UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 39634

UNITED STATES
Appellee

v.

Anthony R. MORROW
Captain (O-3), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 1 October 2020

Military Judge: Donald. R. Eller (arraignment); Shelly W. Schools.

Approved sentence: Dismissal and confinement for 2 months. Sentence adjudged 19 October 2018 by GCM convened at Dyess Air Force Base, Texas.

For Appellant: Captain Alexander A. Navarro, USAF; Mark C. Bruegger, Esquire.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Lieutenant Colonel Brian C. Mason, USAF; Major Jessica L. Delaney, USAF; Major Anne M. Delmare, USAF; Mary Ellen Payne, Esquire.

Before MINK, KEY, and D. JOHNSON, *Appellate Military Judges*.

Judge KEY delivered the opinion of the court, in which Senior Judge MINK and Judge D. JOHNSON joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

KEY, Judge:

A general court-martial composed of officer members convicted Appellant, contrary to his pleas, of one specification of disorderly conduct, in violation of

Article 134, UCMJ, 10 U.S.C. § 934, and one specification of absence without leave, in violation of Article 86, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 886.[1,2] Appellant was sentenced to a dismissal and confinement for two months. The convening authority approved the sentence as adjudged.

On appeal, Appellant raises six issues. His first two issues consist of his assertion that the evidence is legally and factually insufficient to support a finding of guilt for either specification. Appellant's third and fourth issues assert the military judge erred by failing to instruct the members on the defense of involuntary intoxication, and any waiver of that issue by trial defense counsel constituted ineffective assistance of counsel. His fifth issue asserts the military judge erred in admitting extrinsic evidence relating to uncharged misconduct, and his sixth is that his sentence is inappropriately severe. Because we resolve the first two issues in Appellant's favor and set aside the findings and sentence, we do not reach the remainder.

I. BACKGROUND

A. Alleged Disorderly Conduct

Appellant and his civilian girlfriend, Ms. PT, were getting ready for bed around 2100 or 2130 hours on Thursday, 22 March 2018, as they had no plans to go out that evening. The two did not live together, but they would spend some nights together, as they intended to on this particular night. The record is unclear whether they were at Appellant's house or Ms. PT's apartment.

At the time, Appellant had active prescriptions for both the anti-anxiety drug Xanax and the sedative Ambien. Six days before this particular evening, Appellant's Ambien prescription was changed from 5 milligram pills (with instructions on the bottle to take one or two pills at bedtime) to 10 milligram pills (with instructions to take one pill at bedtime). He was dispensed a bottle of 90 pills of the 5 milligram dose on 16 February 2018, and, on 16 March 2018, he received a 90-count bottle of 10 milligram pills. No evidence was introduced to explain the change in the prescription or what directions, if any, Appellant was given regarding either this new prescription or what he was to do with the remaining pills from the February prescription.

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[1] All references in this opinion to the Uniform Code of Military Justice and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2016 ed.).

[2] Appellant was charged with being drunk and disorderly, however, he was only convicted of being disorderly.

Ms. PT did not testify at Appellant's trial, but the parties entered into a stipulation as to her expected testimony which recounted Appellant asking her to give him two of his Ambien pills as they were getting ready to go to bed. She did so, and Appellant fell asleep.[3] At some later point that evening, Ms. PT and a friend exchanged text messages in which the friend invited Ms. PT and Appellant to come to her house for a party. According to the stipulation of expected testimony, Appellant woke shortly thereafter (Ms. PT "may have awoken him"). Ms. PT took a 30-pack of light beer out of the refrigerator and a 6-pack of "craft beer" for Appellant, as he did not like the light beer. They arranged for a ride-share car to take them to the friend's party where Ms. PT recalled seeing Appellant drink "at least two" of the craft beers. She also remembered another person drinking one of the craft beers and that some of those beers were left over at the end of the evening, although her memory of the night was incomplete due to her own consumption of alcohol. No one who attended the party testified at Appellant's trial.

At the end of the evening, Appellant arranged for a ride-share car to take him and Ms. PT to Ms. PT's apartment. The driver, Mr. TJ, picked the couple up at 0219 hours; he testified both Appellant and Ms. PT were intoxicated, slurring their speech, and having what he described as an "incoherent" conversation in the car. During the 12-minute ride to Ms. PT's apartment complex, both Appellant and Ms. PT fell asleep, and Mr. TJ had to wake Appellant in order to determine where to drop them off. Once they arrived, Mr. TJ said it took Appellant about ten minutes to wake up Ms. PT and get her out of the car. Ms. PT's expected testimony was that she remembered being picked up at her friend's house and then waking up in her car the next morning in the parking lot next to her apartment building. The record is silent as to when, how, or why Ms. PT wound up sleeping in her car.

Around 0300 hours, Airman First Class (A1C) CC, who lived in the same apartment complex as Ms. PT in a second-floor unit in a building a short distance away from Ms. PT's apartment, woke to "a loud banging" on her front door which scared her.[4] After the banging occurred a second time, she went to the door, looked out the window, and saw a male dressed in black—later identified as Appellant—standing at her door with a backpack at his feet "trying to stick something into [her] keyhole." Without opening her door, A1C CC told Appellant "[t]his is not your house" and that she was going to call the police.

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[3] No evidence was presented in the findings portion of trial as to whether Appellant took two of the 5 milligram pills, two of the 10 milligram pills, or one of each.

[4] A1C CC characterized the banging a "louder than a knock," but when she was called upon to demonstrate how loud the noise was in court, trial counsel described A1C CC as "tapping the table in front of her."

She retrieved her phone and again told Appellant he was not at his apartment and that she was going to call the police. Appellant said, "okay," picked up his backpack and turned and walked down the stairs while A1C CC called 911. A1C CC testified Appellant said nothing else to her during the incident, and she estimated that the amount of time between her warnings and Appellant leaving was "[l]ike three minutes at the most." On cross-examination, A1C CC acknowledged Appellant was not hostile towards her in any way, did not shout at her, and generally seemed kind of oblivious as to what was going on.

Officer JS from the Abilene Police Department responded to the 911 call and found Appellant sitting on a retaining wall at the apartment complex. Officer JS concluded Appellant was "probably intoxicated" due to the late hour and the fact Appellant was slurring his speech and not making "much sense," along with the fact he "sway[ed] back and forth" when he stood up. When Officer JS asked Appellant what he was doing there, Appellant said he did not know. When asked what he planned to do, Appellant said he was going to walk to a friend's house a few miles away. Because the apartment complex was close to a busy road, Officer JS determined Appellant's plan to "walk around a public area" made him "a danger to himself and others," so Officer JS decided to arrest Appellant pursuant to a Texas public-intoxication law.

Another officer, KW, reported to the scene to assist Officer JS. She described Appellant as "obviously under the influence of an intoxicant," and said that he was "fairly unstable to the point that we had to assist him in walking" because he "was not able to stand on his own." Officer JS said he had to help Appellant to his police vehicle, explaining that "if [he] had let [Appellant] go, [Appellant] would have fallen on his face." Officer KW described Appellant's demeanor as "very agitated" and "very argumentative," and she testified, "I would say probably he was defiant," although she did not identify any particular conduct on Appellant's behalf that supported this description. Officer JS, meanwhile, characterized Appellant as being "smart alecky."

Despite having been issued body cameras which they were required by department policy to have turned on, neither Officer JS nor Officer KW were using their cameras during their interaction with Appellant; they testified their batteries had died. Once in the police car, however, Officer JS's dash-mounted and back-seat cameras captured both a view out the front windshield as well as a view of Appellant who was handcuffed in the back seat. Both of these videos were introduced by the Government and admitted into evidence at trial. While driving through the apartment complex parking lot, Officer JS hit a speed bump causing Appellant to bounce up off the hard plastic back seat at which point Appellant audibly said, "sh*t," in a conversational tone. During the remainder of the eight-and-a-half-minute drive to the jail, Appellant is seen

in the video as being awake and generally quiet, occasionally saying to himself that he did not believe he did anything to warrant being arrested.

Once at the jail, Officer JS parked in an open receiving area to complete paperwork, during which time the cameras continued recording, capturing people occasionally walking by the car to go to nearby buildings. The videos introduced by the Government ran over 20 minutes long and end about 12 minutes after Officer JS drove up to the jail, with Appellant in the back seat of the police car for that entire period. While sitting at the jail, Appellant calmly, but stumbling over his words, asked Officer JS why he was being arrested and whether he was going to be released. Officer JS never answered Appellant's questions, instead telling him, "just relax." Near the end of the videos, Appellant asked Officer JS if he was "trying to find a reason" for arresting Appellant, and Appellant said to himself, "He has no f**king idea."

Officer JS testified that at some later point after the videos ended, he asked Appellant to get out of the car, but that Appellant would say "he didn't know what [Officer JS] was talking about, that [Officer JS] didn't phrase it the right way." Officer JS testified he then "physically drag[ged] [Appellant] out by the arm" and "placed [Appellant] on his knees" because Appellant was unstable and Officer JS needed to close the car door. Still handcuffed, Appellant fell forward, landing on his face. Testifying that he could not get Appellant to stand up due to him going "limp," Officer JS "fed [his] right arm through the loop that is made by [Appellant's] hands be[ing] handcuffed and picked [Appellant] up by his shoulder and dragged [Appellant] into the jail." Officer JS said "it was evident it was hurting [Appellant]," as Appellant was "screaming . . . in pain." According to Officer JS, no one witnessed these events, and he agreed during cross-examination that Appellant was not shouting, being profane, vulgar, or obscene, nor had Appellant insulted him in any way.

Officer JS took Appellant into the jail facility to be booked, and once Appellant was inside, Officer JS described him as "compliant" and not being vulgar, obscene, or disrespectful. In completing his paperwork at the jail, Officer JS did not document any instances of Appellant resisting or not following Officer JS's instructions. Officer LL—the booking officer to whom Officer JS delivered Appellant—recalled personnel being called to assist Officer JS because Appellant could not stand on his own. She said Appellant "was having trouble walking," but she did not perceive him to be resisting Officer JS. She added, "I think he was just really intoxicated, so they were helping him. That happens a lot. People are so intoxicated they can't walk on their own."

Officer JS, who had previously served a four-year enlistment in the Army, testified on direct examination the he found Appellant "to be a discredit to himself as an officer, officers in general, a discredit to the U.S. military, and the

U.S. Air Force." He continued: "I think it's a disgrace that he wears that uniform . . . . It reflects poorly on all of us." On re-direct examination, trial counsel asked Officer JS if he expected "more out of officers," to which Officer JS answered,

> Yes, sir, I do. I expect a professional behavior. They are an example not only to the public, because they're held to a higher standard, but also to men and women that they lead, men and women that are under their supervision. They should be able to provide a good example to all those around them.

At Appellant's court-martial, trial counsel called a pharmacist, Major (Maj) DS, to discuss Appellant's prescriptions. He explained that Ambien "can cause a lot of confusion, loss of coordination . . . sleepwalking and things of that nature. So sometimes people are doing things that they're not necessarily conscious of." Because of Xanax's similar side effects, he said that taking the two drugs together, as Appellant was prescribed, could result in "a pretty marked increase . . . in . . . your loss of coordination, dizziness, your lack of awareness. Amnesia definitely is present with both of these medications." The labels for both drugs explain they are not to be taken with alcohol, and Maj DS testified consuming alcohol along with the medications would magnify the drugs' side effects.

B. Alleged Absence Without Leave

For some period of time prior to his arrest, Appellant had been performing duties for the 7th Force Support Squadron (7 FSS) at Dyess Air Force Base. For reasons not entirely clear from the record, Appellant was not supervised by anyone in 7 FSS. There was some testimony that Appellant had been assigned to the base legal office at some point in the past, and when he was in that office he fell under the staff judge advocate. The deputy staff judge advocate testified he was responsible for approving Appellant's leave requests while Appellant was attached to 7 FSS, but he was not Appellant's supervisor and he had not supervised any of Appellant's duty performance for the year and a half prior to Appellant's arrest. The 7 FSS Resource Management Flight Chief, Ms. KC, testified only that Appellant was "assigned" to her, and that Appellant "was in the IT Department," but she clarified that she was not his supervisor.[5] The evidence at trial did not disclose who supervised Appellant or identify anyone in his chain of command. Ms. KC said Appellant was not required to apprise her of where he was at any given time or what he was working on, but he typically did so "as a courtesy," in her words. Ms. KC never informed Appellant

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[5] We presume "IT" is short for "information technology," but there was no evidence introduced at trial on this point.

of his duty hours, but she said the standard duty day for 7 FSS was from 0730 hours to 1630 hours. She agreed at trial that the unit had a "fairly flexible" and "pretty loose schedule" in that it was common for people to be out of the office working on various projects. This included Appellant working late nights and "strange hours" for which Appellant was not required to obtain her approval. She described Appellant's work on such after-hours projects as "not uncommon." Other than saying Appellant worked "in the IT Department," Ms. KC provided no further detail about the location of Appellant's duty section. She also did not testify Appellant was actually required to be at any particular duty location at any particular time on any day, much less specifically on 23 March 2018.

When Appellant was arrested, the first sergeant for 7 FSS, Master Sergeant (MSgt) SG, was notified. By the time MSgt SG arrived at the jail around 0830 hours, Appellant had been released. MSgt SG decided to try and locate Appellant, but his efforts were slowed by the fact he did not know Appellant's home address because Appellant was not included on the 7 FSS personnel roster. Eventually, MSgt SG made contact with Ms. PT at her apartment, and she offered to lead MSgt SG to Appellant's house, where they found Appellant around noon. On encountering Appellant, MSgt SG testified, "I said, 'Hey, Captain Morrow.' I was like, 'Hey, you know you're required to be at work today.' I asked him if he was, you know, okay to drive and stuff, and he said yes." MSgt SG said he did not ask Appellant anything else. At trial, in response to a question about where Appellant actually worked, MSgt SG said he worked in "the IT office," which was "in a building next to" the one MSgt SG worked in, but he did not provide any further detail. MSgt SG testified he concluded Appellant was at work by approximately 1230 or 1300 hours, apparently based on him seeing Appellant's car in the parking lot.

Although there was evidence Appellant would perform some of his duties outside of the normal duty day, there was no evidence he was doing so around the day of his arrest, and Appellant did not have approved leave scheduled on the day he was arrested.

II. DISCUSSION

Appellant argues his convictions for both specifications are legally and factually insufficient. Regarding the disorderly conduct charge, Appellant asserts the evidence is insufficient to prove he was actually disorderly, and even if he was disorderly, his conduct did not rise to the level of being service-discrediting. With respect to the absence without leave specification, Appellant argues the Government failed to prove Appellant was required to be at Building 7233, as he was charged.

A. Law

We only affirm findings of guilty that are correct in law and fact and, "on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

"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. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). "The term reasonable doubt, however, does not mean that the evidence must be free from conflict." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018). Circumstantial evidence may suffice. *See United States v. Kearns*, 73 M.J. 177, 182 (C.A.A.F. 2014) (citing *Brooks v. United States*, 309 F.2d 580, 583 (10th Cir. 1962)). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). As a result, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (alteration in original) (citation omitted), *cert. denied*, ___ U.S. ___, 139 S. Ct. 1641 (2019).

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 ourselves] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *Wheeler*, 76 M.J. at 568 (alteration in original) (quoting *Washington*, 57 M.J. at 399).

B. Disorderly Conduct

In order to convict Appellant of disorderly conduct as charged here, the Government was required to prove beyond a reasonable doubt that: (1) Appellant was disorderly and (2) under the circumstances, his conduct was of a nature to bring discredit upon the armed forces. *See Manual for Courts-Martial,*

United States (2016 ed.) *(MCM)*, pt. IV, ¶ 73.b. "Disorderly conduct" is defined as "conduct of such a nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment thereby. It includes conduct that endangers public morals or outrages public decency and any disturbance of a contentious or turbulent character." *MCM* at ¶ 73.c.(2). Service-discrediting conduct is that "which has a tendency to bring the service into disrepute or which tends to lower it in public esteem." *MCM* at ¶ 60.c.(3).

Although Article 134, UCMJ, prohibits a broad swath of conduct, it is not "such a catchall as to make every irregular, mischievous, or improper act a court-martial offense." *United States v. Sadinsky*, 34 C.M.R. 343, 345 (C.M.A. 1964). Violations of a state law are not *per se* service discrediting. *United States v. Sadler*, 29 M.J. 370, 374 (C.M.A. 1990). In assessing whether conduct is service discrediting, we look to the time, place, circumstances, and purpose behind the conduct. *United States v. Guerrero*, 33 M.J. 295, 298 (C.M.A. 1991).

Under the facts presented here, we are not convinced Appellant's conduct was "disorderly" under the definition in the *MCM*, nor are we convinced it was service-discrediting. In charging Appellant with drunk and disorderly conduct, the Government did not specify any particular conduct, alleging only that Appellant was drunk and disorderly "on or about 23 March 2018," and that such conduct occurred "at or near Abilene, Texas." For purposes of this analysis, we will assume the relevant conduct is that which occurred from the point where Appellant banged on A1C CC's door until he was booked at the jail. As noted above, Appellant was acquitted of the portion of the specification alleging he was drunk, leaving him convicted only of disorderly conduct.

Appellant's conduct at the apartment complex essentially consisted of him banging on A1C CC's door, trying to put something in the keyhole, walking off after being confronted, and being found swaying, unsteady, and slurring his speech. Officer KW said Appellant was argumentative, but Officer JS described him as being "smart alecky." Once he was arrested, Appellant said very little, although he did ask a few times why he was being held, and he talked to himself in a relatively quiet tone of voice, using vulgar words twice. Officer JS placed Appellant—who could not stand on his own—on his knees while handcuffed, leading to Appellant falling over. Officer JS then "dragged" Appellant such that Appellant was "in pain" and screaming from the pain, although this account is uncorroborated by other witnesses present at the jail. There is no evidence Appellant yelled at, tried to attack, resisted, or acted belligerently towards Officer JS. To the contrary, Appellant generally referred to Officer JS as "sir," although when asking why he was being arrested, Officer JS found Appellant to be "smart alecky"—a characterization only barely supported by the video evidence. Officer KW's description of Appellant's demeanor as "very

agitated," "very argumentative," and "probably . . . defiant" is at odds with Officer JS's testimonial description of Appellant's conduct, and is inconsistent with Appellant's demeanor depicted by the video recordings taken inside Officer JS's vehicle.

The question we are faced with is whether Appellant's conduct meets the legal definition of "disorderly," a word that—standing alone—does not readily yield precise contours. According to the analysis of the offense of disorderly conduct in the *MCM*, the definition for "disorderly" was derived from *United States v. Manos*, 24 C.M.R. 626 (A.F.B.R. 1957), *rev'd on other grounds*, 25 C.M.R. 238 (C.M.A. 1958). *MCM*, *Analysis of Punitive Articles*, ¶ 73, App. 23, at A23-23. The term is defined in the *MCM* as "conduct of such a nature as to affect the peace and quiet" of others "who may be disturbed or provoked to resentment thereby," but the definition goes on to incorporate conduct which "endangers public morals or outrages public decency" and "contentious or turbulent" disturbances. *MCM*, pt. IV, ¶ 73.c.(2). In *Manos*, the Air Force Board of Review concluded so-called "Peeping Tom" conduct was disorderly in a case where an accused was peering into a neighbor's window. 24 C.M.R. at 629–30. Later cases have similarly upheld convictions for disorderly conduct based on acts of voyeurism[6] as well as sexual misconduct occurring in non-private settings.[7] There would seem to be little argument that peering into private spaces or engaging in sexual acts likely to be unwittingly seen by others is the sort of conduct that "endangers public morals or outrages public decency."

A review of disorderly conduct cases reveals that violence is a frequent attribute, which would tend to meet the "contentious or turbulent" aspect of the definition. Our predecessor court concluded that disorderly conduct "requires only that the accused's conduct be contentious or belligerent in nature" in a case involving four Airmen who "join[ed] with an unlawful assembly with a common illegal purpose." *United States v. Haywood*, 41 C.M.R. 939, 945 (A.F.C.M.R. 1969). In that case, the four accused were part of a group who physically fought with and shouted obscenities at military police trying to arrest them in what the court described as "a near melee," conduct the court concluded met the definition of "disorderly." *Id.* at 941, 945.

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[6] *See United States v. McElroy*, No. ACM 31165, 1994 CCA LEXIS 30, at *4 (A.F. Ct. Crim. App. 9 Dec. 1994) (unpub. op.); *United States v. Foster*, 13 M.J. 789, 796 (A.C.M.R. 1982); *United States v. Johnson*, 4 M.J. 770, 772 (A.C.M.R. 1978).

[7] *See United States v. Blake*, 33 M.J. 923, 926 (A.C.M.R. 1991) (accused had sexual intercourse with another soldier in an unlocked government vehicle—which at least one other military member was due to return to—in the middle of a military exercise).

Another disorderly conduct case stemmed from a verbal argument in a public area involving "speaking loudly and cursing" which led to a physical altercation in which the accused held a knife to another's throat. *United States v. Baro*, NMCCA 200200429, 2005 CCA LEXIS 151, at *17–19 (N.M. Ct. Crim. App. 9 May 2005) (unpub. op.). In *United States v. Supapo*, an accused's conviction was upheld based upon him "slapping, pushing, punching, and chasing" a superior petty officer around a cutter's deck in the presence of other crew members, leading to the accused being physically subdued. 61 M.J. 718, 719–20 (C.G. Ct. Crim. App. 2005).

Threatening and profanely berating law enforcement personnel has similarly sufficed as disorderly conduct. For example, in *United States v. Armstrong*, a security forces patrolman broke up an altercation in a parking lot by threatening to deploy his pepper spray. No. ACM 33640, 2001 CCA LEXIS 140, at *5 (A.F. Ct. Crim. App. 9 Apr. 2001) (unpub. op.). The accused in that case then approached the patrolman, raised his arms, bowed his chest, and made aggressive comments which resulted in the crowd re-assembling and "trash talking" with the accused until the patrolman could calm the situation. *Id*. The accused and some of the others involved in the parking lot episode continued the altercation at another location which resulted in a bystander being shot. *Id*. at *2. We found the accused's conduct in the parking lot sufficient to sustain a conviction for disorderly conduct because of its "contentious or turbulent nature" which "provoked a reoccurrence of the argument and could have escalated the situation into physical violence." *Id*. at *6.

Similarly, in *United States v. Brinson*, a military law enforcement noncommissioned officer intervened to stop a physical altercation between the accused and his fiancée—an altercation which involved "grabbing . . ., struggling, yelling[,] and screaming and swearing"—and the accused calling the noncommissioned officer "a white mother f**ker," telling him to "f**k off," and saying he would not produce his "f**king ID card" and that he was going to "kick [the noncommissioned officer's] f**king white a*s." 49 M.J. 360, 361–62 (C.A.A.F. 1998). The accused then "drew his right hand back in a closed fist position and went towards" the noncommissioned officer, who physically restrained and handcuffed the accused as the accused fought with him. *Id*. at 362. Finding the accused's words failed to meet the criteria for indecent language, as he was charged, the United States Court of Appeals for the Armed Forces (CAAF) concluded the accused's "scurrilous public denunciation of [the] law enforcement officer" amounted to disorderly conduct. *Id*. at 364. A similar case involved an accused who was waiting for her pretrial confinement physical examination when she began "screaming and shouting obscenities in front of other patients" and then "verbally abused police personnel who were called for assistance," calling the police "pigs" and "f**king cops," and physically assaulting one of the

police officers by kicking and trying to bite him—all of which caused a gathering of service members who were in the building for a transition assistance program. *United States v. Dickens*, NMCCA 201300025, 2014 CCA LEXIS 251, at *11–15 (N.M. Ct. Crim. App. 22 Apr. 2014) (unpub. op.).

Our superior court, CAAF, upheld another disorderly conduct case in which an accused used threatening words and actions towards a senior noncommissioned officer. There, the accused was found guilty for making the comment that his first sergeant was "f**king with the wrong guy" and then "glaring" at the first sergeant such that witnesses concluded the accused was trying to threaten and intimidate the first sergeant. *United States v. Beckett*, 49 M.J. 354, 357–58 (C.A.A.F. 1998). One of our sister courts recently upheld a guilty plea to disorderly conduct where an accused—as part of a series of domestic-violence offenses directed at his wife—"tore up" their home by "overturning furniture, throwing laundry around the bedroom, and breaking things in an angry rage" and then threatened his wife, leading her to call the police. *United States v. Carrion*, No. 201800118, 2019 CCA LEXIS 172, at *5–6 (N.M. Ct. Crim. App. 15 Apr. 2019) (unpub. op.).

On the other hand, one of our sister courts rejected a guilty plea to disorderly conduct in one case as not being supported by an adequate factual basis. *United States v. Pierre-Louise*, ARMY 20010158, 2004 CCA LEXIS 367 (A. Ct. Crim. App. 27 May 2004) (unpub. op.). In that case, the accused, who was driving after drinking, hit a parked car. *Id.* at *4. Military police were called to the scene and directed the accused to provide his driver's license; the accused, however, gave them his social security card and an automatic teller machine card, and then just handed over his entire wallet. *Id.* at *5. The accused was apprehended after refusing to perform a field sobriety test and using "foul language" in so refusing, as well as engaging in "incoherent babble." *Id.* at *14. Once at the police station, the accused "became belligerent, spouting obscenities" at military police personnel. *Id.* at *5. The Army Court of Criminal Appeals concluded this conduct, in conjunction with the vehicle accident, was insufficient to establish that the accused's conduct was disorderly. *Id.* at *14.

In addition to cases involving aggravated confrontations with law enforcement personnel, the disorderly conduct offense has been employed in sexual harassment cases. We recently upheld a drunk and disorderly conviction where an accused, who was drunk, laid in the grass outside a military lodging facility in the middle of the night before proceeding to try to enter a locked government vehicle, grabbing a lodging employee's hips, and using "inappropriate sexual language" to query the employee about her sexual preferences, after which the employee called security forces. *United States v. Moore*, No. ACM S32477, 2018 CCA LEXIS 560, at *19–21 (A.F. Ct. Crim. App. 11 Dec. 2018) (unpub. op.), *rev. denied*, 79 M.J. 44 (C.A.A.F. 2019). In another case, one of our sister courts

upheld a disorderly conduct conviction when an accused made false representations to gain access to a particular barracks in order to go to the room of another Marine, a woman the accused had met once before. *United States v. Ayalacruz*, 79 M.J. 747 (N.M. Ct. Crim. App. 2020). Once at the room, the accused pushed his way in uninvited, took off his blouse, tried to get the other Marine to dance with him, held the other Marine's legs down, and refused her requests that he leave. *Id*. at 749–50. The woman was so concerned for her safety that she grabbed a knife and texted the barracks duty officer to come and remove the accused from her room. *Id*. at 754.

Other conduct of a patently turbulent or provocative nature has resulted in successful disorderly conduct prosecutions, such as when an accused used "racial and nationalistic slurs" against two officers during his medical treatment for injuries following an affray;[8] an accused's setting fire to a toilet seat in an occupied barracks and his "ensuing disruptive and boisterous antics . . . during which time he called attention to the fire;"[9] and an accused who decided to walk on others' cars in an Italian city in the presence of subordinates, causing damage to the vehicles and leading to the accused being physically restrained.[10]

At the other end of the spectrum, we rejected a guilty plea to disorderly conduct based upon an accused's purposeful inhalation of a volatile aerosol intoxicant, because such was neither a disturbance nor "in any way contentious or turbulent." *United States v. Plesec*, No. ACM 30441, 1994 CCA LEXIS 97, at *7 (A.F. Ct. Crim. App. 25 Oct. 1994) (per curiam) (internal quotation marks omitted) (unpub. op.). We did uphold a conviction for drunk and disorderly conduct in a case in which we characterized the evidence as "not overwhelming." *United States v. Monserrate*, No. ACM S31649, 2012 CCA LEXIS 3, at *15 (A.F. Ct. Crim. App. 5 Jan. 2012) (unpub. op.), *rev'd in part on other grounds*, 71 M.J. 357 (C.A.A.F. 2012) (mem.). In that case, the accused drunkenly drove his car into a ditch, leaving 20-foot-long and 6-inch-deep ruts in a field. *Id*. at *11–12. He was found walking alone across a field towards his apartment—stumbling and slurring his speech—by responding police officers, to whom the accused first declared he had driven the car into the ditch, then that he had not done so, and finally claimed that "she drove it there." *Id*. One of the responding officers testified she was "surprised" to learn the accused was in the military. *Id*. at *13. In finding the conviction legally and factually sufficient, we pointed out that the appellant drove his car into a ditch while intoxicated, that he could

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[8] *United States v. Merriweather*, 13 M.J. 605, 608 (A.F.C.M.R. 1982).

[9] *United States v. Evans*, 10 M.J. 829, 830–31 (A.C.M.R. 1981) (per curiam).

[10] *United States v. Rogers*, 50 M.J. 805, 813 (A.F. Ct. Crim. App. 1999).

not get the car out, someone called the police, and the manager of the apartment complex "felt compelled" to personally pay for the damage to the field and said he "would [have] expect[ed] a little bit more out of the military." *Id*.

What these cases collectively tell us is that the offense of disorderly conduct is characterized by conduct that involves aggressive, violent, destructive, or objectively offensive behavior. That is, they involve real and non-hypothetical threats to personal safety and property. The definition of "disorderly" in the *MCM*, at first blush, simply requires conduct "affect[ing] the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment thereby," but the definition goes on to explain it includes "contentious or turbulent" conduct and that which "endangers public morals or outrages public decency." We interpret statutes in a manner that gives meaning to each word,[11] and we see no reason to interpret non-statutory components of the *MCM* in a different fashion. Considering this premise alongside the cases highlighted above, we view the phrases "contentious or turbulent nature" and "endangers the public morals or outrages public decency" as illustrating the sort of conduct which amounts to a criminal disorder. The question becomes whether Appellant's conduct falls within the term's definition, and we conclude it does not.

Two marginal cases mentioned above—one finding disorderly conduct and one rejecting a conviction—are useful in framing our assessment here. In *Monserrate*, a case we found "not overwhelming," the accused drunkenly crashed his car—an inherently dangerous act—and caused environmental damage which another person had to pay to remediate. 2012 CCA LEXIS 3, at *15. But where an Airman was inhaling a tire inflator aerosol with his friends, we found the conduct fell short of being disorderly, even though it violated a state law, due in part to the lack of evidence the conduct was "in any way contentious or turbulent." *Plesec*, unpub. op. at *7.

We find Appellant's case more akin to *Plesec*, as all the evidence tends to show is that Appellant, while intoxicated (whether by alcohol or prescription medication or a combination of the two) went to the wrong apartment and was subsequently arrested when found sitting on a nearby retaining wall. There was no evidence Appellant was trying to gain entry into A1C CC's apartment for any nefarious purpose; instead, he seemed "kind of oblivious," saying only, "okay" when A1C CC told him she was going to call the police. No evidence was adduced that Appellant was trespassing or was some place he was not authorized to be. Indeed, Officer JS premised his arrest on the fact he found Appellant in a public place and that he was concerned for Appellant's safety. Appellant

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[11] *See, e.g., United States v. Adcock*, 65 M.J. 18, 23–24 (C.A.A.F. 2007) (citations omitted).

was not belligerent with or abusive towards anyone that night, much less combative or violent. Appellant did stumble over his words to the point where he did not make sense on occasion during his arrest and transport to the jail, but we cannot conceive of any criminality arising from being something less than plain-spoken. The same is true regarding Officer JS's claims that Appellant was "smart alecky," as nothing in the UCMJ makes being impolite a crime. Even if we give Officer KW's testimony that she found Appellant agitated, argumentative, and defiant the greatest possible weight, and we disregard both Officer JS's conflicting description of Appellant being merely "smart alecky" and the video evidence depicting Appellant as a passive arrestee, we are just left with the prospect of Appellant arguing with the police about why he was being arrested—conduct which implicates Appellant's constitutionally protected rights.[12] Similarly, Appellant falling over when placed on his knees while handcuffed and then crying out in pain as Officer JS dragged him into the jail facility falls short of contentious or turbulent conduct which may disturb others or provoke resentment, especially in light of the fact that Officer JS testified Appellant could not stand or walk on his own. While we need not precisely delineate the threshold for disorderly conduct, we conclude the offense neither criminalizes every interaction between military members and the police nor reaches Appellant's conduct on this particular night.

We are also unconvinced Appellant's conduct was service discrediting. Officer JS proclaimed Appellant was, among other things, "a discredit to the U.S. military," yet his opinion is hardly grounded in the evidence produced at trial, to include his own testimony. Officer JS may have been personally annoyed that Appellant was "smart alecky," but such conduct objectively falls short of the type of service-discrediting behavior which transforms otherwise legal behavior into a criminal act under the UCMJ. The fact Appellant was intoxicated,

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[12] *See, e.g.*, *Houston v. Hill*, 482 U.S. 451, 462 (1987) ("[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."); *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Kerman v. City of New York*, 261 F.3d 229, 242 (2d Cir. 2001) ("Speech directed at police officers will be protected unless it is likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest." (internal quotation marks and citations omitted)); *Duran v. Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990) (even when "inarticulate and crude," expression of disapproval of police officer falls "squarely within the protective umbrella of the First Amendment."). *See also*, *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944) ("One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.").

banged on a stranger's apartment door, and was subsequently arrested and released a few hours later may have startled A1C CC and occupied some marginal degree of police resources, but it does not rise to the level of bringing the service into disrepute or lowering it in public esteem.

After a careful review of the record in this case and viewing the evidence in the light most favorable to the prosecution, we conclude no rational trier of fact could have found the essential elements of disorderly conduct beyond a reasonable doubt, and the evidence is therefore legally insufficient. *See Robinson*, 77 M.J. at 297–98. Moreover, after making allowances for having not observed the witnesses, we are, ourselves, unable to find Appellant guilty of the offense beyond a reasonable doubt. *See Turner*, 25 M.J. at 325.

C. Absence Without Leave

In order to convict Appellant of being absent without leave as charged here, the Government was required to prove beyond a reasonable doubt that: (1) Appellant absented himself from Building 7233 on Dyess Air Force Base, which was a place of duty at which he was required to be; (2) his absence was without authority from anyone competent to give him leave; and (3) the absence lasted until on or about 1355 hours on 23 March 2018. *See MCM*, pt. IV, ¶ 10.b.(3).

Whether due to oversight or to evidentiary challenges, the Government offered no evidence Appellant was required to be at Building 7233. In fact, no evidence regarding Building 7233 was introduced at all; the only time the building number was mentioned by the Government was during trial counsel's closing argument, which, of course, is not evidence. Trial counsel never established who had authority over Appellant, much less that someone in authority over him directed him to be at Building 7233—or anywhere else, for that matter—on 23 March 2018. What was established at trial was that Appellant was "assigned" to Ms. KC, who was not Appellant's supervisor, that he worked "in the IT Department" of 7 FSS, and that the standard duty day for that unit was from 0730 hours to 1630 hours. Ms. KC, however, testified she never told Appellant what his duty hours were. Moreover, Ms. KC agreed that the unit's schedule was "loose" and "fairly flexible," it was "not uncommon" for Appellant to be out of the office working on projects outside of the typical duty day, and Appellant was not required to get advance approval for such.

"The military is a notice pleading jurisdiction." *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011) (citing *United States v. Sell*, 11 C.M.R. 202, 206 (C.M.A. 1953)). Charges under the UCMJ are sufficient if they contain the elements of the offense charged, inform the accused what he or she must defend against, and are adequate to bar a later prosecution for the same offense. *Id.* (citations omitted). The flipside of this proposition is that if the Government alleges essential elements to an offense, it must prove them. *See*, *e.g.*, *United*

States v. Paul, 73 M.J. 274, 278–79 (C.A.A.F. 2014). Under our Article 66(c), UCMJ, 10 U.S.C. § 866(c), authority, we may narrow the scope of an appellant's conviction to that conduct we deem renders it legally and factually sufficient, but we may not broaden it. *United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019); *see also United States v. Hale*, 77 M.J. 598, 607 (A.F. Ct. Crim. App. 2018), *aff'd*, 78 M.J. 268 (C.A.A.F. 2019).

The Government had a number of options in deciding how to charge Appellant for his conduct on 23 March 2018. Once it settled on a charge, however, it was required to prove the offense it alleged Appellant committed. As such, the military judge instructed the members that they could only convict Appellant of this offense by determining, beyond a reasonable doubt, that Appellant was required to be at "Dyess Air Force Base, Texas, Building 7233" and that he was absent from the same without proper authority. The Government, however, proved nothing at all about Building 7233, much less that Appellant was absent from the building or even required to ever be there at all.[13] The Defense, meanwhile, contested the notion that Appellant had been directed to be at any particular place at any particular time, and that he had the authority to perform his duties at various locations at various times, as dictated by the mission needs he identified. Thus, where precisely Appellant was required to be was a critical aspect of his defense. While we readily accept that Appellant, as an active duty officer, was likely expected to regularly report for duty, and that—by all accounts—he was not performing any official duties the morning of 23 March 2018, the Government alleged Appellant was absent from a particular place he was required to be at, but failed to prove it at trial by any measure.

The Government points to Rule for Courts-Martial (R.C.M.) 603(a) and asks us to except the words "Building 7233" from the specification such that it would allege Appellant's duty location as "Dyess Air Force Base, Texas." This rule, however, addresses changes made or proposed prior to the announcement of findings at trial and provides us no authority at this stage of Appellant's appeal.[14] Our superior court has conclusively rejected the proposition that appel-

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[13] The Government did establish Appellant was found at his home and not on Dyess Air Force Base, but the record of trial before us discloses nothing about where Building 7233 might be located, to include whether it is on the base or somewhere else.

[14] The Government also cites to *United States v. Parker* in support of its argument, yet that case stands for the proposition the Government must prove the facts it alleges. 59 M.J. 195 (C.A.A.F. 2003) (once military judge denied motion to change alleged date of offenses from 1995 to 1993, the Government was obligated to prove the offenses occurred in 1995, as charged).

late courts may rely on R.C.M. 918 to modify court-martial findings by exceptions and substitutions to rectify a variance between the pleadings and the proof. *English*, 79 M.J. at 121. Moreover, the Government's proposal calls upon us to broaden the scope of the charged offense from an absence from a particular building to an absence from the entire Air Force base.[15] This we cannot do, as "there is no authority, statutory or otherwise, that permits [this court] to except language from a specification in such a way that creates a broader or different offense than the offense charged at trial." *Id.*[16] The evidence presented at trial is therefore both legally and factually insufficient to support a conviction on this charge.

III. CONCLUSION

The findings of guilty and the sentence are **SET ASIDE**. The Charges and Specifications are **DISMISSED WITH PREJUDICE**. All rights, privileges, and property of which Appellant has been deprived by virtue of the findings and sentence set aside by this decision are ordered restored. *See* Articles 58b(c) and 75(a), UCMJ, 10 U.S.C. §§ 858b(c), 875(a).

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

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[15] We note the contention Appellant was supposed to be at Dyess Air Force Base was only marginally more supported by the evidence than the allegation he was supposed to be at Building 7233.

[16] Under Article 59(b), UCMJ, 10 U.S.C. § 859(b), we have the authority to affirm a finding of a lesser included offense in lieu of a greater offense, but Appellant's absence from some place other than Building 7233 is not a lesser included offense of the offense charged here. *See, e.g.*, *United States v. Lubasky*, 68 M.J. 260, 261 (C.A.A.F. 2010).