IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee v. Staff Sergeant (E-6) **HECTOR NICOLA** United States Army, Appellant	**FINAL BRIEF ON BEHALF OF APPELLANT** USCA Dkt. No. 18-0247/AR Crim. App. Dkt. No. 20150781

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

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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ISSUE PRESENTED

WHETHER THE EVIDENCE OF INDECENT VIEWING IN VIOLATION OF ARTICLE 120c, UCMJ, WAS LEGALLY SUFFICIENT.

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 (UCMJ), 10 U.S.C. § 866 (2012). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

STATEMENT OF THE CASE

On October 23, November 30, and December 1–2, 2015, at Yongsan Garrison and Camp Casey, Republic of Korea, an officer panel, sitting as a general court-martial, convicted Staff Sergeant (SSG) Hector Nicola, contrary to his pleas, of one specification of violating a lawful general regulation, one specification of abusive sexual contact, and one specification of indecent viewing, in violation of Articles 92, 120, and 120c, UCMJ.[1] The panel sentenced SSG Nicola to be reduced to the grade of E-1 and to be discharged from the service with a bad-conduct discharge. (JA 244). The convening authority approved the sentence as adjudged. (JA 23).

On March 27, 2018, the Army Court set aside and dismissed with prejudice the specification of violating a lawful general regulation, affirmed the remaining findings of guilty, and affirmed the sentence. (JA 1).

[1] The panel acquitted SSG Nicola of one specification of sexual assault, Article 120, UCMJ.

STATEMENT OF FACTS

The Specification of Charge III stated SSG Nicola did "knowingly and wrongfully view the private area of [Corporal (CPL) AA], without her consent, and under circumstances in which she had a reasonable expectation of privacy." (JA 26).

CPL AA attended a unit function with Sergeant Brown, and while there drank 3-4 beers. (JA 70). Following this event CPL AA agreed to go out to an area known as "the ville," in Dongducheon, Korea with fellow Soldiers. (JA 71). While out, CPL AA drank to the point of becoming so intoxicated she had a hard time talking and walking. (JA 81-82). SSG Nicola and SPC Long escorted CPL AA back to her barracks where ultimately SSG Nicola ensured CPL AA got back to her barracks room. (JA 131-132). While in the barracks room, SSG Nicola suggested that CPL AA should take a cold shower to sober up. (JA 133).

SSG Nicola explained what happened after they returned to the barracks: "We get inside the room and she tries to head to the bed and I say negative, take a shower [to help sober up]. . . [s]o immediately she turns around and takes off her top, [and] I turn my back and hear the belt and everything come off." (JA 133). There was no other evidence about how CPL AA's clothes came off. CPL AA testified that she had no memory of events prior to already being naked in the shower. (JA 102).

After CPL AA took her clothes off, SSG Nicola heard her go into the bathroom and shut the door. (JA 133). Later that night, SSG Nicola checked on CPL AA through the door of the bathroom twice. (JA 140). The first time, he yelled "are you okay" to which she responded she was good and wanted to stay in the shower a little longer. (JA 140). The second time, SSG Nicola asked CPL AA if she was alright, he did not receive a verbal response. (JA 140). SSG Nicola testified "I went to the [bathroom] door, knocked on the door, still no response, so I actually open up the door." (JA 140). He pulled the shower curtain partially back to check on CPL AA. (JA 147). CPL AA was in the fetal position; the shower water was hitting her. (JA 147). SSG Nicola touched her shoulder, and she gave a verbal response saying, "I'm good, the water feels good." (JA 140, JA 147). After getting the verbal response from CPL AA, SSG Nicola brought her some new clothes, folded them up, and put them on top of the toilet. (JA 140).

During cross-examination, SSG Nicola testified he saw CPL AA in her bra when she took her shirt off. (JA 149). He also said she was naked when he checked on her in the shower and found her in the fetal position. (JA 148). During this testimony, SSG Nicola repeated that he only went into the shower after he did not receive a verbal response from CPL AA through the bathroom door. (JA 162). He also reiterated that he did not help her get into the shower. (JA 166).

Three other Soldiers – Specialist (SPC) Scott, SPC Long, and SSG Everett – all went to CPL AA's room later that night. Specialist Scott explained, "SGT Everett wanted to put eyes on her, so he needed her to get out of the shower. So, me and Specialist Long tried for about 20 minutes to get her to stand up and to put some clothes on so that she could speak to her NCO." (JA 194). Specialist Scott said SSG Everett wanted someone "to make sure [CPL AA] didn't need any other assistance" and agreed SSG Everett was "concerned for her safety . . . because she was extremely intoxicated." (JA 195). Both SPC Scott and SPC Long testified they found CPL AA in the fetal position in the corner of the shower with the shower curtain closed, which mirrored the testimony from SSG Nicola. (JA 67, 147, 194, 199).

SSG Everett testified that CPL AA told him, "They brought me to my room and they told me I was at my room *and I went in and I took a shower*." (JA 204) (emphasis added). Staff Sergeant Everett had "serious concerns" about CPL AA's safety in the shower, but he did not want to see CPL AA naked, which is why he sent two females to check on her. (JA 208-09). He explained his primary purpose was "to get eyes on her . . . for her safety." (JA 210).

At trial, CPL AA testified the first thing she remembered in her barracks room was "being in my barracks room shower." (JA 102). She then described a

non-consensual sexual encounter with SSG Nicola in her shower. (JA 105-08). The panel acquitted SSG Nicola of this allegation. (JA 243).

During closing argument, the trial counsel explained the government's theories for this offense:

> So I want to pause here as we are talking about her clothes coming off. Sergeant Nicola admitted on the stand that he saw Corporal [AA] in her bra in the room. *He admitted to indecent viewing*. At this point she's so drunk she has no idea what's going on. No idea who is in her room. He has invited himself into her room and she is in her own room, where she clearly has a reasonable expectation of privacy and he, a male NCO, who has essentially conned his way there by telling everybody along the way that he is helping her, has no right to see what he saw.
>
> . . .
>
> [E]ven though he says all he saw was her wearing her bra, we really know that he facilitated all of her clothes coming off.

(JA 234-35) (emphasis added).

> Let's compare and contrast with the accused actions, with the actions of [SSG] Everett. Staff Sergeant Everett purposely stayed on one side of the door so that he couldn't accidentally indecently view Corporal [AA]. But he was worried about her. He said she could choke on her own vomit for instance. She was in the shower. *He knew how drunk she was, so he did what any good NCO would do. He actually sent two female Soldiers into the room to ensure she was okay. Exactly what the accused should have done.*

(JA 228) (emphasis added).

STANDARD OF REVIEW

This Court reviews questions of legal sufficiency de novo as a matter of law. *United States v. Wilcox*, 66 M.J. 442, 446 (C.A.A.F. 2008). The test for legal sufficiency is whether, when viewed in a light most favorable to the government, a rational fact-finder could have found all essential elements of the offense beyond a reasonable doubt. *United States v. Webb*, 38 M.J. 62, 69 (C.A.A.F. 1993)(citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). When applying the test for legal sufficiency, this Court is "bound to draw every reasonable inference from the record in favor of the prosecution." *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993) (quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)).

SUMMARY OF THE ARGUMENT

The government provided two separate theories for why SSG Nicola was guilty of indecent viewing. (1) SSG Nicola indecently viewed CPL AA in her bra when she disrobed in front of him and (2) SSG Nicola indecently viewed CPL AA when he checked on her after being unresponsive in the shower. These theories must fail because CPL AA's reasonable expectation of privacy was relinquished by taking her own clothes off in front of another person, or superseded by placing herself in harm's way when she was unresponsive in the shower. Each theory spotlights the clear deficiencies of proof for this offense.

The government failed to prove beyond a reasonable doubt that SSG Nicola violated Article 120c of the UCMJ. Specifically, they failed to show that CPL AA had any reasonable expectation of privacy when she unclothed herself in front of SSG Nicola or that SSG Nicola was wrongful in checking on CPL AA when she was unresponsive in the shower.

LAW AND ARGUMENT

The elements of Article 120c, UCMJ (MCM pt. IV, para. 45c(a)(a)) are:

> (a) That the accused knowingly and wrongfully viewed the private area of another person;
>
> (b) That said viewing was without the other person's consent; and
>
> (c) That said viewing took place under circumstances in which the other person had a reasonable expectation of privacy.

Article 120c, UCMJ (MCM pt. IV, para. 45c(a)(d)(3)) defines a reasonable expectation of privacy as:

> (A) circumstances in which a reasonable person would believe that he or she could disrobe in privacy, without being concerned that an image of a private area of the person was being captured; or
>
> (B) circumstances in which a reasonable person would believe that a private area of the person would not be visible to the public.

The Army court wrestled with definitions in a similar offense in *United States v. Rice,* 71 M.J. 719 (Army Ct. Crim. App. 2012), when appellant in that case –

among other issues – pled guilty while relying on incorrect definitions of the crime. The Army Court stated that because it "'is confined to the definitions formulated by Congress,' we enforce the specific definition of the element of the offense here at issue." *Rice*, 71 M.J. at 726 (citing *United States v. Wilkins*, 71 M.J. 410 (C.A.A.F. 2012)). Here, CPL AA's conspicuous lack of a reasonable expectation of privacy, as defined in Article 120c, makes the conviction of SSG Nicola legally insufficient.

There is a dearth of law directly on point in regards to what constitutes a reasonable expectation of privacy as it pertains to Article 120c of the UCMJ. In looking to other areas of law for guidance, the 4th amendment's jurisprudence on search and seizure can be a guide for what courts have held to be reasonable expectations of privacy. "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). "Examining the totality of the circumstances, petitioner did not have an expectation of privacy that society would recognize as legitimate." *Samson v. California*, 547 U.S. 843, 846 (2006). Considering the definitions provided by congress, using search and seizure case law, and common sense, it is clear that CPL AA's expectation of privacy in the facts of this case were not reasonable and society would have never recognized her expectations as legitimate.

1. *The unreasonable theory.*

First, the government argued SSG Nicola "admitted" to indecent viewing by seeing CPL AA in her bra. (JA 234). Based on SSG Nicola's testimony, CPL AA voluntarily took off her clothes in front of him and he turned away. (JA 133). The government's position would mean that any Soldier taking care of a drunk Soldier would be guilty of indecent viewing if the drunk Soldier decided to take their clothes off.

This court should apply a reasonable person standard to the expectation of privacy at issue in this case. A *reasonable person* would be aware of other people standing in her apartment and therefore, would not have a reasonable expectation of privacy if she took her clothes off in another person's presence. Accordingly, the evidence does not support a conviction under this theory as the only evidence in the record is that CPL AA took her own clothes off while appellant was present. The government's theory at trial, that "she's so drunk she has no idea what's going on. No idea who is in her room" (JA 235) and thus had a reasonable expectation of privacy is, as a matter of law, incorrect. If CPL AA was so drunk she could not see the person standing right in front of her, she was no longer a reasonable person. The government offered – without *any* supporting testimony – that SSG Nicola "facilitated" CPL AA's clothes coming off. (JA 235). CPL AA told SSG Everett, "*I went in and I took a shower*." (JA 204) (emphasis added). Which is entirely

consistent with SSG Nicola's testimony: she took her own clothes off, he turned around, and she went to take a shower. (JA 133).

2. *Doing what an NCO should.*

The second theory of liability involves SSG Nicola checking on CPL AA in the shower. Again, no rational fact-finder could reach the conclusion that this was indecent viewing. Every witness who went into the room that night – to include SSG Everett – believed someone needed to check on CPL AA. (JA 194). The government, however, appears to argue it would also be "indecent viewing" for SSG Nicola, SSG Everett, or anyone to check on CPL AA while also arguing that ordering other Soldiers (SPC Long and SPC Scott) to check on CPL AA was "what any good NCO would do" and "exactly what the accused should have done." (JA 228).

Notably, the testimony of SSG Nicola, SPC Long, and SPC Scott align on what they saw in the bathroom – a closed shower curtain and CPL AA sitting in the fetal position. (JA 67, 147, 194, 199). Therefore, three different witnesses testified that they went into the bathroom to check on CPL AA, and all three witnesses gave the exact same account giving credence to SSG Nicola's testimony that he went into the bath to check on CPL AA. Furthermore, SSG Nicola's testimony is corroborated by SGT Wilson who saw the folded clothes (pajamas) appellant left on top of the toilet for CPL AA. (JA 217–18). Every person present

owed CPL AA a duty as fellow Soldiers, as battle buddies, and human beings to ensure she was not in danger and was not left unconscious in her shower.

Under such circumstances, SSG Nicola should not stand convicted of indecent viewing because: 1) CPL AA voluntarily took her shirt off in front of him, and 2) SSG Nicola only went into the bathroom to check on CPL AA after she did not provide a verbal response to his second attempt to ensure she was ok. If having someone check on CPL AA was "what any good NCO would do," by the government's own argument, SSG Nicola's actions should not constitute a crime.

Wherefore, SSG Nicola requests this Court set aside and dismiss The Specification of Charge III and remand to the Army Court for a sentence reassessment.

CONCLUSION

WHEREFORE, Appellant respectfully requests that this honorable court grant meaningful relief.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically delivered to the Court and the Government Appellate Division on September 4, 2018.

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