuant to Rule 18.1(b) of the Army Court of Criminal Appeals Rules of Practice and Procedure, a vote was held to determine whether this case should be considered by the court en banc. The vote was not unanimous. Judge FEBBO and Judge WOLFE voted to consider the case en banc. Chief Judge BERGER and Judge CELTNIEKS did not participate in the vote.

forces[,]” and his admitted knowledge of the wrongfulness of his actions, sufficiently separates his criminal conduct from otherwise innocent conduct.

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of conspiracy to obstruct justice, one specification of sexual assault, two specifications of unlawfully providing alcohol to a person under the age of twenty-one, and one specification of obstruction of justice in violation of Articles 81, 120, and 134, UCMJ. The military judge sentenced appellant to a bad-conduct discharge and confinement for forty-two months. In accordance with a pretrial agreement, the convening authority approved only so much of the sentence as provided for a bad-conduct discharge and thirty-six months confinement.

This court affirmed appellant’s conviction on 28 October 2016. *United States v. Tucker*, 75 M.J. 872, 875 (Army Ct. Crim. App. 2016). On 23 May 2017, the United States Court of Appeals for the Armed Forces (CAAF) reversed and remanded the case for further review in light of *Elonis v. United States*, 135 S. Ct. 2001 (2015), and *United States v. Haverty*, 76 M.J. 199 (C.A.A.F. 2017). *United States v. Tucker*, 76 M.J. 257, 258 (C.A.A.F. 2017).

Appellant’s case is before us again for review pursuant to Article 66(c), UCMJ. The sole issue on remand, which requires discussion but no relief, is appellant’s assertion his plea was improvident because, during the providence inquiry, the military judge applied the *mens rea* of simple negligence when he should have applied the *mens rea* of recklessness, as it relates to the Article 134, UCMJ, offenses of providing alcoholic beverages to persons under the age of twenty-one. We disagree.

BACKGROUND

In Specification 1 of Charge IV, appellant was charged with, and pleaded guilty to, providing alcohol to Private (PV2) TG, a person under the age of twenty-one years. The specification alleged a general disorder under Article 134, UCMJ. Specifically, the military judge described the elements of the offense as follows:

One, that on or about 21 June 2014, at or near Fort Knox, Kentucky, [appellant] unlawfully provided [PV2 TG], a person under the age of 21, alcoholic beverages; and

Two, that under the circumstances, [appellant’s] conduct was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

In the stipulation of fact, appellant admitted on the day of the offense “a group of Soldiers were congregated outside the barracks” and decided to drink alcohol. As he was “one of the few Soldiers in the group that was old enough to purchase alcohol,” he went to the store and purchased the alcohol that he later served to the group. During the providence inquiry, appellant admitted he gave alcohol to individuals at the party either knowing they were under age² or without asking their age. He also stated he knew some in the barracks were under age but he had no reason to specifically believe PV2 TG was under the age of twenty-one. After appellant disclaimed actual knowledge of PV2 TG’s age at the time of the offense, the military judge asked defense counsel why appellant had an obligation to verify someone’s age in the barracks before providing alcohol.

At this point, defense counsel requested a “rest in place” to allow him time to search for legal authorities to support his position, which the military judge granted.

After the break, defense counsel explained appellant’s failed duty as follows:

[DC:] With respect, sir, if you live in the barracks, you live with a number of people that are underage. He’s got a duty not to provide alcohol to someone that’s underage. It is not reasonable for him to *put his head in the sand*. It is not reasonable for him just to say, “Hey, I didn’t follow up at all. I just gave this to various people that came.” So considering the level of standard required for a general intent crime that would be the defense’s position.

MJ: Trial Counsel, the government drafted this specification. Do you believe this is a general or a specific intent crime?

TC: A general intent crime, sir.

(emphasis added).

After initially asserting the specification was drafted as a general intent offense, the government modified its position and described the specification as a strict-liability offense. In response, defense counsel reiterated their understanding the specification was a general-intent offense. Specifically, defense counsel noted “that *deliberate ignorance* can create criminal liability” and cited *United States v. Dougal*, 32 M.J. 863 (N.M.C.M.R. 1991), for support. (emphasis added).

² During the plea inquiry as to Specification 2 of Charge IV, alleging a similar Article 134, UCMJ, violation by providing alcohol to PV2 TM, appellant acknowledged he knew PV2 TM was under the age of twenty-one years.

After confirming additional facts, appellant engaged in the following colloquy regarding his state of mind at the time of the offense:

MJ: *When you were living at the barracks did you believe that there were some people who were under the legal drinking age living there?*

ACC: *Yes, sir.*

MJ: Is it fair to say there are a good amount of people who are probably under the age of 21 living in the barracks?

ACC: I am not sure of the exact number, but there was quite a few people under 21, sir.

MJ: Well, just in your knowledge of the ways of the world, that some people enlist in the Army right out of high school, for example.

ACC: Yes, sir.

MJ: And if someone enlisted right out of high school, they might be under the legal drinking age when they join. Is that accurate?

ACC: Yes, sir.

(emphasis added). With that, the military judge instructed appellant that “[n]egligence’ is the lack of that degree of care that a reasonably prudent person would have exercised under the same or similar circumstances.” Appellant agreed he was negligent by providing PV2 TG alcohol without ascertaining her age.

Appellant also described how his conduct was both prejudicial to good order and discipline as well as service discrediting. Among the facts establishing prejudice to good order and discipline was appellant’s assertion that his misconduct was also a violation of civilian law. Furthermore, by placing under-age soldiers in legal jeopardy, appellant increased the risk of harm to their duty performance or their careers. Regarding the service-discrediting nature of the offense, appellant stated the following:

ACC: Sir, it makes us look bad because, one, it’s against the law, and Soldiers are supposed to stand up for the law. And it kind of goes against what we stand for. It could be bad words to say that Soldiers, the underage Soldiers, get drunk a lot because of the military. It would be a source of blame, sir.

MJ: So based on the evidence presented, do you believe that by serving [PV2 TG] alcohol while she was underage, particularly to the point where she became intoxicated, that by itself would tend to lower the Army's reputation in terms of public esteem?

ACC: Yes, sir.

Appellant later described the facts relating to his sexual assault of PV2 TG, as charged in Specification 1 of Charge III. Specifically, appellant recounted how after consuming the multiple servings of alcohol he provided to her, PV2 TG became highly intoxicated and was escorted to her barracks room by PV2 TM. Eventually, one of PV2 TG's friends, Specialist (SPC) SF, noticed her absence. When SPC SF went to check on PV2 TG, appellant followed SPC SF to PV2 TG's barracks room. When they arrived at the room, SPC SF knocked on the door but received no answer. Specialist SF continued to knock on the door loudly until PV2 TM "yelled 'busy' from inside the room." Both SPC SF and appellant returned to the party, but appellant later received a text message from PV2 TM to come back to PV2 TG's room alone. When appellant returned to PV2 TG's room, PV2 TM let him in and told him PV2 TG "needed to be satisfied[.]" Appellant proceeded to have sexual intercourse with PV2 TG while he knew she was "heavily intoxicated" because of her prior slurred speech and difficulty walking.

When SPC SF noticed appellant had left the party again, she returned to PV2 TG's barracks room and, once inside, found appellant sitting on the bed completely naked and PV2 TG, also naked, vomiting in the bathroom. Specialist SF told appellant multiple times to leave the room, but he would not leave. After dressing PV2 TG and helping her walk around, PV2 TG began crying and "mumbled statements that did not make much sense for about an hour" Eventually, PV2 TG was returned to her bed. Before leaving the room, SPC SF told PV2 TM and appellant "To not touch [PV2 TG.]" Appellant promised they would not do anything to PV2 TG, and purportedly stayed in the room to ensure PV2 TG did not choke on her vomit while she slept. However, appellant admitted in his stipulation of fact and during the providence inquiry that he again had sexual intercourse with PV2 TG while he knew she was still intoxicated and reasonably should have known she was incapable of consenting to the sexual acts.

LAW AND DISCUSSION

A military judge's acceptance of a guilty plea is reviewed for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). The test for an abuse of discretion in accepting a guilty plea is whether the record shows a substantial basis in law or fact for questioning the plea. *United States v. Passut*, 73 M.J. 27, 29 (C.A.A.F. 2014). "The providence of a plea is based not only on the accused's understanding and recitation of the factual history of the crime, but also

on an understanding of how the law relates to those facts.” *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008) (citing *United States v. Care*, 18 C.M.A. 535, 538-39, 40 C.M.R. 247, 250-51 (1969)).

Congressional Intent for Article 134, UCMJ, Clauses 1 and 2, Offenses.

Generally, both an *actus reus* and a *mens rea* are required in criminal statutes.³ *United States v. Apfelbaum*, 445 U.S. 115, 131 (1980). There are limited exceptions to this general rule, such as “public welfare” offenses in which a *mens rea* is purposefully omitted from the statute. *United States v. Gifford*, 75 M.J. 140, 143 (C.A.A.F. 2016) (citing *Staples v. United States*, 511 U.S. 600, 606 (1994), and *United States v. Balint*, 258 U.S. 250, 252-53 (1922)). Mere silence in a criminal statute, however, is insufficient to rebut the presumption of a *mens rea* requirement. *Haverty*, 76 M.J. at 203 (citing *Elonis*, 135 S. Ct. at 2009). Instead, the presumption can only be rebutted by evidence of legislative intent, either express or implied, for a particular *mens rea* or to purposefully omit a *mens rea* altogether. *Id.* at 203-04. Accordingly, the CAAF has mandated a deliberate examination of legislative intent before permitting courts to judicially infer a *mens rea* into a statute that is silent.

If a court determines that Congress intended, either expressly or impliedly, to purposefully omit a *mens rea* requirement, then the court must respect that legislative intent. Similarly, if a court determines that Congress intended, either expressly or impliedly, to have a particular *mens rea* requirement apply to a certain criminal statute, then the court must construe that statute accordingly. If, however, a statute is silent regarding a *mens rea* requirement, and if a court cannot discern the legislative intent in regard to that statute, then the court will infer a *mens rea* requirement consistent with the “general rule” cited by the Supreme Court in *Elonis*, 135 S. Ct. at 2009.

Id. at 204 (citations omitted).

To establish a violation of Article 134, UCMJ, “the government must prove beyond a reasonable doubt both that the accused engaged in certain conduct and that the conduct satisfied at least one of three listed criteria.” *United States v. Fosler*, 70 M.J. 225, 226 (C.A.A.F. 2011). The latter element is commonly referred to as the

³ “*Mens rea*” is the Latin term for “guilty mind” and refers to “[t]he state of mind that the prosecution . . . must prove that a defendant had when committing a crime.” *Black’s Law Dictionary* 1075 (9th ed. 2009). “*Actus reus*” is the Latin term for “guilty act” and refers to “[t]he wrongful deed that comprises the physical components of a crime” *Id.* at 41.

“terminal element” and the government must prove “at least one of the article’s three clauses has been met: that the accused’s conduct was (1) ‘to the prejudice of good order and discipline,’ (2) ‘of a nature to bring discredit upon the armed forces,’” or (3) a non-capital crime or offense. *Id.* (quoting UCMJ art. 134).

After reviewing the CAAF’s decision remanding this case, it is now clear Congress did not expressly state in the statutory language of Article 134, UCMJ, its intention to permit a particular *mens rea* for the offense. *See Tucker*, 76 M.J. at 258 (“[C]ontrary to the holding of the CCA, we conclude that the term ‘neglects’ has no connection to the mens rea requirement that the government must prove under the statute.”). In the absence of an express *mens rea* requirement in either element of an Article 134 offense, however, we must next make a deliberate effort to discern the implied intent of Congress. Otherwise, we would exceed our judicial mandate of interpretation and intrude on the congressional mandate of legislation were we to read a particular *mens rea* requirement into a statute without considering its implied intent. Therefore, courts must give special attention to the purpose and nature of offenses enacted without an express *mens rea* requirement to give full effect to the implied intent of Congress, if it can be discerned.

In *Parker v. Levy*, the Supreme Court had occasion to examine the history and intent behind Article 134, UCMJ. As a starting point, the Court noted the unique nature of the military as “a specialized society separate from civilian society” that, “by necessity, developed laws and traditions of its own during its long history.” *Parker v. Levy*, 417 U.S. 733, 743 (1974). The “customary military law” that developed during this long history was essential to maintain the discipline to perform the military mission. *Id.* at 744 (quoting *Martin v. Mott*, 25 U.S. 19, 35 (1827)). Enforcing this customary military law, even “in the absence of positive enactments[,]” was necessary because the Court recognized “there could scarcely be framed a positive code to provide for the infinite variety of incidents” applicable to military society. *Id.* at 745 (quoting *Mott*, 25 U.S. at 35-36).

The Court traced the lineage of this broad enforcement of custom in the absence of positive enactments to the British antecedent of Article 134, UCMJ, “in remarkably similar language.” *Id.*

The Articles of the Earl of Essex (1642) provided that “all other faults, disorders and offenses, not mentioned in these Articles, shall be punished according to the general customs and laws of war.” One of the British Articles of War of 1765 made punishable “all Disorders or Neglects . . . to the Prejudice of good Order and Military Discipline . . .” that were not mentioned in the other articles.

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The British article punishing “all Disorders and Neglects . . .” was also adopted by the Continental Congress in 1775 and re-enacted in 1776. Except for a revision in 1916, which added the clause punishing “all conduct of a nature to bring discredit upon the military service,” substantially the same language was preserved throughout the various reenactments of this article too, until in 1951 it was enacted as Art. 134 of the Uniform Code of Military Justice.

Id. at 746. Based on this history, the Court determined the UCMJ was intended to “regulate aspects of the conduct of members of the military which in the civilian sphere are left unregulated.” *Id.* at 749 (citing as examples disrespect under Article 89; maltreatment of subordinates under Article 93; negligent damaging, destruction, or wrongful disposition of military property under Article 108; improper hazarding of a vessel under Article 110; drunkenness on duty under Article 112; malingering under Article 115; and unbecoming conduct under Article 133).

Following the Supreme Court’s guidance on military law, it is clear to us that Congress impliedly intended a *mens rea* requirement no higher than simple negligence. In *United States v. Blanks*, the CAAF recently affirmed a simple negligence *mens rea* for negligent dereliction of duty under Article 92(3), UCMJ. ___ M.J. ___, 2018 CAAF LEXIS 111 (C.A.A.F. Feb. 28, 2018). Among the reasons for affirming the conviction, the CAAF cited: 1) its case law determining Congress intended a simple negligence *mens rea*, an interpretation supported by the *Manual for Courts-Martial (MCM)*, which Congress had not contradicted through subsequent statutory amendments; 2) the uniquely military nature of the offense with its limited authorized punishments; and 3) the negative repercussions to military discipline if it overruled its precedent. *Id.* at *6-7. The reasons supporting the CAAF’s decision in *Blanks* similarly demonstrate the implied intent of Congress for Article 134, UCMJ, to include simple negligence offenses.

First, the case law regarding negligent homicide and negligent discharging of a firearm is precedent from our superior court regarding the implied intent of Congress to authorize simple negligence as a *mens rea* for Article 134 offenses. When listing examples of offenses that could be charged under Article 134, UCMJ, the President “is not defining offenses but merely indicating various circumstances in which the elements of Article 134, UCMJ, could be met.” *United States v. Jones*, 68 M.J. 465, 471 (C.A.A.F. 2010). Since the President’s listing of offenses under Article 134 is merely persuasive authority, not binding on the courts, subsequent decisions affirming convictions for simple negligence shows judicial concurrence with the President’s interpretation of congressional intent. *See, e.g., United States v. Riley*, 58 M.J. 305, 311 (C.A.A.F. 2003) (affirming a conviction for negligent homicide under Article 134 with a *mens rea* of simple negligence); *United States v. Everson*, 19 U.S.C.M.A.70, 41 C.M.R. 70 (1969) (affirming a conviction for careless

discharge of a firearm under Article 134 with a *mens rea* of simple negligence); *United States v. Kirchner*, 1 U.S.C.M.A. 477, 4 C.M.R. 69, 71 (1952) (concurring with “previous interpretations of the scope of Article 134” that defined negligent homicide as an “unlawful homicide through simple negligence”).

Second, as with Article 92(3), UCMJ, Congress has not rebutted judicial interpretation in case law or the President’s interpretation in the *MCM* by amending the statutory language of Article 134, UCMJ, upon which both are based.

Third, Article 134, UCMJ, particularly when charged under clauses 1 and 2, is no less a “uniquely military offense” that Congress intended for the promotion of “good order and discipline in the military” than a violation of Article 92(3), UCMJ. *Blanks*, ___ M.J. ___, 2018 CAAF LEXIS, at *6-7. Moreover, the Article 134 offense as charged in this case has a “limited authorized punishment” similar to that of Article 92(3), UCMJ.

Fourth, to prove the importance of Article 92(3), UCMJ, in maintaining the “obedience and discipline” essential to the execution of the military mission, the CAAF cited Supreme Court precedent involving Article 134, UCMJ, offenses. *Id.* (citing *Levy*, 417 U.S. at 744, and *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975)). Any repercussions to a commander’s ability to enforce accountability from overruling Article 92(3), UCMJ, precedent would be similarly felt from a change in Article 134, UCMJ, jurisprudence.

Thus, we see this case as fundamentally different from *Gifford*. Although factually similar to the misconduct at issue in this case, as a matter of law, a potential strict-liability offense under Article 92, UCMJ, as in *Gifford* is distinguishable from a potential simple-negligence offense under Article 134, UCMJ. In *Gifford*, the question before the CAAF was “whether the commander—acting pursuant to his congressionally delegated authority—intended to create a public welfare offense through his general order.” 75 M.J. at 144. To resolve this question, the CAAF examined the potential danger to the public from alcohol offenses. *Id.* at 144-46. In contrast, the question before this court is whether Congress intended to create an offense for the specific protection of the military community, not from any particular danger like alcohol, but from the danger of “all disorders and neglects” and “all conduct” that prejudices good order and discipline and/or discredits the armed forces.⁴ UCMJ art. 134. Not all disorders or neglectful

⁴ An analogous area of law is that of “public welfare” offenses. Public welfare offenses impose strict liability to address minor criminal misconduct where the potential punishment is relatively low. See *Morissette v. United States*, 342 U.S. 246, 256 (1952) (“[P]enalties [for public welfare offenses] commonly are relatively

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acts are prejudicial to good order and discipline and service discrediting. There must be a direct and palpable nexus effecting the terminal element. This would, by necessity, require a review of all the circumstances at play at the time of appellant's acts. While there may be no consensus among courts regarding the civilian public danger of serving alcohol to an under-aged person, the same conduct can create a significant danger to the military and its unique mission when it is proven to have

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small, and conviction does not [do] grave damage to an offender's reputation."); *Balint*, 258 U.S. at 252 ("Many instances of [public welfare offenses] are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se."). As an example, the Court in *Balint* stated: "where one deals with others and his mere negligence may be dangerous to them, as in selling diseased food or poison, the policy of the law may, in order to stimulate proper care, require the punishment of the negligent person though he be ignorant of the noxious character of what he sells." 258 U.S. at 252-53 (citing *Hobbs v. Winchester Corp.*, [1910] 2 K.B. 471, 483). Accordingly, here we look to whether the legislative intent demonstrates the primary purpose of achieving "some social betterment" or stimulating "proper care" rather than imposing punishment on an individual exists. *Id.*

Although there is no "precise line or . . . comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not[,] . . . the Supreme Court's core inquiry has remained relatively simple and direct: did Congress *purposefully* omit intent from the statute at issue?" *Gifford*, 75 M.J. at 143-44 (quoting *Morissette*, 342 U.S. at 260). To establish this purpose, "some indication of congressional intent, express or implied, is required" beyond mere omission of a *mens rea* from the statute. *Staples*, 511 U.S. at 606-07.

Standing alone, the Article 134 offense at issue here would typically qualify for alternative punishment under Article 15, UCMJ, but even when tried by court-martial, the maximum punishment is four months confinement, forfeiture of two-thirds pay per month for four months, and reduction in rank. *United States v. Beatty*, 70 M.J. 39, 45 (C.A.A.F. 2011). A punitive discharge is not authorized. Relatively minor punishments are distinguishing characteristics of "public welfare" offenses in general and of the Article 134 offense specifically at issue here. *See Levy*, 417 U.S. at 750 ("Forfeiture of pay, reduction in rank, and even dismissal from the service bring in mind the law of labor-management relations as much as the civilian criminal law."). Absent a punitive discharge and limited to four months of confinement, the maximum punishment for an Article 134 offense as charged in this case stands in sharp contrast to the same conduct charged under Article 92, UCMJ, where the maximum punishment included a dishonorable discharge, two years confinement, and forfeiture of all pay and allowances.

negatively impacted good order and discipline in a direct and palpable manner or when by its nature it discredits the armed forces. The United States military is entrusted with the Nation's war-fighting machinery, and is charged with protecting the Nation against existential threats. Ensuring a disciplined fighting force must include the prohibition of some negligent conduct that would not be punishable in the civilian context.

This case is a general court-martial, and as with almost all cases warranting appellate review, involves serious punishment. However, the vast and overwhelming majority of Army discipline problems are addressed through non-judicial punishment. If negligent conduct is not punishable under Article 134, UCMJ, at a general court-martial, it is also not punishable by any other means under the UCMJ. Moreover, if it is not punishable during times of relative peace with an all-volunteer Army, then it is not punishable during times of mass-mobilization and high-intensity war. Indeed, this case demonstrates why *sometimes* providing alcohol to someone under twenty-one years of age might constitute a general disorder. As appellant admitted in his stipulation, PV2 TG became "heavily intoxicated" after quickly ingesting the multiple servings of alcohol he provided her. Appellant and PV2 TM then had sexual intercourse with PV2 TG while she "was unable to consent to sexual activity because of her level of intoxication." Thus, providing alcohol to *all comers* in the barracks, *in this case*, was the means by which a much more grave and serious crime was committed.

Article 134's Terminal Element Sufficiently Excludes Innocent Conduct.

Even assuming the intent of Congress is too unclear to support a purposeful omission of or an implied authorization for a particular *mens rea*, appellant's admitted *mens rea* of simple negligence, *if combined* with proof of the terminal element and his admitted knowledge of the wrongfulness of his actions, sufficiently separates criminal conduct from otherwise innocent conduct.

In *United States v. Caldwell*, the CAAF considered the *mens rea* required for a violation of Article 93, UCMJ, which "proscribes 'cruelty toward, or oppression or maltreatment of, any person subject to [an accused's] orders.'" 75 M.J. 276, 280 (C.A.A.F. 2016) (quoting UCMJ art. 93). The CAAF affirmed the conviction for two reasons:

First, because of the unique nature of the offense of maltreatment in the military, a determination that the Government is only required to prove general intent in order to obtain a conviction under Article 93, UCMJ, satisfies the key principles enunciated by the Supreme Court in *Elonis*. Second, the military judge's instructions sufficiently flagged for the panel the need to consider this general intent *mens rea* requirement when determining the

guilt or innocence of the accused. We therefore conclude that the instructions were not plainly erroneous as a matter of law.

Id. at 278. In support of its holding, the CAAF “conclude[d] that there is no scenario where a superior who engages in the type of conduct prohibited under Article 93, UCMJ, can be said to have engaged in innocent conduct.” *Id.* at 281 (basing its “conclusion on the unique and long-recognized importance of the superior-subordinate relationship in the United States armed forces, and the deeply corrosive effect that maltreatment can have on the military’s paramount mission to defend our Nation”). As the CAAF explained, “in some instances, the mere requirement in a statute that a defendant commit an act with knowledge of certain facts—i.e., that the defendant possessed ‘general intent’—is enough to ensure that innocent conduct can be separated from wrongful conduct.” *Id.*

Similarly, clauses 1 and 2 of the terminal element in Article 134, UCMJ, sufficiently separate wrongful from innocent conduct to permit criminal liability based on the general-intent *mens rea* of simple negligence. Although “[a]lmost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense[.]” clause 1 of the terminal element “does not include these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable.” *Manual for Courts-Martial, United States* (2012 ed.) [hereinafter *MCM*], pt. IV, ¶ 60.c.(2)(a). Clause 2 of the terminal element “makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem.” *MCM*, pt. IV, ¶ 60.c.(3). Conduct that is innocent, whether by its nature or within its full context, would not ordinarily have the tendency to discredit the service. Truly “innocent” conduct would fail to meet the heightened *actus reus* consequence in clauses 1 and 2, just as it would fail the *actus reus* requirement for maltreatment under Article 93, UCMJ. As a result, clauses 1 and 2 of the terminal element insulate members of the military service from criminal liability for truly “innocent” conduct.

For example, the act of adultery—even if committed *knowingly*—would not violate Article 134, UCMJ, if the terminal element was not satisfied. *See Fosler*, 70 M.J. at 230 (“Because adultery, standing alone, does not constitute an offense under Article 134, the mere allegation that an accused has engaged in adulterous conduct cannot imply the terminal element.”). Instead, the government must allege and prove the heightened *actus reus* consequences in clauses 1 and 2 of the terminal element before an accused can be criminally convicted, thereby separating “innocent” adultery from “criminal” adultery. *See also United States v. Warnock*, 34 M.J. 567 (A.C.M.R. 1991); *United States v. Sadinsky*, 14 C.M.A. 563, 565 (1964) (noting the terminal element of Article 134, UCMJ, separates wrongful from otherwise innocent conduct because “the pleading makes clear that accused did not, under unusual circumstances, jump overboard in the course of his legitimate duties

as, possibly, to rescue a shipmate, or for some other purpose which might be completely innocent”).

In *United States v. Rapert*, the CAAF considered the *mens rea* requirement for a violation of Article 134, UCMJ, for communicating a threat. 75 M.J. 164 (C.A.A.F. 2016). While *Elonis* can be interpreted to create a minimum *mens rea* standard of recklessness in cases involving regulations, the CAAF in *Rapert* concluded “the infirmities found in [the statute regulating speech at issue in *Elonis*] are not replicated in Article 134, UCMJ.” *Id.* at 168. First, the CAAF explained the criminalized speech was not based solely on the objective standard of simple negligence, but cited the “subjective element, which requires the communication to be ‘wrongful[.]’” *Id.* This “subjective element” of wrongfulness “prevents the criminalization of otherwise innocent conduct and places the case at bar beyond the reach of *Elonis*.” *Id.* Second, the appellant could not defend against the wrongfulness of his speech by claiming First Amendment protection because, unlike the statute at issue in *Elonis*, the unique military interests protected by Article 134, UCMJ, can criminalize speech that would be otherwise constitutionally-protected in the civilian sphere. *Id.* at 171 (“Even assuming arguendo that Appellant’s speech was within the ambit of the First Amendment’s embrace, the unique nature of Article 134, UCMJ, and the interests it seeks to protect justify the proscription of Appellant’s speech in this case.”).

Here, the Article 134 offense at issue shares both the subjective element of criminality and the unique military purpose. Similar to *Rapert* where the accused was charged with “wrongfully” communicating certain language, in this case appellant was charged with “unlawfully” providing alcohol to an under-aged soldier. “Unlawful” is a word of criminality. Words of criminality speak to *mens rea* and the lack of a defense or justification, not to the elements of an offense. See *United States v. King*, 34 M.J. 95, 97 (C.M.A. 1992); *United States v. Choate*, 32 M.J. 423, 427 (C.M.A. 1991); *United States v. Fleig*, 16 U.S.C.M.A. 444, 445, 37 C.M.R. 64, 65 (1966). The word “unlawfully” in this case serves the same function as the word “wrongfully” in *Rapert*, separating wrongful from innocent conduct.

Moreover, unlike the accused in *Rapert* whose offense involved speech otherwise protected under the First Amendment, appellant’s conduct was not constitutionally protected. Therefore, appellant’s claim to otherwise innocent conduct is less persuasive. During his guilty plea, appellant stated his subjective belief that his conduct was unlawful and disclaimed any justification or excuse.

It has long been understood that the military justice system works alongside, but separate from the civilian justice system, and military servicemembers are often subject to more restrictions.

Just as military society has been a society apart from civilian society, so military law . . . is a jurisprudence

which exists separate and apart from the law which governs in our federal judicial establishment. And to maintain the discipline essential to perform its mission effectively, the military has developed what may not unfitly be called the customary military law

Levy, 417 U.S. at 749 (internal quotation marks and citations omitted). Because of the special distinctions separating it from the civilian society, the military has developed customary military law. *Levy*, 417 U.S. at 744 (citing *Mott*, 25 U.S. at 35). The UCMJ cannot be equated to a civilian criminal code, and with respect to Article 134, UCMJ, specifically, it must not be judged in a vacuum, but in the context in which the years have placed it. *Id.* at 749, 752 (quoting *United States v. Frantz*, 2 U.S.C.M.A. 161, 163, 7 C.M.R. 37, 39 (1953)). Servicemembers are often expected to demonstrate greater care than their civilian counterparts and this expectation is reflected by the law regulating servicemembers. In the context of Article 134 offenses specifically, the minimum *mens rea* required to separate wrongful conduct from innocent conduct is simple negligence when combined with clauses 1 and 2 of the terminal element.

Here, appellant admitted his conduct had a direct and palpable effect on good order and discipline, and was service discrediting. Appellant's admissions serve to demonstrate his *mens reas* and demonstrate why his conduct met the elements of Article 134, UCMJ. Accordingly, we find the military judge did not abuse his discretion in accepting appellant's plea of guilty to Specification 1 of Charge IV.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Judge FLEMING concurs.

SALUSSOLIA, Judge, dissenting:

I respectfully dissent. First, I agree with my fellow judges that "simple negligence" could conceivably be a sufficient *mens rea* for a novel offense under Article 134, clause 1 and 2. I do not, however, find it to be a sufficient *mens rea* in the instant case.

Here, the government charged appellant with a non-specific Article 134 offense of providing alcohol to a person under twenty-one years of age. During the *Care* inquiry, the parties and the military judge discussed the appropriate *mens rea* requirement for the attendant circumstance of a person under twenty-one years of

age. This occurred after appellant stated he did not know the age of the victim.⁵ Although the drafter of the charged offense, the government did not provide a basis for the *mens rea* of simple negligence either in statute or through a custom of the service. Rather the government merely indicated it believed the *mens rea* for this offense was general intent.⁶ The defense also did not indicate a specific basis for requiring a *mens rea* of simple negligence, but merely believed it was based on an unidentified local law.⁷

Without specifying a basis in either in law or under custom of the service, the military judge defined the *mens rea* for the attendant circumstance, a person under twenty-one years of age, as simple negligence defining it as “the lack of that degree or care that a reasonably prudent person would have exercised under the same or similar circumstances.”

Neither the statutory text of Article 134, UCMJ, nor the elements and explanation of Article 134, clauses 1 and 2, in the *MCM* set forth a specific *mens rea*. UCMJ art. 134; *MCM*, pt. IV, ¶ 60. Thus the proof required for a conviction of an offense under Article 134, clauses 1 and 2, depends on the underlying nature of the charge. *MCM*, pt. IV, ¶ 60.b.⁸ In addition, an Article 134 offense under clause 1 or 2 must have words of criminality and provide an accused with notice as to the elements against which he or she must defend. *United States v. Davis*, 26 M.J. 445, 447 (C.M.A. 1988).

In assessing the application of an appropriate *mens rea* for novel offenses charged under Article 134, our superior court has long refrained from applying simple negligence, a *mens rea* derived from tort law, to separate wrongful from

⁵ Prior to this discussion, appellant had already admitted to committing the same novel Article 134 offense by knowingly providing alcohol to another soldier who was under twenty-one years of age. In this instance, the military judge clearly applied the *mens rea* of knowingly, stating “[i]f you didn’t know at the time that he was under the age of 21, you are not provident or guilty of this offense.”

⁶ The government initially indicated the offense was strict liability but could not provide authority to support this proposition.

⁷ Appellant’s counsel also noted that appellant’s deliberate ignorance could create criminality liability. However, this doctrine was not addressed by the military judge.

⁸ The *MCM* provides that an act in violation of a local civil law or foreign law or a breach of a custom of the service may result in a violation of clause 1 of Article 134, UCMJ. *MCM*, pt. IV, ¶ 60.c.(2). Whereas an act in violation of a local civil law or foreign law is in violation of clause 2 of Article 134, UCMJ, when the act brings discredit upon the armed forces. *MCM*, pt. IV, ¶ 60.c.(3).

otherwise innocent conduct, unless required to do so by statute or custom of the service. See *United States v. Vaughn*, 58 M.J. 29, 35 (C.A.A.F. 2003) (“An Article 134 offense that is not specifically listed in the *MCM* must have words of criminality and provide an accused with notice as to the elements against which he or she must defend.”); *United States v. Manos*, 8 U.S.C.M.A. 735, 735-36, 25 C.M.R. 238, 239-40 (1958) (explaining “an act resulting from simple negligence does not give rise to criminal liability in the absence of a statute or ‘ancient usage[,]’” a principle that also applies to novel offenses under Article 134); *United States v. Greenwood*, 6 U.S.C.M.A. 209, 216, 19 C.M.R., 335, 342 (1955) (“Unless required by statute or ancient custom, we simply hesitate to bottom criminal responsibility as a matter of law on a mere negligent omission.”).

Similar to our superior court in *Gifford* who could not discern from history or tradition a strict-liability standard for alcohol offenses, I could not discern from our customs of the service either a strict-liability standard or a requirement for a *mens rea* of simple negligence for the offense of providing alcohol to another soldier under twenty-one years old. 75 M.J. at 143-45. I also could not find a basis in local law or statute to draw such conclusions. For instance, during the *Care* inquiry, appellant’s counsel referenced “local laws” to support a *mens rea* of simple negligence. A review of the Kentucky Penal Code, however, demonstrates “local law” requires a *mens rea* of “knowingly” to impose such criminal liability.⁹

The majority likens the case to *Rapert* reasoning the offense at issue contains the subjective element “unlawfully” thereby preventing the criminalization of otherwise innocent conduct. I disagree. In *Rapert*, our superior court reasoned the criminal speech was not based on an objective standard of simple negligence because the elements specified by the President in the *MCM* contain the subjective element of “wrongful.” Here that is not the case. The President did not list the term unlawfully as an element for Article 134 offenses under clause 1 or 2. It is also not clear from where the government derived this term. Thus, I am unwilling to conclude that a mere insertion of the term unlawfully when drafting a novel offense creates a subjective element of criminality or provides an accused with notice of the elements which he or she must defend.

Based on our superior courts’ previous holdings, I believe we are bound to apply a *mens rea* higher than simple negligence for this offense because nothing in statute or under customs of the service requires otherwise. Because appellant was advised and pleaded to an impermissibly low *mens rea*, I would set aside the finding of guilty as to Specification 1 of Charge IV, and would reassess the sentence. See

⁹ In relevant part, the Kentucky Penal Code states a person is guilty of “unlawful transaction with a minor in the third degree” when “[a]cting other than as a retail licensee, he *knowingly* sells, gives, purchases or procures any alcoholic or malt beverage in any form to or for a minor.” Ky. Rev. Stat. Ann. § 530.070(1) (LexisNexis 2014) (emphasis added).

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United States v. Medina, 66 M.J. 21 (C.A.A.F. 2008) (“The providence of a plea is based not only on the accused’s understanding and recitation of the factual history of the crime, but also on an understanding of how the law relates to those facts.”); *Care*, 18 C.M.A. at 538-39, 40 C.M.R. at 250-51 (“[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.”).



FOR THE COURT:

A handwritten signature in black ink, appearing to read "John P. Taitt".

JOHN P. TAITT
Acting Clerk of Court