IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*	**BRIEF ON BEHALF OF APPELLEE**
v.	Crim. App. Dkt. No. 20140785
Specialist (E-4) TORRENCE A. ROBINSON United States Army, *Appellant*	USCA Dkt. No. 17-0231/AR

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

Statement of the Case

A panel composed of officers and enlisted members, sitting as a general court-martial, convicted appellant, contrary to his pleas, of one specification of a violation of a lawful general regulation and one specification of sexual assault in violation of Articles 92 and 120, UCMJ. (JA 292). The panel sentenced appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, and to be discharged from the service with a bad-conduct discharge. (JA 293). The convening authority approved the sentence as adjudged and credited appellant with one day of confinement against the sentence to one day of total forfeiture of pay. (JA 3-4).

On December 14, 2016, the Army Court affirmed the findings and sentence. (JA 1). On March 2, 2017, the Supplement to the Petition for Grant of Review was filed, and on March 28, 2017, this Court granted appellant's petition for review.

Statement of Facts

On the evening of July 26 or 27, 2013, SPC VM was playing pool with Mr. Isaiah Rodriguez (then specialist) and another friend in the dayroom of the barracks. (JA 34-35, 93). During this time, SPC VM had a bottle of vodka and lemonade that she was mixing and drinking. (JA 35). Specialist VM played pool and drank for one and a half to two hours until approximately 2100 or 2200. (JA 35). Although SPC VM only recalled having one drink while she was playing pool, the soldier on duty, SPC Casey Martin, observed SPC VM acting rowdy, slurring her words, and drinking directly out of the bottle of vodka. (JA 155, 158).

Afterwards, Mr. Rodriguez had a party at his apartment, which SPC VM attended. (JA 36). Specialist VM drove to Mr. Rodriguez's apartment, which was about ten minutes away. (JA 36). Prior to leaving, SPC VM left her barracks door unlocked so that SPC Breaunna Marshall could use the vacant spare bed in the room if needed. (JA 36).

When SPC VM arrived at Mr. Rodriguez's apartment, there were multiple people already there, including appellant. (JA 37-38). Mr. Rodriguez and SPC William Bready testified that SPC VM did not arrive at the party until around midnight. (JA 86, 106). Specialist VM brought the bottle of vodka and lemonade with her to the party and continued drinking. (JA 38-39). Throughout the night, SPC VM drank out of a regular-sized "solo cup." (JA 38). She drank about five or

six full cups of vodka mixed with lemonade. (JA 40). Specialist VM made each mixed drink and filled each cup about halfway with vodka. (JA 40). She poured only "a little bit more pink lemonade than vodka." (JA 40).

During the party, SPC VM spoke to appellant for only about five minutes. (JA 41). SPC Bready testified that SPC VM appeared intoxicated and stumbled around. (JA 108). Specialist Clay Adams testified that SPC VM slurred her words and stumbled. (JA 122). He believed SPC VM was "really drunk" at the party. (JA 122). Another soldier at the party, Mr. Chailee Natal (then Specialist), saw SPC VM drinking at the party and described her as "tipsy" and "sloppy." (JA 135). Specialist Damon Larson also attended the party and described SPC VM's behavior as "drunk, loud, dancing, and being obnoxious." (JA 148). Specialist Larson believed SPC VM's level of intoxication was a seven or eight on a ten-point scale, with ten being extremely drunk. (JA 149).

Specialist VM left the party because she felt uncomfortable due to an interaction with Mr. Rodriguez's brother, she realized she was the only female at the party, and she felt dizzy from the alcohol. (JA 42-43). Specialist VM walked out of the apartment and down the stairs that were outside of the apartment and stumbled to her car. (JA 43, 44). Appellant and a few other people were outside the apartment smoking cigarettes during this time and they saw SPC VM stumble. (JA 44). A couple of people attempted to stop SPC VM from leaving the party.

(JA 44-45). As SPC VM left, appellant saw her almost drive into a stop sign. (JA 232).

Specialist VM testified that she left the party and drove to her barracks around 0100. (JA 45). Mr. Rodriguez and Mr. Natal testified that SPC VM only stayed at the party for about two hours. (JA 89, 134). Specialist Bready testified that SPC VM left at approximately 0300 or 0400. (JA 109). As she drove, SPC VM felt highly intoxicated and swerved between the lanes. (JA 45). When Mr. Rodriguez saw SPC VM drive away, he took his brother's car and followed her because he was worried she was too drunk to drive. (JA 91). Mr. Rodriguez's brother and SPC Adams went with Mr. Rodriguez and found SPC VM's car parked in front of her barracks. (JA 91-92, 123).

When Mr. Rodriguez, his brother, and SPC Adams returned to the party, they told Mr. Natal and appellant that SPC VM made it back to her barracks safely. (JA 136). Appellant left Mr. Rodriguez's apartment about half an hour to an hour after Mr. Rodriguez returned. (JA 92). Before he left, appellant told SPC Bready that he was going to check on SPC VM. (JA 112). Appellant went to his house and told his wife that he was going to check on a drunk soldier. (JA 226).

As SPC VM entered her barracks room she "was feeling really dizzy and lightheaded" and she vomited in the kitchen sink twice. (JA 47). She hastily washed off the sink. (JA 48). At this point, SPC VM felt hot, dizzy, and

disgusted. (JA 48). She took off all of her clothes, put a trash can next to her bed, and lay down. (JA 48-49). Specialist VM does not recall if she locked her barracks room door or left it open for SPC Marshall, but her lock did not engage automatically because it did not function properly. (JA 50).

Specialist VM's next memory was appellant on top of her, penetrating her vagina with his penis. (JA 51). Specialist VM felt "extremely dizzy" and "confused." (JA 51). She was lying on her back, she felt sick, and she turned to her right toward the trash can. (JA 53). Specialist VM did not recall anything else about the sexual assault. (JA 53, 70). Her next memory is when she woke up around 1200. (JA 53).

Specialist VM went to SPC Marshall's house and told her about the sexual assault. (JA 55). About seven days after the sexual assault, an agent with the Criminal Investigation Command (CID) interviewed appellant. (JA 217). During the interview, appellant admitted to the CID agent that SPC VM was too drunk to consent to sexual intercourse. (JA 219).

Summary of the Argument

First, the military judge did not abuse his discretion in denying defense's motion under Military Rule of Evidence [hereinafter Mil. R. Evid.] 412(b)(1)(C) because the defense failed to articulate how prior flirting was relevant and material to mistake of fact as to consent when the offense was charged as incapable of

consenting due to intoxication. Even if the military judge erred, the error was harmless. Second, the military judge's failure to provide express instruction regarding general intent was harmless because he adequately flagged the issue for the panel and the appellant was not prejudiced. Finally, The Specification of Charge II is legally sufficient in light of SPC VM's testimony and observations of other party attendees regarding her level of intoxication.

Issue Presented I

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

Additional Facts

The defense made a pretrial motion to admit evidence under Mil. R. Evid. 412(b)(1)(B). (Sealed JA 62-87). The government responded to the defense motion, and the military judge conducted a closed hearing on 8 August 2014. (Sealed JA 2-21; 88-95). During the hearing, defense counsel argued that even if ongoing flirtatious behavior was not a Mil. R. Evid. 412(b)(1)(B) exception, it still fell under Mil. R. Evid. 412(b)(1)(C). (Sealed JA 6). Defense counsel proffered a mistake of fact as to consent theory. (Sealed JA 6). The military judge made a written ruling based on the evidence presented that included the following findings of fact:

Several witnesses testified at the Article 32 hearing that they had seen [SPC VM] flirting with [appellant] prior to the incident on 27 July 2013. These witnesses are as follows:

a. SPC William Bready testified that he had seen [SPC VM] showing affection, smiling, flirting, and trying to grab [appellant] on multiple occasions for about four months leading up to the incident. He testified that it was obvious by the way [SPC VM] looked at [appellant] that she was interested in him.

. . . .

b. SPC Chailee Natal testified at the Article 32 hearing that he thought [SPC VM] was "trying to get with" [appellant] and that he could tell she wanted him because of the way she was acting. It was not clear from the Article 32 audio if this was said at the party on 26-27 July 2013 or on another occasion.

. . . .

c. SPC Natal further testified at the party that occurred on or about 26-27 July 2013, the evening before the alleged incident, that he saw [SPC VM] and the accused hugging. That night it looked like she was trying to get with him.

d. SPC Breaunna Marshall, a friend of [SPC VM's], also testified at the Article 32 hearing that [SPC VM] constantly flirted with appellant at work and hugged him on multiple occasions prior to 27 July 2013. SPC Marshall testified that [appellant] was interested in [SPC VM] but [SPC VM] was also interested in him.

. . . . In [appellant's] statement to CID, as indicated in the AIR, [appellant] related that the sex between him and [SPC VM] was consensual. He stated that she 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 92-93). The military judge made the following conclusions of law,

> 2. The following evidence is admissible: Evidence, as described by SPC Natal, that at the party he saw them hugging; evidence of that night it appeared to him (SPC Natal) that she was trying "to get with appellant;" and any other evidence of flirtatious behavior that occurred between [SPC VM] and the accused at the party on 26-27 July 2013.
>
> 3. The following evidence is not admissible: The defense has failed to establish by preponderance of the evidence that the following evidence is admissible under MRE 412(b)(1)(B): Evidence of flirting, hugging, etc. from other witnesses (SPC Bready and SPC Marshall). Additionally, discussions between the accused and [SPC VM] that they talked about having sex on numerous occasions is inadmissible unless those discussions can be linked to the morning of the alleged incident. None of the evidence presented relates to specific instances of sexual behavior relevant to prove consent of [SPC VM] on 27 July 2013.
>
> 4. Other than a summarized statement in the Agent's Investigation Report (AIR), the Defense presented no evidence linking previous flirting episodes with the alleged incident. A summarized statement in the AIR is the only evidence the defense presented that "appellant related he and [SPC VM] had talked about having sex on numerous occasions."

(Sealed JA 94-95). The defense made a new motion to admit the same evidence the court found inadmissible as constitutionally required for appellant's defense against the alleged violations of Article 93, UCMJ, and Article 120, UCMJ.

(Sealed JA 96-100). Defense filed its motion using the same evidence in support of its prior motion. (Sealed JA 23, 96). Although the new motion and subsequent hearing was focused on the Article 93, UCMJ, offense, defense counsel mentioned mistake of fact as to consent in its motion. (Sealed JA 23-26, 64, 99). The motion stated,

> [E]vidence that [SPC VM] had previously flirted, touched, and hugged SGT Robinson on multiple occasions over the course of several months, and that she was "interested in" or "trying to get with" [appellant] is relevant and material as it speaks directly to the Defense's theory that [SPC VM] consented to the sexual act as well as to [appellant]'s mistake of fact as to consent.

(Sealed JA 99). The military judge ruled that the evidence of SPC VM's flirtatious behavior was admissible under Mil. R. Evid. 412(b)(1)(C) for the limited purpose of appellant's defense against the specification under Article 93, UCMJ. (Sealed JA 45). The government then moved to dismiss the charge and specification under Article 93, defense did not object, and the military judge granted the motion. (Sealed JA 45-46).

Further, in regard to impeachment, defense stated, "we believe that [SPC VM] will testify that she was not interested in [appellant] in a romantic way whatsoever. This evidence will also go to directly contradicting her testimony[.]" (Sealed JA 20). The military judge stated, "Well, I mean, if we get to that point, I

believe then rebuttal evidence is certainly permissible. So I would—the court would certainly entertain that." (Sealed JA 20).

Standard of Review

This Court "reviews the military judge's ruling on whether to exclude evidence pursuant to M.R.E. 412 for an abuse of discretion. Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed de novo." *United States v. Ellerbrock*, 70 M.J. 314, 317 (C.A.A.F. 2011) (citing *United States v. Roberts*, 69 M.J. 23, 26 (C.A.A.F. 2010)). "The abuse of discretion standard calls for more than a mere difference of opinion." *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014) (citation and quotation omitted). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008).

Law and Argument

"[T]he right to present relevant testimony is not without limitation. The right may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Rock v. Arkansas*, 483 U.S. 44, 55 (1987) (citation and quotations omitted). Military Rule of Evidence 412 is a reasonable limitation on

the admissibility of evidence "that may be minimally relevant, but also carries a high risk of harassment, confusing the issues, and discouraging reports of sexual assault." *United States v. Gaddis*, 70 M.J. 248, 252 (C.A.A.F. 2011).

Evidence offered by appellant to prove the alleged victim's sexual predispositions, or that she engaged in other sexual behavior, is generally inadmissible. Mil. R. Evid. 412(a). "Appellant has the burden under M.R.E. 412 of establishing his entitlement to any exception to the prohibition on the admission of evidence offered to prove that any alleged victim engaged in other sexual conduct." *United States v. Smith*, 68 M.J. 445, 448 (C.A.A.F. 2010) (citation and quotations omitted). One of the exceptions is evidence the exclusion of which would violate the constitutional rights of the accused. Mil. R. Evid. 412(b)(1)(C). "[W]here evidence is offered pursuant to [the constitutionally required] exception, it is important for defense counsel to detail an accused's theory of relevance and constitutional necessity." *United States v. Banker*, 60 M.J. 216, 221 (C.A.A.F. 2004). Under Mil. R. Evid. 412(b)(1)(C), evidence is generally only admissible if it is "relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice." *Ellerbrock*, 70 M.J. at 318.

"Simply stating a valid purpose or theory of relevance is not sufficient to make evidence admissible . . . . The proponent must demonstrate that the proffered evidence rationally supports the theory, and that the theory is significant to the

outcome of the case." *United States v. Lauture*, 46 M.J. 794, 799 (A. Ct. Crim. App. 1997) (citations omitted). "Relevance is the key to determining when the evidence is 'constitutionally required to be admitted.'" *United States v. Jensen*, 25 M.J. 284, 286 (C.M.A. 1987) (citing *United States v. Dorsey*, 16 M.J. 1, 5 (C.M.A. 1983) *see also United States v. Knox*, 41 M.J. 28 (C.M.A. 1994); *United States v. Greaves*, 40 M.J. 432 (C.M.A. 1994). The test for relevance is whether the evidence has "any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence." Mil. R. Evid. 401. Whether the evidence is material "is a multi-factored test looking at the importance of the issue for which the evidence was offered in relation to the other issues in [the] case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to that issue." *Ellerbrock*, 70 M.J. at 318 (citations and quotations omitted).

"[I]f evidence is material and relevant, then it must be admitted when the accused can show that the evidence is more probative than the dangers of unfair prejudice. Those 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)) (citation and quotations omitted). "[T]he best reading of the rule is that, as in its prior iteration, the probative value of the evidence must be balanced

against and outweigh the ordinary countervailing interests reviewed in making a determination as to whether evidence is constitutionally required." *Gaddis*, 70 M.J. at 255.

If the military judge is found to have abused his discretion in excluding evidence pursuant to Mil. R. Evid. 412, then the court assesses harmlessness using the five *Van Arsdall* factors: (1) the importance of the testimony, (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 otherwise permitted, and (5) the overall strength of the prosecution's case. *Van Arsdall*, 475 U.S. at 684.

A. The military judge did not abuse his discretion.

The military judge did not abuse his discretion because appellant 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.

Defense counsel asserted that this evidence was needed for a mistake of fact as to consent defense. (JA 6, 99). Specifically, defense counsel asserted that the "prior relationship or dynamics between the alleged victim and the accused leading up to this incident," was needed for the mistake of fact defense. (Sealed JA 6). However, with the exception of Mr. Natal's observations the night of the incident, the proffered evidence of flirtatious behavior lacked specificity. (JA 94-95). The

further in time away from the charged incident, the less relevant the evidence is. Here, defense failed to meet their burden. Similarly, the alleged conversations about sex between appellant and SPC VM was limited to one line in an AIR, "[A]ppellant related he and [SPC VM] had talked about having sex on numerous occasions." (JA 95). Again, the evidence lacked context and specificity, it was a self-serving claim made by appellant, and defense failed to connect these purported conversations with appellant's supposed mistake of fact as to consent.

Further, if SPC VM's flirtatious behavior and conversations with appellant were relevant to defense's theory of mistake of fact as to consent, the evidence is not material. Appellant alleges that without the panel knowing of prior flirtatious behavior, appellant's testimony "reads like a teenage male fantasy." (Appellant's Br. 17). Even with the alleged past interactions between appellant and SPC VM, though, defense cannot show how such behavior would indicate SPC VM's consent to sexual intercourse, particularly given her poor condition at the time of the incident. Defense counsel wanted to illustrate a prior existing relationship to provide context for the panel, and defense was able to do so. First, although the appellant provided a non-audible response, defense counsel asked whether appellant considered himself friends with SPC VM. (JA 199). Appellant stated he knew where she lived in the barracks. (JA 202). Also, both appellant and SPC VM stated that SPC VM referred to appellant by his first name. (JA 52, 204).

Therefore, appellant was able to establish that there was an existing relationship beyond a professional level without the use of the requested evidence. Thus, the evidence was not material.

Assuming testimony about flirting between appellant and SPC VM fell within the Mil. R. Evid. 412(b)(1)(C) exception, the minimal probative value is outweighed by the dangers of unfair prejudice. Appellant's theory is based on the belief that hugging and flirting, at some unknown date prior to the offense, establishes consent or mistake of fact as to consent to sexual intercourse. This is misguided, and the probative value of evidence supporting such a theory is low. The low probative value is significantly outweighed by the danger of, "among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall,* 45 U.S. at 679. Accordingly, this evidence was properly excluded.

B. *Van Arsdall* factors.

Even assuming that the military judge erred in excluding evidence of SPC VM flirting or discussing sex with appellant, the error was harmless beyond a reasonable doubt. *See United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006) ("issues involving possible constitutional error can be resolved by assuming error and concluding that the error is harmless beyond a reasonable doubt").

Applying the *Van Arsdall* factors to this case, the exclusion of the evidence of flirtatious behavior and discussion about sex was harmless beyond a reasonable doubt. The first factor weighs in favor of the government as this evidence was not important to the defense because appellant was charged with sexual assault due to SPC VM being incapable of consent. Evidence of prior sexual interest may be material to the issue of consent; however, it is irrelevant here because of SPC VM's inability to consent due to her intoxication. The second factor weighs in favor of the government, as this evidence was cumulative to appellant's testimony that SPC VM flirted with him at the party. (JA 194-95). He also went into detail about the sexual encounter with SPC VM, and described her actions which made him believe she consented to the sexual intercourse. (JA 204-11).

The third factor weighs in favor of the government, as there was a significant amount of evidence that corroborated SPC VM's testimony that she was incapable of consenting due to her level of intoxication, but no evidence that corroborated appellant's unbelievable theory of consent. In addition to SPC VM's testimony, Mr. Rodriguez observed SPC VM with a cup and alcohol, SPC Larson rated SPC VM a seven out of ten when assessing her drunkenness, SPC Adams noticed her stumble and slur, and Mr. Rodriguez was concerned for SPC VM's safety when she drove home due to her potential for intoxication. (JA 88, 90, 149, 121, 122, 124).

The fourth factor weighs in favor of the government, as the military judge allowed the defense to raise SPC VM's flirtatious behavior with appellant on the night of the party with any witness, including SPC VM. (Sealed JA 94-95). Further, the military judge remained open to the possibility of impeachment of SPC VM if she denied all romantic interest in appellant. (Sealed JA 20).

The fifth factor favors the government, as its case was strong as discussed below in the third issue presented. Considering that all five factors weigh in favor of the government, any error in excluding the evidence of prior behavior or discussions about sex prior to the night of the incident was harmless.

Issue Presented 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.

Additional Facts

The Specification of Charge I charged a violation of Army Regulation [hereinafter AR] 600-20, para. 4-14b, *Army Command Policy* (18 Mar. 2008) (Rapid Action Revision, 20 Sept. 2012), by "wrongfully fraternizing with junior enlisted Soldiers." (JA 9). The military judge's instruction to the panel regarding this specification, without objection from either party, was:

> 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 241, 243-44).

During closing argument, trial counsel argued that the junior enlisted soldiers referred to appellant as their friend, and that they still considered him a specialist, even after appellant's promotion to sergeant. (JA 261-62). Similarly, during defense counsel's closing argument, she stated, "So, you heard from several different Soldiers at the party and those Soldiers were junior enlisted Soldiers, and [appellant] at the time, was an NCO. Does it look right? Maybe not right away. . ." (JA 270). Defense counsel went on to argue that appellant's attendance at the junior enlisted soldier's party did not compromise his authority, cause actual or perceived partiality, or impact good order and discipline. (JA 270-71, 272). Trial and defense counsel did not address mental responsibility regarding the consequences of his relationships with the junior soldiers. (JA 260-63).

During direct and cross-examination of appellant, he stated that on the evening of the incident, prior to the party, he conducted a barracks room check in the same barracks where SPC VM resided. (JA 223, 233).

Standard of Review

Questions of statutory interpretation are reviewed by this Court de novo. *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008). "This Court reviews a military judge's decision to give an instruction, as well as the substance of an instruction, de novo." *United States v. Smith*, 50 M.J. 451, 455 (C.A.A.F. 1999) (citing *United States v. Maxwell*, 45 M.J. 406, 424-25 (C.A.A.F. 1996)).

"Where there is no objection to an instruction at trial, [this Court] reviews for plain error." *United States v. Payne*, 73 M.J. 19, 22 (C.A.A.F. 2014) (citing *United States v. Tunstall*, 72 M.J. 191, 193 (C.A.A.F. 2013)). "Under a plain error analysis, the [appellant] 'has the burden of demonstrating that: (1) there was error; (2) the error was plain and obvious; and (3) the error materially prejudiced a substantial right of the [appellant].'" *Id.* at 32 (quoting *Tunstall*, 72 M.J. at 193-94). Appellant bears the burden of demonstrating he meets all three prongs of the plain error test. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008). If appellant meets his burden then the government must demonstrate that the instructional error as to the elements of the offense was harmless beyond a reasonable doubt. *United States v. Upham*, 66 M.J. 83, 86 (C.A.A.F. 2008).

Law and Argument

"It is a fundamental principle of criminal law that 'wrongdoing must be conscious to be criminal.'" *United States v. Caldwell*, 75 M.J. 276, 280 (C.A.A.F. 2016) (quoting *United States v. Rapert*, 75 M.J. 164, 167 n.6 (C.A.A.F. 2016)). This principle "does not mean that an accused must know that his actions constitute criminal conduct. Rather, an accused must have knowledge of 'the facts that make his conduct fit the definition of the offense.'" *Id.* at 280 n.4 (quoting *Staples v. United States*, 511 U.S. 600, 607 n.3 (1994)). In applying this principle, the Supreme Court instructed, "When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute "only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Elonis v. United States*, 135 S. Ct. 2001, 2010 (2015) (quoting *Carter v. United States*, 530 U.S. 255, 269 (2000)).

A. General Intent is a Sufficient Mens Rea for Fraternization.

General intent is proof of knowledge with respect to the actus reus of the crime. *Carter,* 530 U.S. 255, 269 (2000). Under a general intent standard, "once this mental state and *actus reus* are shown, the concerns underlying the presumption in favor of scienter are fully satisfied." *Id.* As defined in *Black's Law Dictionary,* general intent involves "[t]he intent to perform an act even though the actor does not desire the consequences of that result." *United States v. Haverty*, 76

M.J. 199, 204 (C.A.A.F. 2017) (quoting Black's Law Dictionary 931 (10th ed. 2014)).

In *Caldwell,* this court found that a general intent mens rea for Article 93, UCMJ, maltreatment sufficiently separated wrongful from innocent conduct. 75 M.J. at 282. This court highlighted unique military exigencies that were factored into the mens rea assessment for general intent under that offense, stating, "A corollary to the principle that subordinates must obey their superiors is the principle that superiors must not maltreat their subordinates. . . . [T]he provisions of Article 93, UCMJ, . . . has sought to preserve the integrity of the superior-subordinate relationship." *Id.*This follows the long held principle that "the military constitutes a specialized community governed by a separate discipline from that of the civilian." *Parker v. Levy*, 417 U.S. 733, 744 (1974) (quoting *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)). The Supreme Court has found that "the different character of the military community and of the military mission requires a different application of [constitutional] protections. *Id.* at 758. This court has reflected the Supreme Court's distinction between military and civilian life in stating, "[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now

as in the past." *United States v. Heyward*, 22 M.J. 35, 37 (C.M.A. 1986) (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975)).

Similarly, preserving the integrity of the superior-subordinate relationship requires prohibition of fraternization through Article 92, UCMJ, as much as prohibition of maltreatment under Article 93, UCMJ. At its core, AR 600-20, para. 4-14, furthers "managing [Army] relationships to promote the health and welfare of all concerned and maintain[ing] good order, morale, and discipline." Dep't. of Army, Pam. 600-35, Personnel-General: Relationships Between Soldiers of Different Rank, para. 1-5b (21 Feb. 2000). As stated in the Department of the Army Pamphlet, "Soldiers must remain aware that relationships between soldiers of different rank may lead to perceptions of favoritism or influence. The appearance of impropriety can be as damaging to morale and discipline as actual misconduct." *Id.* at para. 1-5a. Therefore, this court should recognize that prohibition of fraternization preserves similar unique military exigencies as Article 93, UCMJ.

In *Caldwell*, this court held that "a military superior [can] be held criminally responsible for voluntary conduct that is later determined to be abusive or otherwise unwarranted, unjustified, and unnecessary for any lawful purpose, even if the Government does not prove that the superior possessed the specific intent to maltreat." 75 M.J. at 282 (quotations omitted). This Court noted, "in some

instances, the mere requirement in a statute that a defendant commit an act with knowledge of certain facts—i.e., that the defendant possessed 'general intent'—is enough to ensure that innocent conduct can be separated from wrongful conduct." *Id.* at 281. *Caldwell* found knowledge requirements within the language of Article 93, UCMJ, when it held:

> [U]nder Article 93, UCMJ, the Government must prove that: (a) the accused *knew* that the alleged victim was subject to his or her orders; (b) the accused *knew* that he or she was making statements or engaging in certain conduct in respect to that subordinate; and (c) *when viewed objectively under all the circumstances*, those statements or actions were unwarranted, unjustified, and unnecessary for any lawful purpose and caused, or reasonably could have caused, physical or mental harm or suffering.

Id.

Fraternization is akin to maltreatment, and should be treated similarly to this Court's approach in *Caldwell*–an accused can be held criminally responsible for voluntary conduct (engaging in a relationship of undue familiarity with soldiers of different rank) that is later determined to

> [1] appear to compromise the integrity of the supervisory authority or chain of command, [2] cause actual or perceived partiality or unfairness, [3] involve or appear to involve improper use of rank or position for personal gain, [4] are or are perceived to be exploitive or coercive in nature, [5] create an actual or predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish the mission.

AR 600-20, para. 4-14b. This Court should infer from the language in the regulation that appellant must have only generally intended to engage in a course of conduct establishing a relationship which is determined by the finder of fact to meet the required criteria.

In this case, appellant attended a party with junior enlisted soldiers where appellant was the only non-commissioned officer. Because the panel objectively determined that appellant's conduct created the perception of compromise, partiality, or creation of an adverse impact on good order and discipline, it properly found that appellant violated AR 600-20, para. 4-14.

Hazing and fraternization are different in that fraternization, similar to maltreatment, requires a rank disparity. In *Haverty,* this court found general intent insufficient for a hazing offense in violation of AR 600-20 para. 4-20. 76 M.J. at 207-08. By way of example, this court illustrated how a general intent mens rea may inadvertently capture innocent conduct. *Id.* The hypothetical included a servicemember who had the intent to perform the actus reus of encouraging his friend to play a drinking game which unnecessarily caused his friend to be exposed to a harmful activity. *Id.* As a result, this court held that "in order for an accused to be convicted under Article 92, UCMJ, for a violation of AR 600-20 para. 4-20, the accused must have consciously disregarded a known risk that his or her conduct would unnecessarily cause another military member or employee to suffer

or be exposed to an activity that is cruel, abusive, oppressive, or harmful." *Id.* at 207. In contrast, fraternization involves a violation of the boundaries necessary for healthy relationships between soldiers of different ranks. A noncommissioned officer cannot innocently expose a junior soldier to an unduly familiar relationship. Accordingly, all that is necessary to separate wrongful from innocent conduct for a fraternization offense is to prove appellant deliberately engaged in the behavior determined by the factfinder to create the deleterious effects prohibited by AR 600-20.

B. The instructions provided were sufficient.

A "military judge has an independent duty to determine and deliver appropriate instructions." *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008) (citing *United States v. Westmoreland*, 31 M.J. 160, 163-64 (C.M.A. 1990)). "In regard to form, a military judge has wide discretion in choosing the instructions to give but has a duty to provide an accurate, complete, and intelligible statement of the law." *United States v. Behenna*, 71 M.J. 228, 232 (C.A.A.F. 2012). "In reviewing the propriety of an instruction, appellate courts must read each instruction in the context of the entire charge and determine whether the instruction completed its purpose." *Id.* (citing *Jones v. United States*, 527 U.S. 373, 391 (1999)). Instructions are evaluated "in the context of the overall message

conveyed to the jury." *United States v. Prather*, 69 M.J. 338, 344 (C.A.A.F. 2011) (citation omitted).

"In order to constitute plain error, the error must not only be both obvious and substantial, it must also have 'had an unfair prejudicial impact on the jury's deliberations.'" *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986) (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)). The plain error doctrine "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *Id.*, 21 M.J. at 328-329 (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)).

Because appellant did not object to the military judge's failure to instruct the members on a mens rea requirement for the offense of fraternization under Article 92, UCMJ, this court reviews this issue for plain error. *Haverty,* 76 M.J. at 208. In this case, the military judge's instructions followed the elements provided in the Military Judge's Benchbook. *See* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook [hereinafter Benchbook], para. 3-16-1 (1 Jan. 2010). "Because the standard Benchbook instructions are based on a careful analysis of current case law and statute, an individual military judge should not deviate significantly from these instructions without explaining his or her reasons on the record." *United States v. Rush*, 54 M.J. 313, 315 (C.A.A.F. 2001) (quoting *United States v. Rush*, 51 M.J. 605, 609 (A. Ct. Crim. App. 1999)). Although there was no

mens rea included in the language of the specification, the military judge instructed on the proper mens rea standard by imposing the requirement that appellant was "wrongfully fraternizing with junior enlisted soldiers." (JA 244). The term "wrongful" separates unlawful from innocent conduct as it "relates to *mens rea* . . . and lack of a defense, such as excuse or justification." *United States v. Rapert*, 75 M.J. 164, 165, 169 (C.A.A.F. 2016) (quoting *United States v. King*, 34 M.J. 95, 97 (C.M.A. 1992); *United States v. Thomas*, 65 M.J. 132, 134 (C.A.A.F. 2007) ("The word 'wrongful,' like the words 'willful,' 'malicious,' 'fraudulent,' etc., when used in criminal statutes, implies a perverted evil mind in the doer of the act.")).

In *Caldwell,* although the instructions were "less-than-explicit" with respect to mens rea, this Court found no error. 75 M.J. at 283. This Court reasoned that the instructions sufficiently flagged for the panel the need to consider general intent. *Id.* at 278. Similarly here, the instructions, as a whole, alerted the panel to apply a general intent mens rea. By inclusion of the word "wrongfully," the military judge alerted the panel to consider appellant's state of mind. In this case, establishing that appellant knowingly directed his actions toward junior soldiers and that the panel determined those actions to constitute fraternization under AR 600-20 sufficiently separated wrongful from innocent conduct. Since the military judge's instruction flagged this general intent requirement, appellant has not met his burden to show the military judge's instructions were erroneous.

Turning to the third prong of the plain error analysis, appellant failed to meet his burden to prove that the error had an unfairly prejudicial impact on the deliberations. There are two factors to consider in concluding whether an error regarding one of the elements of an offense is harmless beyond a reasonable doubt: 1) was the matter contested, and 2) was the element supported by overwhelming evidence. *Upham*, 66 M.J. at 87. Defense counsel's fraternization defense focused primarily on attacking whether appellant's actions created an actual or perceived negative impact, but did not emphasize appellant's lack of knowledge of the effect. (JA 270-73). Accordingly, this matter was not significantly contested.

Further, the element was supported by overwhelming evidence. It was uncontested that appellant conducted a barracks check in the same barracks as SPC VM the night before the incident, that he went to the home of Mr. Rodriguez where appellant was the only NCO present at the party, and that the attendees were drinking. (JA 84, 105, 223, 233). He justified his visit to SPC VM's room on the night of the sexual assault as checking on a drunk soldier. (JA 226). Even by defense's theory at trial, this purported welfare check led to appellant having sexual intercourse with a junior soldier. Therefore, the evidence clearly proved that appellant purposefully engaged in an inappropriate course of conduct directed toward junior soldiers. Even if the panel had been instructed on a higher mens rea standard, such as recklessness, the result would have been the same. Therefore,

any error in the military judge's instructions was harmless beyond a reasonable doubt.

Issue Presented 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.

Additional Facts

Major (MAJ) Earl Smith, a forensic psychiatrist, testified for the defense and discussed signs and symptoms of alcohol induced blackouts. (JA 165, 168-72). On direct examination MAJ Smith testified that a person who was blacked out was still capable of walking, talking, driving, and even consenting to sex. (JA 170-71). However, during cross-examination, MAJ Smith conceded that the point at which someone blacks out depends on their personal tolerance level and that there were studies which state alcoholics have more episodes of blackouts. (JA 178). Major Smith also conceded that he can only speak generally and not to the specific case of SPC VM. (JA 179).

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).

Law and Argument

"The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, any reasonable fact-finder could have found all the essential elements of the offense beyond a reasonable doubt." *United States v. Day,* 66 M.J. 172, 173 (C.A.A.F. 2008) (citation omitted). Under this limited inquiry, appellate courts "'give[] full play to *the responsibility of the trier of fact* [to fairly resolve] conflicts in the testimony, to weigh[] the evidence, *and to draw reasonable inferences* from basic facts to ultimate facts.'" *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995) (quoting *United States v. Hart*, 25 M.J. 143, 146 (C.M.A. 1987)).

Here, the evidence is legally sufficient to establish each element of sexual assault and, therefore, to sustain appellant's conviction. Appellant contests the sufficiency of the second element of the Specification of Charge II, specifically, whether SPC VM was,

> incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by [appellant].

Manual for Courts-Martial, United States (2012 ed.), pt. IV ¶ 45.a.(b)(3). In *United States v. Pease*, this Court affirmed the definition of "incapable of consenting" as "lacking the cognitive ability to appreciate the sexual conduct in question or lacking the physical or mental ability to make [or] to communicate a

decision about whether they agreed to the conduct." 74 M.J. 763, 770 (N.M. Ct. Crim. App. 2015); *aff'd* 75 M.J. 180, 185-186 (C.A.A.F. 2016).

The evidence is sufficient to prove that SPC VM was incapable of consenting due to intoxication when appellant engaged in a sexual act. First, SPC VM testified regarding her level of intoxication. She began drinking alcohol around 2000 or 2100. Most of the witnesses and appellant remembered that SPC VM arrived at the party between 2300 and 0000. Specialist VM felt dizzy and stumbled as she walked. (JA 108, 122). She took lemonade and a bottle of vodka with her to the party. (JA 38-39). She swerved between the lanes when she drove home and vomited when she got to her barracks. (JA 45). Aside from remembering appellant penetrating her, SPC VM could not recall anything else that occurred for the rest of that night. Specialist VM lacked the physical and mental ability to make and communicate a decision about the sexual conduct.

Second, appellant knew that SPC VM was incapable of consenting. Even before the party began, appellant saw SPC VM at her barracks, and he knew that she was waiting for someone to deliver her alcohol. (JA 214-15). As SPC VM left the party, appellant saw SPC VM "abruptly adjust[] her car so that she wouldn't hit anything." (JA 197). After SPC VM left, appellant knew that Mr. Rodriguez went to check on her. (JA 226). However, upon Mr. Rodriguez's return, appellant went home and told his wife that he needed to check on a drunk soldier, then went to

SPC VM's barracks room. (JA 226). When he entered the barracks, appellant did not sign in to the building, did not ask for a female escort, and did not ask for any support staff to escort him. (JA 226-27). He then let himself into SPC VM's barracks room. (JA 227). He saw the trashcan and a water bottle by SPC VM's bed. (JA 228). Further, at trial, appellant was confronted with his original statement to CID. Appellant told CID that he saw SPC VM drinking that evening and believed SPC VM was a seven on a scale of one to ten with ten being highly intoxicated. (JA 231, 232). He also told CID that he saw SPC VM drinking, stumble up the stairs in front of Mr. Rodriguez's apartment, almost hit a stop sign as she drove away, that SPC VM was asleep when she arrived to her barracks room, and that SPC VM was too drunk to consent to sexual intercourse. (JA 219, 231-32).

Finally, to the extent this court finds that appellant did not know SPC VM was incapable of consenting, the evidence proves that appellant should have known. Although the attendees at the party were not closely monitoring her alcohol intake, it was apparent she was consuming alcoholic beverages. Mr. Rodriguez observed SPC VM with a bottle of alcohol and a cup. (JA 88). Specialist Larson observed SPC VM and rated her level of intoxication as a seven or eight out of ten. (JA 149). Specialist Bready never saw SPC VM with alcohol, but saw her with a bottle. (JA 109). He also noticed that she stumbled and

appeared to be intoxicated. (JA 108). Similarly, SPC Adams also noticed that SPC VM stumbled, slurred her speech, and appeared to be intoxicated; he also observed that SPC VM was markedly loud. (JA 121, 122, 124). Although Mr. Rodriguez testified that he did not recall whether SPC VM appeared intoxicated, he felt the need to follow her when she drove away from his apartment to make sure she did not "drive off [into] a ditch." (JA 90). Mr. Natal also observed SPC VM stumble and stated she was "tipsy" and "already a little sloppy" by the end of the night. (JA 135). Mr. Natal also noticed SPC VM was being loud, which he interpreted as indicative of intoxication. (JA 135). Despite appellant's testimony that he never saw signs of intoxication, appellant was with Mr. Natal when SPC VM stumbled, spoke loudly, and showed signs of intoxication. (JA 136).

Appellant focuses on defense counsel's cross examination of SPC VM relating to appellant's sexual assault of her, specifically regarding whether she invited appellant into bed or pulled off his shirt. (Appellant's Br. 45; JA 67-68). Specialist VM testified that she did not remember these actions. (JA 67-68). Appellant further attempts to use these statements with the forensic psychiatrist to undermine legal sufficiency. (Appellant's Br. 45-46). Although defense presented their theory that SPC VM was blacked out during sexual intercourse, a reasonable factfinder certainly could have found that not to be the case. In fact, MAJ Smith's expert testimony was explicitly general in nature rather than specific

to SPC VM's condition, and this evidence did not compel the fact finder to determine that SPC VM was blacked out.

Considering the multiple witnesses who testified that SPC VM was intoxicated, that Mr. Natal stated appellant was with him when observing signs of intoxication, and appellant's statements to CID, this court should find that the government proved all elements of the Specification of Charge II beyond a reasonable doubt. When viewing the evidence in the light most favorable to the prosecution it is clear that a reasonable factfinder could have found that appellant knew or should have known that SPC VM was incapable of consenting to the sexual act due to impairment by an intoxicant.

Conclusion

WHEREFORE, the government prays this Honorable Court affirm the Army Court's decision and the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically filed with the Court (efiling@armfor.uscourts.gov) on 12 June 2017 and contemporaneously served electronically on military appellate defense counsel, Captain Cody Cheek.

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