United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Anthony J.
Livingstone,
Appellant

USCA Dkt. No. 19-0085/CG
Crim.App. No. 1448

ORDER

On consideration of the petition for grant of review of the decision of the United States Coast Guard Court of Criminal Appeals, it is by the Court, this 16th day of April, 2019,

ORDERED:

That said petition be, and the same is hereby granted; and,

That the decision of the United States Coast Guard Court of Criminal Appeals is affirmed.*

For the Court,

/s/ Joseph R. Perlak
Clerk of the Court

cc: The Judge Advocate General of the Coast Guard
Appellate Defense Counsel (Zimmermann)
Appellate Government Counsel (Miros)

* It is directed that the promulgating order be corrected to accurately reflect that the Guilty finding to Specification 2 of Charge II should be footnoted to reflect that it was later conditionally dismissed by the military judge after findings as an unreasonable multiplication of charges with Specification 2 of Charge III.

you further during the appellate process. In addition, you may retain a civilian lawyer at your own expense to assist you.

Sincerely,

V. TASIKAS
Captain, U.S. Coast Guard
Chief, Office of Military Justice

Encl: (1) CAAF Decision, April 16, 2019
(2) Blank receipt with return envelope

Copy: Appellate Defense Counsel w/o encl

U.S. Department of Homeland Security

United States Coast Guard

Commandant
United States Coast Guard

2703 Martin Luther King Jr. Ave SE
U.S. Coast Guard Stop 7213
Washington, DC 20593-7213
Staff Symbol: CG-LMJ
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Naval Consolidated Brig Miramar
Attn: Anthony J. Livingstone, Prisoner
46141 Miramar Way
San Diego, CA 92145-2135

Dear Mr. Livingstone,

Enclosure (1) is the decision of the Court of Appeals for the Armed Forces (CAAF) in your case. You must personally acknowledge receipt of this decision by signing enclosure (2) and returning it in the envelope provided.

Pursuant to 28 U.S.C. §1259(3), you have the right to petition the Supreme Court of the United States to review the judgment of CAAF. Rule 13 of the Rules of the Supreme Court of the United States requires that a petition for a writ of certiorari be filed within 90 days of the CAAF's entry of judgment.

Additionally, in accordance with the Discipline and Conduct Manual, COMDTINST M1600.2 and Coast Guard Clemency Board, COMDTINST 5814.1, you have the right to submit a petition for clemency of the unexecuted portion of your sentence. Petitions must be forwarded to Commandant (CG-1331) and must arrive within 60 days after the sentence and conviction is final under Rule for Court-Martial 1209, Manual for Courts-Martial (MCM) United States (2016 edition).

Should you not petition the Supreme Court, your conviction will become final on July 16, 2019. Petitions must state the specific relief requested and the specific reasons why you believe such relief to be appropriate. If the case has been previously reviewed by the Clemency Board, the petition must identify new facts or circumstances justifying a second review or reconsideration. Petitions must include sufficient evidence to support the request. Such evidence must be in writing and may include documents and citations to specific sections of the record of trial. The Clemency Board may return petitions that are not in compliance with these requirements.

You are advised to contact HQS-DG-LST-CG-LMA-Appellate@uscg.mil if you require advice or assistance in connection with submission of a petition for a grant of review or other matters concerning further appellate review of your case. Also, if you petition the Supreme Court for review, a Coast Guard lawyer in Washington, DC, will be provided at no cost to you to assist

UNITED STATES COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Anthony J. LIVINGSTONE
Cadet, U.S. Coast Guard

CGCMG 0352
Docket No. 1448

5 October 2018

Military Judge:	CAPT Benes Z. Aldana, USCG
Appellate Defense Counsel:	Ms. Terri R. Zimmermann, Esq. (argued) Mr. Jack B. Zimmermann, Esq. LCDR Jason W. Roberts, USCG
Appellate Government Counsel:	LCDR Stephen Miros, USCG (argued) LCDR Tereza Z. Ohley, USCG Mr. Stephen P. McCleary, Esq.
Appellate Special Victims' Counsel:	LCDR Elizabeth A. Hutton, USCG LCDR Jeremy A. Weiss, USCG LT Nathaniel L. Eichler, USCG

BEFORE
McCLELLAND, BRUCE & BRUBAKER
Appellate Military Judges

BRUBAKER, Judge:

Members sitting as a general court-martial convicted Appellant, contrary to his pleas, of two specifications of sexual assault, one specification of extortion (which the military judge later conditionally dismissed), and two specifications of conduct unbecoming an officer and a gentleman in violation of Articles 120, 127, and 133, Uniform Code of Military Justice (UCMJ). The members sentenced Appellant to dismissal and confinement for eight years, which the Convening Authority approved.

Appellant now asserts the following:

(1) The evidence was factually insufficient to support one of his two sexual assault convictions;

(2) The military judge abused his discretion when ruling on the admissibility of evidence under Military Rule of Evidence (M.R.E.) 412;

(3) The evidence was legally and factually insufficient to support both convictions for conduct unbecoming an officer and a gentleman;

(4) The military judge reversibly erred by failing to instruct on *mens rea* with regard to the conduct unbecoming charges;

(5) The prosecutor committed misconduct when she undertook a discovery obligation she would not normally have and failed to exercise due diligence in executing that obligation, to Appellant's prejudice; and

(6) Participation by a Special Victims' Counsel amounted to private counsel providing unauthorized assistance to the trial counsel, to Appellant's prejudice.[1]

We specified an additional issue:

> The Manual for Courts-Martial provides that whenever an offense charged under Article 133 "is the same as a specific offense set forth in [the MCM], the elements of proof are the same as those set forth in the paragraph which treats that specific offense, with the additional requirement that the act or omission constitutes conduct unbecoming an officer and gentleman." Manual for Courts-Martial, United States (2012 ed.), Pt. IV, ¶ 59.c.(2). Applying this, were the charged offenses under Article 133 "the same" as the also-charged extortion under Article 127, Uniform Code of Military Justice? If so, did the specifications under Charge III state offenses and did the military judge properly instruct the members on the elements of the offenses? *Cf. United States v. Reese*, 76 M.J. 297, 302–303 (C.A.A.F. 2017).

We heard oral argument on this and issue (4) pertaining to the *mens rea* of Article 133.

We ultimately need not answer whether the Article 133 offenses were "the same as a specific offense," MCM, Pt. IV, ¶ 59.c.(2) because if they were, they were improperly charged and instructed on and if they were not, there is legally insufficient evidence independent of a specific offense to sustain the convictions. We thus set aside the Article 133 convictions. This

[1] We have considered issues (5) and (6), raised personally by Appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), but reject them without further discussion.

moots the *mens rea* issue. After reviving a conditionally-dismissed extortion specification, we otherwise affirm the findings and reassess the sentence.

Facts

Appellant's convictions center around his relationships with two fellow cadets at the United States Coast Guard Academy, whom we will refer to as Cadet A and Cadet B.

Cadet A

Cadet A and Appellant met and had consensual sex when she was a fourth-class (first year) cadet and he a third class (second year) cadet. Cadet A later texted Appellant that while she "really liked him," she was nervous about getting into trouble for violating cadet rules about relationships between fourth-class cadets and upperclassmen, so she wanted to end the relationship until she became an upperclassman. (R. at 399.)

Appellant responded it was not necessary to end their relationship and was adamant that they talk about it in person. Cadet A told him she would not change her mind but acquiesced to going to his room to discuss it in person. As she was again explaining her reasons for suspending their relationship, he tried to hug her but she held her hands up and said "no." Appellant then grabbed the back of her neck and tried to kiss her but she turned her head away. He then threw her onto a bed and, as she attempted to keep her legs together and said "no," he pulled down her shorts and underwear, pried her legs apart, and penetrated her vagina with his penis.

Cadet A did not initially report the incident, instead avoiding contact with Appellant to the extent she could. Appellant, however, began to send Cadet A Snapchat messages with photographs of her studying or otherwise interacting with upperclassmen and captions to the effect of "looks like frat[ernization] to me." (R. at 414.) Cadet A testified that this made her feel threatened and that he was "collecting things that I had done wrong to use against me in the future." *Id.* She told him to stop and eventually blocked him from sending messages to her via Snapchat.

Cadet B

Appellant and Cadet B were classmates. They developed a very close friendship that included on-and-off dating and frequent consensual sex, both when they considered themselves to be in a dating relationship and not.

As they entered their final year at the Academy, Appellant informed Cadet B that he was dating someone else and that when he saw her on a holiday weekend in a couple of months, he planned to make it serious, meaning he would be sexually exclusive with his girlfriend. Cadet B conceded that this made her a little jealous, but ultimately decided that their friendship was more important and continued to spend time with him. Also, although at first Cadet B thought she and Appellant should just stop having sex immediately, she agreed to continue to have sex with him until the holiday weekend.

While they were still in this status, Appellant invited Cadet B to his room to "cuddle," which Cadet B interpreted to mean lying together holding one another. She ultimately agreed but warned him she was "so tired" and "dead." (Prosecution Ex. 2 at 1.) She went to his room and, dressed in shorts and a t-shirt, fell asleep on his bed "cuddling" with him lying behind her. (R. at 614.)

Some time later, she was awakened by Appellant putting his hand down the front of her pants. Annoyed and just wanting to sleep, she pulled his hand down and told him to stop. He tried again with the same result. On a third try, she again pulled his hand out and told him to stop and said "don't you have a girlfriend" in an effort to deter him. (R. at 616.) He then said "fine" and lay still. (R. at 618.) But after falling back asleep, she awakened to the feeling of pressure and as she lay there still and half asleep, Appellant penetrated her vagina with his penis.

Like Cadet A, Cadet B did not immediately report the assault. Appellant initially was contrite, texting that he felt "horrible" and that he hoped "no one ever hurts you, deceive[s] you, and disrespect[s] you like i have." (Prosecution Ex. 8 at 1). After Cadet B accused him of being a rapist and that she was thinking of reporting him, he replied:

> Everyday i walk by you, or even one of your friends, i feel a pit in my stomach, i hate myself. Your words have cut me and i feel incredibly terrible shame. I deserve this. I will continue to avoid you and continue to leave you alone. . . . My hands started shaking when you sent me this message this morning because i know, should you make an unrestricted report, my career is over. If this is what you want then I understand. I hope you can have peace again one day because i never will knowing how ive hurt you. I hope that somehow i am able to finish my time here if you'll allow it.

(Prosecution Ex. 8 at 1.)

After Cadet B told Appellant that his career was of no concern to her and gave him an ultimatum to leave the Academy or she would report him, his tone changed. In a lengthy text message, he now denied sexually assaulting her and said that dropping out of the Academy was not an option. He said that if she filed an unrestricted report, he would "fight it with every ounce of [his] being." (Prosecution Ex. 10 at 4.) Characterizing the case as a "he said she said matter given that there are no witnesses and no evidence," he indicated it would ultimately be dropped, but the investigation would reveal she had fraternized with a Coast Guard officer and they both would receive nonjudicial punishment for having sex in the barracks. He said that the "embarrassing details of our sex life and every dirty gross bit of our relationship will be dug up and publicized" and further threatened to make a counterclaim that she had sexually assaulted him on an unrelated occasion. *Id.*

Factual Sufficiency of Sexual Assault Conviction

Appellant asserts that the evidence supporting his conviction for sexually assaulting Cadet B is factually insufficient. We disagree.

We review factual sufficiency *de novo*. Article 66(c), UCMJ; *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt. *Id.* Applying this test, we are convinced of Appellant's guilt beyond a reasonable doubt and thus reject this asserted error.

Article 133 Offenses

We turn to Appellant's convictions under Article 133, UCMJ. Explaining our concerns with these convictions requires some background and history.

Conduct unbecoming an officer and a gentleman is a centuries-old offense focused on preserving the ability of officers to lead and to command. *Parker v. Levy*, 417 U.S. 733, 743–45 (1974); *United States v. Schweitzer*, 68 M.J. 133, 137 (C.A.A.F. 2009). Currently codified in Article 133, UCMJ, it is written in the broadest of terms: "Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

Yet while seemingly vague, Article 133 survives constitutional challenges not only because of the unique needs of the military, but because customs and usages of the services narrow its breadth and provide it context and meaning. *Parker*, 417 U.S. at 746–47. The Manual for Courts-Martial (MCM) clarifies that the article prohibits:

> action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or 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. . . . Not everyone is or can be expected to meet unrealistically high moral standards, but there is a limit of tolerance based on customs of the service and military necessity below which the personal standards of an officer, cadet, or midshipman cannot fall without seriously compromising the person's standing . . . .

MCM, United States (2012 ed.), Pt. IV, ¶ 59.c.(2).[2]

Military courts have emphasized that "not every delict or misstep warrants punishment under Article 133. In general, it must be so disgraceful as to render an officer unfit for service." *United States v. Guaglione*, 27 M.J. 268, 271 (C.M.A. 1988). In other words:

> [I]f the act, though ungentlemanlike, be of a trifling character, involving no material prejudice to individual rights, or offence against public morals or decorum, it will not in general properly be viewed as so affecting the reputation of the officer or the credit of the service as to be made the occasion of a prosecution under the Article.

[2] While the 2012 edition applies due to the date of the offenses, there are no changes in the current version.

> William Winthrop, *Military Law and Precedents* 711–12 (2d ed. 1920 Reprint) (footnotes omitted). Article 133 is not violated by conduct that falls short of the attributes of an "ideal officer and the perfect gentleman" or by "slight deviations constituting indecorum or breaches of etiquette," but by conduct that exceeds the "limit of tolerance" set "by the custom of the service to which the officer belongs."

United States v. Brown, 55 M.J. 375, 382 (C.A.A.F. 2001) (citations omitted).

The alluded-to custom of the service may derive from a prohibition already codified under military law. Article 133—in contrast to Article 134[3]—not only lacks a preemption clause but expressly "includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman." MCM, Pt. IV, ¶ 59.c.(2). So one way the Government can prove an Article 133 violation is to prove that the accused committed some other offense under the UCMJ under circumstances that were dishonorable or disgraceful. There is, however, an important caveat:

> Whenever the offense charged is the same as a specific offense set forth in this Manual, the elements of proof are the same as those set forth in the paragraph which treats that specific offense, with the additional requirement that the act or omission constitutes conduct unbecoming an officer and a gentleman.

MCM, Pt. IV, ¶ 59.c.(2). Courts thus view a specific offense incorporated within an Article 133 offense as a lesser-included offense of the latter. *United States v. Palagar*, 56 M.J. 294, 296 (C.A.A.F. 2002).

On the other hand, the underlying act or omission does not *have* to otherwise amount to an offense. Rather, "the appropriate standard for assessing criminality under Article 133 is whether the conduct or act charged is dishonorable and compromising . . . notwithstanding whether or not the act otherwise amounts to a crime." *Schweitzer*, 68 M.J. at 137. So another way for the Government to prove an Article 133 violation is to prove that the accused committed an act or omission that was, under the circumstances, unbecoming an officer and a gentleman independent of whether it otherwise constituted an offense. The Government would then be relieved of having to prove the elements of a specific offense, but to overcome constitutional vagueness and notice challenges, the record would need to demonstrate that the accused's

[3] *See* MCM, Pt. IV, ¶ 60.c.(5)(a).

conduct violated a reasonably-known service custom or standard of conduct. *United States v. Rogers*, 54 M.J. 244, 256 (C.A.A.F. 2000); *United States v. Johanns*, 20 M.J. 155, 158 (C.M.A. 1985); *see also Parker*, 417 U.S. at 747 ("'Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is well known by practical men in the navy and army, and by those who have studied the law of courts martial . . . .'") (quoting *Dynes v. Hoover*, 61 U.S. 65, 82 (1857)).

It is possible for one act to constitute both conduct unbecoming an officer and a specific offense without them necessarily being "the same" within the meaning of MCM, Pt. IV, ¶ 59.c.(2). *See generally United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993). But, we hold, for a conviction under Article 133 to stand on its own apart from a specific offense, the Government must present a theory of liability at trial and prove how the conduct exceeded the "limit of tolerance based on customs of the service," MCM, Pt. IV, ¶ 59.c.(2), notwithstanding—that is, independent of—whether it constituted a specific offense.

Procedural History of the Article 133 Specifications

Appellant was charged with two specifications of conduct unbecoming an officer and a gentleman under Article 133, UCMJ, alleging he:

> (1) disgracefully and dishonorably communicate[d] to Cadet [A], a witness to [Appellant's] misconduct, messages of a harassing and intimidating nature, including electronic communications containing photos of then 4/c Cadet [A] with senior cadets and the words "looks like frat to me," or words or communications to that effect, and that, under the circumstances, his conduct was unbecoming an officer and a gentleman;
>
> and
>
> (2) disgracefully and dishonorably communicate[d] to Cadet [B], a witness to [Appellant's] misconduct, messages of a harassing and intimidating nature, including texts stating that if Cadet [B] made a report of sexual assault no one would believe her, the report would result in exposure of embarrassing details of her sex life and an investigation into and exposure of unrelated misconduct by Cadet [B], and further, that he would make a counter claim of sexual assault, and that, under the circumstances, his conduct was unbecoming an officer and a gentleman.

For the same acts, Appellant was also charged with two specifications of extortion under Article 127, UCMJ, alleging he:

> (1) with intent to unlawfully obtain an immunity, to wit: prevent the initiation of an investigation of his assault on Cadet [A], an investigation that he believed could harm his future prospects of continued service in the U.S. Coast Guard, communicate[d] to Cadet [A] a threat to accuse Cadet [A] of fraternization;
>
> and
>
> (2) with intent to unlawfully obtain an immunity, to wit: prevent the initiation of an investigation of his assault on Cadet [B], an investigation that he believed could harm his future prospects of continued service in the U.S. Coast Guard, communicate[d] to Cadet [B] a threat to make a counter-claim of sexual assault against her.

The military judge provided standard elements and definitions of Article 133 and did not instruct that they incorporated extortion or any other specific offense as the underlying conduct. The Defense objected neither to the sufficiency of the specifications nor to the instructions.

The members acquitted Appellant of the first extortion specification but convicted him of the second as well as both conduct unbecoming specifications. On Defense motion, the military judge ruled that the convictions for extortion and conduct unbecoming for the same underlying act constituted an unreasonable multiplication of charges and conditionally dismissed the extortion specification.

Analysis

We conclude that Appellant's convictions under Article 133 either relied on the underlying conduct also constituting a specific offense—in which case the specifications were improperly charged and instructed on—or the evidence that Appellant's conduct was unbecoming independent of whether it amounted to a specific offense was legally insufficient. Looking at it either way, which we do below, the convictions cannot stand.

First, because the Article 133 offenses were not charged or instructed on as incorporating a specific offense, it would be error for the Government's theory of liability or proof to rely on