

US v. Lopez, Marina D.

[TO BE GIVEN AFTER ARGUMENT OF COUNSEL.]

Members of the court, when you close to deliberate and vote on the findings, each of you must resolve the ultimate question of whether the accused is guilty or not guilty based upon the evidence presented here in court and upon the instructions which I will give you. My duty is to instruct you on the law. Your duty is to determine the facts, apply the law to the facts, and determine the guilt or innocence of the accused. The law presumes the accused to be innocent of the charge(s) against (him) (her).

During the trial some of you took notes. You may take your notes with you into the deliberation room. However, your notes are not a substitute for the record of trial.

I will advise you of the elements of each offense alleged.

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In specifications 1-8, and 10-11 of Charge I, the accused is charged with the offense of failing to obey a lawful written order in violation of Article 92 of the Uniform Code of Military Justice. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:

3-16-2. VIOLATING OTHER WRITTEN ORDER OR REGULATION (ARTICLE 92)

- (1) That there was in existence a certain lawful order, Officer Candidates School Order P1530.3J, dated 9 April 2010, issued by Colonel Richard C. Jackson II;
- (2) That the accused had knowledge of the order;
- (3) That the accused had a duty to obey such order; and
- (4) That on divers occasions at or near Marine Corps Base Quantico between on or about 6 October 2010 to on or about 4 November 2010, the accused failed to obey this lawful order by:

Specification 1: Paragraph 3000(1) – wrongfully running the platoon during hours of darkness in an area with uneven terrain and several obstacles which resulted in at least one injury;

Specification 2: Paragraph 3003(2) – wrongfully pushing candidates out of her way, grabbing candidates clothing forcefully to correct them, and ripping bandages off of a candidate;

Specification 3: Paragraph 3003(3)(e) – wrongfully assigning or calling candidates names such as:

- Billy
- stupid
- retarded
- idiots
- Ms. Cheeseburger
- Greasy Cheeseburger
- weak ass females
- piece of shit
- pieces of garbage
- fucking weirdo
- worthless piece of crap
- fat face

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- fuck up
- pathetic
- disgusting
- that typical female
- zepol;

Specification 4: Paragraph 3003(10) – wrongfully using profanity towards and in the presence of candidates;

Specification 5: Paragraph 3004(1) – wrongfully assigning platoon wide essays;

Specification 6: Paragraph 3005(1)(a) – wrongfully sending the platoon in and out of the buildings, and up and down the ladder wells with no training purpose;

Specification 7: Paragraph 3005(1)(g) – wrongfully making candidates do “Incentive PT”;

Specification 8: Paragraph 3006(3)(a) – wrongfully not allowing candidates to receive medical care;

Specification 10: Paragraph 3006(3)(m) – wrongfully causing candidates to be disrespectful to each other; and

Specification 11: Paragraph 5031(1) – wrongfully throwing candidates’ weapons to the ground.

As a matter of law, the order in this case, as described in the specifications, if in fact there was such an order, was a lawful order.

When an order prohibits certain acts, except under certain conditions, then the burden is on the prosecution to establish by legal and competent evidence beyond a reasonable doubt that the accused does not come within the terms of any exception.

5–11–2. IGNORANCE OR MISTAKE—WHEN ONLY GENERAL INTENT IS IN ISSUE

The evidence has raised the issue of mistake on the part of the accused concerning the precise nature of what constituted those acts which are prohibited by Officer Candidates School Order P1530.3J in relation to the offenses as charged in Specifications 1, 2, 5, 6, 7, 8 and 10 of Charge I.

The accused is not guilty of the offense of Disobedience of a Lawful Order in Violation of Article 92 of the Uniform Code of Military Justice with respect to Specifications 1, 2, 5, 6, 7, 8, 10 and 11 of Charge I if:

(1) she mistakenly believed that, with respect to each such specification she mistakenly believed that:

Specification 1: running the platoon during hours of darkness in an area with uneven terrain and several obstacles was permissible;

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Specification 2: pushing candidates out of her way, grabbing candidates' clothing forcefully to correct them, and ripping bandages off of a candidate were permissible;

Specification 5: assigning platoon-wide essays was permissible;

Specification 6: sending the platoon in and out of buildings, and up and down the ladder wells was permissible;

Specification 8: not allowing candidates to receive medical care was permissible;

Specification 10: causing candidates to be disrespectful to one another was permissible;

and

(2) if such belief on her part was reasonable with respect to such Specification.

To be reasonable the belief must have been based on information, or lack of it, which would indicate to a reasonable person that such actions were permissible.

You should consider the accused's age, education, experience and training along with the other evidence on this issue.

The burden is on the prosecution to establish the accused's guilt. If you are convinced beyond a reasonable doubt that, at the time of the charged offenses, the accused was not under the mistaken belief that her actions were permissible with respect to Specifications 1, 2, 5, 6, 7, 8, 10 or 11 of Charge I, the defense of mistake does not exist with respect to such Specification. Even if you conclude that the accused was under such a mistaken belief, if you are convinced beyond a reasonable doubt that, at the time of the charged offense, the accused's mistake was unreasonable with respect to any such Specification, the defense of mistake does not exist with respect to it.

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In specification 12 of Charge I, the accused is charged with the offense of failing to obey a lawful general order in violation of Article 92 of the Uniform Code of Military Justice. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:

3-16-1. VIOLATING GENERAL ORDER OR REGULATION (ARTICLE 92)

(1) That there was in existence a certain lawful general order in the following terms: Marine Corps 1700.28;

(2) That the accused had a duty to obey such order; and

(3) That on divers occasions at or near Marine Corps Base Quantico between on or about 6 October 2010 to on or about 4 November 2010, the accused failed to obey this lawful general order by causing candidates to suffer or be exposed to activities that were cruel, abusive and humiliating.

As a matter of law, the order in this case, as described in the specification, if in fact there was such an order, was a lawful order.

General orders include those orders which are generally applicable to the command of the officer issuing them throughout the command or a particular subdivision thereof and which are issued by a general or flag officer in command or a commander superior to one of these.

You may find the accused guilty of violating a general order only if you are satisfied beyond a reasonable doubt that the order was general.

A general order issued by a commander with authority to do so retains its character as a general order when another officer takes command, until it expires by its own terms or is rescinded by separate action.

When a general order prohibits certain act, except under certain conditions, then the burden is on the prosecution to establish by legal and competent evidence beyond a reasonable doubt that the accused does not come within the terms of any exception.

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In the sole specification of Charge II, the accused is charged with the offense of cruelty in violation of Article 93 of the Uniform Code of Military Justice. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:

3-17-1. CRUELTY, OPPRESSION, OR MALTREATMENT OF SUBORDINATES (ARTICLE 93)

(1) That Officer Candidates were subject to the orders of Staff Sergeant Marina D. Lopez, United States Marine Corps, the accused; and

(2) That on divers occasions at or near Marine Corps Base Quantico between on or about 6 October 2010 to on or about 4 November 2010, the accused was cruel toward those same Officer Candidates by:

- Running the platoon during hours of darkness in an area with uneven terrain and several obstacles which resulted in at least one injury;
- Running on the parade deck after evening chow which resulted in candidates vomiting on the Parade Deck and not being provided with medical care; and
- Not providing enough time to hygiene despite an increased occurrence of bacterial pneumonia and increased likelihood of cellulites.

“Subject to the orders of” includes persons under the direct or immediate command of the accused and all persons who by reason of some duty are required to obey the lawful orders of the accused, even if those persons are not in the accused’s direct chain of command.

The cruelty, oppression, or maltreatment must be real, although it does not have to be physical. The imposition of necessary or proper duties on a service member and the requirement that those duties be performed does not establish this offense even though the duties are hard, difficult, or hazardous.

“Cruel” refers to treatment, that, when viewed objectively under all the circumstances, is abusive or otherwise unwarranted, unjustified, and unnecessary for any lawful purpose and that results in physical or mental harm or suffering, or reasonably could have caused, physical or mental harm or suffering.

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7-3. CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. "Direct evidence" is evidence which tends directly to prove or disprove a fact in issue. If a fact in issue was whether it rained during the evening, testimony by a witness that he/she saw it rain would be direct evidence that it rained.

On the other hand, "circumstantial evidence" is evidence that tends to prove some other fact from which, either alone or together with some other facts or circumstances, you may reasonably infer the existence or nonexistence of a fact in issue. If there was evidence the street was wet in the morning, that would be circumstantial evidence from which you might reasonably infer it rained during the night.

There is no general rule for determining or comparing the weight to be given to direct or circumstantial evidence. You should give all the evidence the weight and value you believe it deserves.

I have instructed you that you must be satisfied beyond a reasonable doubt that SSgt Lopez knew of the existence and terms of Officer Candidates School Order P1530.3J. This knowledge, like any other fact, may be proved by circumstantial evidence. In deciding this issue you must consider all relevant facts and circumstances including, but not limited to evidence tending to indicate that the accused was trained on the contents of that order, evidence that the accused had served as a Sergeant Instructor at Officer Candidates School for three cycles prior to the cycle during which the events giving rise to the allegations arose, as well as any other evidence of such knowledge, or lack thereof, on the part of SSgt Lopez.

7-12. ACCUSED'S FAILURE TO TESTIFY

The accused has an absolute right to remain silent. You will not draw any inference adverse to the accused from the fact that she did not testify as a witness. The fact that the accused has not testified must be disregarded by you.

7-8-1. CHARACTER—GOOD—OF ACCUSED TO SHOW PROBABILITY OF INNOCENCE

To show the probability of her innocence, the defense has produced evidence of SSgt Lopez's good military character and her character for being a law-abiding person. Evidence of SSgt Lopez's good military character or of her character for being law abiding may be sufficient to cause a reasonable doubt as to her guilt.

On the other hand, evidence of SSgt Lopez's good military character or her character for being law abiding may be outweighed by other evidence tending to show her guilt.

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7-7-1. CREDIBILITY OF WITNESSES

You have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness's intelligence, ability to observe and accurately remember, sincerity, and conduct in court.. Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with either side, and how each witness might be affected by the verdict.

In weighing any discrepancy by a witness or between witnesses, you should consider whether such discrepancy resulted from an innocent mistake or a deliberate lie.

Taking all these matters into account, you should then consider the probability of each witness's testimony and the inclination of the witness to tell the truth.

The believability of each witness's testimony should be your guide in evaluating testimony, not the number of witnesses called.

7-11-1. PRIOR INCONSISTENT STATEMENT

You have heard evidence that before this trial one or more witnesses made statements that may be inconsistent with their testimony here in court.

If you believe that an inconsistent statement was made, you may consider the inconsistency in deciding whether to believe that witness's in-court testimony.

You may not consider the earlier statements as evidence of the truth of the matters contained in any prior statement. In other words, you may only use such statement or statements as one way of evaluating the witness's testimony here in court. You cannot use such a statement or statement as proof of anything else.

For example, if a witness testifies in court that the traffic light was green, and you heard evidence that the witness made a prior statement that the traffic light was red, you may consider that prior statement in evaluating the truth of the in-court testimony. You may not, however, use the prior statement as proof that the light was red.

7-18. "HAVE YOU HEARD" QUESTIONS TO IMPEACH OPINION

During the testimony of LtCol Richman, he was asked whether he had heard that certain language may have been used by various staff members of Officer Candidates School that may violate that school's SOP for staff members. Those were permissible questions. However, there is no evidence that such language was used by those various staff members. This question was permitted to test the basis of the witness's opinion and to enable you to assess the weight you accord his testimony. You may not consider the question for any other purpose.

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7-17. "SPILLOVER"—FACTS OF ONE CHARGED OFFENSE TO PROVE ANOTHER

An accused may be convicted based only on evidence before the court. Each offense must stand on its own and you must keep the evidence of each offense separate. Stated differently, if you find or believe that the accused is guilty of one offense, you may not use that finding or belief as a basis for inferring, assuming, or proving that she committed any other offense.

If evidence has been presented which is relevant to more than one offense, you may consider that evidence with respect to each offense to which it is relevant.

The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt. Proof of one offense carries with it no inference that the accused is guilty of any other offense.

7-15. VARIANCE—FINDINGS BY EXCEPTIONS AND SUBSTITUTIONS

If you have doubt about the date of an alleged offense, or whether such offense occurred on one or more occasions, but you are satisfied beyond a reasonable doubt that the offense was committed at a time, in a particular manner, or on one or more occasions that differs slightly from the exact time or manner, in the specification, you may make minor modifications in reaching your findings by changing the date or manner in which the alleged offenses occurred described in the specification, provided that you do not change the nature or identity of the offense.

As to the Specifications of Charge I, if you have doubt that any of those occurred precisely as alleged, you may still reach a finding of guilty so long as all the elements of the offense are proved beyond a reasonable doubt, but you must modify the specification to correctly reflect your findings, by writing in what specific manner the order which you find to have been violated was so violated.

7-25. DIVERS OR SPECIFIED OCCASIONS

"Divers occasions" means two or more occasions.

If you substitute any word or words for the language "on divers occasions," your findings must clearly reflect the specific instance or instances of conduct upon which your findings are based. That may be reflected on the Findings Worksheet by filling in one or more relevant dates, or other facts clearly indicating which conduct served as the basis for your findings. Two thirds of the members, that is 4 members, must agree on the specific instance or instances of conduct upon which your findings are based. If two-thirds or 4 members do not agree on the same specific instance or instances of conduct, then your finding as to any such Specification must be changed to a finding of "Not Guilty."