IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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| U N I T E D S T A T E S,<br>Appellee | ) | FINAL BRIEF ON BEHALF OF<br>APPELLANT |
| v. | ) | Crim. App. Dkt. No. 20140785 |
| | ) | USCA Dkt. No. 17-0231/AR |
| Specialist (E-4)<br>**TORRENCE A. ROBINSON**,<br>United States Army,<br>Appellant | ) | |


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

## Issues Presented

I.

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO ADMIT CONSTITUTIONALLY REQUIRED EVIDENCE UNDER MILITARY RULE OF EVIDENCE 412(b)(1)(C).

II.

WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR WHEN HE FAILED TO INSTRUCT THE PANEL ON THE MENS REA REQUIRED FOR THE SPECIFICATION OF CHARGE I, WHICH INVOLVED AN ARTICLE 92, UCMJ, VIOLATION OF ARMY REGULATION 600-20.

III.

WHETHER THE EVIDENCE WAS LEGALLY SUFFICIENT TO ESTABLISH THAT APPELLANT KNEW OR REASONABLY SHOULD HAVE KNOWN THAT SPC VM WAS TOO INTOXICATED TO CONSENT TO A SEXUAL ACT.

## Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. 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 April 29, August 26–27, and October 15–17, 2014, at Fort Stewart, Georgia, an enlisted panel sitting as a general court-martial convicted Specialist (SPC) Torrance A. Robinson, contrary to his pleas, of violating a lawful general regulation and sexual assault in violation of Articles 92 and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920 (2012) [hereinafter UCMJ]. The panel sentenced SPC Robinson to be reduced to the grade of E-1, to forfeit all pay and allowances, and to be discharged with a bad-conduct discharge. (JA 293). The convening authority approved the sentence as adjudged and credited SPC Robinson with one day of confinement against the sentence to one day of total forfeiture of pay.

On December 14, 2016, the Army Court summarily affirmed the findings of guilty and sentence. (JA 1). Specialist Robinson was notified of the Army Court's decision and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, appellate defense counsel filed a Petition for Grant of Review on

February 10, 2017. This Honorable Court granted appellate defense counsel's motion to extend time to file the supplement on February 14, 2017, and the Supplement to the Petition for Grant of review was filed on March 2, 2017. On March 28, 2017, this Honorable Court granted appellant's petition for review.

I.

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO ADMIT CONSTITUTIONALLY REQUIRED EVIDENCE UNDER MILITARY RULE OF EVIDENCE 412(b)(1)(C).

**Statement of Facts**

Citing an "abundance of caution," the defense filed a "Motion in Limine to Admit Evidence Under Military Rule of Evidence 412(b)(1)(B)" on July 11, 2014. (Sealed JA 62). In this motion, the defense sought to introduce evidence that the alleged victim – SPC VM – had been flirting with SPC Robinson in the months leading up to the charged offense. (Sealed JA 62–64). The defense also sought to introduce evidence that SPC Robinson and SPC VM had discussed having sex with each other on numerous occasions. (Sealed JA 62–64). The defense submitted this evidence was "relevant and material" to the defense theories of consent "as well as to [appellant's] mistake of fact as to consent." (Sealed JA 64).

The trial counsel subsequently filed a response to the defense's motion on July 15, 2014 (Sealed JA 88–91), asserting the defense had "not articulated any

reasonable nexus" between this evidence and "the issue of consent or mistake of fact as to consent." (Sealed JA 89).

Motions Hearing

At the motions hearing, the defense counsel argued that even if this evidence did not fall under the Mil. R. Evid. 412(b)(1)(B) exception, it would fall under the constitutional exception in Mil. R. Evid. 412(b)(1)(C). (Sealed JA 5–11, 17–20). To that extent, the defense counsel explained how evidence of their prior flirting, hugging, and conversations about having sex with each other went directly to the crux of the defense's case regarding a mistake of fact. (Sealed JA 6–10).

In particular, the defense counsel expressed the importance of the factfinder's ability to view the relationship between SPC Robinson and SPC VM from his perspective, which included knowledge of their prior conversations. (Sealed JA 6–10). The defense counsel also argued that perspectives of other people who saw SPC VM flirting with SPC Robinson would help demonstrate any mistake of fact was reasonable: "One way that the defense can show that it's reasonable is by showing that other people saw this behavior" and "It must be an honest mistake of fact but it also must be reasonable. If we are not allowed to present other witnesses to come and testify what they saw, you are really hamstringing our case." (Sealed JA 17–18).

In his written ruling on the motion, the military judge made a series of factual findings. (Sealed JA 92–93). These findings included, "Several witnesses testified at the Article 32 hearing that they had seen [SPC VM] flirting with [SPC] Robinson prior to the incident." (Sealed JA 92). First, SPC William Bready "testified that he had seen [SPC VM] showing affection, smiling, flirting, and trying to grab [SPC] Robinson on multiple occasions for about four months leading up to the incident." (Sealed JA 93). Second, SPC Chailee Natal "always saw [SPC VM] and [SPC] Robinson hugging and flirting," and [SPC VM] was "trying to get with him." (Sealed JA 93). Specialist Natal also saw SPC VM and SPC Robinson hugging the night of the incident, and he perceived that SPC VM was "trying to get with" SPC Robinson that night. (Sealed JA 93). Third, SPC Breaunna Marshall testified SPC VM "constantly flirted with [SPC] Robinson at work and hugged him on multiple occasions prior to [the incident]." (Sealed JA 93). The military judge also found, "In his statement to CID, as indicated in the [CID report], [SPC Robinson] . . . stated that [SPC VM] had flirted with him on multiple occasions prior to the incident and that they had talked about having sex on numerous occasions as well." (Sealed JA 93).

In his ruling, the military judge concluded the only admissible evidence was SPC Natal's observations the night before the alleged incident, and any other evidence of flirtatious behavior between SPC VM and SPC Robinson that night.

(Sealed JA 94–95). In excluding the rest of the evidence, the military judge held, "The defense has failed to establish by preponderance of the evidence that the following evidence is admissible under Mil. R. Evid. 412(b)(1)(B)." (Sealed JA 95). Notably, while the military judge outlined the requirements for Mil. R. Evid. 412(b)(1)(C) in his ruling, he did not analyze its applicability. (Sealed JA 92–95).

The excluded evidence included "[e]vidence of hugging, flirting, etc. from other witnesses (SPC Bready and SPC Marshall)." (Sealed JA 95). The military judge further ruled that "discussions between [SPC Robinson] and [SPC VM] that they talked about having sex on numerous occasions is inadmissible unless the discussions can be linked to the morning of the alleged incident" and "[n]one of the evidence presented relates to specific instances of sexual behavior relevant to prove consent of [SPC VM] on 27 July 2013." (Sealed JA 95).

Following this ruling, the defense filed a motion to admit the same evidence under Mil. R. Evid. 412(b)(1)(C). (Sealed JA 96–100). The military judge ruled the evidence of SPC VM's flirtatious behavior was admissible for appellant's defense against the Article 93, UCMJ, specification, but not the Article 120, UCMJ, specification. (Sealed JA 45). More specifically, for the Article 120, UCMJ, specification, the military judge said the evidence "may not be used to prove consent or mistake of fact as to consent." (Sealed JA 45). The military judge elaborated, "It may not be used to prove consent or mistake of fact as to

consent because there was no evidence linking the flirtatious behavior with the sexual encounter on the morning of 27 July 2013." (Sealed JA 45). Following this ruling, the government immediately moved to dismiss the Article 93, UCMJ, specification. (Sealed JA 45–46).

Specialist VM's testimony

At trial, SPC VM testified her evening started by playing pool in the barracks dayroom and drinking one mixed drink of pink lemonade and Smirnoff vodka. (JA 34–35, 56). Specialist VM did not make this drink very strong because she was going to drive later that evening. (JA 56–57).

Around 2200, SPC VM drove herself to a party, where she planned on drinking and spending the night. (JA 36–37, 57–58). At the party, SPC VM poured herself five or six mixed drinks. (JA 40). Eventually, SPC VM became uncomfortable, as no other females were at the party and the brother of the party's host got "a little too close." (JA 42). Due to her discomfort, SPC VM's "first instinct was just to leave," and she "went inside, grabbed [her] keys, and left." (JA 42–43). Specialist VM drove home in about ten minutes, navigating through speed bumps, stop signs, and traffic lights. (JA 60–61).

When she returned to her barracks room, SPC VM "was feeling really dizzy and lightheaded" and "threw up in the kitchen sink." (JA 47). She cleaned up the sink, moved her trash can, took off her clothes, and got into bed. (JA 48–49, 64).

Specialist VM testified her next memory after lying down and going to sleep was "[SPC] Robinson on top of me" and "inside of me." (JA 51).

On cross-examination, SPC VM said she did not remember SPC Robinson coming into the room. (JA 66). Similarly, SPC VM did not remember opening her covers, inviting SPC Robinson into her bed, putting her arms around his neck, pulling his shirt off, pulling him down onto her bed, biting his shoulder, or scratching his back during sex. (JA 67–68). However, based on her lack of memory, SPC VM admitted each of these things "could have happened." (JA 68). Specialist VM also agreed it was "possible" she consented to sex. (JA 68).

During SPC VM's testimony, the trial counsel asked her about "what kind of interaction you had with [SPC Robinson] at work or how often you saw him." (JA 33). Specialist VM responded, "We were in the same company. We weren't in the same platoon. I was in the training room and, I guess, he would come in every now and again [ ] with his Soldiers." (JA 33). In this response, SPC VM did not mention any previous hugging, touching, flirting, or conversations about having sex with SPC Robinson. (JA 33).

Panel Member Question

During trial, a panel member submitted a question for Mr. Isaiah Rodriguez, who knew both SPC VM and SPC Robinson. (JA 80, 305). One part of this question asked, "From what you know of SPC [VM], did she ever display interest

towards SPC Robinson?" (JA 305). The trial counsel objected based on "MRE 412." (JA 305). The military judge sustained the objection and told the panel member "that question is prohibited by the Rules of Evidence . . . the question dealing with Specialist [VM] relating to Specialist Robinson." (JA 100).

Specialist Robinson's testimony

At trial, SPC Robinson testified about horse playing with SPC VM during the party. (JA 194). This horse playing involved tapping each other's arms and legs, and SPC Robinson thought SPC VM was "politely flirting, having a good time." (JA 194–95). Later that night, SPC Robinson saw SPC VM leave the party. (JA 195). She ran down the stairs, got into her car, and drove away from the party. (JA 195–96).

Following her abrupt departure, SPC Robinson was going to accompany several people to check on SPC VM at her barracks room, but there was not enough space in the car for him. (JA 200–01). No one told SPC Robinson whether they located SPC VM, and he later left to go check on her. (JA 201). Specialist Robinson stopped by his house on the way to the barracks, telling his wife he was going to check on a drunk Soldier. (JA 226).

When he arrived at SPC VM's room, SPC Robinson knocked, no one answered, and he "checked the door to see if it was opened and it was." (JA 203). When he entered the room, SPC VM was still awake (JA 203), and SPC Robinson

did not notice any vomit or odors. (JA 204). Once SPC Robinson saw SPC VM was okay, he went to leave and told her to call him if she needed anything. (JA 204). However, as he turned to leave, SPC VM reached up, grabbed his wrist, pulled him towards her, and asked him to stay. (JA 205).

Specialist Robinson ended up in the bed with SPC VM, who was naked under the blanket. (JA 206). She wrapped her arms around his neck, they began kissing, and she pulled his shirt over his head. (JA 206). She then grabbed at his belt to get him to take it off. (JA 206–07). Specialist Robinson interpreted this conduct to indicate SPC VM wanted to have sex with him. (JA 207). They had sexual intercourse in her bed multiple times and in multiple positions. (JA 207–11). At one point, SPC Robinson was positioned behind SPC VM, who turned back to look at him, bit her pillow, and reached back to grab her own buttocks. (JA 211).

Based on his overall observations, SPC Robinson did not believe SPC VM was too drunk to consent. (JA 234–37). At one point in his testimony, the defense counsel asked SPC Robinson, "why did you think that Specialist [VM] consented to having sex with you?" (JA 215). In his response, SPC Robinson said, "We had spoken about it before, ma'am." (JA 215). This response drew an immediate objection from the trial counsel based on the military judge's previous ruling. (JA 215–16). The military judge instructed the panel, "The objection is sustained.

*Panel members will not consider anything from prior to the night of the party*. So, please disregard that." (JA 216) (emphasis added).

Mr. Natal's testimony

The main category of evidence not excluded by the military judge's Mil. R. Evid. 412 ruling related to SPC Natal's testimony that he saw SPC VM and SPC Robinson hugging the night of the incident and he perceived that SPC VM was "trying to get with" SPC Robinson that night. (Sealed JA 95–96).

At trial, Mr. Natal (formerly SPC Natal) testified this conduct occurred "before the party." (JA 138). The military judge subsequently ruled this evidence to be inadmissible and gave a curative instruction to the panel. (JA 139). The military judge even told the panel members "*anything prior to that night that occurred you are to disregard*." (JA 139) (emphasis added).

Panel Instructions

As part of his instructions, the military judge told the panel members:

> The evidence has raised the issue of ignorance or mistake on the part of the accused concerning Specialist [VM's] condition in relation to the offense of Sexual Assault.
>
> I advised you earlier that to find the accused guilty of the offense of Sexual Assault, you must find beyond a reasonable doubt that the accused knew or reasonably should have known that Specialist [VM] was incapable of consenting to the sexual conduct due to impairment by an intoxicant, or other similar substance.

The accused is not guilty of the offense of sexual assault if:

One, the accused did not know that [SPC VM] was incapable of consenting to the sexual conduct due to impairment by an intoxicant, or other similar substance; and

Two, such ignorance or belief on his part was reasonable.

To be reasonable, the ignorance or belief must have been based on information, or lack of it, which would indicate to a reasonable person that [SPC VM] was not incapable of consenting to the sexual conduct due to impairment by an intoxicant, or other similar substance.

Additionally, the ignorance or mistake cannot be based on a negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances.

. . .

Even if you conclude the accused was ignorant of the fact that [SPC VM] was incapable of consenting to the sexual conduct due to impairment by an intoxicant, or other similar substance, if you are convinced beyond a reasonable doubt that, at the time of the charged offense, the accused's ignorance or mistake was unreasonable, the defense does not exist.

The evidence has also raised the issue of mistake on the part of the accused whether [SPC VM] consented to the sexual conduct alleged concerning the offense of Sexual Assault, as alleged in the Specification of Charge II.

Mistake of fact as to consent is a defense to the charged offense. "Mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief

> that the other person engaging in the charged sexual conduct consented to all the sexual conduct. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented.
>
> . . .
>
> Furthermore, if you conclude the accused was under a mistaken belief that the alleged victim consented to the sexual conduct alleged, if you are convinced beyond a reasonable doubt that at the time of the charged offense the accused's mistake was unreasonable, the defense does not exist.

(JA 245–48).

Government Argument

Following these instructions by the military judge, the trial counsel argued, "Members of the panel, the version of the story given to you, the version of events given by Specialist Robinson is *unreasonable*. *Unreasonable*. When you return to deliberate, *consider the reasonableness*." (JA 291) (emphasis added).

## Law and Standard of Review

A military judge's ruling on whether to exclude evidence pursuant to Mil. R. Evid. 412 is reviewed for an abuse of discretion. *United States v. Roberts*, 69 M.J. 23, 26 (C.A.A.F. 2010). Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed de novo. *Id*.

Under Mil. R. Evid. 412(a), evidence offered to prove that an alleged victim engaged in other sexual behavior is generally inadmissible. However, this type of evidence is admissible under Mil. R. Evid. 412(b)(1)(C), if its exclusion "would violate the constitutional rights of the accused." As this Court has noted, "the legislative history of M.R.E. 412 'makes clear the drafters intention that this rule should not be applied in derogation of a criminal accused's constitutional rights.'" *United States v. Gaddis*, 70 M.J. 248, 253 (C.A.A.F. 2011) (quoting *United States v. Dorsey*, 16 M.J. 1, 5 (C.M.A. 1983)).

"Generally, evidence must be admitted within the ambit of Mil. R. Evid. 412(b)(1)(C) . . . when the evidence is relevant and material, and the probative value of the evidence outweighs the danger of unfair prejudice." *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011) (citing *Gaddis*, 70 M.J. at 253 (C.A.A.F. 2011)). *See also United States v. Erikson*, 2017 CAAF LEXIS 406, at *9 (C.A.A.F. 2017) ("To establish that the excluded evidence would violate the constitutional rights of the accused, an accused must demonstrate that the evidence is relevant, material, and favorable to his defense") (quoting *United States v. Smith*, 68 M.J. 445, 448 (C.A.A.F. 2010)).

"Relevant evidence is any evidence that has 'any tendency to make the existence of any fact more probable or less probable than it would be without the evidence.'" *Ellerbrock*, 70 M.J. at 318 (quoting Mil. R. Evid. 401). To determine

whether evidence is material, this Court applies "a multi-factored test looking at the importance of the issue for which the evidence was offered in relation to other issues in this case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to th[at] issue." *Id*. (internal quotation marks omitted) (citations omitted). If evidence is material and relevant, "then it must be admitted when the accused can show that the evidence is more than the dangers of unfair prejudice." *Id*. at 319 (citing Mil. R. Evid. 412(c)(3)). These dangers "include concerns about 'harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *Id*. at 319 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

When a military judge abuses his discretion by excluding evidence pursuant to Mil. R. Evid. 412, a court must determine whether the military judge's error was harmless beyond a reasonable doubt. *Id*. at 320 (citing *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007)). Thus, this Court must determine whether "there is a reasonable possibility that the evidence [or error] complained of might have contributed to the conviction." *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007).

This determination, in context of an accused's right to cross-examination, is based on a list of non-exclusive factors: 1) the importance of the testimony in the government's case; 2) whether the testimony was cumulative; 3) the presence or

absence of corroborating or contradictory evidence on material points; 4) the extent of cross-examination permitted; and 5) the overall strength of the prosecution's case. *Ellerbrock*, 70 M.J. at 320 (citing *Van Arsdall*, 475 U.S. at 684).

Similarly, "[i]f the military judged commits constitutional error by depriving an accused of his right to present a defense, the test for prejudice on appellate review is whether the appellate court is able to declare a belief that it was harmless beyond a reasonable doubt." *United States v. Buenaventura*, 45 M.J. 72, 79 (C.M.A. 1996) (internal quotations omitted).

## Argument

### 1. The evidence that SPC Robinson and SPC VM had flirted and talked about having sex with each other on numerous occasions before the alleged sexual assault should not have been excluded under Mil. R. Evid. 412.

The military judge abused his discretion when he excluded evidence that SPC Robinson and SPC VM had flirted and "talked about having sex on numerous occasions" before the alleged sexual assault. Excluding this evidence prevented SPC Robinson from exercising his right to present evidence essential to a fair trial.

Most importantly, and exactly as the defense counsel argued at the motions hearing, the military judge's erroneous ruling prevented the panel members from having an accurate understanding of SPC Robinson's relationship with SPC VM. Absent this contextual information regarding their prior flirting and numerous conversations about having sex with each other, a panel member could have found

any claim of SPC Robinson's "mistake of fact" as to consent to be unbelievable or unreasonable.

Without this key information, SPC Robinson's testimony reads like a teenage male fantasy: shortly after entering SPC VM's room, she pulled him into her bed and started taking off his clothes. The fact that SPC Robinson and SPC VM had previously flirted and talked about having sex with each other was vital to explaining to the panel members why it was reasonable for SPC Robinson to believe that: (1) her behavior did not indicate that she was incapable of consenting, and (2) she was in fact acting on her previously expressed interest and making a decision to consent.

Under normal circumstances between acquaintances, any "ignorance" or "mistake of fact" defense under these circumstances might seem far-fetched, beginning with the idea that SPC VM's conduct should have immediately conveyed to SPC Robinson her level of intoxication. Without knowing the information erroneously excluded by the military judge, the panel members could have found SPC Robinson's claimed mistake to be unbelievable, or subjectively honest but objectively unreasonable. However, when viewed in the context of their prior flirting and conversations about having sex with each other, such beliefs from SPC Robinson become far more reasonable.

The exclusion of this evidence was particularly damaging in light of SPC VM's response to the question, "[C]an you talk to the panel about what kind of interaction you had with [SPC Robinson] at work or how often you saw him." (JA 33). Specialist VM simply said, "We were in the same company. We weren't in the same platoon. I was in the training room and, I guess, he would come in every now and again [ ] with his Soldiers." (JA 33). This response did not mention any previous hugging, touching, flirting, or conversations about having sex with SPC Robinson. (JA 33). If anything, this testimony demonstrated to the panel that SPC Robinson and SPC VM had a strictly professional relationship. Ultimately, this limited response from SPC VM – which went unchallenged due to the military judge's ruling – was misleading and led the panel members to believe that any ignorance or mistake of fact regarding her ability to consent was unreasonable.

In fact, the trial counsel even used this exact same type of argument against SPC Robinson: "Members of the panel, the version of the story given to you, the version of events given by Specialist Robinson is *unreasonable*. *Unreasonable*. When you return to deliberate, *consider the reasonableness*." (JA 291) (emphasis added). In effect, the prosecution obtained exclusion of the evidence that would have made SPC Robinson's mistake of fact *reasonable*, then argued that his mistake of fact was *unreasonable*.

This was the exact fear of the defense counsel at the motions hearing. In fact, the defense counsel clearly explained how SPC Robinson and SPC VM's prior flirting, hugging, and conversations about having sex with each other went directly to the crux of the defense's case: SPC Robinson's honest and *reasonable* beliefs about the sexual activity with SPC VM. (Sealed JA 6–10). Plain and simple, for this critical issue, the panel members needed to be able to view the events from SPC Robinson's perspective.

As such, their prior flirting and conversations about having sex were properly admissible, not to show consent under Mil. R. Evid. 412(b)(1)(B), but under Mil. R. Evid. 412(b)(1)(C) to show that SPC Robinson could have reasonably believed that SPC VM's conduct indicated consent rather than drunkenness. By erroneously excluding this relevant and probative evidence, the military judge hindered SPC Robinson's ability to develop critical evidence supporting his primary defense.

**2. This abuse of discretion was not harmless beyond a reasonable doubt.**

Applying the *Van Arsdall* factors to SPC Robinson's case demonstrates the military judge's error was not harmless beyond a reasonable doubt regarding his right to cross-examination.

First, SPC VM's testimony was vital to the government's case. Only two people could testify about what happened in her barracks room: SPC Robinson and

SPC VM. As such, SPC VM's testimony was crucial to SPC Robinson's conviction, and the first factor weighs in favor of finding harm.

Second, no other evidence was admitted regarding SPC Robinson and SPC VM's prior flirting or discussions about having sex with each other. In fact, the military judge actually excluded this evidence on two separate occasions based on his prior ruling. (JA 138–39, 215–16). Presenting this evidence would not have been cumulative. Therefore, the second factor also weighs in favor of SPC Robinson.

Third, the presence or absence of corroborating evidence does not weigh for or against SPC Robinson. While the government did not produce any evidence to corroborate SPC VM's version of events in the barracks room, there was also no evidence to corroborate SPC Robinson's version of events, though SPC VM testified that several acts described by SPC Robinson "could have happened" and it was "possible" she consented to sex. (JA 67–68, 205–08).

Fourth, although SPC VM was cross-examined, the military judge's ruling prevented defense counsel from asking questions about their prior flirting and sexual conversations. *See Roberts*, 69 M.J. at 29 (recognizing that extensive cross-examination of the witness alone is not enough, if the cross-examination permitted did not include questions on the issue constitutionally required). Thus, the fourth factor weighs in favor of SPC Robinson.

Finally, the fifth factor also weighs in favor of SPC Robinson because the government's case "was not overwhelming." *Ellerbrock*, 70 M.J. at 321. Again, there were only two people who could testify about what actually happened in the barracks room, and SPC VM repeatedly testified she could not remember whether certain actions occurred.

Therefore, four of the five *Van Arsdall* factors weigh in favor of SPC Robinson, and the military judge's erroneous exclusion of this evidence was not harmless beyond a reasonable doubt.

Moreover, the exclusion of evidence from SPC Robinson and multiple other witnesses made it impossible for the accused to both present evidence and give weight to his mistake of fact defense. As noted above, without the additional context of their prior flirting and numerous conversations about having sex with each other, SPC Robinson's testimony at trial resembled a teenage male fantasy. Therefore, for multiple reasons, the military judge's erroneous ruling was not harmless beyond a reasonable doubt.

II.

WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR WHEN HE FAILED TO INSTRUCT THE PANEL ON THE MENS REA REQUIRED FOR THE SPECIFICATION OF CHARGE I, WHICH INVOLVED AN ARTICLE 92, UCMJ VIOLATION OF ARMY REGULATION 600-20.

**Statement of Facts**

In The Specification of Charge I, the government charged SPC Robinson with violating paragraph 4-14b of Army Regulation 600-20, *Army Command Policy* (18 March 2008) (Rapid Action Revision, 20 September 2012) [hereinafter AR 600-20], by "wrongfully fraternizing with junior enlisted Soldiers." (Charge Sheet).[1]

In its opening statement, the government explained its theory of liability for this offense: "Specialist Robinson should not have been at that party that night," as "[h]e was the only NCO at that on post party . . . He was there drinking alcohol with junior enlisted Soldiers, specialists and privates in the United States Army. By being at that party and drinking alcohol with those Soldiers, he was violating a lawful general [regulation]." (JA 24).

During its opening statement, the defense responded, "The government talked to you about fraternization[,] about AR 600-20 . . . it is not a crime for an

[1] At the time of the charged offenses, SPC Robinson was a Sergeant. During trial, he was a Specialist. (JA 14).

NCO to socialize with a junior enlisted Soldier. That's allowed to happen. It's only a crime if certain conditions are met." (JA 29). The defense counsel added that SPC Robinson "was not in the same platoon as any other Soldier at that party" and "had no supervisory relationship over any Soldier at that party." (JA 29). The defense counsel further explained, "You'll also hear from the other Soldiers at that party that Specialist Robinson being there had no impact on the unit. It didn't undermine command authority. It didn't cause any favoritism or appearance of favoritism at work." (JA 30).

At trial, the party's host testified his guests were talking, drinking, playing video games, playing dominoes, or smoking outside. (JA 83–86). When SPC Robinson arrived, the host said he "greeted everybody and started chit-chatting with everybody" and "he was socializing." (JA 87). The host also agreed SPC Robinson was "doing what everyone else was doing." (JA 87).

Several other witnesses provided similar testimony. Specialist William Bready said everyone was "hanging out, playing dominoes, making food, [and] drinking." (JA 105). He also explained SPC Robinson was not in a supervisory position over anyone at the party, and SPC Robinson's presence did not impact his view of him as a non-commissioned officer (NCO). (JA 113, 117). Another witness said guests were "drinking, talking, playing dominoes, [and] just hanging out," and SPC Robinson was "just hanging out talking to people." (JA 120–21).

Another witness, Mr. Natal (formerly SPC Natal), summarized the party as "a normal typical Friday. We were all drinking, playing dominoes, and just having fun and talking." (JA 134). Mr. Natal said SPC Robinson was his "battle buddy" and "we were just good friends." (JA 130, 142). Mr. Natal also clarified SPC Robinson was "a newly promoted E5" (Army Sergeant), and they knew each other prior to his promotion. (JA 141). Like SPC Bready, Mr. Natal did not believe SPC Robinson's presence at the party impacted his authority as an NCO. (JA 142).

During trial, SPC Robinson testified the party's host invited him to the party, was not one of his Soldiers, and SPC Robinson did not have a supervisory relationship over him. (JA 192). Specialist Robinson also explained that none of the Soldiers at the party were his Soldiers or members of his platoon. (JA 192–93). On cross examination, SPC Robinson described the other people at the party as his "friends." (JA 224).

Prior to closing arguments, the military judge provided instructions to the panel members for each offense. For this specification, the military judge instructed the panel:

> In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:
>
> One, that there was in existence a certain lawful general regulation in the following terms: Army Regulation 600-

> 20, dated 18 March 2008, Rapid Action Revision, dated 20 September 2012, paragraph 4-14(b);
>
> The second element is that the accused had a duty to obey such regulation; and
>
> The third element is that on or about 27 July 2013, at or near Fort Stewart, Georgia, the accused violated this lawful general regulation by wrongfully fraternizing with junior enlisted Soldiers.

(JA 243–44).

Neither party objected to this instruction. (JA 241).

During closing argument, the trial counsel said, "You've also heard facts about how he attended a party with junior enlisted Soldiers where he was drinking, carousing, and otherwise fraternizing with them, in violation of AR 600-20." (JA 256). The trial counsel argued the government proved its case by "demonstrating that he was at this party with these people." (JA 261). The trial counsel further asserted "we have somebody who those Soldiers are going to view differently come Monday morning. *They say that they won't. They say that they didn't, but they all testified that they're friends of his*." (JA 261) (emphasis added).

During her argument, the trial counsel conceded "many of these people were not in the same unit at the time," but then asked the panel members to use their "knowledge of the military" to "consider the fact that Soldiers move from installation to installation, from unit to unit, from platoon to platoon, all the time." (JA 262).

In response, the defense counsel extensively and systemically analyzed each of the categories outlined in paragraph 4-14b and described the overall lack of evidence. (JA 270–73). The defense counsel noted, "Specialist Robinson was not the supervisor of any of those Soldiers" and "his relationship with them outside of work . . . had no impact on their working relationship or his working relationship with any other Soldier in that unit." (JA 271). The defense counsel summarized the overall lack of evidence by stating, "You heard no testimony from any junior enlisted Soldier in that unit who noticed any adverse impact . . . there was no impact on unit readiness; there was no impact on morale; and there was no impact on supervisory authority. Gentlemen, there was no impact." (JA 272).

The defense counsel also specifically addressed the trial counsel's request that the panel members use their "knowledge of the military" to consider that Soldiers move to different units:

> Now, the government hypotheses, well, what if the Soldiers change units? What if they moved to his platoon? What if they moved under his supervision? Well, he didn't. They didn't. *And, if they had, we posit that Specialist Robinson very likely would have changed his relationship with those Soldier at that time if they had been put under his command – under his leadership.* That didn't happen. It wasn't going to happen. *There is no testimony that any of those Soldiers were going to move under his authority at any time or that he believed that they would be his Soldiers at any time.*

(JA 272) (emphasis added).

## Standard of Review

In *United States v. Gifford*, this Court analyzed whether a *mens rea* requirement applied to a general order violation for an alcohol-related offense under Article 92, UCMJ. 75 M.J. 140 (C.A.A.F. 2016). After applying Supreme Court precedent (including *Elonis v. United States*, 135 S. Ct. 2001 (2015)), this Court concluded, "[T]he general order at issue required the Government to prove Appellant's *mens rea*." *Gifford*, 75 M.J. at 141.

More recently, in *United States v. Haverty*, this Court applied both *Elonis* and *Gifford* in analyzing the panel member instructions for a charged violation of AR 600-20. 2017 CAAF LEXIS 298, *6–7 (C.A.A.F. 2017). After finding "'general intent' is not a sufficient level of *mens rea* to separate wrongful conduct from otherwise innocent conduct" under the regulation, this Court "conclude[d] that the military judge plainly erred in failing to instruct the members on the *mens rea* element for the offense of hazing under Article 92, UCMJ." 2017 CAAF LEXIS 298, *22 (C.A.A.F. 2017).

Although *Elonis*, *Gifford*, and *Haverty* were decided after SPC Robinson's trial, the "Supreme Court has stated that where the law at the time of trial was settled and clearly contrary to the law at the time of appeal – it is enough that an error be 'plain' at the time of appellate consideration." *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) (citations omitted) (internal quotations omitted).

Whether the members were properly instructed is a question of law reviewed *de novo*. *United States v. Payne*, 73 M.J. 19, 22 (C.A.A.F. 2014). When there is no objection to an instruction at trial, the plain error standard applies. *Id*. Under a plain error standard, an appellant must demonstrate three things: "(1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights." *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014).

**Law**

Failing to specify a required mental state does not mean that none exists. *Elonis*, 135 S. Ct. at 2009. The Supreme Court recently reiterated that "'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.'" *Id*. (citing *Morissette v. United States*, 342 U.S. 246, 250 (1952)). To that extent, "federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." *Id*. at 2012.

In *Elonis*, the Supreme Court examined whether 18 U.S.C. § 875(c) required a defendant to intend for his communications to contain a threat. *Id*. at 2004. The communications involved Facebook postings with violent language related to Elonis' ex-wife, co-workers, a kindergarten class, and law enforcement officials. *Id*. at 2004–07. However, Elonis claimed these postings were "therapeutic" and provided disclaimers stating his "rap lyrics" were fictitious. *Id*. at 2004–05.

At trial, Elonis requested the judge instruct the jury "the government must prove that he intended to communicate a threat." *Id*. The judge rejected this request and instructed the jury to apply an objective standard in determining whether the communications amounted to threats. *Id.* Pursuant to these instructions, the government emphasized the irrelevancy of Elonis' intent and even argued "it doesn't matter what he thinks." *Id*. The jury convicted Elonis on multiple counts of communicating a threat. *Id*.

In reversing his convictions, the Supreme Court found this negligence standard was insufficient. *Id*. at 2013. Within their analysis, the Court outlined basic criminal law principles and noted "under these principles, 'what [Elonis] thinks' *does* matter." *Id*. at 2011 (emphasis added). In particular, as the threatening nature of each communication was "the crucial element separating legal innocence from wrongful conduct . . . the mental state requirement must therefore apply to the fact the communication contains a threat." *Id*. This Court has recently analyzed *Elonis* in a series of cases.

*Gifford* applies *Elonis* to an alcohol-related offense under Article 92, UCMJ.

In *Gifford*, this Court applied *Elonis* in examining a violation of a lawful general order over providing alcohol to minors under Article 92, UCMJ. 75 M.J. at 141–47. In finding the Army Court applied the wrong legal standard in its review, this Court explained, "[C]onsistent with Supreme Court precedent, we

conclude that the general order at issue required the Government to prove Appellant's *mens rea* with respect to the age of the recipients of the alcohol." *Gifford*, 75 M.J. at 141. More specifically, "the Government was required to prove, at a minimum, that Appellant acted recklessly in this regard." *Id*.

Additionally, *Gifford* repeatedly stated the importance of examining congressional intent when a statute is silent over *mens rea*:

> The Supreme Court has acknowledged that, in limited circumstances, Congress may purposefully omit from a statute the need to prove an accused's criminal intent, and courts are then obligated to recognize this congressional intent and conform their rulings accordingly.

75 M.J. at 144.

> The Supreme Court's core inquiry has remained relatively simple and direct: did Congress *purposefully* omit intent from the statute at issue?

*Id*. (emphasis in original).

> Thus, as the Supreme Court held in *Balint*, "[whether *mens rea* is a necessary facet of the crime] is a question of legislative intent to be construed by the court." 258 U.S. at 252. If such an intent can be identified, courts must construe the relevant statute accordingly.

*Id*. (alteration in original).

Within this context, "Congress is expected to speak with a clear voice." *Id*. Applying this principle to Article 92, UCMJ, this Court found "no justification for holding commanders to a lower standard than a legislature as they exercise their

power to issue a general order with punitive consequence, and we take particular note in the instant case that the commander did not explicitly indicate his intention to create a public welfare offense." *Id*. at 144.

*Caldwell* distinguishes *Elonis* regarding Maltreatment under Article 93

In *United States v. Caldwell*, this Court analyzed whether a military judge's instructions for an Article 93, UCMJ, offense "were plainly erroneous in light of the Supreme Court's recent holding in *Elonis*." 75 M.J. 276, 278 (C.A.A.F. 2016). This Court cited two factors in determining the instructions were not erroneous.

First, "because of the unique nature of maltreatment in the military, a determination that the Government is only required to prove general intent . . . satisfies the key principles" of *Elonis*. *Id*. Furthermore, "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." 75 M.J. at 281. Put another way, *Caldwell* found the behavior criminalized by Article 93, UCMJ, can *never* be innocent. 75 M.J. at 281. For that reason, it was unnecessary to read in any *mens rea* beyond a general intent to make the charged statements or engage in the other charged conduct. *Id*. at 281–83.

Second, in looking at the instructions provided to the panel, this Court concluded "the military judge's instructions sufficiently flagged for the panel the

need to consider this general intent *mens rea* requirement." *Id*.

*Haverty* applies the *Gifford* "template" to a violation of AR 600-20

In *Haverty*, this Court reiterated the principles of *Elonis* and *Gifford* in concluding "the military judge committed plain error in this case by not instructing the panel with the proper *mens rea* standard" for an Article 92, UCMJ, violation of AR 600-20. 2017 CAAF LEXIS 298, at *3. During its analysis, this Court reiterated the conclusion from *Gifford* that "commanders should be held to the same standard as legislatures when determining whether they intended to create an offense that does not require the government to prove an accused's *mens rea*; that is, they must speak with 'a clear voice' on the matter." *Id*. at *9–10 (citing 75 M.J. at 144).

Therefore, "[w]hen a commander fails to do so, we interpret the criminal offense as including 'broadly applicable scienter requirements.'" *Id*. at *10 (citing *Elonis*, 135 S. Ct. at 2009). In such cases, "we must decide whether the proper level of *mens rea* that we should infer is 'general intent,' 'negligently,' 'recklessly,' 'knowingly,' or 'intentionally.'" *Id*. For this determination, "we read into the statute or regulation 'only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct.'" *Id*. (citing *Elonis*, 135 S. Ct. at 2010).

In applying this analysis to the relevant language from AR 600-20, this Court cited language from *Elonis* in rejecting a negligence standard, determined general intent "is not a sufficient level of *mens rea* to separate wrongful from otherwise innocent conduct," and explained "our recent opinion in *Gifford* provides the proper template for determining the *mens rea* requirement in the instant case." *Id*. at *10–12. As part of its analysis, this Court utilized a hypothetical to show how applying a "general intent" *mens rea* to the regulation could cause conduct that is "perfectly innocent in a legal context . . . to be treated as *unlawful* conduct under Article 92, UCMJ." *Id*. at *17–19 (emphasis in original). By contrast, this Court found a *mens rea* standard of recklessness would be "sufficient to separate wrongful conduct from innocent conduct in prosecutions" under the regulation. *Id*. at *20.

## Argument

### a. In light of *Gifford* and *Haverty*, the military judge erred by failing to instruct the panel on the *mens rea* required for this offense.

Similar to *Gifford* and *Haverty*, the regulation in this case does not express a clear intent to dispense with *mens rea*. Therefore, this offense should be interpreted as including "broadly applicable scienter requirements," and this Court should "read into the statute or regulation 'only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct.'" *Haverty*, 2017 CAAF LEXIS 298, at *10 (quoting *Elonis*, 135 S. Ct. at 2009–10).

As in *Haverty*, applying a general intent *mens rea* to the language from AR 600-20 in this case is not a sufficient level of *mens rea* to separate wrongful from otherwise innocent conduct. In fact, based on SPC Robinson's testimony, he was merely drinking alcohol and socializing with his friends, none of whom were part of his platoon or under his supervisory authority. Neither of these actions are inherently criminal. One of the witnesses even explained, "It was a normal typical Friday. We were all drinking, playing dominoes, and just having fun and talking." (JA 134).

This type of offense remains markedly different from maltreatment and requires a scienter of at least recklessness to ensure lawful conduct is separated from the scope of the regulation. By applying the "*Gifford* template" as further clarified in *Haverty*, an accused would have to consciously disregard a known risk that his conduct violated the applicable language of the regulation.

In this case, SPC Robinson was invited to a party by his friend, accepted the invitation, and none of the guests (including himself) thought there were any issues with his attendance. In her closing argument, the trial counsel even conceded that no one at the party believed SPC Robinson's attendance created or caused any issues, but still asked the panel members to find him guilty of fraternization. (JA 261–63). Such a scenario conflicts with the general rules that "wrongdoing must be conscious to be criminal" *Gifford*, 75 M.J. at 145 (citations omitted), and "a

guilty mind is a 'necessary element in the [charge sheet] and proof of every crime.'" *Caldwell*, 75 M.J. at 280–81 (C.A.A.F. 2016) (quoting *Balint*, 258 U.S. at 251.

In fact, the overall circumstances of this case are strikingly similar to the hypothetical scenario utilized by this Court in *Haverty*. 2017 CAAF LEXIS 298, at *18–19. In such a scenario, a servicemember's conduct with a long-time friend could be "perfectly innocent in a legal context," but "treated as unlawful conduct under Article 92, UCMJ," based on the language of the regulation and perspective of an objective observer. *Id*. This Court used this hypothetical to show that a higher level of *mens rea* than "general intent" was necessary to separate innocent conduct from wrongful conduct under the regulation. No such hypothetical is necessary in this case, as the existing facts present the exact same concerns outlined by this Court in *Gifford* and *Haverty*.

In conclusion, based on the totality of the circumstances, SPC Robinson's conviction under Article 92, UCMJ, violates the principles of *Elonis*, *Gifford*, and *Haverty*, as the panel members were not clearly instructed to consider the proper level of *mens rea* when convicting appellant for this offense.

**b. The error is plain based on the law at the time of appeal.**

Even though appellant's court-martial was prior to *Elonis*, *Gifford*, and *Haverty*, panel instructions are analyzed for plain error based on the law at the time

of appeal. *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011). Based on these cases, the error here is clear: the military judge failed to instruct the panel on the *mens rea* required for this offense.

**c. Specialist Robinson was materially prejudiced by the erroneous instruction.**

When analyzing the third prong of the plain error analysis, "Appellant has the burden of showing that the error had an unfair prejudicial impact on the members' deliberations." *Haverty*, 2017 CAAF LEXIS 298, at *21–22 (citing *Knapp*, 73 M.J. at 37. This prong was met in *Haverty*, and it is met in this case.

Most notably, SPC Robinson testified regarding his perspective of attending the party: the party's host invited him, was not one of his Soldiers, and they did not have a supervisory relationship. (JA 192). Specialist Robinson further explained that none of the Soldiers at the party were his Soldiers or members of his platoon, but they were his "friends." (JA 192–93, 224).

Additionally, the trial counsel expressly conceded that none of the party's guests thought SPC Robinson's attendance at the party created any issues, and "they all testified that they're friends of his." (JA 261). The trial counsel also conceded "many of these people were not in the same unit at the time," but asked the panel members to use their "knowledge of the military" to "consider the fact that Soldiers move from installation to installation, from unit to unit, from platoon to platoon, all the time." (JA 262). The defense counsel thoroughly dispatched

each of the government's arguments and specifically pointed out "there is no testimony that any of those Soldiers were going to move under his authority at any time *or that he believed that they would be his Soldiers at any time*." (JA 272) (emphasis added). Under the particular circumstances of this case, the military judge's erroneous instructions had an unfair prejudicial impact on the members' deliberations.

III.

WHETHER THE EVIDENCE WAS LEGALLY SUFFICIENT TO ESTABLISH THAT APPELLANT KNEW OR REASONABLY SHOULD HAVE KNOWN THAT SPC VM WAS TOO INTOXICATED TO CONSENT TO A SEXUAL ACT.

**Statement of Facts**

Appellant incorporates the Statement of Facts from the first issue presented, but includes the following additional facts necessary for disposition of this issue.

Testimony of Witnesses at the Party

During trial, multiple witnesses testified about SPC VM's level of intoxication at the party.

First, Mr. Isaiah Rodriguez – the host of the party – testified he had previously seen SPC VM intoxicated, but he did not think she was intoxicated when she arrived at the party. (JA 94). Mr. Rodriguez also testified about seeing SPC VM leave the party: he saw her come down the stairs at a fast pace, go straight to her car, and drive

away. (JA 96–97). He did not see SPC VM stumble, fall, or drop her keys when leaving the party, and he actually thought she was "more angry than intoxicated" and "visibly upset" because his intoxicated brother "invad[ed] her space." (JA 96–97).

Specialist William Bready testified SPC VM seemed "normal" when she arrived, and he "couldn't really tell you" if she appeared to be intoxicated during the party. (JA 106). The trial counsel sought to impeach him with a prior statement to CID, and he said, "I couldn't really tell you the BA—that [SPC VM] was completely intoxicated and everything else because I did not see her ingest any alcohol or anything else that night." (JA 108). Specialist Bready added, "I seen her stumble, I guess, a little bit, but that's – I really wasn't around her." (JA 108). Like Mr. Rodriguez, SPC Bready saw SPC VM "running down the stairs and jumping in her car and speeding off down the road" (JA 109), and he did not see her stumble while running down the stairs to her car. (JA 114–15).

Specialist Clay Adams testified SPC VM was "loud" and "I think one time she stumbled." (JA 121–22). During his testimony, SPC Adams also said SPC VM "really drunk," but later clarified "she wasn't really drunk." (JA 122, 124). He explained she was talking to people, remained in full control of her body, knew what she was doing, and was able to make decisions. (JA 124).

Mr. Chailee Natal testified SPC VM "was tipsy towards the end" of the party because she was "screaming at one of our friends." (JA 135). When the trial

counsel asked if she had "difficulty with her motor skills," Mr. Natal responded, "No, [SPC VM] was just screaming. She was horseplaying with [Rodriguez]." (JA 135). During this horseplay, "Rodriguez put her behind the screen door and she fell when he pushed the door." (JA 135). Like other witnesses, Mr. Natal said SPC VM had control of her body, was interacting with people at the party, ran down the stairs without stumbling or falling, and then drove away in her car. (JA 139–41).

Specialist Daniel Larson said SPC VM was being "drunk, loud, dancing and being obnoxious." (JA 148). He thought her level of intoxication was "a seven or eight," but admitted he didn't know her very well and had limited memories of that night. (JA 147–50). In fact, when asked, "[Y]ou're not really sure how drunk she was," he responded, "I don't really remember that night." (JA 150).

Specialist VM's testimony

At trial, SPC VM testified she briefly spoke to SPC Robinson at the party, and "was sitting on the arm of the chair and he was up against the wall." (JA 41). While she initially felt "relaxed" at the party, she later became "really dizzy" due to her alcohol consumption. (JA 42–43). When leaving the party after becoming "uncomfortable" due to Mr. Rodriguez's brother being "a little too close for comfort," SPC VM said she was "trying to walk," "kind of stutter stepping," "swaying from side-to-side just a little," and "stumbling a bit." (JA 43).

Specialist VM testified she did not remember her drive home. (JA 46–48). More specifically, while SPC VM testified her drive home was around ten minutes (JA 36, 60), she remembered "not much of it, probably the first two minutes." (JA 45–46). Specialist VM later elaborated, "I just remember leaving the carport, stopping at a stop sign and then the swaying [in the lane]." (JA 46). Despite SPC VM only remembering "a stop sign," her drive home included navigating *multiple* stop signs, stop lights, speed bumps, and a parking lot with "concrete blockages." (JA 60–62). Upon arriving home, SPC VM made it up to the top floor of her building by climbing three flights of stairs. (JA 63).

In her barracks room, SPC VM "threw up in the kitchen sink," cleaned up the sink, moved a trash can from her closet to near her bed, took her clothes and shoes off, and got into bed. (JA 47–49, 64–65). SPC Robinson was not in the room when she threw up in the sink and cleaned it up. (JA 72–73). Specialist VM did not drink any further alcohol in this timeframe (JA 72), and her next memory after lying down and going to sleep was "[SPC] Robinson on top of me" and "inside of me." (JA 51).[2] Shortly afterwards, SPC VM thought she "blacked out because the next thing I remember was I was still seeing him over the top of me

[2] The government told the military judge, "The government has not and will not argue that Specialist Robinson began having sex with [SPC VM] while she was asleep" and "The government does not plan to argue and will not argue that she was asleep at the time the accused committed the offense." (JA 184–85).

but I felt like I had to throw up again." (JA 53). Her next memory was waking up "around noonish." (JA 53).

During cross-examination, SPC VM said she did not remember opening her covers, inviting SPC Robinson into her bed, putting her arms around his neck, pulling off his shirt, pulling him down onto her bed, biting his shoulder, or scratching his back during sex. (JA 67–68). However, based on her lack of memory, SPC VM admitted each of these things "could have happened." (JA 68). Specialist VM also agreed it was "possible" she consented to having sex with SPC Robinson that night. (JA 68).

Specialist Robinson's testimony

As outlined in the first issue presented, SPC Robinson testified SPC VM "politely flirt[ed]" with him at the party. (JA 194–95). During their conversation, "she did not slur her words" and then "went about her business around the rest of the party having fun and laughing and joking with everyone else." (JA 196). In assessing her level of intoxication at the party, SPC Robinson told CID he thought she was a "seven" on a scale of 1 to 10. (JA 234). Specialist Robinson did not see SPC VM fall through a door during her horseplay with another Soldier, but he did see her run down the stairs to her car without stumbling or falling. (JA 195–96). He thought she was "angry" when she left the party, as she was "yelling at the top of the stairs beforehand with Rodriguez' brother." (JA 197–98).

Specialist VM was still awake when SPC Robinson arrived at her room later that night, and he did not notice any vomit or odors. (JA 203–04). When he started to leave, SPC Robinson said VM reached up, grabbed his wrist, pulled him towards her, and asked him to stay. (JA 205). She was naked under her blanket, wrapped her arms around his neck, they began kissing, she pulled his shirt over his head, and grabbed at his belt. (JA 206–07). As mentioned previously, they had sexual intercourse multiple times in multiple positions, and SPC VM remained actively engaged in the sexual activity. (JA 207–12, 214). Based on his overall observations, SPC Robinson did not believe SPC VM was too drunk to consent, and he extensively and repeatedly clarified the meaning of his potentially contradictory statement to CID. (JA 216, 219–20, 233–37).

**Law and Standard of Review**

This court reviews questions of legal sufficiency de novo. *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009) (citing *United States v. Chatfield*, 67 M.J. 432, 441 (C.A.A.F. 2009)).

"[I]n reviewing for legal sufficiency of the evidence, the relevant question an appellate court must answer 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. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting *Jackson v. Virginia*, 443 U.S. 307,

319, (1979)). "Further, in resolving questions of legal sufficiency, [appellate courts] are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted).

As outlined by the military judge, the relevant specification for the issue presented contains two elements:

> One, that on or about 27 July 2013, at or near Fort Stewart, Georgia, the accused committed a sexual act upon [SPC VM], to wit: penetrated the vulva of [SPC VM] with his penis; and
>
> Two , that at the time -- that the accused did so when [SPC VM] was incapable of consenting to the sexual act due to impairment by an intoxicant, or other similar substance, and that condition was known or reasonably should have been known by the accused.

(JA 244).

**Argument**

The evidence for this charge is legally insufficient, as the government did not prove SPC Robinson knew or reasonably should have known that SPC VM was too intoxicated to consent to a sexual act.

First, the overall testimony presents a clear picture of SPC VM's apparent level of intoxication when leaving the party. Numerous witnesses – including SPC Robinson – testified that SPC VM got into an argument with Rodriguez's brother, ran down the stairs to her car without stumbling or falling, and then drove away.

(JA 96–97, 109, 114–15, 139–41, 195–98). Several witnesses also testified SPC VM remained in control of her movements, was talking and interacting with other guests, and was able to make decisions. (JA 124, 135, 139–40, 196). While one witness said he saw SPC VM "stumble, I guess, a little bit," at some point during the party, he also said "I wasn't really around her." (JA 108).[3] There is also no evidence that SPC Robinson witnessed when "Rodriguez put [SPC VM] behind the screen door and she fell when he pushed the door." (JA 135, 196).[4]

Essentially, even though SPC VM may have perceived herself as "trying to walk," "kind of stutter stepping," "swaying from side-to-side just a little," and "stumbling a bit" when leaving the party, this was not the impression of anyone else. (JA 43). Put another way, the record presents a chasm between SPC VM's perception of her own movements in leaving the party and the perception of everyone else watching these same movements.

Second, due to her lack of memory, SPC VM admitted certain actions that led SPC Robinson to believe she was capable of consenting to sexual activity "could have happened." (JA 68). This is a critical admission, particularly in light

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[3] There is a line of testimony that SPC Robinson told CID that he saw SPC VM stumble "up" the stairs at some point, but there is no indication of exactly when or how this occurred. (JA 232).

[4] During his testimony, SPC Adams said SPC VM "really drunk" (JA 122), but then clarified "she wasn't really drunk," was talking to people, remained in control of her movements, knew what she was doing, and was able to make decisions. (JA 124).

of her lack of memory of driving home. The record demonstrates that SPC VM successfully drove from the party to her barracks, but she remembered "not much of it, probably the first two minutes." (JA 45–46). This means SPC VM committed a variety of actions that night – namely, navigating through multiple stop signs, stop lights, speed bumps, and a parking lot containing "concrete blockages" – that she just does not remember. (JA 60–62).

Put simply, regarding several events in SPC VM's room, SPC Robinson testified they happened, and SPC VM testified they "could have happened." (JA 67–68, 205–08). In light of this testimony, the government did not prove SPC Robinson knew or reasonably should have known that SPC VM was too intoxicated to consent to a sexual act.[5] To that extent, Specialist VM further agreed it was "possible" she consented to having sex with SPC Robinson that night, and SPC Robinson was not in her room when she threw up in the sink and cleaned it up. (JA 68, 72–73).

Third, the defense presented expert testimony from Major (MAJ) Earl Smith, an "expert in Forensic Psychiatry with a focus in the effects of alcohol on the brain." (JA 167). In discussing the physical signs of someone "blacked out,"

[5] As noted above, the government told the military judge, "The government has not and will not argue that Specialist Robinson began having sex with [SPC VM] while she was asleep" and "The government does not plan to argue and will not argue that she was asleep at the time the accused committed the offense." (JA 184–85).

MAJ Smith testified, "[T]hey can walk, they can talk, they could drive a car, although I wouldn't want to be on the road with them, but they could certainly function." (JA 170). He also testified, "[I]t might even be difficult for a trained psychiatrist to detect if somebody is blacked out" and you would "usually" find out "the next day." (JA 170). Major Smith also explained someone who ran down a flight of stairs and drove their car home was not passed out, and moving abruptly to a pass out stage would "require them – depending on what alcohol level they started at, it would probably require them to drink 16 to 20 drinks in an instant." (JA 173-74).

In sum, every neutral witness shared SPC Robinson's perception of SPC VM's coordination when leaving the party, SPC VM herself agreed that multiple actions in her barracks room indicating her ability to consent "could have happened," and the defense presented expert witness testimony supporting an inference that SPC VM may have experienced a blackout.

In conclusion, even viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of this offense to be proven beyond a reasonable doubt: the government did not prove SPC Robinson knew or reasonably should have known that SPC VM was too intoxicated to consent to a sexual act.

**Conclusion**

Wherefore, SPC Robinson requests this Honorable Court set aside and dismiss The Specification of Charge I and The Specification of Charge II.


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1. This brief complies with the type-volume limitation of Rules 24(c) because it contains 10,849 words.

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing in the case of *United States v. Robinson*, Crim. App. Dkt. No. 20140785, USCA Dkt. No. 17-0231/AR, was delivered to the Court and Government Appellate Division on May 12, 2017.

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