IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	APPELLEE FINAL BRIEF
v.	)	
	)	Crim. App. Dkt. No. 202300632
Lieutenant Colonel (O-5) **JONNY GONZALEZ**, United States Army, Appellant	)	USCA Dkt. No. 25-0032/AR

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

Issue Presented

WHETHER APPELLANT HAD FAIR NOTICE THAT THE PORTIONS OF SPECIFICATION 2 OF THE CHARGE ALLEGING AN ARTICLE 133 VIOLATION FOR AN EXTRAMARITAL KISS CONSTITUTED CONDUCT THAT WAS FORBIDDEN AND SUBJECT TO CRIMINAL SANCTION.

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

[1] All references to the UCMJ are to the versions in the Manual for Courts-Martial, United States (2019 ed.) [2019 MCM] with the 2020 and 2021 National Defense Authorization Act Amendments.

Statement of the Case

On 8 December 2023, an officer panel sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of conduct unbecoming an officer and a gentleman, in violation of Article 133, UCMJ.[2] [3] (JA 006, 178–79). The panel sentenced Appellant to be reprimanded. (JA 006, 181). The convening authority took no action. (JA 184). On 5 January 2024, the military judge entered judgment. (JA 185). On 13 November 2024, the Army Court affirmed the findings of guilty and the sentence. (JA 002)

Statement of Facts

On the night Appellant celebrated his retirement from the Army, he, a senior field grade officer (O-5), kissed Seaman Recruit (SR) (E-1) JT, a trainee, on her lips. (JA 024, 039, 042, 096, 102, 110, 126–27, 141–42, 149,[4] 150–52, 264). Seaman Recruit JT was not his wife; they had met that night at Coyote Ugly, a sports bar and grill on the Riverwalk in San Antonio, Texas. (JA 028–029, 116). SR JT was there with four trainee classmates, including Seaman (SN) (E-3) KD.

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[2] Every finding of guilty in the Entry of Judgment is for an offense that occurred after 1 January 2021. (JA 0006, 185).

[3] The panel excepted the word "cheek" and found him not guilty of the excepted word. (JA 0006, 179). Further, Appellant was acquitted of an additional specification of conduct unbecoming an officer and a gentleman in violation of Article 133, UCMJ. (JA 004, 006, 179).

[4] JA 149's relevant timestamps include "NVR_ch9" at 16:46–16:48, 17:08–17:14 (photographed kisses between Appellant and JT).

(JA 027, 115). Appellant was with his friends, retired Sergeant First Class (SFC) (E-7) AL and retired Master Sergeant (MSG) (E-9) RD, who had come to town to celebrate Appellant's retirement and were staying at his home with his wife and children. (JA 113–14, 119, 130–31).

Appellant introduced himself to SR JT and SN KD as an active-duty Lieutenant Colonel in the Army and showed them his rank on his Common Access Card (CAC). (JA 029–30, 091, 096, 102, 105–06, 108, 117–19). Seaman Recruit JT told him, AL, and RD that she was an E-1 trainee and that she was there with other trainees. (JA 029, 048–49, 062–63, 091, 116, 135, 141). Seaman KD also told Appellant that she was an E-3 and that they had just graduated basic training. (JA 119–20). Appellant then shared stories about his time in basic training. (JA 120). Seaman Recruit JT knew fraternization was prohibited but was flattered a senior officer would converse with her. (JA 048, 106–07).

As the night went on, Appellant, SR JT, and their friends drank, danced, and flirted. (JA 031, 121–22 140, 059–62, 134, 136). Seaman KD saw Appellant flirting and being "touchy feely" with SR JT. (JA 122). They later walked to a bar called Mad Dogs; during the walk, Appellant continued flirting with SR JT, putting his arm around her shoulder. (JA 033–36, 098, 123, 137–39, 149 at "NVR_ch8" at 2:34–3:00, JA 154).

At Mad Dogs, the group ordered more drinks, and Appellant and SR JT's flirtation escalated to kisses on more than one occasion. (JA 037, 110, 124–25, 139–40, 153, 264). Seaman KD saw Appellant with his hand around SR JT and the two of them kissing. (JA 125). A photographer captured photos of their group, including ones of Appellant and SR JT kissing on the lips. (JA 038–39, 042, 066, 127, 132, 139, 141, 149–52[5]). Seaman Recruit JT explained that the kiss was a long, extended kiss for the photo to be taken, but there was no tongue involved. (JA 067, 110). Neither the photographer nor SN KD encouraged the photographed kiss; it was spontaneous and consensual. (JA 067–68, 099). Video footage from Mad Dogs shows Appellant maintained an intimate posture towards SR JT after the photo. (JA 149 at "NVR_ch 9" at 17:14–18:54).

During trial, the parties discussed whether Mil. R. Evid. 412 applied because the specifications encompassed fraternization and adultery. (JA 080–83). But when calculating the maximum sentence, they agreed that the most analogous offense was fraternization, not extramarital sexual conduct. (JA 146–48).

Summary of Argument

There was no error. Appellant was on notice that a kiss between a married O-5 officer and an E-1 junior enlisted entry-level trainee who was not his wife was

[5] JA 149 relevant timestamps include: "NVR_ch9" at 16:14–17:54, 34:34–39:04 (table interactions with the photographer); and "NVR_ch9" at 16:46–16:48, 17:08–17:14 (photographed kisses between Appellant and JT).

forbidden and subject to criminal sanction. Fraternization between an officer and enlisted Soldier is prohibited under Article 134, UCMJ, and Army Regulation 600–20, "Army Command Policy," dated 24 July 2020. Any reasonable officer would recognize that such conduct under the circumstances—married or single—would risk bringing disrepute upon himself and his profession. Further, Congress did not exempt fraternization involving non-sexual extramarital conduct from prosecution by criminalizing extramarital sexual conduct under Article 134, UCMJ.

Argument

WHETHER APPELLANT HAD FAIR NOTICE THAT THE PORTIONS OF SPECIFICATION 2 OF THE CHARGE ALLEGING AN ARTICLE 133 VIOLATION FOR AN EXTRAMARITAL KISS CONSTITUTED CONDUCT THAT WAS FORBIDDEN AND SUBJECT TO CRIMINAL SANCTION.

Standard of Review

This court reviews unpreserved claims of lack of fair notice for plain error. *United States v. Rocha*, 84 M.J. 346, 349 (C.A.A.F. 2024) (citation omitted). Under plain error review, Appellant has the burden of demonstrating (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right. *Id.* (citation omitted).

Law

To convict an appellant of Article 133, UCMJ, the panel must have found, in relevant part, that: (1) the appellant did certain acts; and (2) under the circumstances, these acts constituted conduct unbecoming an officer and gentleman. *See* Manual for Courts-Martial (MCM), pt. IV, ¶ 90b. The term "gentleman" connotes failings in an officer's personal character. UCMJ art. 133c(1). Conduct violative of this article is action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. UCMJ art. 133c(2) ("There is a limit of tolerance based on the customs of the Service and military necessity below which the personal standards of an officer cannot fall without seriously compromising the person's standing as an officer.").

Article 133, UCMJ, is intended to help ensure a "disciplined and obedient fighting force." *United States v. Vorhees*, 79 M.J. 5, 16 (C.A.A.F. 2018) (quoting *Parker v. Levy*, 417 U.S. 733, 763 (1974) (Blackmun, J. concurring)). Because officer behavior is so important, "criminal liability for [conduct unbecoming] does not depend on whether conduct actually effects a harm upon [a] victim," but rather on whether the officer possessed the general intent to act indecorously, dishonestly, or indecently. *Voorhees*, 79 M.J. at 16 (citing *United States v. Caldwell*, 75 M.J.

276, 282 (C.A.A.F. 2016) (discussing Article 93, UCMJ maltreatment of a subordinate)).

Before an officer can be convicted of an offense under Article 133, UCMJ, due process requires "fair notice" that an act is forbidden and subject to criminal sanction. *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003) (citing *United States v. Bivins*, 49 M.J. 328, 330 (C.A.A.F. 1998)). Sources of fair notice may include military case law, military custom and usage, and military regulations. *Vaughan*, 58 M.J. at 31–32; *see also United States v. Mayfield*, 21 M.J. 418 (C.M.A. 1986) (considering evidence the appellant was specifically informed about a policy prohibiting fraternization with trainees).

An officer's conduct need not violate other provisions of the UCMJ or be otherwise criminal to violate Article 133, UCMJ. *United States v. Forney*, 67 M.J. 271, 275 (C.A.A.F. 2009); *United States v. Giordano*, 35 C.M.R. 135, 140 (1964). But "[b]y electing to charge fraternization under Article 133 rather than Article 134, the Government must also prove the additional element that the act constitutes conduct unbecoming an officer and gentleman." *United States v. Boyett*, 42 M.J. 150, 152 (C.A.A.F. 1995); UCMJ art. 133c(2). The question is whether a "reasonable military officer would have no doubt that the activities charged constituted conduct unbecoming an officer." *United States v. Frazier*, 34 M.J. 194, 198 (C.M.A. 1994) (citation and footnote omitted); *United States v. Kroop*, 38 M.J.

470, 473 (C.M.A. 1993) (adultery allegations insufficient without service custom or regulation to the contrary).

Discussion

Appellant had fair notice that a married officer kissing a junior enlisted trainee who was not his wife, under the circumstances, was conduct unbecoming because of well-established military case law, custom, and regulations proscribing fraternization.

A. The panel convicted Appellant of a fraternization-like charge.

The relevant specification provides:

> In that Lieutenant Colonel Jonny Gonzalez, U.S. Army, a married man, did, at or near San Antonio, Texas, on or about 1 August 2021, engage in conduct unbecoming an officer and a gentleman, to wit: while knowing that Seaman Recruit (E-1) J.T. was a junior enlisted trainee a woman who was not his wife, he kissed her lips.

(JA 003, 007). Although the government did not specifically allege fraternization, this specification and the military judge's panel instructions captured its essence. (JA 145). *See Vaughn*, 58 M.J. at 35 (finding the military judge's instructions captured the essence of child neglect); *United States v. Steele*, ARMY 20071177, 2011 CCA LEXIS 17, *25 (Army Ct. Crim. App. Feb. 3, 2011) (mem op.) (citing *United States v. Arthen*, 32 M.J. 541 (A.F.C.M.R. 1990) (analyzing conduct that appeared to be a fraternization charge)). This interpretation is consistent with the parties' understanding at trial that the offense was analogous to fraternization. (JA

146–48). Extramarital kisses are not specifically enumerated in the MCM and, without more, may not be sufficient for Article 133, UCMJ. *But see United States v. Torres Alcantara*, 39 C.M.R. 682 (A.B.R. 1968) (finding conduct unbecoming for an affair with a single woman). Nevertheless, the extramarital kiss was between appellant, who was a commissioned officer, and SR JT, who was a junior enlisted trainee.

B. Fraternization is proscribed by statute.

The prohibition against fraternization between officers and enlisted Soldiers is based on a longstanding custom of the services. *See United States v. Pitasi*, 44 C.M.R. 31 (1971); *United States v. Free*, 14 C.M.R. 466 (N.B.R. 1953). It has appeared as an Article 134, UCMJ offense in every MCM since 1984. *See United States v. Lowery*, 21 M.J. 998 (A.C.M.R. 1986) (considering the promulgation of this offense as Presidential establishment of Armed Force custom); *see also* MCM (1984 ed.), App. 21, ¶ 83 (clarifying the offense may include relationships between senior and junior officers and between non-commissioned officers and their subordinates); *United States v. Callaway*, 21 M.J. 770 (A.C.M.R. 1986) (same).

The elements of the offense provide servicemembers with fair notice that Appellant's specific act is indeed prohibited:

> (1) That the accused was a commissioned . . . officer;
>
> (2) That the accused fraternized on terms of military equality with one or more certain enlisted member(s) in a

> certain manner;
>
> (3) That the accused then knew the person(s) to be (an) enlisted member(s);
>
> (4) That such fraternization violated the custom of the accused's Service that officers shall not fraternize with enlisted members on terms of military equality; and
>
> (5) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline upon the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

MCM, pt. IV, ¶ 101b.

The accompanying explanation states:

> The gist of this offense is a violation of the custom of the armed forces against fraternization. Not all contact or association between officers and enlisted persons is an offense. Whether the contact or association in question is an offense depends on the surrounding circumstances. Factors to be considered include whether the conduct . . . otherwise undermined good order, discipline, authority, or morale. The facts and circumstances must be such as to lead a reasonable person experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced by their tendency to compromise the respect of enlisted persons for the professionalism, integrity, and obligations of an officer.

MCM, pt. IV, ¶ 101c(1). Case law as well as the President's explanation and enumerations provide reasonably clear notice of what conduct is subject to criminal sanction under this statutory provision. *See Rocha*, 84 M.J. at 351.

C. As a long-established custom, the prohibition of fraternization has not been eroded in the Army.

The Army proscribes fraternization involving non-sexual conduct between Soldiers of different grades by regulation and case law. *E.g.*, *United States v. Conn*, 6 M.J. 351, 352 n.1 (C.M.A. 1979) (concerning an officer possessing and using marijuana in the presence of enlisted subordinates); *United States v. Livingston*, 8 C.M.R. 206 (A.B.R. 1952) (concerning an officer offering and drinking liquor and pursuing the company and association of enlisted Soldiers); *see generally Callaway*, 21 M.J. 770 (citations omitted) (finding an officer dating a subordinate officer a violation of the custom of the service, in part, because the custom was not eroded in the Army); *cf. United States v. Wales*, 31 M.J. 301 (C.A.A.F. 1990) (finding no evidence the Air Force had materially changed its policies abandoning rigid separation of officers from enlisted persons).

Army Regulation 600–20, in effect at the time of the charged conduct, proscribed, and gave examples of, prohibited interactions and relationships, including non-sexual conduct.[6] Namely, it stated:

> Soldiers of different grades must be cognizant that their interactions do not create an actual or clearly predictable perception of undue familiarity between an officer and an enlisted Soldier[.] . . . Examples of familiarity between Soldiers that may become "undue" can include repeated visits to bars, nightclubs, eating establishments, or homes

[6] Violations of this regulation may be punishable under Article 91, UCMJ. MCM, pt. IV, ¶ 101c(2).

> between an officer and an enlisted Soldier . . . except for social gatherings, that involve an entire unit, office, or work section. All relationships between Soldiers of different grades are prohibited if they—
>
> (1) Compromise, or appear to compromise, the integrity of supervisory authority or the chain of command.
> . . .
> (4) Are, or are perceived to be, exploitative . . . in nature.
>
> (5) Create an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission.

AR 600–20, para. 4-14b.[7] Furthermore, "intimate or sexual relationships between officers and enlisted personnel are prohibited." *Id.* at para. 4-14c(2). This prohibition does not apply to marriages between an officer and an enlisted member. *Id.* at para. 4-14c(2)(a). These sources delineate the clear bounds of propriety.

D. Prohibited fraternization includes extramarital kisses between an officer and junior enlisted trainee.

Appellant claims that he did not have "fair warning that an extramarital kiss is prohibited." (App. Br. 7). But Congress could not have intended to carve out an exception to fraternization for extramarital non-sexual conduct merely because it separately proscribed extramarital sexual conduct under Article 134, UCMJ.

[7] Army Regulation 600–20, paragraph 4-15a further proscribes fraternization between permanent party personnel and trainees as specially protected junior members of the Armed Forces. *See also* UCMJ art. 93a.

Instead, Article 133, UCMJ, AR 600–20, para. 4-14, and case law would have placed a reasonable Soldier on fair notice that a kiss between an O-5 and an E-1 junior enlisted trainee who was not his wife, under the circumstances, was forbidden, irrespective of whether the officer was married.

Contrary to Appellant's assertion, using Article 133, UCMJ to charge an extramarital kiss was not a novel charging scheme because fraternization between an officer and junior enlisted Soldier is prohibited. First, the conduct need not be specifically listed in the MCM. (App. Br. 8–9). *See United States v. Ashby*, 68 M.J. 108, 118 (C.A.A.F. 2009) (rejecting appellant's claim he lacked notice of the criminality of his conduct by virtue of the absence of its inclusion in the MCM). Second, the fact that appellant was married was relevant to assessing the surrounding circumstances of appellant's conduct. *See* MCM, pt. IV, ¶ 101c(1). Third and relatedly, the fact that SR JT's was not his wife was relevant because if they were married then the conduct would likely not have been forbidden. *See* AR 600–20, para. 4-14c(2)(a).

Ultimately, an experienced officer in appellant's position did or should have had fair warning that his conduct was prohibited. Seaman Recruit JT who had only just graduated basic training was aware of the prohibition. (JA 049). Having previously been a commander, experienced the problems of military leadership, and served over twenty years in the Army as an enlisted soldier and officer,

"[t]here is no question that [A]ppellant was on notice of what sorts of relationships were impermissible." *United States v. Rogers*, 54 M.J. 244, 256 (C.A.A.F. 2000).

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court affirm the finding and sentence and deny relief.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b)(1) because this brief contains 3,046 words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins on all four sides.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on March 12, 2025.

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