

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

UNITED STATES,  
Appellee

v.

Staff Sergeant (E-6)  
**JORGE F. ACEVEDO**  
United States Army,  
Appellant

) BRIEF ON BEHALF OF  
) APPELLEE  
)  
)  
)  
) Crim. App. Dkt. No. 20150076  
)  
) USCA Dkt. No. 17-0224/AR  
)

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WHETHER THE EVIDENCE IS LEGALLY  
INSUFFICIENT TO SUPPORT A CHARGE OF  
KIDNAPPING BY INVEIGLEMENT.

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

**Issue Presented**

WHETHER THE EVIDENCE IS LEGALLY  
INSUFFICIENT TO SUPPORT A CHARGE OF  
KIDNAPPING BY INVEIGLEMENT.

**Statement of Statutory Jurisdiction**

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice, 10 U.S.C. § 866(b) (2012) [hereinafter UCMJ]. The statutory basis for this Court's jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

**Statement of the Case**

On January 23 and February 9-11 2015, an enlisted panel sitting as a general court-martial convicted Staff Sergeant (SSG) Jorge F. Acevedo, Appellant, contrary to his plea, of kidnapping in violation of Article 134, Uniform Code of

Military Justice (UCMJ), 10 U.S.C. § 934 (2012). (JA 100). The panel sentenced Appellant to one year of confinement and a bad-conduct discharge (BCD). (JA 6). After deferring automatic forfeitures until action, then waiving forfeitures for six months, the convening authority otherwise approved the sentence. (JA 8-9, 592). On 21 December 2016, the Army Court summarily affirmed the findings of guilty and the sentence. (JA 1). On 1 March 2017, Appellant petitioned this Honorable Court for review, and this Court granted review for the issue specified above on 14 April 2017.

### **Statement of Facts**

A few days after advanced individual training (AIT), in January 2014, nineteen year old Private (PV2) AM was sent to the Defense Language Institute (DLI) in Monterey, California to learn Arabic. (JA 16-17). In March, PV2 AM and a friend went to a bar to meet with PV2 AM's boyfriend, Mr. Ryan Moore. (JA 17, 19). Mr. Moore was a civilian with no military affiliation. (JA 60). Though not yet twenty-one years of age, PV2 AM consumed alcohol at the bar. (JA 19). While at the bar, PV2 AM saw Appellant and Sergeant (SGT) Benavides. (JA 20). At the time, Appellant was in PV2 AM's platoon and was her Non-commissioned Officer (NCO). (JA 21). Appellant had "general military authority" over PV2 AM akin to a "team leader." (JA 81). It was his job to provide "purpose, guidance, mentorship for" his platoon, to include PV2 AM. (JA

81). Appellant was described as an “old school” NCO, “hard, hard, very, very disciplined.” (JA 83).

As they were leaving the bar, Mr. Moore went to the restroom while PV2 AM went to talk with Appellant and SGT Benavides. (JA 22). When Mr. Moore later joined the group, the mood changed. (JA 22). Appellant and SGT Benavides “became instantly possessive and aggressive....” (JA 25). With a raised voice, Appellant told Mr. Moore, “You’re not taking my soldier anywhere....I saw her drinking, if she doesn’t get in a cab and go back to base, I’m going to report her for drinking.” (JA 26-27). Appellant started “getting into Ryan’s face.” (JA 26). Appellant grabbed PV2 AM’s upper arm to keep her from going with Mr. Moore. (JA 27, 77). Private AM started crying. (JA 27). Mr. Moore told Appellant and SGT Benavides that he would drive PV2 AM back to post instead of his residence. (JA 27). They responded, “You’re not taking our soldier anywhere. She’s not leaving with you.” (JA 27). Appellant admitted it was a heated discussion. (JA 102). Private AM was given a choice between going back to base alone or leaving with Mr. Moore and being punished. (JA 77). The mood was threatening and Mr. Moore felt that if he kept arguing with Appellant, it would “become a physical confrontation.” (JA 65). At that point, PV2 AM believed that Appellant and SGT Benavides were going to call a taxi for her to take her to the barracks on DLI. (JA 28, 30). Private AM got into the taxi and she was surprised when Appellant also

got into the taxi. (JA 30). Appellant gave his address, closed the door, and the taxi left. (JA 30-31). Appellant pulled PV2 AM next to him and held her hand for the five to ten minute taxi ride to his residence. (JA 31-32). When they arrived at Appellant's apartment, both he and PV2 AM exited the cab and walked out of view of the street toward appellant's apartment. (JA 32). Once in front of the door to the apartment, Appellant asked PV2 AM, "Do you know what's about to happen?" (JA 35). Private AM nodded and indicated that she did know. (JA 25). Appellant replied, "No, I want you to tell me." (JA 35). Private AM responded, "We're going to fuck." (JA 35). When asked at trial why she responded that way, she replied, "I just did what I knew what—what he wanted me to do. I was afraid that if I didn't do what he wanted, there would be some sort of retaliation." (JA 35). Appellant told PV2 AM she could get back in the taxi and leave, but PV2 AM could no longer see the cab and no one had told it to wait. (JA 36). Appellant and PV2 AM went into the apartment and engaged in sexual activity.<sup>1</sup> (JA 38-42). In the morning, Appellant called a taxi for PV2 AM to take her back to DLI, gave her \$20 to pay for the cab, and told her not to tell anyone what happened. (JA 43). During an interview with law enforcement, Appellant denied engaging in sexual

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<sup>1</sup> These sexual acts were the basis for the charges for which the Appellant was acquitted. (JA 7-8, 100).

activity with PV2 AM and claimed he took a taxi by himself to his residence that evening. (JA 102).

The military judge used the standard definitions during instructions for the terms “inveigle,” “held,” and “against the person’s will.” (JA 87-88); *See also* Dep’t of Army, Pam. 27-9, Legal Services: Military Judges’ Benchbook [hereinafter Benchbook], para. 3-92-1 (10 Sept. 2014).

### **Summary of Argument**

The finding of guilty is legally sufficient because under the facts of this case, a reasonable fact-finder could have found that Appellant kidnapped the victim.

### **Argument**

WHETHER THE EVIDENCE IS LEGALLY  
INSUFFICIENT TO SUPPORT A CHARGE OF  
KIDNAPPING BY INVEIGLEMENT.

### **Standard of Review**

Questions of legal sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency 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. Turner*, 25 M.J. 324, 324-325 (C.M.A. 1987).



## Law and Analysis

The elements of kidnapping are (1) that the accused inveigled a certain person; (2) that the accused then held such person against that person's will; (3) that the accused did so willfully and wrongfully; and (4) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. *Manual for Courts-Martial, United States* (2012 ed.) [hereinafter *MCM*], pt. IV, ¶ 92.b.

### 1. Appellant Inveigled PV2 AM.

The military judge defined “inveigle” during instructions as “to lure, lead astray, or entice by false representations or other deceitful means. For example, a person who entices another to ride in a car with a false promise to take the person to a certain designation [sic] has inveigled the passenger into the car.” (JA 87). This example comes from the explanation section under kidnapping. *MCM* pt. IV, ¶ 92.c.(1); Benchbook, para. 3-92-1.

In *Blocker*, after having been rebuffed by the victim, K, earlier in the night, the Appellant offered K and a friend a ride home from a club. *United States v. Blocker*, 32 M.J. 281, 283 (C.M.A. 1991). After dropping the friend off at her house, instead of driving K home, Appellant drove into the woods telling K that he had to urinate. *Id.* Appellant did so and when he came back, K told the Appellant

she had a boyfriend. *Id.* Appellant then restrained K and forcibly raped her. *Id.* The court held that a “reasonable factfinder could infer from this evidence that appellant’s sexual interest in the victim that evening was constant and, therefore, he intended to have sex with her when he redirected his vehicle down the hiking path.” *Id.* at 286. Further, Appellant was deceitful in conveying to K his intent in driving down the hiking path and such “evidenced conduct constitutes inveiglement for purposes of Article 134.” *Id.*

Here, Appellant knew that PV2 AM wanted to either go to Mr. Moore’s house or to her on post residence. Just as in *Blocker* and the example given in the instructions, Appellant used false pretenses to convince PV2 AM to get into the taxi. Instead, Appellant intended to take PV2 AM to his own residence and did so.

Private AM wanted to leave with Mr. Moore but the Appellant aggressively refused to allow that to happen. Appellant loudly argued with Mr. Moore and violently grabbed PV2 AM’s arm to pull her away from Mr. Moore. The encounter was so disruptive that PV2 AM started crying. Appellant threatened to report PV2 AM for underage drinking and told Mr. Moore that PV2 AM must take a taxi back to her on post residence to avoid trouble. This false representation of the situation caused Mr. Moore to leave and convinced PV2 AM to get into the taxi. Once PV2 AM was in the taxi, the true nature of Appellant’s plan was revealed as he got in the cab himself, gave his address to the cab driver, pulled

PV2 AM close to him, and held her hand. A reasonable factfinder could infer from this evidence that appellant intended for his deception to lure PV2 AM away from the safety of Mr. Moore, an individual that she trusted, and into a cab in order to bring her back to his residence for the purpose of engaging in sexual activity. Thus, the evidence is legally sufficient to support the first element of kidnapping.

## **2. Appellant Held PV2 AM Against Her Will.**

The military judge defined “held” during instructions as follows:

“held” means detained. The holding must be more than a momentary or incidental detention. For example, a robber who holds the victim at gunpoint while the victim hands over a wallet, or a rapist who throws his victim to the ground, does not, by such acts, commit kidnapping. On the other hand, if, for example, before or after such robbery or rape, the victim is involuntarily transported some substantial distance, as from a housing area to a remote area of the base or post, this may be kidnapping, in addition to robbery or rape.

(JA 87-88); *MCM* pt. IV, ¶ 92.c.(2); Benchbook, para. 3-92-1. Further, the “involuntary nature of the detention may result from force, mental or physical coercion, or false representations. (JA 88); *MCM* pt. IV, ¶ 92.c.(3); Benchbook, para. 3-92-1.

In *Jeffress*, the Appellant pled guilty to kidnapping by grabbing a woman and pulling her around the side of a building “some 15 feet to a location outside the normal route of pedestrians—an open field without any sidewalks, paths, lights, stores, shops or amusements” in order to sexually assault her. *United States v.*

*Jeffress*, 28 M.J. 409, 410 (C.M.A. 1989). The court recognized that under “the modern view of kidnapping . . . . movement of the victim for only a few feet has sufficed to establish guilt.” *Id.* at 414. Under this view, the court held that the kidnapping was “more than an ‘incidental’ detention or asportation” and “not inherent in the crime” of sexual assault. *Id.* at 414.

Like in *Jeffress*, here the Appellant involuntarily held PV2 AM. He convinced Mr. Moore to leave the scene under false pretenses so that Mr. Moore could no longer help PV2 AM. He convinced PV2 AM to get into a taxi under threat of punitive action and under the false pretense of returning to her barracks alone. Appellant had already physically assaulted PV2 AM by grabbing her arm and verbally threatened to turn her in for underage drinking. After Mr. Moore had left and PV2 AM was secure in the taxi, Appellant got into the taxi. This was unexpected and added to PV2 AM’s duress. Appellant directed the taxi to his residence to further remove PV2 AM from the safety of Mr. Moore, her on post residence, and from any potential bystanders. Appellant pulled PV2 AM close and held her hand to ensure her compliance. At his residence, a place where there was increased risk of harm to PV2 AM, Appellant intended to and did engage in sexual activity with PV2 AM.

Appellant falsely represented the purpose of PV2 AM’s taking a cab, namely that she needed to get back to her own on post residence safely. Instead, Appellant

was intentionally isolating PV2 AM from Mr. Moore and facilitating PV2 AM's travel to his own residence for the purpose of engaging in sexual activity. Here, the involuntarily nature of PV2 AM's detention resulted from force, coercion, and false representations. Thus, the evidence is legally sufficient to support the second element of kidnapping.

### **3. Appellant Did So Willfully And Wrongfully.**

“Willfully” means the “accused must have specifically intended to hold the victim against the victim's will to be guilty of kidnapping.” (JA 88); *MCM* pt. IV, ¶ 92.c.(4); Benchbook, para. 3-92-1. “Wrongfully” mean without justification or excuse. (JA 88); *MCM* pt. IV, ¶ 92.c.(4); Benchbook, para. 3-92-1.

The court in *Blocker* determined that “circumstantial evidence of the required intent will suffice” and held that “a rational factfinder could conclude beyond a reasonable doubt that appellant intended to take K and hold her against her will when he turned off the road and drove down the hiking path.” *Blocker*, 33 M.J. at 285.

Appellant lied to PV2 AM and Mr. Moore about the purpose of getting PV2 AM into a taxi. He intimidated both individuals. His threats of reporting PV2 AM for drinking under age caused Mr. Moore to leave and caused PV2 AM to be fearful of potential disciplinary repercussions. Having already physically restrained PV2 AM by her arm and prevented her from leaving with Mr. Moore,

PV2 AM was afraid Appellant would physically harm her further if she did not comply and get into the taxi. The Appellant manipulated PV2 AM into the cab under false pretenses of returning her to her residence. He then surprised PV2 AM by entering the taxi and directing it to his own residence. Appellant then pulled PV2 AM close and held her hand. Due to the previous restraint, PV2 AM was again afraid of physical harm if she did not comply with Appellant's direction. Thus, the evidence is legally sufficient to support the third element of kidnapping.

#### **4. Prejudicial to Good Order and Discipline and Service Discrediting.**

There is sufficient evidence on the record that Appellant's actions were prejudicial to good order and discipline and service discrediting. Appellant does not directly contest this element in his brief.

Mr. Moore was a civilian. He admitted that he trusted Appellant as a member of the military to take care of PV2 AM. Mr. Moore stated that this was part of the reason he left PV2 AM in the custody and care of Appellant. Further, an NCO, and specifically in PV2 AM's platoon, Appellant was trusted with providing purpose, guidance, and mentorship to PV2 AM. Instead, he coerced PV2 AM into returning to his residence to engage in sexual activity. Sexual activity between an NCO and a junior member of the platoon such as Appellant and PV2 AM is strictly prohibited because it undermines the disciplinary structure of the military and unit cohesiveness. Further, Appellant told PV2 AM not to tell

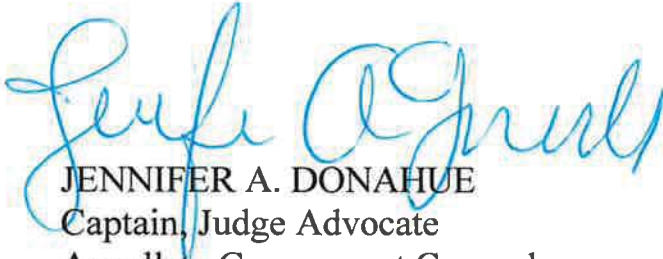
anyone about the sexual encounter, which demonstrates that Appellant had knowledge of this prohibition. Thus, the evidence is legally sufficient to support the fourth and final element of kidnapping.

## **5. Conclusion.**

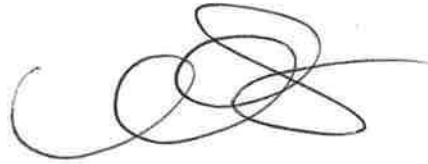
Here, the enlisted panel carefully weighed the evidence presented and found the appellant not guilty of the sexual misconduct, likely based on the fact that PV2 AM stated she did not manifest her non-consent. However, this same enlisted panel, who heard PV2 AM testify live and saw her demeanor and was able to determine her credibility in real time and not merely from reading a transcript, found appellant guilty of kidnapping because the prosecution had proven the charge beyond a reasonable doubt. Since there is substantial evidence on each of the elements of the crime, and in viewing such evidence in a light most favorable to the government, the evidence was legally sufficient to support a finding of guilt for kidnapping.

### Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the decision of the Army Court.



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**CERTIFICATE OF COMPLIANCE WITH RULE 24(d)**

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**CERTIFICATE OF FILING AND SERVICE**

I certify that the original in the case of United States v. Acevedo, Crim. App. Dkt. No. 20150076/ USCA Dkt. No. 17-0224/AR, was filed electronically with the Court at [efiling@armfor.uscourts.gov](mailto:efiling@armfor.uscourts.gov) on this 19<sup>th</sup> day of May, 2017 and contemporaneously served electronically and via hard copy on appellate defense counsel.

A handwritten signature in black ink, appearing to read 'D. Mann', with a long horizontal flourish extending to the right.

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