

THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S,) FINAL BRIEF ON BEHALF OF
Appellee) APPELLANT
)
v.) Crim. App. No. 20120104
)
Private First Class (E-3)) USCA Dkt. No. 14-0009/AR
JESUS GUTIERREZ, JR.,)
United States Army,)
Appellant)

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

U N I T E D S T A T E S,)	FINAL BRIEF ON BEHALF OF
Appellee)	APPELLANT
)	
v.)	
)	Crim. App. No. 20120104
Private First Class (E-3))	
Jesus Gutierrez, Jr.)	USCA Dkt. No. 14-0009/AR
United States Army,)	
Appellant)	

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Issue Presented

**WHETHER THE EVIDENCE OF STALKING WAS LEGALLY
SUFFICIENT WHERE APPELLANT WAS ACQUITTED OF
RAPE AND THE PROSECUTION RELIED ON THE
EVIDENCE OF RAPE TO PROVE STALKING.**

Statement of Jurisdiction

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2012). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On August 4 and 31, November 2 and 15, 2011, and January 4-7 and 20, 2012, an enlisted panel sitting as a general court-martial tried Private First Class (PFC) Jesus Gutierrez, Jr., at Ansbach, Vilseck, and Schweinfurt, Germany. Contrary to his pleas, the panel convicted PFC Gutierrez of stalking, in

violation of Article 120a, UCMJ, 10 U.S.C. § 920a (2006). Private First Class Gutierrez was found not guilty of rape in violation of Article 120, UCMJ. The panel sentenced PFC Gutierrez to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for one year, and a bad-conduct discharge. The convening authority approved the adjudged sentence.

The Army Court affirmed the findings and the sentence on July 8, 2013. (JA 1). On October 16, 2013, this Honorable Court granted PFC Gutierrez's petition for review.

Summary of Argument

The government relied on the allegation that PFC Gutierrez raped Ms. AM in order to establish evidence of a "course of conduct" with Ms. AM to establish PFC Gutierrez' intent. However, based on the panel's finding that the sexual encounter between PFC Gutierrez and Ms. AM on or about August 1, 2010, either did not happen or was consensual, the panel could not have used that encounter to establish "course of conduct" in order to find stalking. Since PFC Gutierrez' was acquitted of raping Ms. AM, there is no evidence that PFC Gutierrez "wrongfully engaged in a course of conduct directed at Ms. AM that would cause a reasonable person to fear death or bodily harm to herself or her immediate family." *Manual for Courts-Martial, United States* (2008 ed.) [hereinafter MCM], Part IV,

¶45.g.14. In order to be found guilty, the evidence must have shown that PFC Gutierrez engaged in such conduct on "two or more occasions." Here, at most, the evidence shows that PFC Gutierrez engaged in one such fear-inducing incident on October 2, 2010. Therefore no reasonable factfinder could have found PFC Gutierrez engaged in a course of conduct and, as such, could not have found him guilty of stalking.

Statement of Facts

The government's theory at trial was that the course of conduct to establish that PFC Gutierrez stalked Ms. AM began with him raping her. (JA 301). The government argued that "It all starts with the rape." (JA 301). The government then argued:

A few weeks after the rape, the texts aren't enough, the phone calls aren't enough, the fake Facebook isn't enough. He goes to her house. And, for an hour, baaa-baaa, he rings the bell, trying to get in to her house, knowing he already raped her, knowing he had been contacting her, knowing she didn't want contact. It's reasonable to assume this is a course of conduct directed at her.

(JA 302).

Finally, the government argued that the events of the night of October 2, 2010, completed the offense of stalking when:

"[PFC Gutierrez] shows up at her house and calls her. He shows up at her house and rings the outside buzzer. He gets inside and he kicks the door, he pounds the door, and he makes enough

racket to scare not just her, but Ms. Drzazgoski upstairs.”
(JA-302). However, PFC Gutierrez was acquitted of the rape.
(JA-012).

Private First Class Gutierrez and his wife met Ms. AM at a New Year's Eve party on December 31, 2009. (JA 107, 222). Ms. AM made friends with PFC Gutierrez's wife Julia Gutierrez. (JA 108). Ms. AM later asked Mrs. Gutierrez if she could ship items she ordered online to the Gutierrez's Army post office (APO) address since some online sellers did not ship to Germany. (JA 109-110).

In total, Ms. AM ordered about twelve packages online for her and her nine-year old daughter that she wanted shipped to the Gutierrez APO address. (JA 110-111). Mrs. Gutierrez would then deliver the packages to Ms. AM. (JA 110-111). However, Mrs. Gutierrez did not deliver the last three packages to Ms. AM immediately. (JA 110-111). Ms. AM communicated with PFC Gutierrez regarding the packages. (JA 112-113). However, the two were unable to coordinate a delivery method. (JA 112-113). Ms. AM testified that she "hated Gutierrez" referring to PFC Gutierrez. (JA 109). And that after about two or three months, things went "sour" between herself and Mrs. Gutierrez as well. (JA 109).

Eventually, Ms. AM sent Facebook messages to Mrs. Gutierrez on August 3, 2010 threatening to go to the military police if

she did not receive her packages. (JA 153, Def. Ex. R).

According to Mrs. Gutierrez, PFC Gutierrez "wanted the whole packages stories [sic.] over." (JA 264). Private First Class Gutierrez, "Grabbed the packages, and [Mrs. Gutierrez] argued a little bit, like, no, you don't need to because she wants [sic.] if she wants them, she can pick them up." (JA 268).

Eventually, PFC Gutierrez walked to Ms. AM's home and delivered the final three packages. (JA 113-114). According to Ms. AM, when he arrived, he began hugging and kissing her (JA 114). Eventually, PFC Gutierrez and Ms. AM had sexual intercourse which the panel found to be consensual.¹ (JA 12 and 119). After this, Ms. AM laid on her couch for a little while before returning to work. (JA 119). Private First Class Gutierrez said that he would call Ms. AM and he did so the very next day. (JA 119).

Approximately one month later, in August or September, PFC Gutierrez came to Ms. AM's house. (JA 122). Private First Class Gutierrez rang Ms. AM's doorbell for approximately one hour, but she never let him in. (JA 122-123). Ms. AM testified that she told PFC Gutierrez to go away or she would call the police, to go away or she would call his wife, and to just "please leave me alone because my daughter is awake now, and it is two in the morning." (JA-123). However, Ms. AM never

¹ This incident of sexual intercourse forms the basis of the Specification of Charge I.

testified that she felt threatened or afraid of PFC Gutierrez during that incident. After this, PFC Gutierrez and Ms. AM exchanged Facebook messages wherein PFC Gutierrez asked her to call him. (JA 127-129 and 345).

On October 2, 2010, PFC Gutierrez called and sent text messages to Ms. AM asking her to talk to him. (JA 129 and 187-212). Eventually, PFC Gutierrez arrived outside Ms. AM's apartment and began kicking and banging on her door. (JA 131). Ms. AM did not call the police, however, she called her friend Staff Sergeant Rosas ("David") who eventually called the police. (JA 132). When the police arrived, they placed PFC Gutierrez in handcuffs and placed him outside of Ms. AM's apartment. (JA 479). From here, PFC Gutierrez blew Ms. AM kisses and winked at her. (JA 133 and 171). While the military police were at Ms. AM's home, she told them that PFC Gutierrez raped her "when he was there the first time." (JA 134 and 172).

Prior to trial, defense counsel filed a motion to sever the Specification of Charge II, stalking, from the Specification of Charge I, rape. (JA 15). The military judge denied this motion. Further, during trial, trial defense counsel moved to dismiss the stalking charge. (JA 279). The military judge denied this motion and defense counsel then renewed his previous motion to sever. (JA 15 and 281). In response, the military judge asked the trial counsel if the panel could convict on

stalking if they acquit on the rape charge. (JA 284). The trial counsel argued that even if Ms. AM was not raped in August, "there was some type of incident that puts it in fear [sic.] raises the threat level" and, as such, they could convict on stalking even if the panel acquitted PFC Gutierrez of rape. (JA 284).

Issue Presented

WHETHER THE EVIDENCE OF STALKING WAS LEGALLY SUFFICIENT WHERE APPELLANT WAS ACQUITTED OF RAPE AND THE PROSECUTION RELIED ON THE EVIDENCE OF RAPE TO PROVE STALKING.

Law

This Court conducts a de novo review for issues of legal sufficiency. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humphreys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citations omitted)). The assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

The term "reasonable doubt" does not mean that 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). However, it does mean 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 (1 Jan. 2010).

Here, the essential elements of stalking are:

1. That PFC Gutierrez wrongfully engaged in a course of conduct directed at Ms. AM that would cause a reasonable person to fear death or bodily harm to herself or her immediate family;
2. That PFC Gutierrez had knowledge, or should have had knowledge, that Ms. AM would be placed in reasonable fear of death or bodily harm to herself or a member of her immediate family; and
3. That PFC Gutierrez's acts induced reasonable fear in Ms. AM of death or bodily harm to herself or her immediate family.

MCM, Part IV, ¶45.g.14.

The military judge adequately instructed the panel on these elements as follows:

"In the Specification of Charge II, the accused is charged with the offense of stalking, in violation of Article 120a, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt: One, that at or near Schweinfurt, Germany, from between on or about 1 August 2010 until on or about 2 October 2010, the accused wrongfully engaged in a course of conduct directed at [Ms. AM], that is: repeatedly calling and texting her and coming to her house uninvited, that would cause a reasonable person to fear

death or bodily harm to herself and/or a member of her immediate family."

(JA 286; see JA 2, Charge Sheet). The military judge further defined "course of conduct" and "repeated." (JA 286).

Further, the military judge gave a "spillover instruction" as follows:

"Each offense must stand on its own, and you must keep the evidence of each offense separate. Stated differently, if you find or believe that the accused is guilty of one offense, you may not use that finding or belief as a basis for inferring, assuming, or proving that he committed any other offense."

. . .

"The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt. Proof of one offense carries with it no inference that the accused is guilty of any other offense."

(JA 295-296).

Argument

Based on the panel's finding of not guilty as to the rape charge, a reasonable fact-finder could not have found all of the elements of stalking beyond a reasonable doubt. The Army Court erred when it held the finding of guilty and the sentence as approved by the convening authority correct in law and fact in PFC Gutierrez's case. *United States v. Gutierrez*, ARMY 20120104 (Army Ct. Crim. App. 8 July 2013) (JA 1).

a. The evidence fails to establish that PFC Gutierrez "wrongfully engaged in a *course of conduct* directed at a specific person that would cause a reasonable person to fear death or bodily harm to himself or herself or a member of his or her immediate family." See *MCM*, Part IV, ¶45.a.b.(1) (emphasis added).

"Course of conduct" means "a repeated maintenance of visual or physical proximity to a specific person or a repeated conveyance of verbal *threats*, written *threats*, or *threats* implied by conduct, or a combination of *threats*, directed at or towards a specific person." *MCM*, Part IV, ¶45.b. (emphasis added). The term "repeated," with respect to conduct, means "two or more occasions of such conduct." *Id.* (emphasis added).

Private First Class Gutierrez delivered a package to Ms. AM in her home in early August 2010. (JA 113-114). Then approximately one month later, in August or September, PFC Gutierrez came to Ms. AM's house and rang her doorbell for approximately one hour. (JA 122-123). However, Ms. AM never testified that this put her in fear or that she expressed to PFC Gutierrez that she was afraid, only that she told him to leave. (JA-123).

Private First Class Gutierrez and Ms. AM later exchanged text and Facebook messages after this wherein PFC Gutierrez asked her to call him. (JA 127-129, JA 345 Pros. Ex. 5). However, none of these messages were threats. (JA 187 and 345, Pros. Ex. 1 and 5). Private First Class Gutierrez simply repeated requests for a phone conversation and asked why she had

not called him. There were no threats, no violence, and no sexual assaults.

On October 2, 2010, PFC Gutierrez called and sent text messages to Ms. AM asking her to talk to him. (JA 129). Later that night, PFC Gutierrez arrived outside Ms. AM's apartment and began kicking and banging on her door. (JA 131). This is arguably the first and only act by PFC Gutierrez that would cause a reasonable person to fear death or bodily harm.

The attempts by PFC Gutierrez to simply contact Ms. AM are not threats within the meaning of the UCMJ. *MCM*, Part IV, ¶45.b. Although "threat" in the context of Article 120a, UCMJ, is not defined, it requires more than knocking at a door or sending nonthreatening text messages. In a similar case, a panel of the Army Court found evidence of stalking to be factually insufficient where the only contact an appellant had with his putative victim consisted of one visit to her home followed by a series of unanswered text messages and a subsequent and final visit to her home culminating with a sleep over at the putative victim's behest. *United States v. Kirkpatrick*, ARMY 20100716, 2013 WL 395616, at *2 (Army Ct. Crim. App. 31 January 2013) (mem. op.) (JA 372). The *Kirkpatrick* court found the evidence failed to "establish that appellant 'had knowledge, or should have had knowledge, that the specific person would be placed in reasonable fear of death or

bodily harm to himself or herself or a member of his or her immediate family.'" *Id.* citing *MCM*, pt. IV, ¶45a.b.(2).

During closing argument in this case, the government extensively argued to the panel that in order to find PFC Gutierrez guilty of stalking, the panel must find that PFC Gutierrez raped Ms. AM. (JA 299, 301, 309). First, government counsel stated "And, then he raped her. And then he terrorized her." (JA 299). Next, "How did the accused direct his course of conduct at Ms. AM? It all starts with the rape. (JA 301). He raped her, and then contacted--he called the next day." (JA 301).

In their closing argument, the government argued that the course of conduct in this case included several occurrences commencing with the rape of Ms. AM. (JA 301). In order to find PFC Gutierrez guilty of stalking, the fact-finder had to believe that PFC Gutierrez engaged in a course of conduct which induced a reasonable fear of bodily harm. (JA 303-304). Although the charge sheet alleged that the course of conduct consisted of "repeatedly calling and texting [Ms. AM] and coming to [Ms. AM's] house uninvited," as explained above, the government correctly argued on closing that the rape was necessary in order to find that these repeated phone calls and text messages as well as coming to Ms. AM's house uninvited would cause such fear in Ms. AM because he first raped her. (JA 2, Charge Sheet).

This is because the text messages by themselves were mere requests to speak with Ms. AM and not threatening. (JA 187).

Without the context of PFC Gutierrez's first visit to Ms. AM's home culminating in a rape, a panel could not have found that these phone calls, text messages, and visits would have reasonably induced fear of bodily harm. Within these three courses of conduct, arguably only one instance could potentially be seen as threatening: PFC Gutierrez kicking and beating Ms. AM's door on October 2, 2010. And this instance was not on the charge sheet. (JA 2). As the definition of stalking requires a "course of conduct," at least two, leading to fear of bodily harm, even if this act is threatening, it is just one instance. As such, the "course of conduct" element is not met.

b. The evidence fails to establish that PFC Gutierrez "had knowledge, or should have had knowledge, that the specific person would be placed in reasonable fear of death or bodily harm to himself or herself or a member of his or her immediate family." See *MCM*, pt. IV, ¶45a.b.(2).

Government counsel argued during closing with respect to the second element of stalking, that,

PFC Gutierrez had knowledge, or should have had knowledge, that Ms. AM would be placed in reasonable fear of death or bodily harm to herself or a member of her immediate family

. . .

The second element of stalking: That this would cause--this would cause a reasonable person to fear death or bodily harm to herself or immediate family. Think about

it. He raped her and then he comes after her in multiple avenues.

(JA 303). Without first finding that PFC Gutierrez raped Ms. AM, no reasonable factfinder could have found that PFC Gutierrez knew or should have known that Ms. AM was placed in fear by his text messages and ringing the doorbell.

Based on the nature of the incidents between PFC Gutierrez and Ms. AM, PFC Gutierrez did not knowingly place her in fear of bodily harm. Prior to the kicking and banging on October 2, 2010, PFC Gutierrez was never violent toward Ms. AM nor had he made threats. None of the text or Facebook messages between PFC Gutierrez and Ms. AM involved threats. (JA 182, 187). When PFC Gutierrez was ringing her doorbell, Ms. AM yelled over the intercom for him to leave her alone, but she did not call the police. (JA 123).

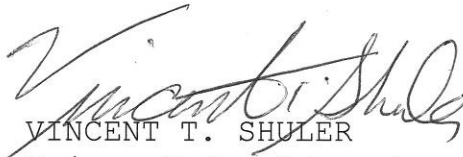
Based on their history, it would be impossible for PFC Gutierrez to know that he was causing Ms. AM to fear bodily harm. Therefore, no reasonable panel could be convinced beyond a reasonable doubt that PFC Gutierrez stalked Ms. AM. Because the findings are not supported by the evidence, PFC Gutierrez's conviction for this offense cannot stand.

Conclusion

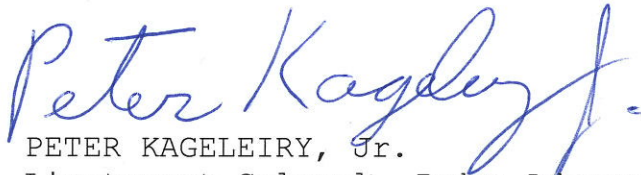
WHEREFORE, PFC Gutierrez respectfully requests that this Honorable Court set aside the finding of guilty as to the Specification of Charge II and set aside the sentence.



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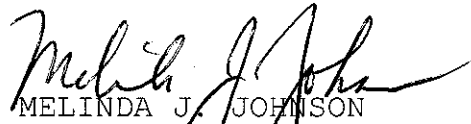
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Gutierrez, Crim. App. Dkt. No. 20120104, Dkt. No. 14-0009/AR, was delivered to the Court and Government Appellate Division on November 26, 2013.



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