IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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Statement of the Case

On March 28, 2017, this Court granted appellant's petition for review. On May 12, 2017, appellant filed his final brief with this Court. The government responded on June 12, 2017. This is appellant's reply.

I.

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

The government first contends the military judge did not abuse his discretion by excluding the evidence of prior flirting and sexual conversations because SPC Robinson purportedly "failed to articulate a theory that showed the evidence was relevant, material, and . . . more probative than the dangers of unfair prejudice." (Gov't. Br. 14). This is incorrect. During trial, the defense consistently explained this evidence was necessary to substantiate his "mistake of fact" defense.

Next, in arguing the error was harmless beyond a reasonable doubt, the government claims this evidence was "not important," "irrelevant," and even "cumulative." (Gov't. Br. 17). Again, this is incorrect. At a minimum, this evidence was necessary to demonstrate why appellant's mistake of fact was both "honest" and "reasonable." In fact, the government has twice exploited the absence of this evidence by arguing appellant's testimony during trial was "unreasonable" and "unbelievable." (JA 291; Gov't. Br. 17).

a. In claiming the military judge did not abuse his discretion, the government makes a series of arguments that are either incorrect or inaccurate.

The government argues SPC Robinson "failed to articulate a theory that showed the evidence was relevant, material, and that the evidence was more probative than the dangers of unfair prejudice." (Gov't. Br. 14). Each of these arguments lacks merit, especially since the military judge's ruling was rooted in a separate – yet equally erroneous – conclusion.

In his oral ruling over the defense's supplemental motion under Mil. R. Evid. 412(b)(1)(C), the military judge concluded the evidence "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." (Sealed JA 45). This ruling failed to account for the importance of how the prior flirting and sexual conversations would affect SPC Robinson's perceptions about the sexual encounter. Put another way, this evidence was critical towards explaining why it was reasonable for SPC Robinson to believe that SPC VM's behavior did not indicate she was incapable of consent, but instead represented SPC VM acting on a desire she had expressed, repeatedly, for months. (*See also* Appellant Br. 16–19*).*

In its brief, the government does not squarely address or analyze the military judge's rationale for this issue. Instead, the government substitutes three different arguments for why his ruling was not erroneous. As outlined below, each of these arguments is either incorrect or inaccurate.

First, the government asserts the excluded evidence was not relevant to a mistake of fact defense for several reasons, including that it "lacked specificity." (Gov't. Br. 14–15). This is a remarkable assertion, particularly in light of the factual findings of the military judge. In his written ruling for a separate motion, the military judge found the evidence of flirting included "[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) (emphasis added). The military judge further found, "[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*." (Sealed JA 93) (emphasis added). Such evidence is clearly relevant to a mistake of fact defense. The defense even explained the absence of this evidence would "really [hamstring] our case," as a mistake of fact "must be reasonable." (Sealed JA 17–18).

Second, the government argues this evidence was "not material," since the defense "wanted to illustrate a prior existing relationship to provide context to the panel, and defense was able to do so." (Gov't. Br. 15). This misses the point. The defense did not want to illustrate "*a* prior existing relationship," but instead wanted to illustrate "*the* prior existing relationship," which included months of flirting and numerous conversations about having sex with each other. This was the "context" the defense needed to present, and they were not allowed to do so.

To that extent, a panel member even submitted a question to seek such contextual information: "From what you know of SPC [VM], did she ever display interest towards SPC Robinson?" (JA 305). The trial counsel objected, and the military judge told the panel member "that question is prohibited by the Rules of Evidence." (JA 100, 305). The panel was further denied this type of contextual information when the military judge sustained similar objections to testimony from Mr. Natal and SPC Robinson over the prior incidents of flirting and conversations about having sex with each other. (JA 138–39, 215–16).

The weakness of the government's argument is best demonstrated by its purported proof: the government merely cites that the defense was able to ask whether SPC Robinson and SPC VM were friends, whether he knew where she lived, and whether she referred to him by his first name. (Gov't. Br. 14). Such evidence is clearly insufficient towards providing the proper "context" for their relationship, particularly regarding a mistake of fact defense. Again, the panel needed to understand why it was reasonable for SPC Robinson to believe that SPC VM's actions – which included pulling him into bed, kissing him, and taking off his clothes – were indicative of consent rather than excessive intoxication.

Third, the government alleges "the minimal probative value [of this evidence] is outweighed by the dangers of unfair prejudice" and "the probative value of evidence supporting such a theory is low." (Gov't. Br. 16). To the

contrary, this evidence was highly probative, and the government did not attempt to explain why this evidence was unfairly prejudicial. (Gov't. Br. 16).

In sum, the military judge abused his discretion by excluding the evidence of prior flirting and sexual conversations between SPC Robinson and SPC VM, as this evidence was properly admissible under Mil. R. Evid. 412(b)(1)(C).

b. The military judge's error was not harmless beyond a reasonable doubt.

Despite the government's contentions, the military judge's error in excluding this evidence was not harmless beyond a reasonable doubt. (*See* Gov't. Br. 16–18). Appellant has two responses to the government's brief.

First, appellant disputes the government's assessment of the *Van Arsdall* factors. (*See* Appellant Br. 19–21). For example, the government declares the excluded evidence was "not important," "irrelevant," and even "cumulative to appellant's testimony that SPC VM flirted with him at the party." (Gov't. Br. 17). Each of these claims is either inaccurate or unsupported by the record. Notably, despite claiming the excluded evidence would be "cumulative" to the evidence from the party (Gov't. Br. 17), the government acknowledged that SPC VM and SPC Robinson spoke at the party "for only about five minutes." (Gov't. Br. 4).

Second, while not expressly addressed by the government's brief, appellant reasserts his argument that he was deprived of his ability to present a defense. (*See* Appellant Br. 16, 21) (quoting *United States v. Buenaventura*, 45 M.J. 72 (C.M.A.

1996)). Plain and simple, by excluding the evidence of prior flirting and sexual conversations, the military judge restricted appellant's ability to present evidence showing his mistake of fact was honest and reasonable.

In conclusion, the military judge abused his discretion by excluding the evidence of prior flirting and sexual conversations between SPC Robinson and SPC VM, and this error 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.

Appellant reiterates his prior analysis for this assignment of error (Appellant Br. 22–37), but provides three responses to the government's brief. As outlined below, the government ignores its own position during trial, fails to distinguish this offense from *Haverty*, and erroneously claims the panel instructions mandated consideration of SPC Robinson's *mens rea*.

a. In its analysis, the government ignores its own position during trial.

In its brief, the government repeatedly asserts a theory of liability for this offense involving SPC Robinson going to SPC VM's barracks room. (Gov't. Br. 20, 29). For example, in discussing prejudice, the government argues "even by the defense's theory at trial," this visit to SPC VM's room "led to appellant having

sexual intercourse with a junior soldier. Therefore, the evidence clearly proved that appellant purposely engaged in an inappropriate course of conduct directed toward junior soldiers." (Gov't Br. 29). What the government fails to note is that such a theory of liability was previously disavowed by the trial counsel.

Prior to trial, the defense filed a "Motion for Appropriate Relief – Bill of Particulars." (App. Ex. I). Part of this motion requested the government provide a bill of particulars for "the alleged act or acts that constitute fraternization." (App. Ex. I). The trial counsel provided a written response stating, "On the evening in question, the Government alleges that the Accused attended an off-duty party at the home of a junior Soldier . . . [a]t that party, the Accused socialized with junior Soldiers who were consuming alcohol." (App. Ex. IV). The trial counsel did not allege a theory of fraternization beyond the limited scope of the party, and the government cannot attempt to vitiate prejudice for this assignment of error by providing an alternate theory of liability on appeal.

b. As in *Haverty*, general intent is not a sufficient level of *mens rea* for this offense.

The government asks this Court to "infer" a general intent *mens rea* from the regulation. (Gov't. Br. 25). However, in *Haverty*, this Court reiterated that offenses that are silent as to *mens rea* 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.'" 76 M.J. 199, 204 (C.A.A.F. 2017) (quoting *Elonis v. United States*, 135 S. Ct. 2001, 2009–10 (2015)) (emphasis added).

For this offense, as in *Haverty*, a general intent *mens rea* is insufficient to separate wrongful from otherwise innocent conduct. Put simply, applying such a *mens rea* to this regulation could cause conduct that is "perfectly innocent in a legal context . . . to be treated as *unlawful* conduct under Article 92, UCMJ." *Id*. at 207 (emphasis in original). In this very case, the offense involved SPC Robinson being invited to a party by his friend, accepting the invitation, and none of the other guests were his subordinates or thought there were any issues with his attendance. One of the guests even testified it was "a normal typical Friday" where everyone was "drinking, playing dominoes, and just having fun and talking." (JA 134). None of this conduct is inherently criminal.

While the government continually cites *Caldwell*, such a comparison remains inapt. First and foremost, in *Caldwell*, this Court found "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. 276, 281 (C.A.A.F. 2016). Essentially, there is no scenario in which the behavior criminalized by Article 93, UCMJ, can be innocent. By contrast, such a scenario for fraternization exists in this very case. Second, unlike *Caldwell* and Article 93, UCMJ, this offense of fraternization does not explicitly encapsulate the "superior-

subordinate" relationship.[1] In this case, SPC Robinson did not have a supervisory relationship over any of the other Soldiers at the party, yet stands convicted of fraternization. (JA 192). Ultimately, while both of these points were critical in *Caldwell* – that such conduct could never be innocent and involved the "unique and long-recognized importance of the superior-subordinate relationship" – they did not apply to the hazing offense in *Haverty*, nor do they apply to the fraternization offense in this case.

c. Contrary to the government's position, the panel instructions for this offense did not mandate any consideration of SPC Robinson's *mens rea*.

Even assuming this Court finds that a general intent *mens rea* is sufficient for this offense, the panel instructions did not require any consideration of scienter. As the government itself states, the instructions allowed the panel to "*objectively determine* that appellant's conduct" violated the regulation. (Gov't. Br. 25) (emphasis added).

The government later attempts to argue the single and undefined word of "wrongfully" served to "[alert] the panel to consider appellant's state of mind." (Gov't. Br. 28). It did no such thing. Panel members are presumed to follow the instructions given by the military judge. *United States v. Custis*, 65 M.J. 366, 372

[1] In *Haverty*, this Court further distinguished *Caldwell* from offenses under Article 92, UCMJ, by noting *Caldwell* "involved a military offense that was specifically created by Congress and prohibited under its own separate article." 76 M.J. at 205 n.10.

(C.A.A.F. 2007). The Supreme Court has held the effect of an instruction is determined by how a "reasonable juror" could have interpreted it, not by an appellate court's interpretation of its legal import. *Sandstrom v. Montana*, 442 U.S. 510, 514, 517 (1979). No "reasonable juror" would have concluded the instructions mandated consideration of SPC Robinson's *mens rea*. Instead, any "reasonable juror" would have accepted the trial counsel's invitation to objectively determine whether they believed the offense was committed, without giving any consideration to whether the necessary scienter was satisfied. (JA 262–63).

This is again distinguishable from *Caldwell*, where this Court found the panel instructions for maltreatment provided "proper emphasis on general intent." 75 M.J. at 283. More specifically, this Court concluded these instructions "made clear that the panel members were required to consider . . . whether Appellant possessed the requisite general intent *mens rea*."[2] *Id*.

[2] The government also fails to appreciate how this Court's decisions following *Elonis* have discerned whether scienter is present in jurisprudence and instructions. Because communicating a threat in violation of Article 134 has long required a subjective intent (such as not being spoken in jest), the Court found *Elonis* did not apply. *United States v. Rapert*, 75 M.J. 164, 169 (C.A.A.F. 2016). Similarly, in *Caldwell*, the Court noted the knowledge requirements inherent in the Article 93 instructions. In contrast, Article 92(1) offenses, such as those charged in *Haverty* and *Gifford*, and in this case, have never been understood to require knowledge of the order, and often do not address malum in se conduct. *See, e.g., United States v. Leverette*, 9 M.J. 627, 631 (A.C.M.R. 1980) (upholding an Article 92(1) violation of a local installation's firearms regulation without actual knowledge).

In sum, as in *Gifford* and *Haverty*, this offense necessitates a *mens rea* of at least recklessness. However, even if this Court finds a general intent *mens rea* is sufficient, the instructions did not mandate any consideration of *mens rea*. Under either scenario, the instructions for this offense constitute plain error.

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.

In its analysis of the sufficiency of the evidence, the government overstates SPC VM's apparent level of intoxication at the party, understates the importance of her gaps in memory, and largely ignores her critical admission that a variety of physical actions indicative of active and enthusiastic consent with SPC Robinson "could have happened." (Gov't. Br. 32–35).

First, and as outlined in appellant's initial brief, the evidence presents a clear picture of SPC VM's apparent level of intoxication to other guests at the party. (Appellant Br. 37–39, 41, 43–44). In testifying about her actions during the party, multiple witnesses explained SPC VM remained in control of her movements, was talking and interacting with other guests, and was able to make her own decisions. (Appellant Br. 37–39, 41, 44). Then, in describing how SPC VM left the party, numerous witnesses testified she got into an argument, ran down the stairs without

stumbling or falling, and then drove away. (Appellant Br. 37–39, 41, 43–44).

While the government cites to excerpts of testimony from certain guests, each of these guests provided additional or clarifying testimony. (Gov't. Br. 33–34). For example, the government cites SPC Larson's testimony that SPC VM's intoxication was a "seven or eight" (Gov't. Br. 33), but he also testified he didn't know her that well and had limited memories of that night. (JA 147, 150). Most strikingly, when asked, "[Y]ou're not really sure how drunk she was," SPC Larson responded, "I don't really remember that night." (JA 150).

Similarly, the government cites Mr. Natal's testimony that SPC VM was "tipsy" and "a little sloppy." (Gov't. Br. 34). However, he thought she was tipsy because she was "screaming at one of our friends" and being "loud." (JA 135). Mr. Natal further clarified SPC VM did not have any difficulty with her motor skills, was interacting with other people, and she ran down the stairs to her car without any issues. (JA 135, 139–41). Furthermore, while Mr. Natal did see SPC VM fall down that night, he specifically testified it was not due to intoxication. (JA 141). Instead, this incident occurred when "she was horseplaying with Specialist Rodriguez," who "pushed the screen door and she fell." (JA 141).

The testimony of the three other guests excerpted by the government contains similar additions and clarifications. (Gov't. Br. 33–34). First, SPC Bready testified he "couldn't really tell you" if SPC VM appeared to be

intoxicated, stated he "really wasn't around her," and he did not see SPC VM stumble when she ran down the stairs to her car. (JA 106, 108, 114–15). Second, SPC Adams explicitly testified "[SPC VM] wasn't really drunk," and he also said she was talking to people, remained in control of her body, and was able to make her own decisions. (JA 124). Lastly, Mr. Rodriguez testified he was with SPC VM for most of the party, but did not think she was intoxicated. (JA 94–95). In fact, he thought she was more "angry than intoxicated" due to his brother's conduct. (JA 95–97).[3]

The government also points to testimony from SPC VM that she struggled to walk. (Gov't. Br. 32). However, as outlined in appellant's initial brief, the record presents a chasm between SPC VM's perception of her own movements and the perception of other people viewing her movements. (Appellant. Br. 43–44). Essentially, while SPC VM may have felt like she was struggling to walk during the party, this was not the impression of anyone else.

Second, the government understates the importance of SPC VM's critical gaps in memory. (Gov't. Br. 32). After briefly acknowledging these memory gaps, the government then concludes "Specialist VM lacked the physical and mental ability to make and communicate a decision about sexual conduct." (Gov't. Br. 32). But such a conclusion skips past the central importance of SPC VM's

[3] The government also cites to portions SPC Robinson's statement to CID, which he explained and clarified on multiple occasions. (JA 219–20, 234–37).

memory gaps: based on the record, she committed a series of complex actions that night – such as navigating her car through multiple stop signs, stop lights, speed bumps, and a parking lot containing "concrete blockages" – that she simply does not remember. (JA 45–46, 60–62). If SPC VM had the "physical and mental ability" to drive her car home (which she did but does not fully remember), then she similarly could have performed each of the physical actions described by SPC Robinson. Which is exactly what she testified.

To that extent, SPC Robinson testified that SPC VM performed a variety of actions indicative of active and enthusiastic consent from a willing and capable partner, and SPM VM agreed each of these actions "could have happened." (JA 67–68, 205–08). The government fails to address or account for the importance of this admission, and SPC VM also agreed it was "possible" she consented to having sex with SPC Robinson. (JA 68).

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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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 June 22, 2017.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rules 24(c) because it contains 3,495 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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