IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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ISSUE PRESENTED:

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

ISSUE

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) reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 [hereinafter UCMJ]. This Honorable Court exercises jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. §867(a)(3) which permits review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review." In a case reviewed under subsection (a)(3), "action need be

taken only with respect to issues specified in the grant of review." UCMJ art. 67(c).

STATEMENT OF THE CASE

On 23 October, 30 November, and 1-2 December 2015, a panel comprised of officers sitting as a general court-martial convicted appellant, 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, 10 U.S.C. § 892, 920, and 920c (2012). The officer panel sentenced appellant to be to reduction to the grade of E-1 a bad conduct discharge. (JA at 244). The convening authority approved the sentence as adjudged. (JA at 22). On 27 March 2018, the Army Court set aside the conviction for violating a lawful general regulation but affirmed the convictions for abusive sexual contact and indecent viewing. (JA at 6). The Army Court reassessed appellant's sentence pursuant to *United States v. Winkelmann*, 73 M.J. 11 (C.A.A.F. 2013), and affirmed the sentence as adjudged. (JA at 6). On 20 July 2018, this court granted appellant's petition for review.

STATEMENT OF FACTS

On 10 October 2015, Corporal AA played a drinking game down at the smoke pit outside her barracks building with a group that included appellant. (JA at 97). She played two rounds and drank four beers in that time. (JA at 97).

Appellant had the idea for the group to go off post. (JA at 97). At the first bar the group visited, CPL AA had three shots of tequila. (JA at 98). By that time, CPL AA could not speak clearly and had trouble walking without assistance. (JA at 98-99). The group then went to a second bar and CPL AA continued to drink but could not remember how much. (JA at 99). At the second bar, appellant escorted CPL AA outside and down the street to an alleyway. (JA at 100). Corporal AA could not walk by herself and appellant had his arm around her waist. (JA at 100). After being on all fours vomiting in an alleyway, the next thing CPL AA remembered was being in her shower. (JA at 102). She was naked and her private area was exposed. (JA at 105). Specifically, she was sitting back on her heels with her knees splayed open. (JA at 115).

It had been appellant who brought CPL AA back to the barracks in a cab. (JA 28-29). Specialist JL, who had known CPL AA since she arrived in Korea, observed CPL AA hunched over in the back of the cab vomiting as JL exited the barracks. (JA at 28). Specialist JL physically helped CPL AA move from the cab to the smoke pit. (JA at 29). During the movement from the cab to the smoke pit, CPL AA fell over in a drunken stupor. (JA at 29). Among other signs that CPL AA was heavily intoxicated, she could barely walk on her own, she was unable to walk straight, and she was unable to speak clearly. (JA at 30). A wet spot on CPL AA's jeans indicated that she had urinated on herself. (JA at 50). Appellant

assisted Corporal AA to her barracks room from the smoke pit; she could not walk without appellant's assistance. (JA at 31). Specialist JL followed and witnessed CPL AA weave down the hall from left to right on her way to her room. (JA at 31). Had appellant not been guiding CPL AA, she would have collided with the walls. (JA at 31).

Once in CPL AA's barracks room, appellant helped CPL AA into her bed. (JA at 32). At first, CPL AA sat down on the bed, then she lay down on it. (JA at 32). At that point, SPC JL told appellant that they both should leave. (JA at 32). Specialist JL did not want appellant to stay in CPL AA's room by himself because it did not feel right. (JA at 33). Specialist JL told appellant three times that they should leave. (JA at 33). Each time, appellant told SPC JL "It's okay, I got it." (JA at 33). Specialist JL decided to leave and told appellant that she would return in fifteen minutes and that he had better answer the door. (JA at 33).

A little less than an hour later, SPC JL and SPC MS returned to CPL AA's barracks room. (JA at 35). Specialist JL knocked three separate times on the door without answer. (JA at 37). Each knock increased in force. (JA at 37). Specialist JL and SPC MS then left to fetch the master key from the CQ desk and alert CPL AA's platoon sergeant, Staff Sergeant DE. (JA at 37). When SPC JL and SPC MS returned to CPL AA's barracks room with her platoon sergeant, SPC MS knocked on the door and appellant answered. (JA at 37). Approximately, ten to fifteen

minutes elapsed between when SPC JL and SPC MS first knocked on the door and when they returned with the platoon sergeant. (JA at 39, 198).

When appellant answered the door, he was fully dressed wearing jeans, boots, and a coat. (JA at 53, 60, 198). Appellant told SPC JL that he had not checked on CPL AA in the shower because he did not feel comfortable doing so. (JA at 40, 193). Appellant further told SPC JL that CPL AA had been in the shower for the past 45 minutes. (JA at 192-193). Appellant left CPL AA's room without providing any sort of update on CPL AA's condition. (JA at 193). Appellant left his beanie, ring, and a bracelet in CPL AA's room. (JA at 216).

Staff Sergeant DE, CPL AA's platoon sergeant, was surprised to find appellant in CPL AAs barracks room, given the strict barracks visitation policies. (JA at 202). Barracks policy prohibited somebody being in a soldier's barracks room except for certain circumstances. (JA at 215). There was also a unit policy against fraternization such that noncommissioned officers were not allowed to socialize with junior soldiers, especially when alcohol was involved. (JA at 214). Staff Sergeant DE waited outside of the barracks room while SPC JL and SPC MS went into the bathroom to help CPL AA out of the shower. (JA at 208). Corporal AA's speech was slurred, and she was not able to stand up without support from the wall. (JA at 194). It took twenty minutes to get CPL AA out of the shower. (JA at 194).

Staff Sergeant DE noted that CPL AA was still heavily intoxicated when he finally spoke to her. (JA at 203). Staff Sergeant DE had serious concerns about CPL AA's safety, including possible alcohol poisoning or choking on water in the shower. (JA at 208-09). However, appellant had not provided SSG DE with any information about CPL AA's care when he left the room. (JA at 208). Appellant was also aware that SSG DE was CPL AA's platoon sergeant. (JA at 212).

Sergeant MB, a member of the group that went to the bars that night, saw appellant after he had returned to the post. (JA at 71). Appellant told SGT MB that he left early because CPL AA was heavily intoxicated and needed to be taken back to the barracks. (JA at 73). Appellant told SGT MB that he did not go into CPL AA's room. (JA at 73).

Sergeant KW, CPL AA's immediate supervisor, went into CPL AA's room the following morning and observed her underwear near the dresser. (JA at 249). The underwear was located apart from the jeans that she wore the previous night. (JA at 249). Sergeant KW also observed CPL AA's bathroom. Sergeant KW noted a raised lip separated the shower space from the rest of the bathroom. (JA at 248).

Appellant testified in his own defense and made several pertinent assertions. Appellant stated that CPL AA did not need help walking but admitted he did have his arm around her. (JA at 169). When appellant and CPL AA returned to the

barracks, he fed her crackers and had her slurp water out of his hand. (JA at 130-31). Appellant testified that he had never seen some one as drunk as CPL AA. (JA at 131).

According to appellant, once they were inside CPL AA's barracks room, CPL AA tried to head for her bed but appellant directed her to take a shower. (JA at 133). Appellant stated that CPL AA had "caught a second wind," undressed herself, and ran to the bathroom under her own power. (JA 150). After CPL AA threw her pants past appellant's head, he picked up her jeans and put them in a pile with the rest of her clothes with CPL AA's underwear still inside her pants. (JA at 133-34). Appellant denied ever separating CPL AA's underwear from her jeans. (JA at 183, 185). Appellant went to sleep while CPL AA was in the shower and did not hear when SPC JL and SPC MS knocked on the door the first time. (JA at 151).

Appellant claimed he only went into the bathroom after he received no verbal response from CPL AA. (JA at 162). Once in the bathroom, appellant pulled back the shower curtain slightly, touched CPL AA when she was naked, but did not ask anyone else for help with CPL AA. (JA at 162). Appellant stated that he was concerned about alcohol poisoning but admitted that he did not tell SSG DE that he had checked on CPL AA when she was in the shower. (JA at 172).

Appellant admitted that he was in CPL AA's room for almost an hour. (JA at 160). He also admitted that he knew CPL AA was a junior soldier and she was naked in the shower. (JA at 161). Appellant admitted he knew it was wrong to be in CPL AA's room. (JA at 159, 161). Appellant also conceded that the night of the incident was the only night he had ever forgotten to put his ring and bracelet back on after washing his hands. (JA at 156). He further conceded that, during his CID interview, he never told the special agent that he had picked up CPL AA's pants. (JA at 153). Responding to a panel member's question, appellant again admitted he knew it was wrong to enter CPL AA's barracks room. (JA at 185). Also responding to a panel member's question, appellant conceded that it was not routine medical training procedure to place an intoxicated person in the shower or to fall asleep while caring for said person. (JA 189-90).

SUMMARY OF ARGUMENT

This court should affirm appellant's conviction for indecent viewing because the evidence admitted was legally sufficient. Appellant's argument requires this court to impermissibly make a credibility determination between CPL AA and appellant and accept appellant's testimony as true. However, taking all interpretations of evidence and reasonable inferences arising therefrom in the light most favorable to the government, a reasonable factfinder could have concluded that CPL AA did not relinquish any expectation of privacy in her barracks room or

when she was naked in the shower and that she did not consent to appellant disrobing her or viewing her naked in the shower. Therefore, the conviction for indecent viewing is legally sufficient.

STANDARD OF REVIEW

Questions of legal sufficiency are reviewed de novo. *United States v. Gutierrez*, 73 M.J. 172, 175 (C.A.A.F. 2014); *United States v. Harman*, 68 M.J. 325, 327 (C.A.A.F. 2010) (citing *United States v. Wilcox*, 66 M.J. 442, 446 (C.A.A.F. 2008)).

LAW AND ARGUMENT

"The test for legal sufficiency 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. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (quoting *Gutierrez*, 73 M.J. at 175 (quoting *United States v. Bennitt*, 72 M.J. 266, 268 (C.A.A.F. 2013))). "The appellate question for this legal sufficiency test is whether 'a reasonable factfinder reading the evidence one way could have found all the elements of the offense beyond a reasonable doubt.'" *Id*. (quoting *Gutierrez*, 73 M.J. at 175 (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011))).

There are four elements for indecent viewing as charged: (1) that appellant knowingly viewed the private area of CPL AA; (2) that appellant did so without

the consent of CPL AA; (3) that under the circumstances at the time of the charged offense, CPL AA had a reasonable expectation of privacy; and (4) that appellant's conduct was wrongful. (JA at 24); Manual for Courts-Martial [hereafter *MCM*], pt. IV, ¶¶ 45c.a.(a)(1). Private area "means the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple." *MCM*, pt. IV, ¶¶ 45c.a.(c)(2). A reasonable expectation of privacy means "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, circumstances in which a reasonable person would believe that a private area of the person would not be visible to the public." *MCM*, pt. IV, ¶¶ 45c.a.(c)(3)(A)-(B).

In framing his argument on appeal, appellant asserts that CPL AA did not have a reasonable expectation of privacy because she voluntarily disrobed in front of appellant, and appellant's concern for CPL AA's possible alcohol poisoning superseded her expectation of privacy while she was in the shower. (Appellant's Br. at 7). In crafting this argument, appellant relies on his own testimony at trial to factually support his argument. (Appellant's Br. at 10, 11). Appellant's argument lacks merit because it relies on a narrow interpretation of only some evidence in the record, particularly his own testimony. This court does not review the evidence through such a narrow prism, and is "not limited to appellant's narrow view of the record." *Gutierrez*, 73 M.J. at 175 (citing *United States v. Cauley*, 45 M.J. 353,

356 (C.A.A.F. 1996) (citing *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993))). To the contrary, this court must "draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Winckelmann*, 70 M.J. 403, 406 (C.A.A.F. 2011) (quoting *United States v. Bright*, 66 M.J. 359, 365 (C.A.A.F. 2008)). In this case, when all the facts are examined in the light most favorable to the government, a rational fact-finder could have determined appellant's actions constituted indecent viewing.

"When a defendant chooses to testify, he runs the risk that if disbelieved, the [factfinder] might conclude the opposite of his testimony is true." *United States v. Pleasant*, 71 M.J. 709, 713 (Army Ct. Crim. App. 2012)(quoting *United States v. Williams*, 390 F.3d 1319, 1325 (11th Cir. 2004)). "A trier of fact is not compelled to accept and believe the self-serving stories of vitally interested defendants. Their evidence may not only be disbelieved, but from the totality of the circumstances, including the manner in which they testify, a contrary conclusion may be properly drawn." *Pleasant*, 71 M.J. at 714 (quoting *United States v. Cisneros*, 448 F.2d 298, 305-06 (9th Cir. 1971)(citing *Dyer v. MacDougall*, 201 F.2d 265, 268 (2d Cir. 1952)).

Appellant gave testimony that contradicted other evidence admitted at trial, and with so many contradictions, a panel could reasonably disregard appellant's testimony. First, either appellant lied when he told SPC JL that he did not check

on CPL AA while she was in the shower, (JA at 40, 193), or he lied when he testified that he looked at CPL AA in the shower because he was concerned for her safety. (JA at 140). Appellant's statement to SGT MD denying that he had been in CPL AA's room at all further undermined appellant's testimony. (JA at 73). Second, appellant testified that CPL AA "caught a second wind" and undressed herself before going to the shower under her own power. (JA at 150). Not only did SPC JL's testimony contradict appellant, where she described CPL AA was too drunk to walk under her own power and that she had urinated on herself, but appellant contradicted himself when he also testified that CPL AA was the drunkest person he had ever seen. (JA at 30-31, 50, 131, 203). Third, appellant testified that when he picked up CPL AA's jeans and put them in a pile with the rest of her clothes, CPL AA's underwear was still inside her pants. (R. at 133-34). He also described picking up the jeans and underwear as a light touch. (JA at 154). Physical evidence contradicted appellant's testimony because appellant's transfer DNA on CPL AA's underwear required more than a light touch. (JA at 93-95). Further, CPL AA's underwear and jeans were found separated on the floor, contradicting that appellant had not separated them. (JA at 91, 249). Finally, appellant's DNA was found on the outside of CPL AA's underwear, further contradicting appellant's testimony that had had not separated the clothes because

his hand would have had to have been between CPL AA's jeans and underwear when picking them up for his story to be true. (JA at 183, 185).

Appellant asserts on appeal that CPL AA lacked a reasonable expectation of privacy because appellant was acting as a "good NCO" by checking on her in the shower. (Appellant's Br. at 11). Appellant's testimony belies this assertion and directly contradicts his theory. First, appellant knew he should not have been in CPL AA's room in the first place. (JA at 159, 161, 185). Specialist JL did not want appellant to stay in CPL AA's room by himself and told appellant three times that they should leave. (JA at 33). Second, despite an alleged concern for alcohol poisoning, appellant allegedly left CPL AA alone in a running shower while he fell asleep on her bed. (JA at 189-90). Appellant conceded that would not be the normal practice when caring for a person suffering from alcohol poisoning. (JA at 189-90). Third, he did not share his concern for CPL AA's safety with her platoon sergeant when he arrived on the scene. (JA at 172). This eviscerates any notion that appellant was concerned for CPL AA's safety. Fourth, barracks policy prohibited somebody being in a soldier's barracks room except under certain circumstances. (JA at 215). Though appellant tries to analogize his own actions to those of other witnesses, even SSG DE, CPL AA's platoon sergeant, waited outside of the barracks room while two female Soldiers, SPC JL and SPC MS, went into the bathroom to help CPL AA out of the shower. (JA at 208).

Consequently, the evidence does not support appellant's theory that his role as a noncommissioned officer superseded CPL AA's expectation of privacy.

Given these contradictions, a reasonable factfinder could regard appellant's testimony as false and, as a result, find that CPL AA was too drunk to reach the shower under her own power, let alone disrobe by herself and run to the shower. Instead, a factfinder could infer that appellant disrobed CPL AA and took her to the shower. Appellant viewed CPL AA's private area when disrobing her and again when CPL AA was naked in the shower sitting back on her heels with her knees splayed when he should not have been in her barracks room in the first place.

Finally, in his brief to the Army Court, appellant conceded that the government's theory of sexual assault was one of several theories that could also support the indecent viewing charge. (JA at 13). The Army Court also rejected appellant's "good NCO" excuse as the factual basis for his being in CPL AA's room:

> According to SPC [sic] AA's testimony appellant remained in the room and sexually assaulted her in the shower. Although acquitted of this conduct, we see nothing in the evidence presented to indicate appellant's specific intent while entering and remaining in the room was anything other than to undress and shower naked with an incapacitated individual.

(JA at 5). Appellant fails to demonstrate why, given the prerequisite that the evidence in the case be viewed in the light most favorable to the government, his testimony must be taken at face value as the only reasonable way of viewing the evidence, especially when the Army Court found appellant's view of the evidence unconvincing.

While appellant was acquitted of the sexual assault charge, his acquittal in this case is not dispositive of the evidence that informs his conviction for indecent viewing. A factfinder may independently consider evidence supporting a charge on which an accused was acquitted when deliberating on a separate charge. *Gutierrez*, 73 M.J. at 175. Likewise, when the same evidence is offered at trial to support two different offenses, a Court of Criminal Appeals is not necessarily precluded from considering the evidence that was introduced in support of the charge for which appellant was acquitted when conducting its Article 66(c), UCMJ, legal and factual sufficiency review of the charge for which appellant was convicted. *Rosario*, 76 M.J. at 117.

Additionally, to the extent the panel rendered an inconsistent verdict, such a conclusion does not support reversal for legal insufficiency. As an initial matter, that the panel returned a finding of not guilty to Specification 2 of Charge II for sexual assault is not necessarily inconsistent with its findings of guilt to the Specification of Charge III, indecent viewing. The indecent viewing specification

required proof that appellant saw CPL AA naked without her consent and when she held an expectation of privacy, whereas the sexual assault specification required additional proof of a sexual act. Compare Article 120(b), UCMJ with Article 120c, UCMJ. It is reasonable to conclude that the panel determined CPL AA did not consent to appellant seeing her naked at a time when she held a reasonable expectation of privacy but that the evidence did not establish, beyond a reasonable doubt, that appellant committed a sexual act. Regardless of the differences of proof, the courts have long held that criminal defendants may not leverage inconsistencies in verdicts to challenge a finding of guilty. "We follow the Supreme Court's admonition that it is 'imprudent and unworkable' to allow an accused to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them." *United States v. Emmons*, 31 M.J. 108, 112 (C.M.A. 1990) (quoting *United States v. Powell*, 469 U.S. 57, 66 (1984)). Accordingly, CPL AA's testimony of her naked body position in the shower (JA at 107-08, 115), how appellant joined her in the shower (JA at 106), and how she did not consent to appellant being in the shower (JA at 107), sufficiently supports the charge of indecent viewing.

CONCLUSION

A factfinder could reasonably conclude that CPL AA did not consent to appellant seeing her naked and that she had a reasonable expectation of privacy in her room and shower. Accordingly, appellant's conviction for indecent viewing is legally sufficient. Wherefore, the United States respectfully requests that this Honorable Court answer the granted issue in the affirmative.

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CERTIFICATE OF FILING AND SERVICE

I certify that the original was filed electronically with the Court at efiling@armfor.uscourts.gov on this 4th day of October, 2018 and contemporaneously served electronically and via hard copy on appellate defense counsel.

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