IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Private First Class (E-3) **MITCHELL L. BRANTLEY** United States Army, Appellant	) BRIEF ON BEHALF OF APPELLEE)))) Crim. App. Dkt. No. 20150199)) USCA Dkt. No. 17-0055/AR))

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UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
	)	Crim. App. Dkt. No. 20150199
Private First Class (E-3) **MITCHELL L. BRANTLEY** United States Army, Appellant	)	USCA Dkt. No. 17-0055/AR

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

Issue Presented

WHETHER THE GOVERNMENT PROVED BEYOND A REASONABLE DOUBT THAT APPELLANT KNEW OR REASONABLY SHOULD HAVE KNOWN THAT SR WAS "OTHERWISE UNAWARE" OF SEXUAL CONTACT.

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice, 10 U.S.C. § 866(b) (2012) [hereinafter UCMJ]. The statutory basis for this Court's jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On 11 February and 24-25 March 2015, a panel of officer and enlisted personnel, sitting as a general court-martial, convicted Private First Class (PFC)

Mitchell L. Brantley (Appellant), contrary to his pleas, of abusive sexual contact in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). (JA 299). The panel sentenced Appellant to be reduced to the grade of E-1, to be confined for ninety days, and to be discharged from the service with a bad-conduct discharge. (JA 301). The convening authority approved the sentence as adjudged. (JA 302).

On October 6, 2016, the Army Court of Criminal Appeals affirmed the findings and sentence. (JA 1). On October 26, 2016, the Appellant submitted to this Court a Petition for Grant of Review. On January 12, 2016, this Honorable Court granted the Appellant's petition for review.

Statement of Facts

On 19 September 2014, PFC DS invited Appellant to dinner along with other colleagues from the 258th Military Police (MP) Company. (JA 68, 166). Appellant arrived at PFC DS's home later that evening where he met PFC DS's mother, Mrs. SR, who was visiting from Missouri. (JA 24-25). Sometime after dinner, the guests began to consume alcohol in the living room. (JA 26, 103, 198). Later, the guests moved to the backyard, where they started a fire pit and continued to consume alcohol. (JA 200). In total, Mrs. SR consumed approximately nine shots of Bacardi Dragon Berry Rum. (JA 26). The Appellant personally witnessed Mrs. SR take "five to seven shots in the living room and three more outside." (JA 232).

During this time, Mrs. SR became visibly intoxicated with slurred speech and impaired motor skills. (JA 69, 103, 126, 135). Appellant noticed Mrs. SR's impairment and gave her his seat so she would not fall into the backyard fire pit. (JA 200). As the night progressed, Mrs. SR began to feel sick and asked PFC DS to bring her Zofran, a prescribed anti-nausea medication, from her travel bag. (JA 27, 69, 201). Private First Class DS, however, mistakenly brought her mother Klonopin, which is an anti-anxiety medication. (JA 27, 69). Mrs. SR was prescribed Klonopin in case the physiological effects of her recent hysterectomy caused her to experience anxiety. (JA 27).

Klonopin should not be taken while drinking alcohol because it can exacerbate the effects of alcohol, such as sleepiness, dizziness, or worse. (JA 28-29). In the case of Mrs. SR, she became violently ill after taking the Klonopin. (JA 28-29). She became "very erratic" and "off-balance," and started vomiting uncontrollably. (JA 29, 70). She also suffered a loss of memory and consciousness at several points. (JA 28-31, 57). After ingesting the Klonopin, the next thing Mrs. SR recalled was lying down on a couch in the living room and vomiting uncontrollably into a nearby wastebasket. (JA 28-29). After she was placed on the couch, Mrs. SR went "in and out" of consciousness. (JA 70).

The dinner party ended when Mrs. SR became ill, but PFC DS insisted Appellant stay the night because he had consumed alcohol without a designated

driver. (JA 71). Private First Class DS continued to care for her mother until Appellant offered to care for Mrs. SR and let PFC DS and her husband sleep. (JA 29-30, 71-72).

After hearing Appellant's offer to take care of her, the next thing Mrs. SR remembered was Appellant straddling her and trying to pull her shorts to the side. (JA 30). She told Appellant to get off of her, but lost consciousness again. (JA 31). When Mrs. SR awoke the next morning, Appellant told her not to tell anyone what happened during the night or else he would "go after" PFC DS and "hurt her." (JA 32). Mrs. SR assumed Appellant was referring to him straddling her. (JA 32). On 21 September 2014, however, Appellant sent Mrs. SR a text message that admitted, "While you were passed out, I took out your breasts and masturbated to you." (JA 37). Mrs. SR responded in disbelief, "You did not do that." (JA 37, 52). Appellant replied, "I had to." (JA 37). Shocked by this new information, Mrs. SR showed the text messages to her daughter, PFC DS, before deleting the messages. (JA 37, 52, 77-78). The Appellant corroborated that Mrs. SR told him she showed a text message to her daughter. (JA 224).

On 23 September 2014, PFC DS responded to a text message from Appellant and let him know she saw the message he sent her mother. (JA 81, 303). Appellant apologized and asked how he could regain her trust after the "stupid decision" he made. (JA 303). Private First Class DS asked Appellant if he knew

what he did was a "sexual assault" and asked if he did "anything else to [her mother] while she was sleeping besides take her boobs out of her shirt and masturbate to them[.]" (JA 81, 304, 306). Appellant responded "[n]othing else happened" and that he felt "ashamed[.]" (JA 303-304, 306).

On 1 October 2014, when interviewed by a special agent from the Criminal Investigation Command (CID), Appellant denied any sexual touching of Mrs. SR. (JA 236). While the Appellant admitted to sending a text message to Mrs. SR on 21 September 2014, he claimed that the message said Mrs. SR should have worn a t-shirt to sleep. (JA 240). The Appellant also mischaracterized his text messages with PFC DS telling CID that his response to PFC DS's text messages was "no, that's not what happened." (JA 243). At trial, Appellant admitted that he never denied PFC DS's accusations and testified he only touched Mrs. SR's breast over her clothing after she initiated the sexual contact by touching his thigh and penis. (JA 207-208). Appellant further claimed he stopped touching Mrs. SR's breast and went to sleep on another couch after she abruptly stopped touching him. (JA 208-209). While the Appellant emphatically denied removing Mrs. SR's breasts from her shirt and masturbating that evening, he admitted to sending the aforementioned text messages to PFC DS expressing remorse. (JA 209, 240-243). The Appellant also testified that Mrs. SR was "restless" and "never passed out" but then admitted to telling CID that she was "out at some point." (JA 236).

Additional facts necessary to the disposition of this case are cited below under the argument section of the government's brief.

Summary of Argument

This Court should deny the Appellant's request for relief and affirm the lower court's findings of legal and factual sufficiency. There was a plethora of evidence presented at trial that Mrs. SR was "unaware" of the sexual contact, far exceeding the legal sufficiency threshold. If this Court determines that the evidence can only support a finding of "asleep," a statutory review of the plain language in Article 120(b)(2), UCMJ supports that the words "asleep, unconscious, or otherwise unaware" describe the same theory of criminal liability, making any error harmless.

WHETHER THE GOVERNMENT PROVED BEYOND A REASONABLE DOUBT THAT APPELLANT KNEW OR REASONABLY SHOULD HAVE KNOWN THAT SR WAS "OTHERWISE UNAWARE" OF SEXUAL CONTACT.

Standard of Review

Questions of legal sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). This Court also reviews statutory interpretation de novo. *United States v. Schloff*, 74 M.J. 312, 313 (C.A.A.F. 2015).

Law

"Evidence is legally sufficient if, viewed in the light most favorable to the Government, a rational trier of fact could have found the essential elements of the

crime beyond a reasonable doubt." *United States v. Winckelmann*, 70 M.J. 403, 406 (C.A.A.F. 2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In resolving questions of legal sufficiency, this court is "not limited to Appellant's narrow view of the record." *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996) (citing *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993)). To the contrary, this court must "draw every reasonable inference from the evidence of record in favor of the prosecution." *Winckelmann*, 70 M.J. at 406 (quoting *United States v. Bright*, 66 M.J. 359, 365 (C.A.A.F. 2008)).

Argument

The evidence presented at trial is legally sufficient to affirm Appellant's conviction for abusive sexual contact. After drawing every reasonable inference from the evidence of record in favor of the prosecution, a rational panel could have found beyond a reasonable doubt that the Appellant made sexual contact with Mrs. SR's breasts while she was "passed out," which is sufficient evidence of her being "unaware." (JA 37).

Before deliberation, the military judge properly instructed the panel that a finding of guilt for abusive sexual contact required them to be convinced by legal and competent evidence beyond a reasonable doubt:

> One, that at or near Fort Polk, Louisiana, between on or about 19 September 2014 and on or about 20 September 2014, the accused committed sexual contact upon Mrs. SR, to wit: touching her breast; and

> Two, that the accused did so when he knew or reasonably should have known that Mrs. SR was *otherwise unware* that the sexual contact was occurring. (R. at 405) (emphasis added).

Appellant only challenges the sufficiency of the second element, arguing that the government failed to present *any* evidence that Mrs. SR was "otherwise unaware" of the sexual contact. The Appellant argues that the evidence presented at trial supported a separate theory of criminal liability, impairment. Finally, the Appellant argues that even if the government provided sufficient evidence that Mrs. SR was "passed out," this proved that she was "asleep," not that she was "unaware."

1. There was sufficient evidence that Mrs. SR was "unaware" of the sexual contact.

A rational trier of fact could have found that Mrs. SR was "unaware" of the sexual contact beyond a reasonable doubt. Appellant's assertions that the *only* evidence presented to support a finding that the victim was unaware was evidence of her intoxication is directly contradicted by the record. The Appellant himself provided the strongest evidence of his guilt through his voluntary, text-message confessions that he exposed Mrs. SR's breasts while she was "passed out" and masturbated to them. (JA 303, 306, 37, 52, 77-78, 81-82).

"[A] voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such a confession." *United States v. Ellis*, 57 M.J. 375, 381 (C.A.A.F. 2002) (quoting *Hopt v. Utah*, 110 U.S. 574, 585 (1884)).

> A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him . . . . Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.

Arizona v. Fulminate, 499 U.S. 279, 296 (1991) (citations omitted).

In this case, there is evidence of three confessions from Appellant, which include two to his victim and one to PFC DS. Because these confessions go to the contested element, each one is examined in closer detail below.

A. Appellant first confessed his offense to his victim.

At trial, Mrs. SR testified that Appellant sent her the following text message a day after the offense: "While you [Mrs. SR] were passed out, I [Appellant] took out your breasts and masturbated to you." (JA 37, 52). Mrs. SR replied to Appellant's text message in disbelief stating, "You did not do that." (JA 52). Appellant responded, "I had to." (JA 37, 52). The victim essentially offered Appellant an opportunity to retract his initial spontaneous confession to her, however, Appellant doubled down, confirming his initial confession. Although this first series of admissions were deleted and therefore not physically produced at

trial, Mrs. SR testified at trial that she showed the text messages to her daughter, PFC DS. (JA 37). At trial, the Appellant admitted that Mrs. SR told him that same Sunday via text message that she showed the text messages to PFC DS. (JA 224). In her trial testimony, PFC DS further confirmed the existence of the text messages and provided an almost identical description of the contents: "She showed me texts from PFC Brantley saying that he had taken out her breasts while she was sleeping and masturbated to them." (JA 77). The existence and contents of these confessions to Mrs. SR were adopted by Appellant in his second text-message confession to PFC DS. (JA 303, 306, 81-82).

B. Appellant also confessed his offense to PFC DS.

In response to the Appellant's first series of admissions to her mother, PFC DS confronted the Appellant in the following text-message exchange:

> [Appellant:] can you tell me what's wrong please?
>
> [PFC DS:] I saw what you texted my mom before she left
>
> [Appellant:] So your mad about that. . . . I'm sorry I guess would be the start. Why I did it idk I don't really know how to make it up to you or for yall to trust me again I'm just sorry for my stupid decision I made while you and Chris trusted me . . . (JA 303).

If this were the extent of the text message exchanges between Appellant and PFC DS, Appellant's claims of mistake of fact or misunderstanding a comment

about the appropriateness of Mrs. SR's sleep attire might be plausible. However, PFC DS clarified the nature of the accusation when she responded:

> [PFC DS:] You can be sorry all you want. Do you know what that is sexual assault!!! You set her back so much!
>
> [PFC DS:] And at work you will leave me alone. Unless having to do with work
>
> [Appellant:] Ok

(JA 303). A reasonable person confronted with the nature of the accusation (i.e., sexual assault) would respond with a denial, challenge, question, or at least silence if a mistake or misunderstanding actually existed in his or her mind. However, Appellant responded with an affirmative "Ok" precisely because he knew exactly what text message and conduct PFC DS was referencing.

Finally, any remaining doubt regarding Appellant's culpability is removed by the last portion of his confession to PFC DS, which states:

> [PFC DS:] Did you do anything else to my mom while she was sleeping besides take her boobs out of her shirt and masturbate to them? She deserves to know
>
> [Appellant:] Nothing else happened. . . .
>
> [Appellant:] I feel ashamed . . .
>
> [PFC DS:] So just that?
>
> [Appellant:] Yes
>
> [Appellant:] Your reporting me arnt you?

> [PFC DS:] I'm getting closure for my mom that's why I wanted to know because she's had nothing but panic attacks since.
>
> [Appellant:] Listen I'm sorry for the screw up I truly am I wanna know what I can do to try and fix it. I'm not saying i wanna be apart or involved in your life just to be ok in passing. . . . I wanna fix this

(JA 303, 306). While Appellant makes an attempt at damage control, he never denies the offense, challenges any of the facts, offers clarification regarding the context of his actions, or even questions why Mrs. SR would have panic attacks from a consensual encounter. Instead, Appellant confirms the same facts of the sexual contact with Mrs. SR while she was unaware that he communicated in his first confession to his victim.

Not only does Appellant admit that he did not do anything *else* to Mrs. SR besides expose her breasts and masturbate to them "while she was sleeping," the Appellant goes along with the rationale for the question (i.e., Mrs. SR "deserves to know" what happened to her "while she was sleeping"), which assumes his victim was otherwise unware that the sexual contact was occurring and not merely suffering from a lack of recollection. (JA 303). When confronted during cross-examination at the court-martial with the gravity of his confession and its incompatibility with his claim of misunderstanding, Appellant admitted he did nothing to correct the misunderstanding or challenge the factual premise of the "sexual assault" allegation. (JA 241-243).

Neither Appellant's efforts at trial to claim misunderstanding, nor his efforts on appeal to challenge the charging theory, does anything to raise reasonable doubt that he did exactly what he said he did—expose Mrs. SR's breasts and masturbate to them while he knew she was passed out, asleep, and unaware.

C. Appellant's testimony at trial did not provide a different context to his previous confessions.

While a credibility determination is not necessary in a legal sufficiency review, Appellant's trial testimony certainly failed to provide any further context that would change the nature of his text message confessions and the testimony of his victim. In total, Appellant gave three different narratives about his physical contact with Mrs. SR. In his first version, Appellant confessed to his victim and her daughter that he exposed Mrs. SR's breasts while she was "passed out" and masturbated to them. (JA 303, 306, 37, 52, 77-78, 81-82). In his second version, Appellant lied to CID, stating he had no physical contact with Mrs. SR besides patting her back, and claimed the text messages to Mrs. SR were about her wearing a t-shirt to sleep. (JA 236-237). In his last version for trial, Appellant claimed he cupped Mrs. SR's breast only after she initiated the sexual contact and again said that the text messages referenced Mrs. SR wearing a t-shirt to sleep. (JA 207-208). However, Appellant's trial version of events is so factually distinct from his text

message confessions that this issue boils down to credibility versus whether there is evidence of Mrs. SR's unawareness.

Specifically, Appellant would have this Court believe Mrs. SR was feeling amorous and initiated the sexual contact (JA 207-208) while she was ill from ingesting Klonopin with a significant amount of alcohol (JA 199-202) and still experiencing "vaginal pain" due to a recent hysterectomy. (JA 59). Appellant also claimed that he immediately stopped cupping Mrs. SR's breast when she abruptly stopped touching his thigh and penis, for some unexplained reason. (JA 208-209). With the Appellant's insistence that he did not masturbate that evening (JA 208-209), it strains credibility to believe his confessions mistakenly reference a benign comment about the appropriateness of Mrs. SR's sleep attire, precluding any mistaken confession. (JA 240).

D. Appellant's admissions were corroborated.

Mrs. SR's testimony that she took nine shots of rum, began "feeling sick," then took Klonopin, which "increases the effects of the alcohol," resulting in her vomiting "uncontrollably," combined with similar accounts from the other witnesses, corroborated the Appellant's admission. (JA 26-31). It is highly likely that a person in this state in the early morning hours would "pass out." Mrs. SR explained waking up to the accused straddling her, and then passing back out. (JA 31). She described passing out as "I lost consciousness again." (JA 31). While

the Court is well aware of situations where a conscious victim may not remember certain events, may be aware despite intoxication, or may be in various states of consciousness or unconsciousness, the Appellant eliminated any ambiguity through his corroborated admissions. The Appellant was the only person present when he touched Mrs. SR's breasts. (JA 30, 206). He described Mrs. SR as "passed out," which is certainly unaware. (JA 37).

All of this forecloses any reasonable doubt, especially when considered in the light most favorable to the prosecution, that Appellant did exactly what he confessed to doing and was charged with—exposing Mrs. SR's breasts while he knew she was unaware. Taken together, after drawing every reasonable inference from the evidence of record in favor of the prosecution, a rational panel could have found the second element of the offense was met beyond a reasonable doubt. Accordingly, Appellant's conviction is legally sufficient.

2. Even if the evidence indicated that Mrs. SR was "asleep" or "unconscious," such is consistent with a finding of "otherwise unaware."

The words "asleep, unconscious, or otherwise unaware" constitute a descriptive list of various means by which a victim could be unaware and thus unable to consent, not separate theories of criminal liability. This Court need only look to the plain language of Article 120, UCMJ to make such a determination.

The context of the statute, the legislative history, the case law history, and persuasive authority from two service courts also support this reading.

A. The Plain Meaning of the Statute

It is a fundamental tenet of statutory construction to construe a statute in accordance with its plain meaning. *Loving v. United States*, 62 M.J. 235, 240 (C.A.A.F. 2005) (citing *Lamie v. United States Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004)) ("It is well established that when the statute's language is plain, the sole function of the courts -- at least where the disposition required by the text is not absurd -- is to enforce it according to its terms."). This Court "interpret[s] words and phrases used in the UCMJ by examining the ordinary meaning of the language, the context in which the language is used, and the broader statutory context." *United States v. Pease*, 75 M.J. 180, 184 (C.A.A.F. 2016) (citing *Schloff*, 74 M.J. at 314; *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). The findings here are legally sufficient based on the plain meaning of Article 120(b)(2), UCMJ, especially considering the context of the language and the statute as a whole. The government proved beyond a reasonable doubt that the Appellant touched Mrs. SR's breasts while she was "passed out," which is unaware. (JA 37).

Article 120(d), UCMJ, Abusive Sexual Contact, is defined as:

> Any person subject to this chapter who-

(1) commits or causes sexual contact upon or by another person by-

(A) threatening or placing that other person in fear;

(B) causing bodily harm to that person;

(C) making a fraudulent representation that the sexual contact serves a professional purpose;

(D) inducing a belief by any artifice, pretense, or concealment that the person is another person;

(2) commits or causes sexual contact upon or by another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or

(3) commits or causes sexual contact upon or by another person when the other person is incapable of consenting to the sexual contact due to-

(A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person or;

(B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person; is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

Article 120, UCMJ.

Simply examining the construction of the abusive sexual contact offense defeats the Appellant's argument that "asleep, unconscious, or otherwise unaware" are separate theories of criminal liability. The structure shows that sexual contact is prohibited under several circumstances that are specifically enumerated in different clauses or paragraphs of the statute to indicate different theories of criminal liability. Congress' listing of "asleep, unconscious, or otherwise unaware" in one paragraph of the statute, indicates that these require proof of the same element, that the accused knew or should have known that the victim was unaware. These descriptions were not intended as "means" that "are so disparate as to exemplify [three] inherently separate offenses." See *United States v. Schad*, 501 U.S. 624, 643 (U.S. 1991). In Article 120(b)(1), UCMJ, Congress explicitly listed four methods to commit abusive sexual contact and outlined them in paragraphs A-D. If the drafters also intended for "asleep, unconscious, or otherwise unaware" in Article 120(b)(2), UCMJ, to serve as separate methods to commit abusive sexual contact, they would be similarly listed in separate paragraphs or defined separately. Congress did not define the terms "asleep," "unconscious," or "unaware" in Article 120, UCMJ.

While Appellant argues that the "or" in "asleep, unconscious, or otherwise unaware" could be a disjunctive, the correct reading in this context is that "or" is "the equivalent or substitutive character of two words or phrases." Merriam-

Webster's Collegiate Dictionary 872 (11th ed. 2014). The example of substitutes provided in the Dictionary for this use of the word "or" is "lessen or abate." *Id.* The definitions of "asleep," "unconscious," and "unaware" support this reading.

> "Sleep" is "the natural periodic suspension of consciousness during which the powers of the body are restored." Merriam-Webster's Collegiate Dictionary 1171 (11th ed. 2014).
>
> "Unconscious" is defined as "not knowing or perceiving: not aware." Merriam-Webster's Collegiate Dictionary 1362 (11th ed. 2014).
>
> "Unaware" is defined as "not aware: ignorant." Webster's 1360. "Aware" is "having or showing realization, perception, or knowledge." Merriam-Webster's Collegiate Dictionary 86 (11th ed. 2014).

These definitions are practically synonyms, overlapping in meaning and each description ultimately explains the way in which the victim was "unaware." Taken in the context of Article 120 of the UCMJ, the words "asleep, unconscious, or otherwise unaware" were meant to be a non-exhaustive list of equivalents, or examples, as they all refer to a victim who is not aware and thus, cannot consent.

Looking at Article 120(b), UCMJ, specifically, there are four other paragraphs that use similar descriptive lists to explain the same theory of criminal liability. Article 120(b)(1)(A), UCMJ, uses the words "threatening or placing that other person in fear;" Article 120(b)(1)(D), UCMJ, uses the words "artifice, pretense, or concealment;" Article 120(b)(3)(A), UCMJ, uses the words "drug,

intoxicant or other similar substance;" and Article 120(b)(3)(B), UCMJ, uses the words "disease or defect."

Taking the example in Article 120(b)(1)(A), UCMJ, "threatening or placing that other person in fear" describes different means of how one can prove inability to consent similar to how "asleep, unconscious, or otherwise unaware" does. "Threat" is defined as "an expression of intention to inflict evil, injury or damage." Merriam-Webster's Collegiate Dictionary 1302 (11th ed. 2014). Fear is defined as "to feel fear in oneself . . . to be afraid of: expect with alarm . . . apprehensive." Merriam-Webster's Collegiate Dictionary 458 (11th ed. 2014). These definitions are not as synonymous as "asleep, unconscious, or otherwise unaware," but they do indicate that both the act of expressing a threat and the result of causing a person to have fear carry the same theory of criminal liability in the context of effectuating sexual contact. Sexual contact is prohibited in both situations because "The UCMJ's definition of 'consent' indicates as a matter of law that placing the victim in fear prevents consent." *United States v. Riggins*, 75 M.J. 78 (C.A.A.F. 2015).

In *Riggins*, this Court found that, under the factual circumstances presented, assault consummated by battery could not be a lesser included offense of abusive sexual contact because a different theory of criminal liability existed for assault consummated by battery, to the point that the Appellant did not have notice of "what offense and under what legal theory" he would be tried and convicted. *Id.* at

85 (citing *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010); *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008). The court adopted the trial defense team's reasoning that they would have attacked both actual consent (under Article 128, UCMJ) and ability to consent (under Article 120, UCMJ) if they had been notified of the lesser included offense. *Id.* In the case at hand, there were no lesser included offenses at play and the same theory of criminal liability was present from the charging decision through the finding of guilty – that a person who is unaware cannot consent.

An examination of other punitive articles within the UCMJ further supports use of the word "or" to provide a substitutive list of means in which the statute can be violated, absent specific language to the contrary. Article 93, UCMJ, lists "cruelty toward, or oppression, or maltreatment of." Again, these virtual synonyms were listed in the same paragraph and were repeatedly listed together throughout the statute. Looking to aggravated assault in Article 128(b)(1), UCMJ, Congress provided explicit definitions to differentiate the use of the word "or" between "dangerous weapon" and "other means or force." In comparison, Article 120, UCMJ, does not define "asleep, unconscious or otherwise unaware" separately and lists them together.

Appellant's analysis of the word "otherwise," (Appellant's Br. at 16), disregards the plain meaning, "the context in which the language is used, and the

broader statutory context." *See Pease*, 75 M.J. at 184. "Otherwise" is defined as "something or *anything* else." Merriam-Webster's Collegiate Dictionary 879 (11th ed. 2014). Contrary to Appellant's assertion, "otherwise unaware" is broad language, meaning *any* situation where a victim does not have "realization, perception, or knowledge." *Any* situation is not mutually exclusive with the other descriptors of "asleep" and "unconscious." It merely leaves an opening for all possible scenarios where a victim is unaware. In the case at hand, the victim did not have realization, perception, or knowledge of the sexual contact, as she did not know it occurred until the Appellant informed her. (JA 37). The Appellant described Mrs. SR's condition as "passed out," which is consistent with sleep, unconsciousness, *and* unawareness. The government could have proceeded with any of these descriptions and the Appellant would have been on notice regarding the same criminal conduct and the same theory of criminal liability (sexual contact with a victim who is unaware and thus cannot consent). *See United States v. Sager*, NMCCA 201400356, 2015 CCA LEXIS 571 (N-M. Ct. Crim. App. 29 Dec 2015); *United States v. Chero*, ACM 38470, 2015 CCA LEXIS 168 (A.F. Ct. Crim. App. 28 Apr 2015), (*findings aff'd.*, 75 M.J. 315, 2016 CAAF LEXIS 301 (C.A.A.F. 21 Apr 2016)).

Reasons for being "passed out" could include overindulgence in alcohol, exhaustion, ingestion of medication, a medical condition, a concussion, or any

number of other explanations. However, the dispositive fact is not the *reason* a person is "asleep, unconscious, or otherwise unaware," but the end result, that a person in any of those states is unaware and thus cannot consent to sexual contact. *See Sager*, 2015 CCA LEXIS 571, at *9. It is this end result, a victim that is unaware and unable to consent, that the government must prove to satisfy the second element of abusive sexual contact. This conclusion is also supported by the explanation "A sleeping, unconscious, or incompetent person cannot consent." Article 120(g)(8)(B), UCMJ.

Similarly, a charge under Article 120(b)(3)(A), UCMJ, for sexual contact with a victim who is incapable of consenting due to impairment would also require the government to prove inability to consent. The major discernable difference between a victim who is unaware and a victim who is incapable of consenting due to impairment is that one who is incapable of consenting due to impairment could be either aware or unaware. Likewise, a victim who is unaware, could be unaware due to impairment, unconsciousness, sleep, medication, or several other causes. *See Sager*, 2015 CCA LEXIS 571, at *9. While the trial counsel in this case emphasized the circumstantial evidence of intoxication supporting Mrs. SR's eventual unawareness, the charge of unaware remained unchanged. Further, the panel was instructed on unawareness and the fact that counsel arguments are not evidence. (JA 277, 324-329).

B. Legislative History

"Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. Only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language." *Salinas v. United States*, 522 U.S. 52, 57 (1997) (internal quotation marks, citations, and brackets omitted). The legislative history of Article 120, UCMJ, supports and certainly does not contradict the analysis above. First, "the new statute clarifies previously confusing language from the 2007 version regarding *the state of the victim's consciousness* by prohibiting a sexual act with a person who the accused knows or reasonably should know is sleeping, unconscious or otherwise unaware that the sexual act is occurring." *Manual for Courts-Martial, United States* (2012 ed.) [hereinafter *MCM*], App'x 23-15 (emphasis added). The previous language that would have applied here was "substantially incapable of appraising the nature of the sexual act; declining participation in the sexual act; or communicating unwillingness to engage in the sexual act." The new description uses plain language and clearly illustrates Congress' intent to provide examples and notice that sexual contact with a person who is unaware, regardless of the reason, is prohibited. "The proposed change makes it clear that sleeping or unconscious persons cannot consent." *MCM*, App'x 23-15, 23-16. Given the substantial revisions between 2007 and 2012, Congress had every opportunity to

specifically list separate legal theories or separately define the descriptions in Article 120(b)(2), UCMJ, if that was their intent. Congress' repeated listing of these terms together and treatment of them as one in the statute indicates they were drafted to address the same theory of criminal liability.

C. Case Law History

While the statute before the Court is fairly new, the criminalization of sexual contact with an asleep, unconscious, or unaware victim is well established; as is the concept that these are merely different examples of when a victim cannot consent, capacity to consent being the dispositive factor resulting in criminal liability. In *United States v. Spann*, the victim indicated that she could not recall engaging in sexual intercourse because she had passed out. 8 MJ 586 (N-M.C.C.A. 1998). However, the Appellant made a pre-trial admission, which he attempted to recant at trial, that the victim was asleep when he began sexual intercourse. *Id.* The Navy Marine Court of Criminal Appeals found the case legally sufficient, explaining: "The force component of rape is established by penetration alone (constructive force) if the victim is incapable of consenting because she is asleep, unconscious, or lacks mental capacity." *Id.* at 588, citing *United States v. Palmer*, 33 M.J. 7, 9 (C.M.A. 1991). This Honorable Court reviewed the case on another issue and affirmed the decision. *United States v. Spann*, 51 MJ 89, (C.A.A.F. 1999). *See also United States v. Hudson*, NMCCA 201100560, 2012 CCA LEXIS

344 (N-M. Ct. Crim. App. 31 Aug 2012) (denying Appellant's ineffective assistance claim against his counsel for not explaining defenses of consent and mistake of fact because Appellant made statements during his *Care* inquiry indicating he understood that his action in having sexual intercourse with female servicemember while she was passed out, intoxicated, and generally non-responsive, was wrongful); *United States v. Haire*, 44 MJ 520 (C.G.C.C.A. 1996) (finding a rape conviction legally sufficient where the victim testified that she had been drinking earlier in the night and was asleep, passed out, or unconscious until she awoke with Appellant inside her, despite Appellant's contrary testimony that she participated in the sexual encounter).

3. Even if the Court finds the Appellant's arguments persuasive, any error is harmless.

"When a party does not appeal a ruling, the ruling of the lower court normally becomes the law of the case." *United States v. Savala*, 70 M.J. 70, 76 (C.A.A.F. 2011) (citing *United States v. Parker*, 62 M.J. 459, 464 (C.A.A.F. 2006)). Although the Appellant mentioned notice and variance in his brief, he did not raise these before this Court or the lower court, and the lower court found legal and factual sufficiency. The Appellant waived these issues.

Absent waiver, "asleep, unconscious, or otherwise unaware" are so similar that if the panel had substituted one for the other, such would not have constituted

a material variance. *See e.g. United States v. Lubasky*, 68 M.J. 260, 264 (C.A.A.F. 2010) (quoting *United States v. Teffeau*, 58 M.J. 62, 66 (C.A.A.F. 2003)). Therefore, if this Court finds the evidence is more accurately captured with the more specific description of "asleep," any error is harmless. Unaware is the most broad of these terms and the Appellant was notified of this charging theory in the plain language of the Charge Sheet. (JA 5-7). Appellant did not file any motion for a bill of particulars or question the meaning of "unaware" at trial. The plain meaning of the words "unaware" and "asleep" are so similar that the Appellant was "on notice of the charge against which he must defend," and "able to plead an acquittal or conviction in bar of future prosecutions." *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011).

Even if the Court finds that "asleep" espouses a different theory of criminal liability than "unaware," there was no prejudice to the Appellant. Both notice and lack of prejudice are evidenced by Appellant's reasonable mistake of fact and consent theories at trial. The Appellant testified that Mrs. SR spoke to him and touched him on his penis immediately prior to him touching her breasts. (JA 206-207). The defense pointed to evidence of Mrs. SR sending text messages at 0430 and being in and out of consciousness per her own testimony and when the other witnesses were present. (JA 26-33). The defense would not have changed that strategy if the government had substituted the words "otherwise unaware" with

"asleep." The trial judge properly recognized the defense theory when he instructed on the mistake of fact and consent defenses. The Appellant did not object to the Military Judge's instructions on the "otherwise unaware" language.

In *United States v. Chero*, the Appellant was found guilty of violating Article 120(b)(2), UCMJ, and the specification stated he committed a sexual act upon a person who was "unconscious or otherwise unaware," but the evidence at trial showed the victim was "asleep." No. 38470, 2015 CCA LEXIS 168, unpublished op. (A.F.Ct.Crim.App. 28 Apr 2015). On appeal, the Appellant argued he was not on notice because the phrase "unconscious or otherwise unaware" omitted the term "asleep" and thus failed to provide notice. The AFCCA expressly rejected the Appellant's argument, stating: "we do not find [the] omission to result in a fatal variance; asleep is just one example of how an individual may be 'otherwise unaware' and is not an alternative theory." *Id.* at *9. The Navy-Marine Court adopted this reasoning in *United States v. Sager*, explaining, "A plain reading of the phrase is that a person cannot engage in sexual contact with another person when he/she knows or reasonably should know that the recipient of the contact does not know that it is happening." 2015 CCA LEXIS 571, at *9. The interpretations in *Chero* and *Sager* are consistent with a plain reading of the statute and the legislative history for creating the statute.

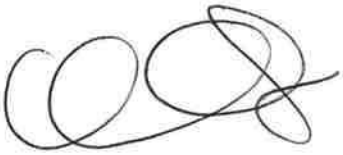
In the case at hand, the Appellant's admission to Mrs. SR clearly shows that the Appellant not only should have known, but did know that Mrs. SR was "unaware." In the Appellant's own words, Mrs. SR was "passed out" when he masturbated to her breasts. (JA 37). The Appellant points to the testimony of witnesses during the party, arguing that Mrs. SR was "in and out of consciousness," as well as the Appellant's testimony that Mrs. SR spoke to him and touched him immediately prior to him touching Mrs. SR's breast. (JA 70, 206-208). These arguments go to weight and factual sufficiency, but do not disturb legal sufficiency. Here, the Appellant was the only person present with Mrs. SR at the moment he touched her breast. (JA 206-208). His initial admission to Mrs. SR and subsequent admission to PFC DS constitute some evidence that Mrs. SR was "passed out" and unaware at that moment of the sexual contact. (JA 37).

The panel was instructed in accordance with the Military Judges' Benchbook to "use [their] own common sense and [their] knowledge of human nature and the ways of the world." (JA 327); Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 2-5-12 (10 Sep. 2014). "Passed out" is a commonly used term in the English language that clearly and unambiguously describes a person who is not aware of what is occurring. This description would have been sufficient evidence to support the conviction here regardless of whether the charge stated "asleep," "unconscious," or "unaware." The fact finder in this

case had evidence that Mrs. SR was "passed out" at the time Appellant touched her breast and found that she was "unaware" at the time the Appellant touched her breast. There is no legal sufficiency concern. At trial, the government also provided circumstantial evidence of Mrs. SR's intoxication and lack of memory to corroborate the Appellant's admission that Mrs. SR was, in fact, "passed out" and unaware. Contrary to Appellant's argument, this did not create a separate theory of criminal liability.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court deny the Appellant's petitions for review.



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MELISSA DASGUPTA SMITH
Major, Judge Advocate
Attorney for Appellee
March 13, 2017

Appendix 1

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UNITED STATES OF AMERICA v. DMENICO D. HUDSON, HOSPITALMAN APPRENTICE (E-2), U.S. NAVY

NMCCA 201100560

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2012 CCA LEXIS 344

August 31, 2012, Decided

NOTICE: AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

SUBSEQUENT HISTORY: Motion granted by *United States v. Hudson, 2012 CAAF LEXIS 1076 (C.A.A.F., Sept. 21, 2012)*
Review denied by *United States v. Hudson, 2012 CAAF LEXIS 1188 (C.A.A.F., Oct. 25, 2012)*

PRIOR HISTORY: [*1]
GENERAL COURT-MARTIAL. Sentence Adjudged: 21 June 2011. Military Judge: LtCol Charles Hale, USMC. Convening Authority: Commander, National Naval Medical Center, Bethesda, MD. Staff Judge Advocate's Recommendation: LCDR K.J. Ian, JAGC, USN.

CASE SUMMARY:

OVERVIEW: There was no merit to a servicemember's claim that he was denied effective assistance of counsel during his trial on charges alleging that he committed aggravated sexual assault and wrongful sexual contact, in violation of UCMJ art. 120, *10 U.S.C.S. § 920*, because counsel did not explain the defenses of consent and mistake of fact as to consent before he pled guilty. Statements the servicemember made during the Care inquiry showed that he understood that his action in having sexual intercourse with a female servicemember while she was intoxicated and unaware of what was occurring was wrongful.

OUTCOME: Findings and sentence affirmed.

COUNSEL: For Appellant: LT Toren Mushovic, JAGC, USN.

For Appellee: LT Joseph Moyer, JAGC, USN.

JUDGES: Before B.L. PAYTON-O'BRIEN, R.Q. WARD, J. R. MCFARLANE, Appellate Military Judges. Judge WARD and Judge McFARLANE concur.

OPINION BY: B.L. PAYTON-O'BRIEN

OPINION

OPINION OF THE COURT

PAYTON-O'BRIEN, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of aggravated sexual assault, abusive sexual contact, and wrongful sexual contact, in violation of Article 120, Uniform Code of Military Justice, *10 U.S.C. § 920*. The military judge sentenced the appellant to confinement for 84 months, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and pursuant to a pretrial agreement (PTA), suspended confinement in excess of 30 months.

The appellant raises five assignments of error.[1] In three of the assignments of error, the appellant claims that his trial defense counsel were [*2] ineffective as follows: by not explaining the defenses of consent and mistake of fact as to consent before the appellant pled guilty; by advising the appellant that he would not have to register as a sex offender if he pled guilty; and by telling the appellant that he would receive a bad-conduct discharge if he pled guilty. In his other two assignments of error, the appellant claims his plea was not provident because he did not intelligently understand the defenses

of consent and mistake of fact as to consent, and that the evidence is neither factually nor legally sufficient.

1 Raised pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

On 28 December 2011, we granted the appellant's Non-Consent Motion to Attach Documents.[2] These documents consisted of a handwritten declaration under penalty of perjury from the appellant, a Government Disclosure Pursuant to *Brady vs. Maryland*, a voluntary statement by Mr. JP, and a Memorandum for Evidence Custodian. The appellant outlined his complaints in his declaration and believes the assertions made establish ineffective assistance of counsel, improvident pleas, and factual and legal insufficiency. We disagree.

2 The Government filed [*3] a written opposition to the motion to attach, citing Rule 23.4 of this court's Rules of Practice and Procedure and *United States v. Ginn, 47 M.J. 236 (C.A.A.F. 1997)*.

We have examined the record of trial, the appellant's assignments of error and the pleadings from the parties. We conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. *59(a)* and *66(c)*, UCMJ.

Factual Background

The sexual assault charges in this case arise from the appellant's interaction with Hospitalman Recruit (HR) KJ while stationed at the National Naval Medical Center (NNMC) in Bethesda, Maryland. HR KJ and the appellant were acquaintances, having gone to hospital corpsman school at the same time, working together in the Plastic Surgery Clinic at NNMC, residing in the same building onboard Naval Support Activity Bethesda, and socializing together.

The relevant facts concerning the charged offenses are as follows. The night of the incident, the appellant sent a text message to HR KJ asking if she wanted to go out in town with him and a fellow corpsman, but she declined. Thereafter, the appellant went [*4] to the smoke deck to have a cigarette, running into HR KJ and one of her friends on the way. The appellant noticed that HR KJ was intoxicated, because she was stumbling, slurring her words and talking quickly. The appellant further noticed that HR KJ was having trouble sitting up and staying awake. HR KJ told the appellant that she thought she had left her barracks key in her purse in another service member's barracks room, so the appellant accompanied HR KJ to the room to retrieve her key. While in the room, the appellant stopped other service members from trying to take advantage of HR KJ because of her inebriated state.

After returning to the smoke deck with HR KJ, the appellant's roommate, Hospitalman Apprentice (HA) CP, decided that the victim should be taken back to her room because of her intoxication. HA CP, the appellant, and an unknown third man helped HR KJ to her room. After arriving at HR KJ's barracks room, the appellant witnessed several individuals arguing outside her door, including HR KJ's roommate, HR JB, who refused to let HR KJ into the room because HR KJ was so intoxicated. The appellant and his roommate decided to take HR KJ to their own barracks room so she could [*5] sleep.

Upon reaching their barracks room, the appellant and HA CP laid HR KJ down on the bed and she immediately turned onto her side and appeared to fall asleep. Meanwhile, HA CP went back to HR KJ's room to try and convince her roommate to allow her back into her room, leaving the victim alone with the appellant in his room. While HR KJ was still passed out, the appellant pulled her jeans down slightly and put his hand down her pants, digitally penetrating her vagina with his fingers. Eventually, the appellant removed his hand and pulled HR KJ's pants down past her hips and rubbed his penis along her vagina, ultimately penetrating her vagina. Throughout this entire series of events, HR KJ was very intoxicated and was generally nonresponsive. The appellant stopped his actions after HR KJ called him somebody else's name.

Trial Proceedings

At trial, the appellant elected to be represented by his two trial defense counsel (TDC) and declined to be represented by any other attorney. The appellant pleaded guilty pursuant to a PTA, which required that the appellant enter into a stipulation of fact. After an appropriate inquiry with the appellant, the military judge admitted the stipulation [*6] of fact into evidence. The appellant was notified of the possible charges by the military judge, including that the maximum punishment included a dishonorable discharge. The appellant informed the military judge that he had discussed the charges with his TDC and understood the ramifications of pleading guilty. Pursuant to the defense request, the military judge took judicial notice of the Adam Walsh Act[3] and the State of Georgia's sex offender registration law, and attached the relevant statutes to the record as appellate exhibits.[4] The appellant acknowledged he understood the potential effects of sex offender registration. TDC also informed the military judge at trial that they advised the appellant of the potential impact of sex offender registration laws.

3 Adam Walsh Child Protection and Safety Act of 2006, *42 USC § 16901*

4 Appellate Exhibits VI and VII.

During the providence inquiry, the military judge listed the elements of each offense. The military judge defined consent and mistake of fact as to consent and after conferring with his defense counsel, the appellant acknowledged his understanding of the defenses and indicated he had no questions for the military judge. Under oath, [*7] the appellant admitted to engaging in sexual acts with HR KJ without her consent. He told the military judge that there was nothing about HR KJ's conduct or a prior relationship that would make him believe that she consented to sexual activity with him on the night in question, nor that he had a mistaken belief that HR KJ consented to the sexual activity.

The military judge conducted an appropriate inquiry into the terms of the PTA, and the appellant acknowledged an understanding of the agreement. The appellant informed the military judge that he understood what it meant to plead guilty, that he was pleading guilty freely and voluntarily, and he was not forced or threatened into pleading guilty.

Ineffective Assistance of Counsel

We review ineffective assistance of counsel claims *de novoUnited States v. Osheskie, 63 M.J. 432, 434 (C.A.A.F 2006)*. To establish ineffective assistance of counsel, "an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green, 68 M.J. 360, 361-62 (C.A.A.F. 2010)* (citing *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984))*.

In the guilty plea context, the first [*8] part of the *Strickland* test remains the same -- whether counsel's performance fell below a standard of objective reasonableness expected of all attorneys. *United States v. Bradley, 71 M.J. 13, 16 (C.A.A.F. 2012)* (citing *Hill v. Lockhart, 474 U.S. 52, 56-58, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985))*. The second prong is modified to focus on whether the "ineffective performance affected the outcome of the plea process." *Hill, 474 U.S. at 59*.

With respect to the first prong, whether counsel's performance was deficient, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland, 466 U.S. at 689*; *see also Harrington v. Richter, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624, (2011)* ("Even under *de novo* review, the standard for judging counsel's representation is a most deferential one."). With regard to the second prong, an appellant in a guilty plea case establishes prejudice by showing that, but for counsel's deficient performance, there is a "'reasonable probability'" that "'he would not have pleaded guilty and would have insisted on going to trial.'" *United States v. Tippit, 65 M.J. 69, 76 (C.A.A.F. 2007)* (quoting *United States v. Alves, 53 M.J. 286, 289 (C.A.A.F. 2000))*.

This [*9] case involves a post-trial declaration-based claim of ineffective assistance of counsel. The Government objected to our consideration of the post-trial declaration and did not submit an opposing affidavit. Applying the factors set forth in *United States v. Ginn, 47 M.J. 236, 248 (C.A.A.F. 1997)*, we will resolve the appellant's claims based on the record before us without the need for an evidentiary hearing.[5]

5 In *Ginn*, the Court of Appeals for the Armed Forces delineated the authority of Courts of Criminal Appeals to decide ineffective assistance of counsel issues without further proceedings:

(1) if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in the appellant's favor, the claim may be rejected;

(2) if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected;

(3) if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issue on the basis of [*10] those uncontroverted facts;

(4) if the affidavit is factually adequate on its face but the appellate filings and record as a whole "compellingly demonstrate" the improbability of those facts, the court may discount the factual assertions and decide the legal issue;

(5) when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal; and

(6) the Court of Criminal Appeals is required to order a fact-finding hearing only when the above-stated circumstances are not met. In such circumstances the court must remand the case to the trial level for a DuBay proceeding. During appellate review of the *DuBay* proceeding, the

court may exercise is *Article 66*, UCMJ, fact-finding power and decide the legal issue.

Id. at 248.

The first, second, fourth, and fifth *Ginn* factors are relevant here. After consideration [*11] of these factors, we conclude that TDC's performance was not deficient and the appellant has failed to meet his burden in proving ineffective assistance of counsel. *Strickland, 466 U.S. at 687*. We find nothing in the record to suggest that TDC were deficient in their representation in any of the three ways averred by the appellant. Rather, the record compellingly demonstrates that the appellant was satisfied with counsel, fully informed of the charges to which he was pleading guilty and the possible defenses to those charges, understood the maximum punishment he faced, and was fully apprised of and understood the administrative consequence of sex offender registration.

Assuming *arguendo* that the appellant and the victim had previously engaged in sexual activity, that she touched him in a "sexual way" the night of the charged incident, or that the appellant had a contagious venereal disease, these facts do not negate the fact that the appellant, under oath, admitted to engaging in sexual acts with HR KJ without her consent. The appellant's post-trial affidavit contains his admission that he engaged in sexual touching of the victim after she had been drinking and expressed knowledge of [*12] the wrongfulness of his actions. Furthermore, his conclusory statement that he could not have committed the offenses without the victim contracting his disease is mere speculation. The statement of JP and the DNA report, enclosed with the appellant's declaration, even if true, do not change the legal conclusion of this case.

The appellant offers no evidence, other than his statements in this declaration, that he was forced to admit anything at trial or that he pleaded guilty without being fully apprised of the potential consequences. Although he claims now that he felt like he was forced to admit to things that he did not do, the military judge gave the appellant ample time to consider whether he desired to plead guilty. The appellant conferred with his TDC numerous times in order to clarify his facts. Although the appellant now alleges he was forced into a particular narrative, it is clear from the record that at any point during the providence inquiry the appellant could have clarified any points of confusion, yet he failed to do so. Finally, the appellant's claims as to a misunderstanding about the maximum punishment and sex offender registration requirements are wholly unsupported [*13] by the record. In fact, the appellate filings and the record as a whole "compellingly demonstrate" the improbability of the facts set forth by the appellant.

Providence of the Appellant's Plea/Legal and Factual Sufficiency

Next, the appellant alleges that his guilty plea was not provident because he did not intelligently understand the defenses of consent and mistake of fact as to consent, and that the evidence was not legally and factually sufficient. As the issues are related, we will address them together.

Although the appellant alleges that the evidence is neither factually nor legally sufficient to support a guilty finding, since he did not enter a conditional plea, he waives any objection relating to factual issues of guilt of the offenses to which his pleas were made. RULE FOR COURTS-MARTIAL 910(j), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). As the appellant pleaded guilty unconditionally, the issue is analyzed in terms of the providence of plea, not sufficiency of the evidence. *United States v. Faircloth, 45 M.J. 172, 174 (C.A.A.F. 1996)*.

To prevent the acceptance of improvident pleas, the military judge has a duty to establish, on the record, the factual bases that establish [*14] that "the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty." *United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (C.M.A. 1969)* (citations omitted). If the military judge fails to establish that there is an adequate basis in law and fact to support the plea during the *Care* inquiry, the plea will be improvident. We review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea *de novoUnited States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008)*. "A military judge abuses this discretion if he fails to obtain from the accused an adequate factual basis to support the plea-an area in which we afford significant deference." *United States v. Nance, 67 M.J. 362, 365 (C.A.A.F. 2009)* (quoting *Inabinette, 66 M.J. at 322*). If an accused sets up a matter inconsistent with the plea at any time during a guilty plea proceeding, the military judge must resolve the conflict or reject the plea. *Art. 45(a)*, UCMJ; *see* R.C.M. 910(h)(2).

R.C.M. 916(j)(1) states, "[I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances [*15] such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense." It is an affirmative defense to several *rticle 120*, UCMJ, violations that the accused held, as a result of mistake or ignorance, an incorrect belief that the other person engaging in the sexual conduct consented. R.C.M. 916(j)(3). This ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. *Id.* To be reasonable, the

mistake or ignorance must have been based on information or lack of information which would indicate to a reasonable person that the other party consented. *Id.* In the event that the accused's statements or matters in the record indicate a defense might exist, the military judge must determine whether that information raises a conflict with the plea and thus the possibility of a defense or only the "mere possibility" of conflict. *United States v. Riddle, 67 M.J. 335, 338 (C.A.A.F. 2009)* (citing *United States v. Shaw, 64 M.J 460, 462 (C.A.A.F. 2007)).*

In this case, the record does not support the appellant's contention that he failed to understand the defense of consent or mistake of fact as [*16] to consent. Neither does the information provided by the appellant at trial raise a possibility of a defense. The record is clear that the appellant demonstrated sufficient understanding as to the two defenses. The appellant repeatedly informed the military judge that HR KJ was substantially intoxicated when he committed his offense against her. The military judge asked the appellant more than once if there was anything that would have led the appellant to believe that HR KJ consented to the sexual conduct. The appellant replied each time in the negative. Based on the record before us, we conclude that there was no possible defense of consent or mistake of fact as to consent and that the appellant's plea was provident. Under the circumstances of this case, a reasonable person would not have held a mistaken belief that HR KJ consented to sexual conduct. We conclude that the appellant completed a knowing, voluntary, and intelligent plea of guilty to the charged offense, including a proper *Care* inquiry.

Conclusion

The findings and sentence as approved by the convening authority are affirmed.

Judge WARD and Judge McFARLANE concur.

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UNITED STATES v. Senior Airman SEAN J. CHERO United States Air Force

ACM 38470

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

2015 CCA LEXIS 168

April 28, 2015, Decided

NOTICE:

THIS OPINION IS ISSUED AS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 18.4.

SUBSEQUENT HISTORY: Review granted by *United States v. Chero, 75 M.J. 20, 2015 CAAF LEXIS 682 (C.A.A.F., 2015)*
Affirmed in part and reversed in part by, Remanded by *United States v. Chero, 2016 CAAF LEXIS 301 (C.A.A.F., Apr. 21, 2016)*

PRIOR HISTORY: [*1] Sentence adjudged 22 June 2013 by GCM convened at Fairchild Air Force Base, Washington. Military Judge: Christopher M. Schumann. Approved Sentence: Dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

CASE SUMMARY:

OVERVIEW: HOLDINGS: [1]-A servicemember's admission that he had sexual intercourse with another servicemember ("victim") who fell asleep in his home after she consumed alcohol, which was corroborated by the victim and other witnesses, was sufficient to sustain the servicemember's conviction for sexual assault, in violation of UCMJ art. 120(b)(2), *10 U.S.C.S. § 920(b)(2)*; [2]-There was no merit to the servicemember's claim that the military judge erred when he instructed the panel members that a sleeping person could not consent to sexual intercourse; [3]-The military judge properly found that the maximum punishment for sexual assault between the time UCMJ art. 120 was revised by Congress and the time the President signed Executive Order 13643 was a dishonorable discharge and 30 years' confinement; [4]-The servicemember was not denied his right to a speedy posttrial review.

OUTCOME: The court affirmed the findings and sentence.

COUNSEL: Appellate Counsel for the Appellant: Major Christopher D. James.

Appellate Counsel for the United States: Major Daniel J. Breen; Major Mary Ellen Payne; and Gerald R. Bruce, Esquire.

JUDGES: Before HECKER, MITCHELL, and TELLER, Appellate Military Judges.

OPINION BY: MITCHELL

OPINION

OPINION OF THE COURT

MITCHELL, Senior Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his plea, of sexual assault, in violation of *Article 120(b)(2), UCMJ, 10 U.S.C. § 920(b)(2)*.[1] The adjudged and approved sentence was a dishonorable discharge, 3 years of confinement, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

1 Because the offense occurred on or about 25 November 2012, the appellant was charged under the current version of *Article 120, UCMJ, 10 U.S.C. § 920*, applicable to offenses committed on or after 28 June 2012.

The appellant avers the following errors: (1) the military judge erred in providing findings instructions that included a [*2] reference to a sleeping person as someone who cannot consent, (2) the evidence is legally and factually insufficient, (3) the military judge abused his discretion in determining the maximum sentence for the offense, and (4) he was deprived of his right to speedy trial in the appellate review process when action occurred 121 days after the court-martial was completed. We disagree and affirm the findings and sentence.

Background

In a signed sworn statement, which was admitted into evidence, the appellant described how he and some friends, to include Staff Sergeant (SSgt) SF, met for drinks on the evening of 24 November 2012. He and SSgt SF were texting earlier that evening, and he knew she was upset. When they met at a mutual friend's home, everyone in their group had a shot of whiskey. They then went to Lucky's Bar where more drinks were consumed. The appellant bought SSgt SF three beers and another shot of whiskey. The group then proceeded to another bar. After an altercation among friends at that second bar, the appellant took SSgt SF back to his home. Although he initially wrote that they engaged in consensual sexual activity, at the end of the statement he admitted "the truth is that [*3] she passed out and I proceeded to have sex with her." The appellant also differentiated himself from others whom he knew had committed sexual assaults and wrote, "I don't want to be viewed as a rapist or a sex offender of any kind . . . [the others] denied everything they did . . ., they're rapists, I made the biggest mistake of my life but I am being a fucking man and admitting that I fucked up and theres [sic] nothing I can do to change that . . . ."

Other witnesses, to include SSgt SF, corroborated the appellant's confession.

Findings Instructions Regarding "Unconscious or Otherwise Unaware"

SSgt SF confirmed that she and the appellant were friends. She met the appellant and some other friends for a night out on the town on 24 November 2012. They went to two bars where she had alcoholic drinks, some of which the appellant purchased her. After she and another friend had a verbal altercation, SSgt SF decided to go home. The appellant offered to drive her home in his car. SSgt SF testified that after she entered the appellant's car for a ride home she experienced the following: "The heat hit me and at that point, I was really tired and I just . . . the last thing that I remember was buckling [*4] my safety belt in his car and the heat hit over me and I then, from that point, knocked out like I was falling asleep."

She next had a flash of memory of vomiting while hanging her head outside the car. She testified: "The next thing, I woke up and my head was pounding and I was laying [sic] on a bed." She described finding her shirt and bra pulled up and her pants and underwear pulled down around her ankles. Her vaginal area was sore, and there was semen on her face, chest, and stomach and wetness around her legs. A man had his arm around her back and his penis was against her leg. At that moment, SSgt SF did not know where she was or who was lying in bed with her. After the man got up from the bed, she opened one eye and saw that it was the appellant. She described herself as feeling violated and scared and unsure of what she should do so she pretended to still be asleep. The appellant returned to the bed and used a rag to clean up her body and redressed her. He then woke her up by calling her name while tapping her face and splashing her with water. After she left the appellant's home, she went to a friend's residence where she reported that she had been raped, first to her friend [*5] and the police immediately thereafter.

The appellant was charged with sexual assault pursuant to *Article 120(b)(2), UCMJ*. Using the words found in the charged specification, the military judge instructed the members that the charged offense had two elements: (1) the appellant committed a sexual act (sexual intercourse) upon SSgt SF and (2) he did so when he knew or reasonably should have known that she was unconscious or otherwise unaware that the sexual act was occurring. The military judge also provided instructions on consent, including that evidence of consent may provide a reasonable doubt as to whether the appellant knew or reasonably should have known that the alleged victim was unconscious or otherwise unaware. Along with this instruction, the military judge stated, "A sleeping, unconscious, or incompetent person cannot consent to a sexual act." Trial defense counsel affirmatively stated that he did not object to any of the military judge's instructions.

Later, the members asked the military judge additional questions about the instructions to include a question about the interplay between consent and unconsciousness. The military judge explained that if there was evidence that [*6] SSgt SF consented, then that evidence would show she was conscious. The military judge further explained, "So, again, with regard to the evidence that you've got, if you look at that evidence and you feel that there is some evidence of consent, or any other really [sic] evidence of consciousness, that may demonstrate that [SSgt SF] was, in fact, conscious and therefore, the government fails on the second element . . . ." The military judge also explained, "The issue is whether or not the accused knew or reasonably should have known that [SSgt SF] was either unconscious or otherwise unaware . . . whether that condition, if it existed, was contributed

by alcohol use, by tiredness . . . it really is just a matter of how you interpret the strength and the weight of the evidence as to whether or not that element is met." Trial defense counsel did not raise any objections to the military judge's additional instructions.

The appellant now contends that he was not charged with committing this offense while SSgt SF was asleep, and therefore the military judge should not have instructed the members that a sleeping person was unable to consent. He further argues that he was not on notice that [*7] the charged phrase "unconscious or otherwise unaware" includes a person who is asleep.

A. Due Process and Fair Notice

We address first the appellant's implicit challenge to the charge and specification on due process and fair notice grounds, and we reject his argument.

> The military is a notice pleading jurisdiction. A charge and specification will be found sufficient if they, first, contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend, and, second, enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense. The rules governing court-martial procedure encompass the notice requirement: A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication.

United States v. Fosler, 70 M.J. 225, 229 (C.A.A.F. 2011) (citations and internal quotation marks omitted).

Here, the specifications contain every element of the offenses as enacted by Congress.

> The Supreme Court has observed that the definition of the elements of criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute. Congress has broad authority to define the elements [*8] of offenses under the constitutional power to make rules for the government and regulation of the armed forces.

United States v. Neal, 68 M.J. 289, 300 (C.A.A.F. 2010) (citations and internal quotation marks omitted).

Due process requires that a military member have fair notice that an act is forbidden and subject to criminal sanctions before he can be prosecuted for it. *United States v. Vaughan, 58 M.J. 29, 31 (C.A.A.F. 2003)*. We conclude that Congress provided the required due process notice when it revised *Article 120, UCMJ*, as a punitive article established by the National Defense Authorization Act for Fiscal Year 2012. The appellant has been on notice since this law was passed by Congress. While an Executive Order providing further guidance would be welcome, it is not required to establish the elements or provide fair notice of the offense.[2] The elements of federal criminal law are established by Congress. *See United States v. Jones, 68 M.J. 465, 478 (C.A.A.F. 2010)*. The referred specifications and charges included the congressionally mandated elements.

> 2 Executive Order 13643 was published on 15 May 2013, prior to the adjournment of the appellant's court-martial. It includes the maximum punishments for *Article 120, UCMJ, 10 U.S.C. § 920*, offenses but does not include any elements, explanation, lesser included offenses, or sample specifications.

We reject the appellant's [*9] argument that he was not on notice that the phrase "unconscious or otherwise unaware" includes a person who is asleep. The law clearly prohibits sexual acts with those who are "asleep, unconscious or otherwise unaware." We acknowledge that the charged specification lists only "unconscious or otherwise unaware" and inexplicably omitted the word "asleep."[3] We do not find this omission to result in a fatal variance; asleep is just one example of how an individual may be "otherwise unaware" and is not an alternative theory. *Cf. United States v. Mandy, 73 M.J. 619 (A.F. Ct. Crim. App. 2014)* (concluding that the appellant's conviction of malingering by exaggerating an injury was a fatal material variance from charged offense of malingering by self-injury). We also note that the investigating officer included "asleep" in the elements of the charged specification and referenced the possibility that SSgt SF was "asleep" during the *Article 32, UCMJ, 10 U.S.C. § 832*, investigation. Furthermore, the primary defense theory at trial was that this sexual encounter was consensual and SSgt SF was misrepresenting or exaggerating her lack of awareness of the encounter.

> 3 Until the President issues an Executive Order that includes sample specifications we strongly encourage the use [*10] of the complete statutory language.

B. Military Judge's Findings Instructions

The appellant did not object to the instructions regarding a sleeping victim at trial. The appellant raised some concern about whether an incompetent person should be further defined to exclude those who are intoxicated but not unconscious or otherwise unaware. The military judge determined that additional instruction was not necessary as the allegation was not whether SSgt SF was intoxicated but rather whether she was unconscious or otherwise unaware. Whether a military judge properly instructs the court members is a question of law we review de novo. *United States v. McDonald, 57 M.J. 18, 20 (C.A.A.F. 2002)*. If there was no objection at trial we review for plain error, which requires (1) error, (2) that is plain or obvious, and (3) that it impacts a substantial right of the appellant. *United States v. Kho, 54 M.J. 63, 65 (C.A.A.F. 2000)* (citing *United States v. Finster, 51 M.J. 185, 187 (C.A.A.F. 1999))*. The appellant bears the burden of persuading this court of the plain error. *See United States v. Powell, 49 M.J. 460, 464-65 (C.A.A.F. 1998)*. We determine there was no plain error in the military judge's instructions. We agree with the military judge that the underlying reason for SSgt SF's unconsciousness was not an element of the offense but instead was part of the evidence the members could consider in deciding if the prosecution [*11] proved the elements and disproved any affirmative defenses beyond a reasonable doubt.

Legal and Factual Sufficiency

The appellant challenges the legal and factual sufficiency of his convictions. He argues that the evidence at best proved that SSgt SF was asleep when the sexual intercourse occurred and that a person who is asleep is not someone who is "unconscious or otherwise unaware."

We review issues of legal and factual sufficiency de novo. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*. "The test for legal sufficiency of the evidence is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002)* (quoting *United States v. Turner, 25 M.J. 324 (C.M.A. 1987))* (internal quotation marks omitted). "[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)*. Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)*.

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 the [appellant]'s guilt beyond a reasonable doubt." [*12] *Turner, 25 M.J. at 325, quoted in United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000)*. 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." *Washington, 57 M.J. at 399*.

Having evaluated the entire record of trial, we are convinced of the legal and factual sufficiency of the appellant's convictions. The appellant's confession, as corroborated by the other evidence regarding the offense when viewed in the light most favorable to the prosecution, establishes each element of each offense and therefore is legally sufficient. SSgt SF testified that she fell asleep in the car and woke up with the realization that someone had sexual intercourse with her when she was unaware, combined with the circumstantial evidence that it was the appellant, also establishes the legal sufficiency of the conviction.

The appellant confessed that the sexual intercourse occurred after SSgt SF "passed out." SSgt SF said she was "knocked out" like she was going to sleep. We acknowledge that there was no medical evidence introduced on SSgt SF's blood alcohol content [*13] and the effect that would have on her consciousness. In this case, whether SSgt SF was unconscious due to alcohol consumption, being exhausted, or a combination of the two is only relevant to determining whether the appellant knew or reasonably should have known she was "unconscious or otherwise unaware." Having personally reviewed the entire record of trial, to include the testimony of all the witnesses and all the admitted exhibits, we ourselves are personally convinced of the appellant's guilt. We are convinced beyond a reasonable doubt that the appellant knew SSgt SF was unconscious or otherwise unware that the sexual act was occurring. The appellant's conviction on the charge and specification is both legally and factually sufficient.

Maximum Sentence

At the time of the appellant's offense, 25 November 2012, the current version of *Article 120, UCMJ*, did not have an Executive Order that listed maximum punishment for that offense.[4] At trial and again on appeal, the appellant challenges the determination of the maximum sentence. The trial judge determined that the maximum sentence was a dishonorable discharge, forfeiture of all pay and allowances, confinement for 30 years, and reduction [*14] to E-1. The maximum punishment authorized for an offense is a question of law, which we review de novo. *United States v. Beaty, 70 M.J. 39, 41*

(C.A.A.F. 2011). Our colleagues in a sister-service court analyzed this same issue of the maximum imposable sentence for an offense that occurred after the enactment of the current *Article 120, UCMJ*, but before the publication of the President's Executive Order establishing the maximum sentence for a sexual assault against an individual who was asleep, unconscious, or otherwise unaware. *United States v. Booker, 72 M.J. 787 (N.M. Ct. Crim. App. 2013), appeal denied sub nom United States v. Schaleger, 73 M.J. 92 (C.A.A.F. 2013)* (summary disposition). That court concluded that the maximum authorized punishment included 30 years confinement and a dishonorable discharge. *Id. at 807*. We find their reasoning highly persuasive and concur with both our Navy-Marine Corps Court colleagues and the trial judge.

> 4 On 15 May 2013, a month prior to the appellant's trial, the President amended the Manual for Courts-Martial to establish the maximum punishment as including a dishonorable discharge and confinement for thirty years. Executive Order 13643 of 15 May 2013.

Post-trial Processing

The appellant's court-martial concluded on 22 June 2013, and the convening authority took action 121 days later on 21 October 2013. The appellant argues [*15] that pursuant to *United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)*, this violated his right to speedy appellate review. We disagree.

We review de novo whether an appellant has been denied the due process right to speedy post-trial review and whether any constitutional error is harmless beyond a reasonable doubt. *United States v. Allison, 63 M.J. 365, 370 (C.A.A.F. 2006)*. The overall delay of more than 120 days between adjournment and action is presumptively unreasonable and triggers an analysis of the four factors elucidated in *Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)*, adopted in *Moreno, 63 M.J. at 142*. Those factors are "(1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant." *United States v. Mizgala, 61 M.J. 122, 129 (C.A.A.F. 2005)* (citing *Barker, 407 U.S. at 530*).

The first factor weighs in favor of the appellant; the length of the delay is presumptively unreasonable and therefore satisfies the first *Barker* factor. *See Moreno, 63 M.J. at 142*. The second factor weighs minimally in favor of the appellant. The record of trial was sent to the appellant and trial defense counsel on 26 March 2013. The staff judge advocate's recommendation was served on trial defense counsel on 17 September 2013, and the appellant signed a receipt for it on 24 September 2013. The appellant submitted his initial clemency request on 3 October 2013. The addendum was completed [*16] on 15 October 2013. The court reporter's chronology demonstrates a dedicated and responsible court reporter who through no fault of her own was furloughed for 5 days while this case was being transcribed. The government decided to furlough court reporters at the expense of potential violations of *Moreno* standards. We recognize that the base legal office had limited decision making on the furlough of civilian employees, however, the appellant had even less input on this decision. We point this problem out because had the furlough been reduced by even one day, then the standards would likely have been met. We are mindful of our superior court's emphasis that the 120-day period after the conclusion of trial is not a "free" period, and "personnel and administrative issues . . . are not legitimate reasons justifying otherwise unreasonable post-trial delay." *United States v. Arriaga, 70 M.J. 51, 57 (C.A.A.F. 2011)*. Regarding the third factor, although the government carries the burden of primary responsibility for speedy post-trial processing, *United States v. Bodkins, 60 M.J. 322, 323-24 (C.A.A.F. 2004)*, the appellant did not assert his right to speedy post-trial processing until he filed his assignment of errors on 5 September 2014. Finally, on the fourth factor, the appellant fails to articulate any [*17] prejudice in this case, other than a concern his confinement might have been oppressive upon a successful appeal. "An appellant must demonstrate a 'particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision.'" *Arriaga, 70 M.J. at 58* (quoting *Moreno, 63 M.J. at 140*). Here, the appellant has not done so.

When there is no showing of prejudice under the fourth factor, "we will find a due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006)*. Having considered the totality of the circumstances and the entire record, when we balance the other three factors, we find the post-trial delay in this case is not so egregious as to adversely affect the public's perception of fairness and integrity of the military justice system. We are convinced the error is harmless beyond a reasonable doubt.

While we find the post-trial delay was harmless, that does not end our analysis. *Article 66(c), UCMJ, 10 U.S.C. § 866(c)*, empowers appellate courts to grant sentence relief for excessive post-trial delay without the showing of [*18] actual prejudice required by *Article 59(a), UCMJ, 10 U.S.C. § 859(a). United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002)*; *see also United States v. Harvey, 64 M.J. 13, 24 (C.A.A.F. 2006)*. In *United States v. Brown, 62 M.J. 602, 606-07 (N.M. Ct.*

Crim. App. 2005), our Navy and Marine Court colleagues identified a "non-exhaustive" list of factors to consider in evaluating whether *Article 66(c), UCMJ*, relief should be granted for post-trial delay. Among the non-prejudicial factors are the length and reasons for the delay, the length and complexity of the record, the offenses involved, and the evidence of bad faith or gross negligence in the post-trial process. *Id. at 607*. We have addressed several of these factors above in our *Moreno* analysis. The record of trial was 8 volumes with 955 pages of transcript, 25 prosecution exhibits, and 60 appellate exhibits. The nature of the offense is described in detail earlier in this opinion. We find there was no bad faith or gross negligence in the post-trial processing, and the length of delay was minimal. We conclude that sentence relief under *Article 66(c), UCMJ*, is not warranted.

Conclusion

The findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. *Articles 59(a)* and *66(c), UCMJ*. Accordingly, the findings and sentence are

AFFIRMED.

1 of 2 DOCUMENTS

U.S. v. Sean J. Chero.

No. 15-0664/AF.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

75 M.J. 315*; *2016 CAAF LEXIS 301

April 21, 2016, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

SUBSEQUENT HISTORY: On remand at, Decision reached on appeal by *United States v. Chero, 2017 CCA LEXIS 14 (A.F.C.C.A., Jan. 9, 2017)*

PRIOR HISTORY: CCA 38470 [*1] . *United States v. Chero, 2015 CCA LEXIS 168 (A.F.C.C.A., Apr. 28, 2015)*

OPINION

On further consideration of the granted issue, *75 M.J. 20 (C.A.A.F. 2016)*, and in light of *United States v. Busch, 75 M.J. 87 (C.A.A.F. 2016)*, it is ordered that the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed as to the findings but reversed as to the sentence. The record of trial is returned to the Judge Advocate General of the Air Force for remand to that court for further consideration in light of Busch.

2 of 2 DOCUMENTS

U.S. v. Sean J. Chero.

No. 15-0664/AF.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

75 M.J. 20*; *2015 CAAF LEXIS 682

July 13, 2015, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: CCA 38470 [*1] .
United States v. Chero, 2015 CCA LEXIS 168 (A.F.C.C.A., Apr. 28, 2015)

OPINION

Order Granting Petition for Review

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is ordered that said petition is hereby granted on the following issue:

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE CONCLUDED APPELLANT'S MAXIMUM PUNISHMENT WAS 30 YEARS CONFINEMENT, TOTAL FORFEITURES AND A DISHONORABLE DISCHARGE.

No briefs will be filed under Rule 25.

UNITED STATES OF AMERICA v. JEFFREY D. SAGER, AVIATION ORDNANCEMAN AIRMAN (E-3), U.S. NAVY

NMCCA 201400356

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2015 CCA LEXIS 571

December 29, 2015, Decided

NOTICE: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

SUBSEQUENT HISTORY: Appeal granted by *United States v. Sager, 2016 CAAF LEXIS 448 (C.A.A.F., May 31, 2016)*

PRIOR HISTORY: [*1] Sentence Adjudge: 13 May 2014. Military Judge: CDR John A. Maksym, JAGC, USN. Convening Authority: Commander, U.S. Naval Forces Japan, Yokosuka, Japan. Force Judge Advocate's Recommendation: CDR T.D. Stone, JAGC, USN.

CASE SUMMARY:

OVERVIEW: HOLDINGS: [1]-A servicemember's conviction for abusive sexual contact was not based on unconstitutionally vague statutory language since a finding that the victim was "otherwise unaware" of the sexual contact, such as by being asleep or unconscious, provided sufficient notice of the prohibited conduct and there was no risk of arbitrary or discriminatory enforcement; [2]-The servicemember admittedly had sexual contact with the victim, and the evidence was sufficient to show that the victim was unaware of the contact since the victim was heavily intoxicated and awoke while the contact was occurring and the servicemember reasonably should have known that the victim was unaware that the sexual act was occurring; [3]-Although testimony concerning the servicemember's statement was erroneously admitted, a mistrial was properly denied in view of a timely and specific curative instruction.

OUTCOME: Findings and sentence affirmed.

COUNSEL: For Appellant: LT David Warning, JAGC, USN.

For Appellee: LCDR Keith Lofland, JAGC, USN; LT Amy Freyermuth, JAGC, USN.

JUDGES: Before J.A. FISCHER, B.T. PALMER, T.H. CAMPBELL, Appellate Military Judges.

OPINION BY: FISCHER

OPINION

GENERAL COURT-MARTIAL

OPINION OF THE COURT

FISCHER, Senior Judge:

A general court-martial, consisting of members with enlisted representation, convicted the appellant, contrary to his plea, of a single specification of abusive sexual contact, in violation of *Article 120, Uniform Code of Military Justice*.[1] The convening authority (CA) approved the adjudged sentence of 24 months' confinement and a bad-conduct discharge.

1 The charge was alleged as the "Additional Charge," and is referenced as such throughout this opinion.

The appellant asserts six assignments of error (AOE): (1) his charges were referred to a different court-martial than the one that adjudicated his case; (2)

the CA systematically excluded E-5 personnel as potential members;[2] (3) the convictions are factually and legally [*2] insufficient; (4) the military judge abused his discretion by giving a curative instruction vice declaring a mistrial after he excluded the entire testimony of a Government witness heard by the members; (5) the Additional Charge was unconstitutionally vague, as applied in the appellant's case; and (6) the staff judge advocate (SJA) failed to comply with RULE FOR COURTS-MARTIAL 1106, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) when making his recommendation to the CA. After carefully considering the record of trial and the parties' submissions, we conclude the findings and sentence are correct in law and fact, and there is no error materially prejudicial to the appellant's substantial rights. *Arts. 59(a)* and *66(c)*, UCMJ.

2 In light of the affidavit submitted by the Rear Admiral Terry Kraft, USN, regarding the member selection process for the appellant's court-martial and in view of *United States v. Ward, 74 M.J. 225 (C.A.A.F. 2015)*, we find no merit to this AOE.

Background

Airman (AN) TK and the appellant were assigned to the same Division aboard USS GEORGE WASHINGTON, homeported in Yokosuka, Japan.[3] On the evening of 8 March 2013, AN TK visited several bars with a group of shipmates in an area outside the base referred to as "the Honch."[4] AN TK testified that [*3] after visiting several bars, he left that group of friends and went to another nearby bar to charge his cellphone. AN TK understood the appellant would be at this bar and planned to use him as his "liberty buddy."[5] Once he arrived at the bar, AN TK found the appellant and joined him and his friends for the remainder of the evening.[6] This group of six Sailors left the bar around 2300 and walked to Fire Control Technician Second Class (FC2) DS's apartment where they all spent the night.[7]

3 Record at 502.
4 *Id.* at 505-06.
5 *Id.* at 513. At the time of the incident, USS GEORGE WASHINGTON's policy required Sailors to have a "liberty buddy" when traveling off-base.
6 *Id.* at 1033-34.
7 *Id.* at 1034-35.

Witnesses from the group described AN TK as exhibiting signs of intoxication while walking to the apartment.[8] In a statement to the Naval Criminal Investigative Service (NCIS), the appellant described AN TK's level of intoxication as "plastered." But he later testified that AN TK was stumbling and slurring his words "a little bit" while walking to the apartment.[9] Once inside the apartment, AN TK vomited into a bucket the appellant provided him.[10]

8 A Government expert witness estimated AN TK's blood alcohol content (BAC) peaked at approximately .226 on the night in question. [*4] *Id.* at 657.
9 *Id.* at 1035, 1056; Prosecution Exhibit 16 at 1.
10 *Id.* at 527, 1036, 1075.

The accounts of AN TK and the appellant diverge at this point. According to AN TK's testimony, after vomiting he "passed out" on a futon in the living room and then awoke to the appellant manually stimulating his (AN TK's) penis.[11] His penis was erect after about 5-10 minutes of manual stimulation, and the appellant then performed oral sex on him until he ejaculated. He did not open his eyes during this encounter, but maintained that he knew it was the appellant because "[the appellant] was the only other one in the room."[12] In describing why he did not respond during the sexual encounter, AN TK stated he was frustrated, confused, and "wasn't really sure what was going on."[13] He described himself as "too intoxicated," and that he was unable to move, talk, or think of a way out of the encounter.[14] When the encounter was over, AN TK fell back asleep.[15]

11 *Id.* at 528, 604.
12 *Id.* at 529.
13 *Id.* at 533.
14 *Id.*
15 *Id.* at 535.

In his testimony, the appellant provided a different account of the incident. He stated that after AN TK vomited, he and AN TK laid down on the futon together and discussed AN TK's problems with his girlfriend and the difficulty the appellant, a homosexual, had in a previous relationship with a heterosexual [*5] male.[16] The appellant described this conversation as "intimate" and stated that at one point AN TK began crying, then rested his head on the appellant's chest.[17] He interpreted the conversation and AN TK's actions as an invitation for sexual contact and put his hand on AN TK's stomach to "test the waters."[18] When AN TK did not resist, the appellant moved his hand to AN TK's pants, pulled his penis out of his underwear, and began to manually stimulate it.[19] After a short time AN TK's penis became erect and the appellant performed oral sex until AN TK ejaculated.[20]

16 *Id.* at 1037-38.
17 *Id.*

18 *Id.* at 1038.
19 *Id.* at 1081.
20 *Id.* at 1043.

The next morning, AN TK awoke after the appellant had left the apartment.[21] AN TK testified that his penis was tucked into his waistband, his pants were undone, and he had ejaculated on his stomach.[22] Sometime after leaving the apartment, AN TK called his mother. Based in part on her advice, he decided to go to the hospital and report the incident.[23]

21 *Id.* at 535.
22 *Id.* at 536.
23 *Id.* at 546.

At the hospital, AN TK underwent a sexual assault examination and then was connected with an NCIS agent.[24] At the request of NCIS Special Agent (SA) SC, AN TK participated in a "pretext" Facebook messenger conversation with the appellant.[25] During this conversation the appellant initially [*6] stated he did not remember having a sexual encounter with AN TK. Eventually, however, the appellant acknowledged the encounter, writing: "It was me it had to be I'm not lying when I say I really don't remember doing that to you . . . It's inexcusable and I will say I am so sorry . . . ."[26] DNA testing identified AN TK's semen and the appellant's saliva from the crotch of AN TK's boxer shorts worn on the night in question.[27]

24 *Id.* at 547.
25 *Id.* at 549, 788.
26 PE 14 at 22.
27 Record at 708.

Analysis

Constitutional Challenge to Article 120 as Applied

We first address the appellant's contention that his conviction based on the element that AN TK was "otherwise unaware the sexual act was occurring" is unconstitutionally vague as applied in his case.

We review the constitutionality of statutes *de novo. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000)*. Laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." *Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)*. Prior to prosecution, due process requires that a person have fair notice that an act is criminal. *United States v. Vaughan, 58 M.J. 29, 31 (C.A.A.F. 2003)*. Therefore, when "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application," it is unconstitutional. *Connally v. General Construction Co., 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)* (citation [*7] omitted). In assessing a vagueness challenge, we must examine the statute "in light of the conduct with which the defendant is charged." *Parker v. Levy, 417 U.S. 733, 757, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974)* (citation omitted). "Criminal statutes are presumed constitutionally valid, and the party attacking the constitutionality of a statute has the burden of proving otherwise." *United States v. Mansfield, 33 M.J. 972, 989 (A.F.C.M.R. 1991)* (citation omitted), *aff'd, 38 M.J. 415 (C.M.A. 1993)*.

The Specification of the Additional Charge is:

> **Specification**: In that [appellant], on active duty, did, at or near [location], on or about 9 March 2013, touch the penis of [AN TK] with his hand when he knew or reasonably should have known that [AN TK] was asleep, unconscious, or otherwise unaware that the sexual contact was occurring, with an intent to arouse the sexual desires of either himself or [AN TK].

The findings work sheet presented to the members read as follows:

> (b) Guilty **in that [the appellant] committed a sexual contact upon [AN TK] when [the appellant] (knew) (or) (reasonably should have known) that [AN TK] was (asleep), (unconscious), (or) (otherwise unaware) that the sexual act was occurring.**[28]

The military judge instructed the members that if they voted to convict they were required to both choose the Government theory under which they found [*8] guilt and reflect that choice on the findings worksheet by circling the applicable language contained in parentheses.

28 Appellate Exhibit XXV.

Following the military judge's instruction the members circled "reasonably should have known" and "otherwise unaware" on the findings worksheet for this specification. The appellant now argues that through this action the members rejected the Government theories that AN TK was asleep or unconscious at the time of the contact and the Government did not provide notice as to AN TK's physical state that rendered him "otherwise unaware" of the sexual act aside from being asleep or unconscious. Thus, the appellant contends the specifica-

tion is unconstitutionally vague in his case. The appellant's attack is two pronged: (1) the phrase "otherwise unaware" did not provide the appellant sufficient notice of the prohibited conduct; and (2) the phrase "otherwise unaware" encourages arbitrary and discriminatory enforcement.

Our sister court in the Air Force (AFCCA) faced a similar issue in *United States v. Chero, No. 38470, 2015 CCA LEXIS 168, unpublished op. (A.F.Ct.Crim.App. 28 Apr 2015)*. In that case the appellant was found guilty of violating *Article 120(b)(2)* and the specification stated he committed a sexual [*9] act upon a person who was "unconscious or otherwise unaware," but the evidence at trial showed the victim was asleep. On appeal, the appellant argued he was not on notice because the phrase "unconscious or otherwise unaware" omitted the term "asleep" and thus failed to provide notice. The AFCCA expressly rejected the appellant's argument, stating: "we do not find [the] omission to result in a fatal variance; asleep is just one example of how an individual may be 'otherwise unaware' and is not an alternative theory." *Id. at *8-9* (citation omitted).[29]

> 29 On 13 July 2015 the Court of Appeals for the Armed Forces granted Chero's Petition for Review on an unrelated AOE. *See United States v. Chero, 75 M.J. 20, 2015 CAAF Lexis 682 (C.A.A.F. July 13, 2015)*.

So too here, we conclude that asleep or unconscious are examples of how an individual may be "otherwise unaware" and are not alternate theories of criminal liability. A plain reading of the phrase is that a person cannot engage in sexual contact with another person when he/she knows or reasonably should know that the recipient of the contact does not know it is happening. We find that, as applied to the appellant's case, *Article 120(d)* provided sufficient notice of the proscribed conduct and there is no risk of arbitrary and discriminatory [*10] enforcement. We also note the defense theory at trial was that AN TK was fully aware of the appellant's actions and the sexual encounter was either consensual or the appellant reasonably believed it was consensual.

Factual and Legal Sufficiency

The appellant also argues that his conviction was factually and legally insufficient. We review factual and legal sufficiency claims *de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*. The test for factual sufficiency is whether we are convinced of the appellant's guilt beyond a reasonable doubt, allowing for the fact that we did not personally observe the witnesses. *United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)*. The test for legal sufficiency is whether any rational fact-finder could have found that the evidence met the essential elements of the charged offenses, viewing the evidence in a light most favorable to the Government. *Id. at 324*. Here, we find appellant's conviction both factually and legally sufficient.

Members convicted the appellant of one specification of abusive sexual contact. They found the appellant committed sexual contact upon AN TK by touching AN TK's penis when the appellant reasonably should have known that AN TK was otherwise unaware that the sexual act was occurring. In his testimony, the appellant admitted to the [*11] sexual contact and thus focuses his legal and factual insufficiency argument on the second element contending "there was no evidence that [AN] TK was 'otherwise unaware the sexual contact was occurring.'"[30]

> 30 Appellant's Brief of 8 Jun 2015 at 19 (footnote omitted).

AN TK testified that when he awoke the appellant was already manually stimulating his penis. The Government introduced substantial evidence that AN TK was heavily intoxicated when he returned to FC2 DS's apartment and laid on the futon. Whether AN TK was asleep or unconscious due to alcohol consumption/exhaustion, or a combination of these things is only relevant as to whether the appellant reasonably should have known AN TK was "otherwise unaware" of the sexual contact. After carefully reviewing the entire record of trial, to include all testimony and admitted exhibits, and considering the evidence in the light most favorable to the prosecution, we are convinced that a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt. Furthermore, after weighing all the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced beyond [*12] a reasonable doubt that the appellant reasonably should have known AN TK was otherwise unware that the sexual act was occurring. Thus, we find the appellant's conviction on the Additional Charge and specification is both legally and factually sufficient.

Failure to Grant a Mistrial

NCIS SA AR testified as a Government witness about her interrogation of the appellant. The Government introduced the appellant's written statement into evidence during her direct examination. The appellant had provided her greater detail about the sexual encounter than in an earlier statement to SA SC. Specifically, in his earlier interrogation the appellant maintained that he did not remember the sexual encounter with AN TK, but said he must have been involved because he was on the futon with AN TK and no one else in the apartment that night would have done it. But in his statement to SA AR, the appellant said that AN TK was lying on the appellant's

chest, then rolled off before the appellant performed the sexual acts. The appellant also told SA AR that there was initially some kissing before the oral sex, but later admitted to SA AR that he lied about the kissing. Finally, SA AR testified that the appellant [*13] told her that AN TK "mumbled a couple of times, during the [sexual activity]."

After both special agents testified, the Government began playing the NCIS video recording of the appellant's interrogations for the members.[31] The trial counsel provided the military judge a transcript of the video and based on his concerns from reading ahead, the military judge *sua sponte*, raised a suppression issue in an *Article 39(a)* session, before the members viewed the appellant's interrogation by SA AR.[32]

31 Record at 815-18.
32 *Id.* at 887.

After identifying the issue for counsel, the military judge recessed the court-martial and gave the defense an opportunity to bring a suppression motion the following day.[33] While the members had heard SA AR's testimony, they had not seen the appellant's second written statement because, although it was admitted into evidence, it had not yet been published.[34]

33 *Id.* at 894.
34 *Id.* at 871-86.

The following day, trial defense counsel moved to suppress the appellant's statements to SA AR.[35] After considering the issue, the military judge found that SA AR "substantively violated the constitutionally based rights of the accused" by representing to the appellant that he would be compelled to take a polygraph examination and if [*14] found deceptive would face enhanced punishment.[36] The military judge then quashed (1) SA AR's testimony; (2) the appellant's written statement to SA AR; and (3) the recording of SA AR's interrogation of the appellant.[37]

35 *Id.* at 895.
36 *Id.* at 909-10.
37 *Id.* at 911.

After the ruling, the defense moved for a mistrial.[38] The military judge denied the motion, opting instead to give the following curative instruction:

> During the course of the government's case, you heard from Special Agent [AR] from the Naval Criminal Investigative Service, indicating that there was essentially a subsequent statement, both orally and written, made to her from [the appellant]. Listen very carefully to me.
>
> In your mind, as you go forward in this case, Special Agent [AR] never testified. She has no place in this trial. Her opinions, her recollections, her statements, her sworn testimony do not exist. I have quashed them in their entirety. Any reference to Special Agent [AR] does not exist. It has been eradicated, ab initio, as if it never had been said or done.
>
> Special Agent [AR], it has come to the attention of this court, grossly violated the constitutional protections of [the appellant]. You can have no level of trust or reliability in anything said by [the [*15] appellant] to Special Agent [AR]. Thus, I have eradicated her testimony, the statement, and any reference to the statement, as though they never had been uttered.
>
> Now, Special Agent [AR]'s inappropriateness and violative conduct was not known by the prosecutors in this courtroom. Accordingly, you are not to hold them personally responsible in being unethical attorneys going forward in this case. I assure you that is not the case.
>
> But likewise, I assure you that Special Agent [AR]'s participation in this matter rendered the statement made to her grossly unreliable. Nothing in our system is more important than fairness and equity.
>
> Because of its incredible unreliability, which is the fundamental makeup of any participation of Special Agent [AR] in this case, you can draw no conclusions whatsoever that anything you formerly heard about what [the appellant] said, because of certain prompting and threats made by Special Agent [AR], would be to any degree truthful in their foundation. Thus, you must completely, like I have judicially done, quash them and eradicate them from anywhere in your functioning medulla oblongata.
>
> . . . .
>
> [T]hat includes any reference to this statement, which no longer exists, [*16] or that witness, who no longer exists in this trial, by the government in their opening statement. So you literally sub-

tract that from their opening statement and go forward.[39]

38 *Id.* at 917.
39 *Id.* at 933-34, 939.

The military judge gave the instruction immediately after he ruled on the mistrial.[40] He inquired with each member individually to see if they could abide by his instruction and all members replied in the affirmative.[41] He then advised the members a second time using similar language during findings instructions before the members deliberated on the merits of the case.[42] The appellant argues the military judge abused his discretion in denying the motion for a mistrial. We disagree.

40 *Id.* at 932.
41 *Id.* at 934-35.
42 *Id.* at 1187, 1194.

This court reviews a military judge's decision on whether to grant a mistrial for abuse of discretion. *United States v. Dancy, 38 M.J. 1, 6 (C.M.A. 1993)*. "[A] mistrial is a drastic remedy" and should be used "only to prevent a manifest injustice against the accused." *Id.* (citation and internal quotation marks omitted). A military judge's decision to grant a mistrial "is appropriate only whenever circumstances arise that cast substantial doubt upon the fairness or impartiality of the trial." *Id.* (citation and internal quotation marks omitted). When the members have heard inadmissible [*17] evidence, a curative instruction is the preferred remedy as opposed to declaring a mistrial, so long as the curative instruction avoids prejudice to the accused. *United States v. Rushatz, 31 M.J. 450, 456 (C.M.A. 1990)*. Absent evidence to the contrary, this court may presume that members follow a military judge's instructions. *See United States v. Loving, 41 M.J. 213, 235 (C.A.A.F. 1994)*; *United States v. Holt, 33 M.J. 400, 408 (C.M.A. 1991)*.

Here, the military judge did not abuse his discretion in giving a curative instruction and denying the defense motion for a mistrial. The military judge gave a timely, specific, and lengthy curative instruction, which ultimately advised the members that they were required to "completely . . . quash [the appellant's statement to SA AR and SA AR's testimony] and eradicate them from anywhere in [their] functioning medulla oblongata."[43] He reviewed the curative instruction with each member individually. Every member individually agreed to abide by his instruction. The military judge expressed great confidence in the members' ability to follow his instructions. He then went on to give the instruction a second time prior to findings. At no time did the members see the appellant's written statement to SA AR or watch the video of SA AR's interrogation of the appellant. Therefore, taking all of these circumstances into [*18] account, we find the curative instruction avoided prejudice to the accused and the military judge did not abuse his discretion in deciding to give a curative instruction vice declaring a mistrial.

43 *Id.* at 934.

Moreover, we find no reasonable possibility that the appellant suffered prejudice from the members having heard SA AR's inadmissible testimony. The appellant gave substantially the same account of the incident in his testimony that SA AR previously indicated in her quashed testimony.

Court-Martial Convening Orders

On 5 September 2013, the CA referred a charge and two specifications, alleging the appellant violated *Article 120, UCMJ*, to a court-martial consisting of five officer members convened by General Court-Martial Convening Order (GCMCO) 2-13, signed that same day. At the appellant's arraignment on 17 September 2013, the trial counsel stated the general court-martial was "convened by Commander, U.S. Naval Forces Japan, by [GCMCO] 2-13[.]"[44] During this session, the appellant elected to be tried by a court-martial composed of members with enlisted representation.[45]

44 *Id.* at 2.
45 *Id.* at 12.

On 6 January 2014, the CA signed GCMCO 1-14. It does not reference a specific case and lists five officers as members. The CA [*19] selected additional members and detailed them to the appellant's court-martial in modifications to GCMCO 1-14. The members that ultimately heard the appellant's case were detailed in GCMCO 1A-14 and 1B-14. The court-martial assembled on 15 January 2014.[46] Prior to assembly, the appellant repeated his forum selection-a court composed of members with enlisted representation--and entered a plea of not guilty to the charge and specifications.[47] Following the entry of pleas, the trial defense counsel moved to dismiss Specification 1 for failing to state an offense.[48] The military judge heard argument on the issue, but did not immediately rule on the motion.[49] Instead, he elected to proceed with the assembly of members and *voir dire*.[50]

46 *Id.* at 108.
47 *Id.* at 110.
48 *Id.* at 111.
49 *Id.* at 111-23.
50 *Id.* at 127.

Prior to the assembly of members, trial counsel stated:

> This court is convened by Commander, U.S. Naval Forces Japan, by General Court-Martial Convening Order 1-14, dated 6 January 2014, as amended by 1A-14, dated 9 January 2014, as amended by 1B-14, copies of which have been furnished to each member. And 1B-14 is dated 14 January 2014, your honor.[51]

51 *Id.*

Contrary to her original jurisdictional statement, trial counsel pointed to GCMCO 1-14 as the original convening order. [*20] GCMCO 1-14, however, did not amend GCMCO 2-13, and GCMCO 2-13 was actually the convening order listed on the charge sheet.[52]

52 GCMCO 1-14; Charge Sheet dated 29 Aug 2013.

Regardless, none of the members listed in GCMCO 1-14 or 2-13 actually appeared at court on 15 January 2014.[53] The CA issued GCMCOs 1A-14 and 1B-14 to detail members specifically for the appellant's court-martial, and those members assembled for the court-martial.[54]

53 Record at 127-28.
54 GCMCO 1A-14 and GCMCO 1B-14; Record at 127-28, 130.

After assembly, during *voir dire*, the military judge revisited and granted trial defense counsel's motion to dismiss Specification 1,[55] but without prejudice. He also granted a recess to afford the Government time to correct the specification, and prefer and refer it anew.[56]

55 *Id.* at 164.
56 *Id.* at 164-67, 173.

The Government accomplished these tasks that same day. The CA referred the "Additional Charge" -- one specification of abusive sexual contact -- to a general court-martial convened by "[GCMCO] 2-13 dtd 5 Sep 13, as amended by [GCMCO] 1A-14 dtd 9 Jan 14, as amended by [GCMCO] 1B-14 dtd 14 Jan 14."[57] The CA also provided the following special instructions: "to be tried in conjunction with the remaining charge and specification before the [*21] court convened by [GMCCO] 2-13 dtd 5 Sep 13, as amended by [GCMCO] 1A-14 dtd 9 Jan 14, as amended by [GCMCO] 1B-14 dtd 14 Jan 14."[58]

57 Charge sheet dated 15 Jan 2014.
58 Charge sheet dated 15 Jan 2014; Record at 176.

The court-martial reconvened on 21 January 2014.[59] In light of the CA's special instruction to try the Additional Charge at the same proceeding as the remaining specification on the original charge sheet, the military judge reviewed with the appellant his ability to have two separate trials.[60] After consulting with counsel, the appellant advised that he wanted to have one trial encompassing both the Charge and the Additional Charge.[61] The Government arraigned the appellant on the Additional Charge, and he again elected to have a panel of members with enlisted representation decide his case.[62]

59 Record at 175.
60 *Id.* at 176.
61 *Id.* at 177.
62 *Id.* at 189.

Prior to entry of the appellant's pleas on the Additional Charge, trial counsel described several corrections to the GCMCO:

> There are three dates that need to be changed in 1A-14 and we just need to reflect that the court was originally convened by 2-13 dated 5 September 2013, as opposed to 1-14 dated 6 January 2014. So there are three separate paragraphs that have the wrong convening [*22] order number in them, and we would like them all to reflect Convening Order 2-13 dated 5 September 2013.[63]
>
> . . . .
>
> And then on the second Amending Order 1B-14, there are two places where 1-14 is referenced--excuse me, just one where 1-14 is referenced and that needs to be changed to 2-13 dated 5 September.[64]
>
> . . . .
>
> And then one final issue, sir, we discussed this last week. But the members that were listed on 2-13, we would ask that the court relieve those members. That was the--[65]

The military judge responded:

> They stand relieved, so ordered.[66]

63 *Id.* at 180.
64 *Id.*
65 *Id.* at 181.
66 *Id.*

When asked by the military judge, the trial defense counsel raised no objections to the convening orders.[67] The trial counsel then re-stated the jurisdictional data as follows:

> [T]his general court-martial is convened by Commander, U.S. Naval Forces Japan by General Court-Martial Convening Order 2-13 dated 5 September 2013, as amended by order 1A-14 dated 9 January 2014, as amended by order 1B-14 dated 14 January 2014[.][68]

67 *Id.* at 180-82.
68 *Id.* at 184.

The military judge then announced that the court-martial was assembled, both with respect to the original charge and specification as well as the Additional Charge.[69] The appellant entered a plea of not guilty to the Additional Charge and the [*23] parties moved forward with *voir dire*.[70]

69 *Id.* at 185.
70 *Id.* at 189.

The appellant now asserts his court-martial lacked jurisdiction to hear his case because the CA referred the charges to GCMCO 2-13--a panel that never assembled. We disagree with the appellant's contention.

When convening a court-martial, it is the CA's convening order which brings the court-martial into existence. *United States v. Glover, 15 M.J. 419, 421 (C.M.A. 1983)*. Court-martial jurisdiction thus "depends upon a properly convened court, composed of qualified members chosen by a proper convening authority, and with charges properly referred." *United States v. Adams, 66 M.J. 255, 258 (C.A.A.F. 2008)* (citations omitted). The convening order itself, however, is "merely a formal recordation of [the CA's] expressed intent." *Glover, 15 M.J. at 421*. In those cases where the order itself, or conflicting orders, create doubt about the composition of the court-martial, the courts may attempt to give effect to the CA's intent, bearing in mind that "[a]dministrative errors in the drafting of a convening order are not necessarily fatal to jurisdiction." *Adams, 66 M.J. at 259*; *see also United States v. Padilla, 1 C.M.A. 603, 5 C.M.R. 31 (C.M.A. 1952)* ("[W]e should give weight to substance, and should not unduly emphasize matters of form"); *United States v. Mack, 58 M.J. 413, 416 (C.A.A.F. 2003)*. Furthermore, our superior court has recognized that the process of excusing members and adding substitute members is an administrative vice jurisdictional [*24] matter. *Mack, 58 M.J. at 417*.

The appellant correctly identifies several convening order errors reflecting a lack of attention to proper court-martial procedure which cannot be condoned. The GCMCO modifications erroneously reference and relieve detailed members in GCMCO 1-14 vice GCMCO 2-13. However, those modifications, along with the special referral instructions for the Additional Charge, also clearly evince the CA's intent to relieve all the members in a standing panel and detail members, including enlisted members as required following the appellant's forum selection, solely for the appellant's court-martial.

The CA selected all of the members listed in General Court-Martial Amending Orders 1A-14 and 1B-14 and detailed them as the members for the appellant's trial. The parties agreed at trial that the CA intended for the appellant's panel of members to be comprised of the members listed in the amending orders. The appellant had the opportunity to *voir dire* all of the members the CA detailed to the court-martial, and none of the members listed in GCMCOs 2-13 or 1-14 were actually present on the day of assembly. In fact, the convening authority clarified his intent when he referred the Additional Charge [*25] on 15 January 15, stating that he referred the Additional Charge to "[GCMCO] 2-13 dtd 5 Sep 13, as amended by Order 1A-14 dtd 9 Jan 14, as amended by Order 1B-14 dtd 14 Jan 14."

While these administrative errors reflect a less than ideal practice, we find no prejudice to the appellant's substantial rights and do not find jurisdictional error. Nonetheless, the appellant is entitled to a promulgating order that references the correct convening orders and we direct the required corrective action in our decretal paragraph. *United States v. Crumpley, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998)*.

SJA's Failure to Comment on Legal Error

Following the court-martial, trial defense counsel submitted two clemency requests--one on 30 June 2014 and another on 12 September 2014. Trial defense counsel raised several legal issues in these requests. Notably, she outlined arguments asserting the military judge erred in denying a defense motion for a mistrial and that Article 120 was unconstitutionally vague as applied to the ap-

pellant. The latter argument had been the subject of a post-trial hearing wherein trial defense counsel moved to dismiss the charge upon which the members convicted the appellant.[71] In a written ruling issued on 25 August 2014, the military judge denied [*26] the defense motion.[72]

71 Record at 1331.
72 Military Judge's Order of 25 Aug 2015.

On 12 September 2014, the CA's SJA submitted the staff judge advocate's recommendation (SJAR) to the CA.[73] In the recommendation, he enclosed both clemency letters from trial defense counsel.[74] The SJA advised that this allowed the CA to review the raised legal errors in their entirety and "allowed for a specific discussion on the issues" with the CA.[75] In the text of his recommendation, he stated:

> The Defense raised multiple legal issues during the trial and post-trial; these issues are reiterated in enclosures (2) and (3). Due to these perceived legal errors, Defense requests the finding of guilty be set aside, the charge and specification be dismissed, and the sentence be disapproved.[76]
>
> . . . .
>
> Having reviewed the results of trial and the record of trial, I recommend that you approve the sentence as adjudged and order the sentence executed in accordance with the UCMJ, MCM, and applicable regulations.[77]

The SJA advised that he made this recommendation after "determin[ing] Trial Defense Counsel's raised legal errors were without merit and did not require additional action by the CA."[78]

73 The SJAR is dated 8 September 2014. However, the SJA clarified [*27] in his affidavit that the date was a typographical error and that he actually submitted the SJAR on 12 September 2014. Government Motion to Attach Affidavit of CDR Timothy Stone of 9 Apr 2015, filed on 10 Apr 2015.
74 *Id.*
75 *Id.*
76 SJAR at 2.
77 *Id.* at 3.
78 Affidavit of CDR Timothy Stone at 3.

The CA received the SJAR. Prior to approving the sentence as adjudged, he "considered the results of trial, the recommendation of the staff judge advocate, and all matters submitted by the defense and the accused in accordance with R.C.M. 1105 and 1106."[79]

79 General Court-Marital Order No. 3-14 of 19 Sep 14 at 3.

The appellant asserts the SJA failed to provide an opinion concerning corrective action on the findings or sentence following the trial defense counsel's allegation of legal error under R.C.M 1105 and requests that we order a new SJAR and CA's action. R.C.M. 1106(d)(4) provides that in response to trial defense counsel's allegation of legal error in a clemency request, the SJA is required to advise the CA "whether, in the staff judge advocate's opinion, corrective action on the findings or sentence should be taken[.]" The advice the SJA provides to the CA, however, may simply "consist of a statement of agreement or disagreement" and does not require the SJA to offer [*28] "an analysis or rationale." R.C.M. 1106(d)(4). *See also United States v. Hill, 27 M.J. 293, 295-96 (C.M.A. 1988)*

Here, the SJA enclosed both clemency requests in his SJAR, acknowledged the trial defense counsel's assertion of legal error in the body of his recommendation, discussed the issues with the CA, and advised the CA to approve the appellant's findings and sentence as adjudged. While the SJA did not explicitly state in his SJAR that the legal errors were without merit, his recommendation does demonstrate that he neither agreed with the alleged legal errors nor believed corrective action was warranted. Therefore, we find the SJAR complied with the requirements of R.C.M. 1106(d)(4).

Furthermore, we have already concluded the legal errors raised in the clemency petition did not warrant relief. Thus, even if the SJAR did not comply with R.C.M. 1106(d)(4), there was no prejudice. For these reasons, we decline to grant the requested relief.

Conclusion

The findings and the sentence are correct in law and fact, and they are affirmed. The supplemental Court-Martial Order will reflect that the court-martial was convened by Commander, U.S. Naval Forces Japan General Court-Martial Convening Order 2-13 of 5 September 2013, as amended by General Court-Martial Amending Order 1A-14 of 9 January 2014, [*29] as further amended by General Court-Martial Amending Order 1B-14 of 14 Jan 2014."

CERTIFICATE OF FILING AND SERVICE

I certify that the original was filed electronically with the Court at efiling@armfor.uscourts.gov on this 13th day of March, 2017 and contemporaneously served electronically and via hard copy on appellate defense counsel.

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