IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
Private (E-2) **CAMERON M. MAYS,** United States Army, Appellant	)	Crim. App. Dkt. ARMY 20200623 USCA Dkt. No. 23-0001/AR

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

Issue Presented

WHETHER THE OFFENSE OF INDECENT VIEWING UNDER ARTICLE 120c, UCMJ, INCLUDES VIEWING A VISUAL IMAGE OF THE PRIVATE AREA OF ANOTHER PERSON.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2016) [UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

Statement of the Case

On October 19, 2020, a military judge sitting as a general court-martial convicted Appellant, consistent with his pleas, of one specification of making a

false official statement, one specification of wrongful use of a controlled substance, one specification of wrongful possession of a controlled substance, one specification of wrongful introduction of a controlled substance, one specification of larceny, and one specification of assault upon a person in the execution of law enforcement duties, in violation of Articles 107, 112a, 121, and 128, UCMJ, 10 U.S.C. §§ 907, 912a, 921, and 928 (2019). (JA 14–18, 23–24). On October 22, 2020, the military judge convicted Appellant, contrary to his pleas, of two specifications of attempted indecent viewing, one specification of insubordinate conduct toward a non-commissioned officer, one specification of sexual assault, one specification of assault upon a commissioned officer, and one specification of assault upon a non-commissioned officer, in violation of Articles 80, 91, 120, and 128, UCMJ, 10 U.S.C. §§ 880, 891, 920, and 928 (2019).[1] (JA 14–18, 23, 84). The military judge sentenced Appellant to reduction to the grade of E-1, confinement for 48 months, and a dishonorable discharge. (JA 87). The military judge credited Appellant with six months and four days of pretrial confinement credit. (JA 85–86). On November 20, 2020, the convening authority approved the adjudged sentence. (JA 8). On November 23, 2020, the military judge entered judgment. (JA 7). On September 7, 2022, the Army Court affirmed the findings of

[1] The military judge found Appellant not guilty of one specification of sexual assault and two specifications of indecent recording in violation of Articles 120 and 120c, UCMJ, 10 U.S.C. §§ 920 and 920c (2019). (JA 014–018, 023, 084).

guilty and sentence. (JA 2–6).

Statement of Facts

Specifications 1 and 2 of Charge III alleged that Appellant attempted to view the private area of his fellow soldiers without their consent and under circumstances where they had a reasonable expectation of privacy. (JA 15). This occurred on November 8–9, 2018, while Appellant's unit was deployed to Kandahar, Afghanistan. (JA 15).

When Appellant's unit deployed to Afghanistan, they lived in modular housing that the soldiers referred to as "mods." (JA 25). Each "mod" had one bathroom for the soldiers to share. (JA 26). The bathroom contained four sinks and three shower stalls with curtains along the same wall as the entrance and exit to the bathroom as best shown in Prosecution Exhibit 11. (JA 61, 89). The shower stall dividers in between each shower stood roughly six feet tall. (JA 30).

A. Appellant attempted to view the private area of Specialist JS while he was showering on November 8, 2018.

On November 8, 2018, Sergeant (SGT) KW[2] walked into the "mod" bathroom and went to the first sink closest to the door to brush his teeth. (JA 26, 88). He noticed someone else in the bathroom who he later identified as Appellant. (JA 26, 35). Appellant, who is over six feet tall, appeared to be

[2] Sergeant KW was a specialist at the time of the incident. (JA 25).

"looking for a signal on his cell phone" because he was "holding the phone up in the air" near the first shower stall closest to the sinks. (JA 26–27, 37–38, 83, 88). As he was brushing his teeth, SGT KW realized that there was no cell phone service given their location in Afghanistan. (JA 28). Consequently, SGT KW looked at Appellant, who was still holding his phone up in the air, and he saw the phone's picture screen. (JA 28, 40). The phone's camera function appeared to be open on the screen, and SGT KW saw "a grayish blue fuzziness," which SGT KW later thought "could have been water." (JA 28). The lighting in the bathroom at the time "was bright as day." (JA 39). Appellant was standing on his "tiptoes" at the time and "lean[ing] up and over the shower stall" with the phone "angled downwards." (JA 29, 35). In fact, Appellant angled his cell phone over the other side of the shower stall divider. (JA 40–41).

After realizing what was occurring, SGT KW stated, "hey man." (JA 31). Appellant immediately "turned around and looked at [SGT KW] out of the corner of his eye and then just started washing his hands." (JA 31–32). Before SGT KW could say anything else, Appellant quickly stopped washing his hands, and "made a beeline straight towards the door, rushing past" SGT KW. (JA 32, 36). Specialist (SPC) JS was in the first shower stall at the time while SPC SJ (formerly known as SPC SB) was in the middle shower stall. (JA 34). Prosecution Exhibit 10 visually demonstrated the relevant locations of SGT KW, Appellant, SPC JS,

and SPC SJ at the time, and Appellant's route when he abruptly left the bathroom. (JA 88).

Specialist JS testified that he was showering in the first shower stall closest to the sinks on November 8, 2018 when he heard SGT KW exchange words with someone. (JA 42). After hearing SGT KW say something, SPC JS next "heard water run really quick from the sink and then the bathroom door open and close." (JA 43). Specialist JS confirmed that he was naked while he was showering on November 8, 2018. (JA 44). Specialist JS did not see a phone or Appellant while he showered. (JA 45).

B. Appellant attempted to view the private area of Specialist SJ while he was showering the very next day on November 9, 2018.

On November 9, 2018, SPC SJ was showering in the shower located the furthest from the entrance to the bathroom when he noticed a cell phone extended about two to three inches over the shower stall divider. (JA 58–59). Specialist SJ was naked at the time, and he cursed and called out the middle stall occupant where the cell phone came from upon seeing it. (JA 59–60). After getting out of the shower, SPC SJ noticed that Appellant "was standing in the second shower with the curtain slightly open." (JA 61). Specialist SJ confronted Appellant, and then he left the bathroom to get his leadership to report the situation. (JA 61–62). Later the same evening, SPC SJ saw Appellant with his cell phone, and it appeared to be the same phone as the one extended over the shower divider that SPC SJ

noticed when he showered earlier. (JA 64).

Mr. JW was also in the bathroom on November 9, 2018, as he previously served in the same unit as Appellant and SPC SJ before he left the military. (JA 52–53). Mr. JW was in the first shower stall closest to the sinks when he heard SPC SJ cry out. (JA 54–55). Mr. JW poked his head out of the shower stall, saw SPC SJ who had also poked his head out of the shower furthest from the entrance, and SPC SJ asked Mr. JW if he knew who was in the middle shower. (JA 55). Specialist SJ reported to Mr. JW that he saw a cell phone extended over the shower stall divider and was concerned that somebody was recording him. (JA 55). Ultimately, Mr. JW saw Appellant leave the middle shower stall, and Appellant left the bathroom "in a rush . . . as quick[ly] as he could." (JA 56). Appellant "was pretty quiet" and "did not really talk" as he left the bathroom. (JA 57).

Sergeant LN was a member of the same unit who was also in the bathroom at the time. (JA 46–48). Sergeant LN was brushing his teeth when he heard someone curse. (JA 49–50). Soldiers then "started jumping out of the shower." (JA 50). Specialist SJ, who seemed angry and excited at the time, walked up to SGT LN and told him not to let Appellant go anywhere. (JA 50–51). Appellant seemed "worried," "confused," and "shocked." (JA 51). After SPC SJ left the bathroom, Appellant "looked like he really wanted to get out of [the bathroom]," and "[h]e just grabbed up . . . his things and then he left in a hurry." (JA 51).

C. The government did not recover any images or videos of Specialist JS or Specialist SJ after seizing and searching Appellant's phone.

Captain MK, Appellant's company commander, seized Appellant's cell phone, a Samsung Galaxy Note 8, on November 10, 2018. (JA 65–66, 82). Captain MK noticed that Appellant was on his phone when CPT MK took it. (JA 67). Special Agent (SA) WH, a digital forensic examiner with the Army Criminal Investigative Command, attempted to extract data from Appellant's cell phone. (JA 68–69, 70). When he attempted to do so, SA WH received "a warning on the phone that indicated . . . it had water and moisture damage." (JA 71). Special Agent WH received similar error messages in the past when he examined and attempted to extract data from cell phones that had water damage. (JA 75). Ultimately, SA WH was unable to perform a "physical extraction" of Appellant's cell phone, which would have extracted the most amount of data from the phone, including any "deleted images or deleted information." (JA 72–73). Instead, SA WH was only able to perform a "logical extraction," which only extracts "the live information off of the device" and not any deleted information. (JA 72–73). A review of the logical extraction of Appellant's cell phone did not reveal any images or videos of SPC JS or SPC SJ. (JA 76).

WHETHER THE OFFENSE OF INDECENT VIEWING UNDER ARTICLE 120c, UCMJ, INCLUDES VIEWING A VISUAL IMAGE OF THE PRIVATE AREA OF ANOTHER PERSON.

Standard of Review

This Court conducts a de novo review of a record of trial for legal sufficiency. *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003). This Court reviews questions of statutory interpretation de novo as well. *United States v. Vargas*, 74 M.J. 1, 5 (C.A.A.F. 2014).

Summary of the Argument

When Appellant attempted to view in real time[3] the private area of SPC JS and SPC SJ through the camera function on his cell phone while they were showering, he attempted to commit indecent viewing as proscribed in Article 120c(a)(1), UCMJ. The ordinary meaning of the verb "views," as used in Article 120c(a)(1), UCMJ, includes seeing and looking, which captures what Appellant was attempting to do at the time through his cell phone's camera function. Moreover, the broader statutory context of Article 120c(a), UCMJ, indicates congressional intent to prosecute the indecent viewing of the private area of one's fellow soldiers in real time and while within the victim's presence. Lastly, Appellant's interpretation would lead to inconsistent results. Thus, the Army

[3] The Army Court described Appellant as "contemporaneous[ly] viewing" his victims "through the camera of his cellphone." (JA 5).

Court correctly concluded "that Congress intended to proscribe the knowing and wrongful viewing, by direct or indirect means, of the private area of another person, without that other person's consent during the existence of circumstances in which that other person has a reasonable expectation of privacy." *United States v. Shea*, No. ACM S32220, 2015 CCA LEXIS 235, at *9 (A.F. Ct. Crim. App. Jun. 4, 2015) (unpub.).

Law and Analysis

Guilty findings are legally sufficient when "any rational fact-finder could have found all essential elements of the offense beyond a reasonable doubt." *United States v. Nicola*, 78 M.J. 223, 226 (C.A.A.F. 2019) (citations omitted). When this Court conducts a legal sufficiency review, it is obligated to draw "every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Robinson*, 77 M.J. 294, 298 (C.A.A.F. 2018) (citations omitted). "As such, the standard for legal sufficiency involves a very low threshold to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (cleaned up).

A. Appellant's conduct satisfied the elements for Attempted Indecent Viewing.

The elements of Attempted Indecent Viewing are the following: (1) Appellant did a certain act; (2) the act was done with specific intent to commit the offense of indecent viewing; (3) the act amounted to more than mere preparation;

and (4) the act apparently tended to bring about the commission of the offense of indecent viewing. 10 U.S.C. § 880; *Manual for Courts-Martial*, *United States* [*MCM*], pt. IV, ¶ 4.b. Indecent viewing requires the government to prove the following elements: (1) Appellant knowingly and wrongfully viewed the private area of the victims; (2) Appellant did so without the consent of the victims; and (3) the viewing took place under circumstances in which the victims had a reasonable expectation of privacy. 10 U.S.C. § 920c; *MCM*, pt. IV, ¶ 63.b.(1).

Here, Appellant did a certain act with the specific intent to commit the offense of indecent viewing—namely, he attempted to view in real time through the camera function on his cell phone the private area of soldiers while they showered. (JA 28–29, 34–38, 42–43). Appellant's actions were more than mere preparation, as Appellant likely would have viewed the private area of the victims if not for SGT KW's intervention or SPC SJ's observation. (JA 31–32, 58). Appellant did not have the consent of the victims to view their private area, and the victims had a reasonable expectation of privacy while they showered. (JA 44, 58–59). Appellant apparently concedes all of the elements of the two offenses were met except that he did not "view" the victims' private areas.

B. The ordinary and natural meaning of the verb "views" encompasses seeing and looking through the camera function of one's cell phone.

The statutory language of Article 120c(a)(1), UCMJ, proscribes "knowingly and wrongfully view[ing] the private area of another person, without that other

person's consent and under circumstances in which that other person has a reasonable expectation of privacy." Article 120c, UCMJ, does not define the term "views" as it is used in Article 120c(a)(1), UCMJ, and nothing in the statutory language modifies the word "views" other than the mens rea requirement. Since Article 120c, UCMJ, does not define the term "views," the "plain language [of the term] will control, unless use of the plain language would lead to an absurd result." *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007) (cleaned up).

Here, the statutory language does not dictate one way or the other whether the prohibited viewing must be done "directly" with one's eyes or "indirectly," such as through a mirror, binoculars, or some other technological aid. *See Shea*, 2015 CCA LEXIS 235, at *6 (finding that the statutory language of Article 120c(a)(1), UCMJ, could proscribe viewing the private area of a victim both through "a recorded image of the person as well as viewing that person directly"). Similarly, Black's Law Dictionary does not define the verb "views." *Black's Law Dictionary* (11th ed. 2019).

Nonetheless, the ordinary meaning of the verb "views" better supports a reading encompassing Appellant's actions in this case. Merriam-Webster defines the verb "view" to mean the following: "(1) to look at attentively: scrutinize, observe // *view* an exhibit; (2)(a) see, watch." *Merriam–Webster's Online Dictionary*, https://www.merriam-webster.com/dictionary/views (last visited Feb.

21, 2023) (emphasis in original); *see also United States v. Schmidt*, 82 M.J. 68, 75 (C.A.A.F. 2022) (Ohlson, C.J., concurring) (stating that "when a word has an easily graspable definition outside of a legal context, authoritative lay dictionaries may . . . be consulted") (citation omitted). Thus, the ordinary definition of the verb "views" encompasses exactly what Appellant did in this case—he attempted to look at and see (i.e., view) the private area of two unsuspecting victims through the camera function of his cell phone. *See Smith v. United States*, 508 U.S. 223, 228 (1993) (recognizing that courts should construe undefined statutory words "in accord with its ordinary or natural meaning"); *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012) (recognizing that "[b]ut for his stepdaughter's refusal to lift her shirt, [appellant] would have 'viewed' his stepdaughter's breasts using the webcam"); *United States v. Uriostegui*, 75 M.J. 857, 863 (N-M. Ct. Crim. App. 2016) (recognizing that "the ordinary meaning of 'view' includes watching an indecent visual recording").

In contrast, Appellant interprets "views" to only prohibit "direct" viewing scenarios since Congress "specifically did not include *visual image of the private area*, or incorporate visual image into the definition of private area." (Appellant's Br. 5) (emphasis in original). Yet appellant cites no authority for the proposition that Congress must comprehensively identify and proscribe scenarios it wishes to punish when they are prohibited by the statute's plain language. For example, if

Appellant viewed the private area of the victims via a mirror[4] or through binoculars like a traditional "Peeping Tom,"[5] or even through live streaming capabilities like a high-tech "Peeping Tom," Appellant apparently would find this outside the scope of Article 120c(a)(1), UCMJ, because all three methods involve a "visual image of the private area."[6] The Army Court put it best when it found "[t]his is a distinction without a difference." (JA 5). *See also United States v. Ferguson*, 68 M.J. 431, 432–35 (C.A.A.F. 2010) (finding appellant provident to indecent exposure since he admitted sending "images of himself nude with an erect penis" and "digital video clips of [himself] ejaculating" via the internet to someone who he thought was a fourteen-year-old boy and that these actions "could be *observed* by members of the public" in public *view*) (emphasis added).

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[4] This hypothetical is not far-fetched since such a fact pattern has come up before. *See*, *e.g.*, *United States v. Walker*, No. ACM S31788, 2011 CCA LEXIS 352, at *3 (A.F. Ct. Crim. App. Mar. 11, 2011) (involving an accused who "used a mirror to watch other Airmen shower" in order "to relieve sexual frustration in a deployed environment . . . [in] Qatar").

[5] A "Peeping Tom" is a popular cultural reference for someone who engages in voyeurism.

[6] To the extent Appellant concedes that a traditional "Peeping Tom" using binoculars violates the plain language of Article 120c(a)(1), UCMJ, the government submits that today's cell phones can act as binoculars since they can zoom in on a given object in real time just like binoculars to enable enhanced viewing.

C. The broader statutory structure, context, and history indicates congressional intent to prosecute the indecent viewing of the private area of one's fellow soldiers in real time and within the victim's presence.

In addition to considering the ordinary meaning of the term "views," this Court should consider "the specific context in which that language is used, and the broader context of the statute as a whole." *Yates v. United States*, 574 U.S. 528, 537 (2015) (citations omitted). The overall statutory scheme of Article 120c(a), UCMJ, indicates congressional intent to prosecute all forms of wrongful, nonconsensual, real time viewing of another's private area. As an initial matter, Appellant's attempted indecent viewing of the two victims in this case occurred in real time with his attempt to observe them through the camera function of his cell phone while he was in close proximity to them. For example, SGT KW testified that he saw the camera function on Appellant's cell phone screen while Appellant was on his "tiptoes . . . leaned up and over the shower stall." (JA 28–29, 40). Sergeant KW saw "grayish blue fuzziness" on the screen of Appellant's cell phone as it was "angled downwards," which he later realized "could have been water." (JA 28, 35). If SGT KW could see the images shown on Appellant's cell phone in real time while SPC JS showered, the natural implication is that Appellant probably could have as well, or was at least attempting to, especially given his height. *See United States v. Bright*, 66 M.J. 359, 365 (C.A.A.F. 2008) (noting the court is "bound to draw every reasonable inference from the evidence of record in

favor of the prosecution" when "resolving questions of legal sufficiency") (cleaned up).

Next, both victims testified that they were naked while they showered (JA 44, 59). Since Article 120c(d)(2), UCMJ, broadly defines "private area" as "the naked or underwear-clad genitalia, anus, [or] buttocks," Appellant naturally could have seen, or was at least attempting to see, the victims' naked private area while they showered by looking at the images being shown in real time through his cell phone's camera function as Appellant positioned his cell phone above the shower stall divider. This inference is made even more reasonable given SGT KW's testimony that Appellant angled his cell phone downwards into the shower stall and SPC SJ's testimony that he saw a cell phone camera pointed at him. (JA 35, 60).

Consequently, the Army Court correctly found that "Appellant's acts facilitated the viewing of the naked [victims] in the shower stall through the camera lens of [his] cellphone, regardless of whether he was also capturing a photograph or recording, or merely using the camera and screen as a technologically advanced mirror." (JA 5). In situations such as this where there is only evidence that an accused attempted to view the private area of another in real time through a cell phone camera but did not photograph or film the other person, the government could only prosecute under Article 120c(a)(1), UCMJ. While

Article 120c(a)(2), UCMJ, prohibits knowingly photographing, filming, or recording the private area of another without their consent in circumstances where they have a reasonable expectation of privacy, it would not apply to situations where the accused merely viewed the private area of another through a cell phone without also recording it. Further, Article 120c(a)(3), UCMJ, also would not apply in this case since there was no evidence Appellant broadcasted or distributed any recording since there was insufficient evidence he recorded anything to begin with.

More broadly, Article 120c, UCMJ, is not an integrated statute where all of the provisions necessarily relate to each other. To begin with, the statute is titled "[o]ther sexual misconduct," and the contents of the statute reflect miscellaneous provisions dealing with sexual misconduct that were not placed elsewhere within Article 120, UCMJ. In addition to prohibiting "[i]ndecent viewing, visual recording, or broadcasting," Article 120c, UCMJ, also prohibits "[f]orcible pandering," involving compelled prostitution acts, and "[i]ndecent exposure." Therefore, at least three offenses within Article 120c, UCMJ, could be accomplished without technology: (1) indecent viewing; (2) forcible pandering; and (3) indecent exposure. *See*, *e.g.*, *Nicola*, 78 M.J. at 225, 229–30 (providing an example of where an accused indecently viewed a victim when he saw her in her shower after he removed her clothes); *United States v. Lewis*, No. 201900048, 2020 CCA LEXIS 269, at *18–19 (N-M. Ct. Crim. App. Aug. 17, 2020) (unpub.)

(upholding indecent viewing finding since appellant opened the victim's shower curtain and viewed the victim's private area without his consent and under circumstances where he had a reasonable expectation of privacy); *United States v. Williams*, 75 M.J. 663, 666 (A. Ct. Crim. App. 2016) (holding that "Congress did not intend to criminalize an 'exposure' [to adults] through communication technology under Article 120c(c), UCMJ"). Collectively, the broader statutory structure indicates that indecent viewing is a separate, stand-alone crime that is wholly independent from the provisions contained within visual recording and broadcasting. *See United States v. Bessmertnyy*, No. ACM 39322, 2019 CCA LEXIS 255, at *23 (A.F. Ct. Crim. App. Jun. 14, 2019) (unpub.) (identifying that Article 120c(a), UCMJ, "forbids three separate acts—viewing, recording, and broadcasting or distribution of another's private area—that are violations of law when done knowingly and under identically proscribed circumstances").

Further, indecent viewing is much broader than visual recording and broadcasting, as Article 120c(a)(2), UCMJ, is much narrower than 120c(a)(1), UCMJ, while Article 120c(a)(3), UCMJ is the narrowest of the three. The privacy violations correspondingly increase as one goes from Article 120c(a)(1), UCMJ, to Article 120c(a)(3), UCMJ, which is likely why the President set the maximum punishments for the three offenses to one year, five years, and seven years confinement respectively. *Manual for Courts-Martial*, *United States* (2019 ed.)

[*MCM*], pt. IV, ¶ 63.d.(1)–(3). Since indecent viewing, visual recording, and broadcasting are three separate and distinct offenses, with indecent viewing being the broadest of the three, this Court would not "render superfluous an interpretation of private area that implicitly included a visual image of a private area." (Appellant's Br. 7).

Appellant points to Article 120b, UCMJ, as support for the argument that "Congress did not intend visual image to be included into the term private area" since "Congress's deliberate inclusion of additional language for abuse of a child reveals a deliberate exclusion in Article 120c, UCMJ." (Appellant's Br. 7–8). Appellant's argument is misplaced for several reasons. To begin with, Article 120b(h)(5)(B), UCMJ, essentially provides the definition for indecent exposure with a child, which can be accomplished by "communication technology" as well as in-person exposure. Such language is not contained within Article 120c(c), UCMJ, which covers indecent exposure to adults. This is for good reason:

> Congress' distinction between the offenses is clear when the victim is a child. Congress has indicated a strong societal interest in protecting children from pornographic images thrust upon them by predatory adults via the internet. Thus, Congress expanded the definition of exposure as it relates to children—eliminating the requirement for the actual display of live genitalia. That heightened societal interest, however, does not extend to adults.

Williams, 75 M.J. at 668. Moreover, indecent exposure is intended "to *protect the*

public from shocking and embarrassing displays of sexual activities." *Id*. at 665 (emphasis in original and cleaned up). This is different from the purpose of indecent viewing, which is to protect unsuspecting victims from violations of their privacy rights. *See* Article 120c(a)(1), UCMJ (only proscribing indecent viewings when it violates the victim's "reasonable expectation of privacy"). Relatedly, indecent exposure under Article 120c(c), UCMJ, is more restrictive than indecent viewing under Article 120c(a)(1), UCMJ, since one has to expose "the genitalia, anus, buttocks, or female areola or nipple," whereas indecent viewing broadly encompasses "the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple." *Compare* Article 120c(c), UCMJ, *with* Article 120c(a)(1), UCMJ, and Article 120c(d)(2), UCMJ. Thus, indecent exposure and indecent viewing are completely separate crimes given the different harms each offense is intended to address, not to mention the difference between protecting children versus adults from indecent exposures. As a result, Appellant's citation to the language within Article 120b(h)(5)(B), UCMJ, does not inform the proper interpretation of Article 120c(a)(1), UCMJ, especially since indecent viewing is a broader offense than indecent exposure given the privacy right at stake.

Similarly, Appellant's reliance on Article 117a, UCMJ, must fail as that statute, titled "[w]rongful broadcast or distribution of intimate visual images," is also not a closely related offense to indecent viewing. Article 117a, UCMJ, in

part, addresses a type of "revenge porn" by expressly prohibiting non-consensual distribution of intimate images. *Briefing on Information Surrounding the Marines United Website: Hearing before the Committee on Armed Services*, 115th Cong. 44–45 (2017) (statements of Sen. Reed and Gen. Ewers). The "gap" that Congress filled with Article 117a, UCMJ, were instances where intimate photos and/or videos were taken with consent, but then distributed beyond the initial scope of consent since Article 120c, UCMJ, only applies to situations where photos or videos were taken without consent. *Id*. at 60 (statements of Sen. Blumenthal, Gen. Neller, Gen. Reynolds, Gen. Ewers, and Mr. Traver); *see*, *e.g.*, *United States v. Griffin*, 81 M.J. 646, 648 (N-M. Ct. Crim. App. 2021) (providing an example of a "revenge porn" case only prosecutable under Article 117a, UCMJ, and not Article 120c, UCMJ, since the victim consented to being recorded at the time of the sexual activity). Nothing in the legislative history or the enactment of Article 117a, UCMJ, indicates congressional intent to constrain the broad statutory language of Article 120c(a)(1), UCMJ. Instead, indecent viewing in violation of Article 120c(a)(1), UCMJ, remains a much broader offense than the wrongful broadcast or distribution of intimate visual images in violation of Article 117a, UCMJ.

In fact, Congress has only enlarged the offense of indecent viewing over time. Article 120(t)(12), UCMJ, served as the precursor to indecent viewing and was effective from October 2007 until June 2012, when Article 120c, UCMJ, went

into effect. *MCM*, app. 21, at A21-4. Article 120(t)(12), UCMJ, prohibited indecent conduct, which included "observing . . . without another person's consent, and contrary to that other person's reasonable expectation of privacy, of (A) that other person's genitalia, anus, or buttocks, or (if that other person is female) that person's areola or nipple." *Id*; *see also United States v. Rice*, 71 M.J. 719, 725 (Army Ct. Crim. App. 2012) (recognizing that "Congress added voyeurism of a particular sort as an indecent act under Article 120, UCMJ, when it overhauled that article under the UCMJ in 2007"). First, "views" is arguably broader than "observing" since Merriam-Webster defines the verb "observe" to mean the following: . . . "(2) to inspect or take note of . . .; (4)(a) to watch carefully especially with attention to details . . . ." *Merriam–Webster's Online Dictionary*, https://www.merriam-webster.com/dictionary/observing (last visited Feb. 22, 2023). Second, Article 120(t)(12), UCMJ, required actual viewing of one's genitalia, anus, buttocks, or female areola or nipple while Article 120c(a)(1), UCMJ, prohibits indecently viewing "the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple." *See* Article 120c(d)(2), UCMJ. Moreover, while Article 120(t)(12), UCMJ, prohibited recording such body parts under certain circumstances as well, it did not prohibit broadcasting or distributing such images with the requisite body parts as Article 120c(a)(3), UCMJ, now does. The fact that Congress has either added more provisions penalizing "high-tech" sexual

misconduct like Articles 117a and Article 120c(a)(3), UCMJ, or expanded the provisions of indecent viewing and visual recording under Articles 120c(a)(1)–(2), UCMJ, indicates congressional intent to broadly criminalize indecent viewing. Further, Congress did not need to include "visual image" within the language of Article 120c(a)(1), UCMJ, since the statutory language currently prohibits the broad spectrum of indecent viewing possible, from directly viewing one's private area to indirectly viewing one's private area in real time via a mirror, binoculars, cell phone, or other live streaming capability.

To recap, Article 120c(a)(1), UCMJ, is a broad, stand-alone provision that prohibits indecent viewing such as the high-tech "peeping" that was done in this case. No other enumerated offense could be used to prosecute Appellant, and Article 120c(a)(1), UCMJ, was part of several miscellaneous sexual misconduct provisions tucked into Article 120c, UCMJ. The addition of Article 117a, UCMJ, addresses "revenge porn" situations, and the one change that Congress made to indecent viewing over the years demonstrates an intent to extend the scope of it. Therefore, examination of the broader statutory structure, context, and history reveals that "Congress intended to prohibit all wrongful, nonconsensual viewing of a person's private area in [Article 120c(a)(1)]." *Shea*, 2015 CCA LEXIS 235, at *7.

D. Appellant's restrictive interpretation of the term "views" as it is used in Article 120c(a)(1), UCMJ, would lead to inconsistent and absurd results.

This Court must provide "the construction [of Article 120c(a)(1), UCMJ,] that produces the greatest harmony and least inconsistency." *United States v. Johnson*, 3 M.J. 361, 362 (C.M.A. 1977). Yet, Appellant's interpretation would create unnatural inconsistencies and draw an arbitrary line within Article 120c(a)(1), UCMJ. One hypothetical example highlights how Appellant's reading would lead to inconsistent and absurd results.

Both *Nicola* and *Lewis* involved service members who indecently viewed their victims while they showered. *See Nicola*, 78 M.J. at 225; *Lewis*, 2020 CCA LEXIS 269, at *2–3. Both were properly convicted of indecent viewing in violation of Article 120c(a)(1), UCMJ. *Nicola*, 78 M.J. at 230; *Lewis*, 2020 CCA LEXIS 269, at *19. Now imagine that instead of viewing the victims' private areas with their own eyes while they showered, the accused in *Nicola* and *Lewis* put their cell phones in between their eyes and their victims and opened the camera function on their phone. A savvy criminal would know not to photograph, record, or broadcast any recording since it could be found on their phone and/or increase their chances of being caught. In this hypothetical example and under Appellant's interpretation, the government could not prosecute indecent viewing in violation of Article 120c(a)(1), UCMJ. Articles 120c(a)(2)–(3) and Article 117a, UCMJ, would not provide an avenue for prosecution either. Under Appellant's reading,

service members would be free to peer into showers and bathroom stalls to view the private area of others and escape legal consequences if they merely viewed the other person's private area through the camera function of their cell phone and not directly with their own eyes. The Army Court correctly concluded this would be "a plainly absurd result and contrary to the statute's intent." (JA 5).

Further, Appellant's interpretation would arguably preempt the government from prosecuting similar fact patterns under even Article 134, UCMJ. "The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132," UCMJ. *MCM*, pt. IV, ¶ 91.c.(5)(a). If this Court requires an accused to directly view the private area of another with his or her own eyes, there can subsequently be no indecent viewing or indecent viewing type of offense, either under Article 120c(a)(1), UCMJ, or, because of preemption, under Article 134, UCMJ. *Id*. This is because Article 134, UCMJ, "cannot be used to create a new kind of [indecent viewing] offense, . . . where Congress has already set the minimum requirements for such an offense in Article [120c(a)(1)]," UCMJ. *Id*; s*ee also United States v. Norris*, 8 C.M.R. 36, 39 (C.M.A. 1953) (stating that "Article 134[, UCMJ,] should generally be limited to military offenses and those crimes not specifically delineated by the punitive Articles").[7]

[7] The Federal Assimilative Crimes Act could permit enforcement of an applicable state crime to the extent exclusive or concurrent federal jurisdiction exists on a given installation. *See* 18 U.S.C. § 13(a); *MCM*, pt. IV, ¶ 91.c(4)(a)(iii).

At the very least, Appellant's interpretation would inject unneeded uncertainty and inconsistency into the scope of Article 120c(a)(1), UCMJ. Appellant apparently draws a line between direct observation, such as what occurred in *Nicola* and *Lewis*, with using a cell phone like a "technologically advanced mirror." (JA 5). It is unclear where mirrors or binoculars would fall in this spectrum in Appellant's view, although both also seem to generate a visual image. Since modern cell phones can be used like binoculars these days anyway, Appellant's interpretation would apparently include direct observation through one's eyes and perhaps a mirror, but exclude other technological tools like binoculars, cell phones, or live streaming capabilities. Accordingly, Appellant's interpretation does not provide the "greatest harmony and least inconsistency." *Johnson*, 3 M.J. at 362.

E. This Court need not resort to the rule of lenity.

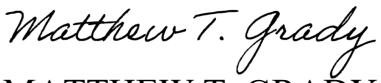
Appellant maintains that "[i]f Congress's exclusion of *visual image* from indecent viewing is not clear from the plain language of the statute, then Appellant is entitled to the requested relief under the rule of lenity." (Appellant's Br. 10) (emphasis in original). However, ambiguity alone cannot justify a court picking the narrowest interpretation plausible. *See* Amy Coney Barrett, Substantive Canons and Faithful Agency, 90 B.U.L. Rev. 109, 131 (2010). Instead, courts are "obliged to choose the best, not the narrowest, interpretation of a statute." *Id*. at

131 & n.99 (collecting cases standing for this proposition). Here, the government possesses the best reading of Article 120c(a)(1), UCMJ, and this Court "may not manufacture ambiguity in order to defeat" congressional intent. *Albernaz v. United States*, 450 U.S. 333, 342 (1981); *see also Chapman v. United States*, 500 U.S. 453, 463 (1991) (recognizing that resort to the rule of lenity "is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the [statute,] such that even after a court has seized everything from which aid can be derived, it is still left with an ambiguous statute.") (cleaned up).

Further, the rule of lenity ultimately rests on fairness, as an accused should "be on clear notice of what the law proscribes." *See* Barrett, Substantive Canons and Faithful Agency, 90 B.U.L. Rev. at 130. Here, Appellant knew that his actions were wrongful, as best shown by the consciousness of guilt he manifested on both occasions. Appellant essentially rushed out of the bathroom both times after he had been caught, and multiple witnesses described how "worried" he appeared after being caught on the second occasion. (JA 32, 36, 43, 51, 56–57).

Conclusion

WHEREFORE, the government respectfully requests that this honorable court affirm the findings and sentence.



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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains **6,150** words.

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

Matthew T. Grady

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March 13, 2023

CERTIFICATE OF SERVICE AND FILING

I hereby certify that the original was electronically filed to efiling@armfor.uscourts.gov on 13 March 2023 and electronically filed to Defense Appellate on March 13, 2023.

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APPENDIX

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Document (1)

1. *United States v. Bessmertnyy, 2019 CCA LEXIS 255*
   Client/Matter: -None-
   Search Terms: 2019 CCA LEXIS 255
   Search Type: Natural Language
   Narrowed by:

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Cases	-None-

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United States v. Bessmertnyy

United States Air Force Court of Criminal Appeals

June 14, 2019, Decided

No. ACM 39322

Reporter
2019 CCA LEXIS 255 *; 2019 WL 2513358

UNITED STATES, Appellee v. Petr K. BESSMERTNYY, Airman First Class (E-3), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by *United States v. Bessmertnyy, 79 M.J. 226, 2019 CAAF LEXIS 591, 2019 WL 4278500 (C.A.A.F., Aug. 14, 2019)*

Motion granted by *United States v. Bessmertnyy, 79 M.J. 244, 2019 CAAF LEXIS 631, 2019 WL 4279280 (C.A.A.F., Aug. 28, 2019)*

Motion granted by *United States v. Bessmertnyy, 79 M.J. 260, 2019 CAAF LEXIS 704, 2019 WL 5106693 (C.A.A.F., Sept. 17, 2019)*

Review denied by *United States v. Bessmertnyy, 80 M.J. 91, 2020 CAAF LEXIS 153 (C.A.A.F., Mar. 18, 2020)*

Habeas corpus proceeding at, Motion granted by *Bessmertnyy v. United States, 2021 U.S. Dist. LEXIS 109070 (S.D. Cal., June 10, 2021)*

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Natalie D. Richardson. Approved sentence: Dishonorable discharge, confinement for 6 years, forfeiture of all pay and allowances, and reduction to E-1. Sentence adjudged 19 May 2017 by GCM convened at Altus Air Force Base, Oklahoma.

Core Terms

recording, indecent, sentence, trial counsel, military, Specification, circumstances, pictures, reasonable expectation of privacy, laptop, videos, private area, trial defense counsel, posted, instructions, online, occasions, sessions, convening, Internet, camera, convicted, installed, software, sexual, declarations, distributed, images, confinement, convinced

Case Summary

Overview

HOLDINGS: [1]-A servicemember's conviction under *10 U.S.C.S. § 920c* for indecent recording was both legally and factually sufficient because a rational factfinder could conclude that a witness's credible testimony as corroborated by forensic evidence proved beyond a reasonable doubt that the servicemember knowingly recorded her private area on divers occasions without her consent and that the recordings were made under circumstances in which she had a reasonable expectation of privacy; [2]-The servicemember's interpretation of *10 U.S.C.S. § 920c*, that would require the Government to prove he viewed the recording subject's private area without her consent, defied a plain reading of the unambiguous statute because his interpretation would preclude application of the statute to all but the narrowest of circumstances.

Outcome

The findings and the sentence were affirmed.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1[] **Judicial Review, Courts of Criminal Appeals**

The United States Air Force Court of Criminal Appeals

reviews issues of legal and factual sufficiency de novo. Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*. The court's assessment of legal and factual sufficiency is limited to the evidence produced at trial. Though the court cannot find as fact any allegations of which an appellant was found not guilty at trial, it may consider facts underlying an acquitted charge in considering whether the facts support a separate charge. The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The term reasonable doubt, however, does not mean that the evidence must be free from conflict. In resolving questions of legal sufficiency, the court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN2 **Judicial Review, Standards of Review**

In the context of review under Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*, 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, the United States Air Force Court of Criminal Appeals is itself convinced of the appellant's guilt beyond a reasonable doubt. In conducting this unique appellate role, the court takes a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

HN3 **Burdens of Proof, Proof Beyond Reasonable Doubt**

In order to find the appellant guilty of Unif. Code Mil. Justice art. 120c, *10 U.S.C.S. § 920c*, the Government was required to prove beyond a reasonable doubt: (1) that the servicemember knowingly recorded another person's private area on divers occasions; (2) that he did so without the other person's consent; (3) that the recordings were made under circumstances in which the other person had a reasonable expectation of privacy; and (4) that the servicemember's conduct was wrongful. Manual Courts-Martial, pt. IV, para. 45c.b.(2) (2016). "Private area" means "the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple." Unif. Code Mil. Justice art. 120c(d)(2), *10 U.S.C.S. § 920c(d)(2)*.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

HN4 **Military Offenses, Rape & Sexual Assault**

In the context of a charge of indecent recording, a person has a "reasonable expectation of privacy" when a reasonable person would believe (a) she could disrobe in privacy without being concerned that an image of her private area was being captured; or (b) her private area would not be visible to the public. *10 U.S.C.S. § 920c(d)(3)*.

Governments > Legislation > Interpretation

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Governments > Legislation > Interpretation > Rule of Lenity

HN5 **Legislation, Interpretation**

An issue of statutory construction is a question of law the court reviews de novo. Unless ambiguous, the plain language of a statute will control unless it leads to an absurd result. Whether the statutory language is ambiguous is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.' Any ambiguity should be resolved in favor of lenity. Resort to the rule of lenity, however, is reserved for those situations in which after seizing every thing from which aid can be derived, a court is left with an ambiguous statute.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

HN6[] Military Offenses, Rape & Sexual Assault

Unif. Code Mil. Justice art. 120c(a), 10 U.S.C.S. § 920c(a), establishes the three offenses of indecent viewing, recording, or broadcasting, by providing: Any person subject to this chapter who, without legal justification or lawful authorization—(1) knowingly and wrongfully views the private area of another person, without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy; (2) knowingly photographs, videotapes, films, or records by any means the private area of another person, without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy; or (3) knowingly broadcasts or distributes any such recording that the person knew or reasonably should have known was made under the circumstances proscribed in paragraphs (1) and (2); is guilty of an offense under this section and shall be punished as a court-martial may direct. To prove distribution of an indecent recording in violation of paragraph (3) of 10 U.S.C.S. § 920c(a) the Government is required to prove an appellant distributed a recording that the appellant knew or reasonably should have known was made under the circumstances proscribed in paragraphs (1) [indecent viewing] and (2) [indecent recording] of 10 U.S.C.S. § 920c(a). 10 U.S.C.S. § 920c(a)(3).

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

HN7[] Military Offenses, Rape & Sexual Assault

Unif. Code Mil. Justice art. 120c(a), 10 U.S.C.S. § 920c(a), forbids three separate acts—viewing, recording, and broadcasting or distribution of another's private area—that are violations of law when done knowingly and under identically proscribed circumstances. The acts are separated by the disjunctive, "or," in the text of both the header and the substantive paragraphs of the statute.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

HN8[] Military Offenses, Rape & Sexual Assault

In order to find a servicemember guilty of distribution of an indecent recording the Government is required to prove beyond a reasonable doubt: (1) that the servicemember knowingly distributed a recording of another person's private area on divers occasions; (2) that the recording was made without that person's consent; (3) that the servicemember knew or reasonably should have known that the recording was made without consent; (4) that the recording was made under circumstances in which the other person had a reasonable expectation of privacy; (5) that the servicemember knew or reasonably should have known that the recording was made under circumstances in which the other person had a reasonable expectation of privacy; and (6) that the servicemember's conduct was without legal justification or lawful authorization. Manual Courts-Martial, pt. IV, para. 45c.b.(4). The term "distribute" means delivering to the actual or constructive possession of another, including transmission by electronic means. Unif. Code Mil. Justice art. 120c, 10 U.S.C.S. § 920c(d)(5).

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Instructions

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Findings

Military & Veterans Law > ... > Trial Procedures > Instructions > Theory of Defense

Military & Veterans Law > ... > Trial Procedures > Instructions > Special Defenses

HN9[] Trial Procedures, Burdens of Proof

The mens rea applicable to an offense is an issue of statutory construction, reviewed de novo. Whether a required instruction on findings is reasonably raised by the evidence is a question of law reviewed de novo, as well. When there was no objection to the instructions at trial, the United States Air Force Court of Criminal Appeals reviews for plain error. Under a plain error analysis, the appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the appellant. A military judge is required to instruct members on any affirmative defense that is in issue, and a matter is considered in issue

when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose. Some evidence can be raised by evidence presented by the defense, the prosecution, or the court-martial. If shown by some evidence, mistake of fact is a defense. It requires that an appellant hold, due to ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the appellant believed them, the appellant would not be guilty of the offense. R.C.M. 916(j)(1), Manual Courts-Martial. To be a viable defense, the mistake of fact must have been honest and reasonable under all the circumstances.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN10[] Judicial Review, Courts of Criminal Appeals

The United States Air Force Court of Criminal Appeals reviews whether a military judge correctly understood and applied a legal concept de novo. R.C.M. 917, Manual Courts-Martial requires the military judge, on motion by the accused or sua sponte, to enter a finding of not guilty if the evidence is insufficient to sustain a conviction. R.C.M. 917(a). The military judge grants a motion for a finding of not guilty only in the absence of some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged. R.C.M. 917(d). The military judge views the evidence in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Governments > Legislation > Interpretation

HN11[] Case or Controversy, Constitutionality of Legislation

The United States Air Force Court of Criminal Appeals reviews the constitutionality of a statute de novo. When the accused did not claim at trial that Unif. Code Mil. Justice art. 120c(a)(2), *10 U.S.C.S. 920c(a)(2)*, is unconstitutional as applied, under a plain error review he must point to particular facts in the record that plainly demonstrate why his interests should overcome Congress' and the President's determinations that his conduct be proscribed.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Governments > Legislation > Vagueness

HN12[] Procedural Due Process, Scope of Protection

The *Due Process Clause of the Fifth Amendment* requires fair notice that an act is forbidden and subject to criminal sanction before a person can be prosecuted for committing that act. Due process also requires fair notice as to the standard applicable to the forbidden conduct. In other words, void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. In addition, due process requires that criminal statutes be defined in a manner that does not encourage arbitrary and discriminatory enforcement. This more important aspect of the vagueness doctrine requires that the statute establish minimal guidelines to govern law enforcement rather than a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Governments > Legislation > Overbreadth

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

HN13[] Fundamental Freedoms, Freedom of Speech

A statute is overbroad under the *First Amendment*, and therefore unconstitutional, if it prohibits a substantial amount of protected speech. The challenged statute's overbreadth must be substantial, not only in the absolute sense, but also relative to its plain sweep. The accused bears the burden of demonstrating substantial overbreadth exists from the text of the statute and the facts of the case.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > Anticipatory Challenges

Governments > Legislation > Overbreadth

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > Standing

HN14[] **Constitutionality of Legislation, Anticipatory Challenges**

The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court. The overbreadth doctrine is one of the few exceptions to this rule of limited standing, and allows a person to attack an overly broad statute even though the conduct of the person making the attack is clearly unprotected. Even though this doctrine allows an accused to raise the constitutionally protected expressions of others, where conduct and not merely speech is involved the overbreadth must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

Evidence > Burdens of Proof > Allocation

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN15[] **Burdens of Proof, Allocation**

Prosecutorial misconduct and improper argument are questions of law that the United States Air Force Court of Criminal Appeals review de novo. When there was no objection at trial, the accused has forfeited the right to challenge the issue on appeal and the court reviews the propriety of trial counsel's argument for plain error. To prevail under a plain error analysis, the accused must show (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

HN16[] **Trial Procedures, Arguments on Findings**

The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused. It is improper for a trial counsel to attempt to win favor with the members by maligning defense counsel. However, not every improper comment by the prosecution is a constitutional violation. Instead, the United States Air Force Court of Criminal Appeals evaluates the comment in the context of the overall record and the facts of the case.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN17[] **Trial Procedures, Arguments on Findings**

It is important that both the defendant and prosecutor have the opportunity to meet fairly the evidence and arguments of one another. A trial counsel is permitted to make a "fair response" to claims made by the defense, even where a constitutional right is at stake. In assessing prejudice, the United States Air Force Court of Criminal Appeals evaluates the cumulative impact of any prosecutorial misconduct on an accused's substantial rights and the fairness and integrity of his trial. It does so by balancing three factors: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction. The court also recognizes that the lack of defense objection is some measure of the minimal prejudicial impact of the trial counsel's argument. In sum, reversal is warranted only when the trial counsel's comments, taken as a whole, were so damaging that the court cannot be confident that the

members convicted the appellant on the basis of the evidence alone.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

HN18[] Trial Procedures, Burdens of Proof

The Government always has the burden to produce evidence on every element and to persuade the court martial members of guilt beyond a reasonable doubt. This burden never shifts to the defense and the Government may not comment on the failure of the defense to call witnesses. R.C.M. 919(b), Manual Courts-Martial. A trial counsel's suggestion that an accused may have an obligation to produce evidence of his own innocence is error of constitutional dimension.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN19[] Criminal Process, Assistance of Counsel

The *Sixth Amendment to the United States Constitution* guarantees an accused the right to effective assistance of counsel. In assessing the effectiveness of counsel, the United States Air Force Court of Criminal Appeals applies the standard set forth in Strickland v. Washington, and begins with the presumption of competence announced in United States v. Cronic. Accordingly, the court will not second-guess the strategic or tactical decisions made at trial by defense counsel, and considers whether counsel's performance fell below an objective standard of reasonableness.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Evidence > Burdens of Proof > Allocation

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN20[] Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel

The United States Air Force Court of Criminal Appeals reviews allegations of ineffective assistance of counsel de novo. To prevail on an ineffective assistance claim, the appellant bears the burden of proving that the performance of defense counsel was deficient and that the appellant was prejudiced by the error. The court utilizes the following three-part test to determine whether the presumption of competence has been overcome: 1. Are appellant's allegations true; if so, is there a reasonable explanation for counsel's actions? 2. If the allegations are true, did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers? 3. If defense counsel was ineffective, is there a reasonable probability that, absent the errors, there would have been a different result?

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Testify

HN21[] Defendant's Rights, Right to Testify

The right to testify in one's own behalf is a choice that belongs exclusively to an appellant, not his lawyer.

Immigration Law > Denaturalization of Naturalized Citizens > Grounds for Denaturalization

HN22[] Denaturalization of Naturalized Citizens, Grounds for Denaturalization

Citizenship through expedited naturalization may be revoked if a servicemember has not served honorably in the Armed Forces for an aggregate of five years.

Evidence > Burdens of Proof > Allocation

Immigration Law > Denaturalization of Naturalized Citizens > Administrative Proceedings

HN23[] Burdens of Proof, Allocation

In contrast to the practical inevitability of deportation of a non-citizen, petitions by the United States to revoke a

citizen's naturalization, which are similarly cognizable under the Immigration and Nationality Act, 8 U.S.C.S. § 1101 et seq., are nonetheless the subject of civil proceedings in federal district court. The Government bears the burden of proof in a revocation proceeding by clear, convincing, and unequivocal evidence.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN24[] Criminal Process, Assistance of Counsel

The United States Air Force Court of Criminal Appeals evaluates trial defense counsel's performance not by the success of their strategy, but rather by whether the counsel made reasonable choices from the alternatives available at trial.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Courts Martial > Sentences

HN25[] Judicial Review, Courts of Criminal Appeals

The United States Air Force Court of Criminal Appeals reviews sentence appropriateness de novo. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*. The court assesses sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial. While the court has great discretion in determining whether a particular sentence is appropriate, it is not authorized to engage in exercises of clemency.

Evidence > Burdens of Proof > Allocation

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Courts Martial > Posttrial Procedure

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN26[] Burdens of Proof, Allocation

The United States Air Force Court of Criminal Appeals reviews de novo alleged errors in post-trial processing. Although the threshold for establishing prejudice in this context is low, the appellant must nonetheless make at least some colorable showing of possible prejudice.

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > Military Justice > Courts Martial > Sentences

HN27[] Courts Martial, Convening Authority

The National Defense Authorization Act (NDAA) for Fiscal Year 2014 modified Unif. Code Mil. Justice art. 60, *10 U.S.C.S. § 860*, and limited the convening authority's ability to affect an adjudged sentence of confinement for more than six months or a sentence of dismissal, dishonorable discharge, or bad-conduct discharge. *Pub. L. No. 113-66, § 1702, 127 Stat. 672, 954-58 (2013)*; Unif. Code Mil. Justice art. 60 (c)(4)(A), *10 U.S.C.S. § 860(c)(4)(A) (2014)*. The effective date of the change was 24 June 2014. Pub. L. No. 113-66, § 1702, 127 Stat. at 958. The NDAA for Fiscal Year 2015 clarified that, where a court-martial includes a conviction for an offense committed before 24 June 2014 and an offense committed on or after 24 June 2014, the convening authority has the same clemency power under Unif. Code Mil. Justice art. 60 as was available before 24 June 2014, except with respect to a mandatory minimum sentence under Unif. Code Mil. Justice art. 56(b), *10 U.S.C.S. § 856(b)*.

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

HN28 **Courts Martial, Convening Authority**

Whether an appellant was prejudiced by a mistake in the staff judge advocate recommendation generally requires a court to consider whether the convening authority plausibly may have taken action more favorable to the appellant had he or she been provided accurate or more complete information.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Courts Martial > Posttrial Procedure

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN29 **Judicial Review, Courts of Criminal Appeals**

The United States Air Force Court of Criminal Appeals reviews de novo whether an appellant has been denied the due process right to a speedy post-trial review and appeal. A presumption of unreasonable delay arises when appellate review is not completed and a decision is not rendered within 18 months of the case being docketed. When a case is not completed within 18 months, such a delay is presumptively unreasonable and triggers an analysis of the four factors laid out in Barker v. Wingo:(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice.

Counsel: For Appellant: Major Dustin J. Weisman, USAF; Tami L. Mitchell, Esquire; David P. Sheldon, Esquire.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Captain Zachary T. West, USAF; Mary Ellen Payne, Esquire.

Judges: Before MAYBERRY, MINK, and POSCH, Appellate Military Judges. Judge POSCH delivered the opinion of the court, in which Chief Judge MAYBERRY and Judge MINK joined.

Opinion by: POSCH

Opinion

POSCH, Judge:

A general court-martial composed of officer members convicted Appellant, contrary to his pleas, of two specifications of indecent recording on divers occasions, and one specification of distribution of an indecent recording on divers occasions, in violation of *Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c*.[1],[2] The three offenses involve Appellant's recording and distributing images of his former girlfriend, KG, and recording images of a female friend and co-worker, Airman (Amn) HM. Appellant was **[*2]** sentenced to a dishonorable discharge, confinement for six years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

Appellant raises eight assignments of error on appeal:[3] (1) whether the evidence is legally and factually sufficient to support the three convictions; (2) whether the court should use the test adopted by the United States Supreme Court in *Katz v. United States*[4] to determine whether a person has a "reasonable expectation of privacy" for purposes of *Article 120c, UCMJ*; (3) whether the military judge erred in failing to give the members instructions on (a) the *mens rea* requirements for the "consent" and "reasonable expectation of privacy" elements of indecent recording, and (b) Appellant's mistaken belief that KG did not have a reasonable expectation of privacy at the time of the recording; (4) whether the military judge erred in failing to *sua sponte* find Appellant not guilty of wrongful broadcasting under Rule for Courts-Martial (R.C.M.) 917, or alternatively, whether trial defense counsel were

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[1] All references to the Uniform Code of Military Justice (UCMJ) and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.) (*MCM*), unless specifically indicated.

[2] Appellant pleaded not guilty and was acquitted of one specification of sexual assault and two specifications of abusive sexual contact in violation of *Article 120, UCMJ, 10 U.S.C. § 920*. Appellant also pleaded not guilty and was acquitted of one specification of assault consummated by a battery in violation of *Article 128, UCMJ, 10 U.S.C. § 928*.

[3] We renumbered Appellant's assignments of error.

[4] *389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)*.

ineffective in violation of the *Sixth Amendment to the United States Constitution*[5] for failing to move under R.C.M. 917 for a finding of not guilty of **[*3]** indecent recording and broadcasting[6] of KG's private parts; (5) whether the offense of indecent recording is unconstitutionally vague and overbroad on its face and as applied to Appellant; (6) whether trial counsel engaged in prosecutorial misconduct by making improper arguments during findings and rebuttal argument; (7) whether Appellant was denied effective assistance of counsel as alleged in 16 deficiencies in the performance of his trial defense counsel; and (8) whether Appellant's sentence is inappropriately severe. In addition, we address an error in the recommendation of the staff judge advocate (SJA) and consider the issue of timely appellate review. We find no prejudicial error and affirm.

I. Background

In July 2015, KG's boyfriend, SS, received a text message from a phone number he did not recognize offering, "[t]hese could be beneficial to you," with a link to an Internet website. SS followed the link and saw sexually explicit pictures of KG and links pointing to another website that hosted three Skype[7] video recordings of KG. The videos variously showed KG masturbating and displaying her breasts and buttocks as she conversed with someone she called, "Peter."

SS immediately contacted **[*4]** KG and told her about the images he saw of her online. KG went to the website and recognized the videos of her from private Skype sessions with Appellant, which she was unaware had been recorded and posted on the Internet. KG felt violated and was upset and embarrassed that these images of her had "gone public." With KG's support and assistance, SS reported the matter to agents of the Air Force Office of Special Investigations (AFOSI) at Altus Air Force Base (AFB), Oklahoma. The AFOSI agents visited the link in the text message and saw sexually explicit pictures of KG in various stages of undress[8] and links to videos of KG partially undressed and masturbating. KG explained that Appellant had the opportunity to surreptitiously record her during their private Skype sessions between January and August 2014 when they were living apart in a long-distance intimate relationship.

The AFOSI agents obtained search authorizations to seize and examine Appellant's computers and cell phone for evidence that Appellant recorded and posted the three online videos. As a result, KG subsequently identified additional private Skype sessions with Appellant in which she had been recorded without her knowledge. **[*5]** The members convicted Appellant of indecent recording of KG on divers occasions, between on or about 1 December 2013 and on or about 31 July 2014, and distribution of an indecent recording of KG on divers occasions, between on or about 1 May 2015 and on or about 30 May 2015, as charged in Specifications 1 and 2, respectively, of Charge II.

While searching Appellant's cell phone for images of KG, investigators found pictures of Amn HM disrobing in her on-base dormitory room, including four pictures of her naked above the hips, apparently unaware she was being photographed and recorded. Subsequent investigation and analysis confirmed the pictures were taken without her knowledge with the camera built in to her laptop computer after Appellant had returned the laptop she had given to him to repair. The members convicted Appellant of indecent recording of Amn HM on divers occasions, between on or about 1 March 2015 and on or about 31 July 2015, as charged in Specification 3 of Charge II.

Additional facts necessary to resolve the assignments of error are provided below.

II. Discussion

A. Legal and Factual Sufficiency — Indecent Recordings and Distribution of Indecent Recordings of KG (Specifications [*6] 1 and 2 of Charge II)

Appellant challenges the legal and factual sufficiency of the findings of guilty to Specifications 1 and 2 of Charge II, which allege Appellant made and distributed an

[5] *U.S. Const. amend. VI*.

[6] To conform with Specification 2 of Charge II as referred and tried, we conclude Appellant's counsel meant "distribution" and not broadcasting in the assignment of error.

[7] Skype is a software application that allows two-way voice and video calls between computers and mobile electronic devices.

[8] Appellant was not charged with an offense involving the pictures.

indecent recording of KG on divers occasions. We are not persuaded by Appellant's claims and conclude the convictions are legally and factually sufficient.

1. Additional Facts

In July 2015, four days after KG saw videos of herself posted online from private Skype sessions with Appellant, and while the AFOSI investigation was in its initial stages, KG sent a text message to Appellant asserting that his posting "pictures" of her online was "irreversible" and stressing, "[y]ou can't take that back." She probed, "Do you have any explanation for why you could possibly justify behaving like this?" Appellant responded he did "feel bad for posting the pictures online," but "that was months ago" and he "took them down soon after." Additionally, Amn HM testified that during the period when Appellant knew he was under investigation by AFOSI, he admitted to her that he had posted "photos" online he had received from KG when they were dating, "in retaliation" for KG revealing his infidelity with KG to his current **[*7]** girlfriend.[9]

Forensic analysis of digital media seized from Appellant's on-base dormitory room revealed approximately 90 recordings, some of them duplicates, which KG subsequently identified for the AFOSI agents as private Skype sessions that had been recorded without her knowledge. These recordings were found on Appellant's computer and organized in a folder named with KG's initials that was nested nine subfolders deep in Appellant's folder structure. Some filenames included KG's first name in place of the default filename that the software fashioned from the date and time when each recording was made. A number of files had names that combined KG's first name with "Catastrophe," in addition to a date and time.

Included among the 90 recordings were identical copies of two of the three Skype recordings posted on the public website. The videos showed KG masturbating and displaying her breasts and buttocks as she looked into the camera and spoke to "Peter," whose image and speech were not recorded. The Government presented records from the website that showed the recordings had been uploaded on 17 May 2015 from a specific Internet Protocol (IP) address. The Government also presented evidence **[*8]** in the form of a record obtained from Appellant's Internet service provider on 2 May 2017 that associated Appellant with this IP address along with a physical address on Altus AFB where Appellant lived. However, it is not clear from this record or any other evidence when Appellant had been assigned the IP address at issue. The record showed an "Install Date" of 17 July 2013, which predated the charged timeframe. The record also showed a "Lease Start" date of 31 May 2015, which was 14 days after the date that the Government claimed Appellant uploaded the videos. The Government did not call a records custodian as a witness but relied on the record as circumstantial evidence that Appellant was associated with the IP address at issue on 17 May 2015. No evidence was offered at trial that associated Appellant with two usernames used to post the videos or the text message SS received with a link pointing to the website that hosted the videos.

The Government presented expert testimony of a computer forensic analyst who found Skype installed on Appellant's laptop computer as well as software with a default setting to automatically begin recording when a Skype connection was established. Appellant's **[*9]** girlfriend, MC, testified that Appellant knew how to use the same Skype-recording software that analysts found on Appellant's computer. MC testified she had never visited the website where the recordings of KG were posted.

At trial, the Government presented the three online videos, altogether 31 minutes in length, which showed KG's bare breasts in all three videos and part of her buttocks in one. The Government also presented three recordings, totaling 40 minutes, which investigators found saved in Appellant's computer that variously showed her bare breasts, buttocks, and genitalia. In each video, KG speaks to someone but only her side of the conversation is audible except for faint sounds of low-pitch, muffled speech heard on occasion in some recordings. KG testified that the 90 recordings she identified for the AFOSI agents, including the six admitted in evidence, were exclusively recorded during private online Skype sessions with Appellant when she was living three and a half-hours away in Texas and they used Skype to stay in touch. KG explained that she had occasionally performed sexual acts like masturbating at Appellant's request when they were

[9] Amn HM testified that Appellant explained to her that KG "had reached out to him asking for sexual favors, and he had replied no; to which, she had said she would tell his girlfriend, and then in retaliation he had taken photos that he received from her when they were dating and placed them on the Internet." This conversation occurred before Amn HM learned about images AFOSI agents discovered of Amn HM on Appellant's cell phone.

living apart in a long-distance **[*10]** relationship. KG testified she was unaware that Appellant had been recording her during these sessions and she had never discussed, much less given Appellant permission, to record her, and she did not consent to Appellant posting any of the recordings of her online.[10]

KG contrasted these recordings of her during Skype sessions with sexual images that she at times recorded of herself, which were not Skype sessions. She explained that she sometimes sent Appellant videos that she took of herself performing sexual acts at Appellant's request using her laptop computer.[11] Also at Appellant's request, KG sometimes e-mailed Appellant sexual photos she took of herself with a camera Appellant had given to her to use. KG further contrasted these Skype recordings from seven videos in the media that had been seized from Appellant in which Appellant and KG were physically together in a sexually explicit video that she was aware of and consented to Appellant recording. However, these recordings of them together were made towards the end of a prior relationship she had with Appellant that ended in May 2011, before KG graduated from high school and before they began an intimate relationship again in December **[*11]** 2013.

2. Law

HN1[] We review issues of legal and factual sufficiency de novo. *Article 66(c), UCMJ, 10 U.S.C. § 866(c)*; *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)* (citation omitted). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)* (citations omitted). Though we "cannot find as fact any allegations of which [an appellant] was found not guilty at trial," we "may consider facts underlying an acquitted charge in considering whether the facts support a separate charge." *United States v. Rosario, 76 M.J. 114, 117 (C.A.A.F. 2017)*.

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson, 77 M.J. 294, 297-98 (C.A.A.F. 2018)* (quoting *Rosario, 76 M.J. at 117 (C.A.A.F. 2017))*. "The term reasonable doubt, however, does not mean that the evidence must be free from conflict." *United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017)* (citing *United States v. Lips, 22 M.J. 679, 684 (A.F.C.M.R. 1986)*, *aff'd*, *77 M.J. 289 (C.A.A.F. 2018))*. "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001)* (citations omitted).

HN2[] The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are ourselves] convinced of the [appellant]'s **[*12]** guilt beyond a reasonable doubt." *United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)*. In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington, 57 M.J. at 399*.

3. Analysis

a. Indecent Recordings of KG (Specification 1 of Charge II)

The members convicted Appellant of Specification 1 of Charge II in violation of *Article 120c(a)(2), UCMJ*, which alleged Appellant made an indecent recording of KG on divers occasions. ***HN3***[] In order for the members to find Appellant guilty of this offense, the Government was required to prove beyond a reasonable doubt: (1) that Appellant knowingly recorded KG's private area on divers occasions; (2) that Appellant did so without KG's consent; (3) that the recordings were made under circumstances in which KG had a reasonable expectation of privacy; and (4) that Appellant's conduct was wrongful.[12] *See Manual for Courts-Martial, United*

[10] Before us, Appellant's counsel avers, "KG and Appellant both recorded some of their Skype sessions," however, there is no evidence in the record that KG used Skype to record herself, or Appellant, or them together, performing sexually, or that KG recorded Appellant without his consent.

[11] KG explained the files were too large to e-mail to Appellant so she used a feature in Skype to attach and transfer the files.

[12] The requirement for an appellant's conduct to be wrongful, i.e., without legal justification or lawful authorization, is not an

States (2016 ed.) (*MCM*), pt. IV, ¶ 45c.b.(2). "Private area" means "the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple." **[*13]** *Article 120c(d)(2), UCMJ, 10 U.S.C. § 920c(d)(2)*.

i) Appellant Knowingly Recorded KG's Private Area without Her Consent

At trial, the Defense strategy was to discredit KG's ability to differentiate videos Appellant made during their private Skype sessions that she said she did not consent to Appellant recording (charged recordings) on the one hand, from other videos she was aware of and did consent to on the other. Appellant also challenged KG's veracity that she was unaware of, and, therefore, had not consented to Appellant making recordings of her. Appellant argued KG had a motive to lie in retaliation for Appellant revealing to SS that KG cheated on SS with Appellant in February 2015. Appellant also argued the possibility that Appellant did not knowingly record the videos because the default setting of software installed on his computer was set to record his Skype conversations as soon as a Skype connection was made.

We do not find Appellant's challenges to KG's credibility persuasive. KG had no difficulty distinguishing the charged Skype recordings she was unaware Appellant had made of her from those she sometimes recorded herself or others from a previous relationship with him where **[*14]** they appeared together and she was aware and did consent to Appellant recording.[13] We have considered Appellant's challenges to KG's credibility, along with biases and motives advanced by Appellant, and have no reason to reach a different conclusion than the factfinder. While we have the independent authority and responsibility to weigh the credibility of the witnesses in determining factual sufficiency, we recognize that the members saw and heard KG's testimony. *See United States v. Moss, 63 M.J. 233, 239 (C.A.A.F. 2006)* (citation omitted) (stating it is the members' role to determine whether testimony is credible or biased).

Forensic analysis provided direct evidence that someone who had access to Appellant's computer and knowledge of Appellant's folder structure actively managed the location and name given to the folder where recordings of KG were found on Appellant's computer. The recordings were found in a folder named with KG's initials, and someone overrode default filenames to personalize a number of these recordings with KG's first name.

This evidence of active human intervention discredits Appellant's assertion on appeal that he had no knowledge of any of the recordings because of a software program setting that automatically **[*15]** started recording Skype sessions when a connection was made. KG's testimony about the Skype recordings was corroborated by the testimony of a computer forensic analyst who found Skype installed on Appellant's laptop computer as well as software used to record Skype sessions. KG's testimony was also corroborated by Appellant's girlfriend, MC, who testified that Appellant knew how to use the Skype-recording software that the analyst found on Appellant's computer.

We find a rational factfinder could conclude that KG's credible testimony as corroborated by forensic evidence proved beyond a reasonable doubt that Appellant knowingly recorded her private area on divers occasions without her consent. And, we are convinced that the Government met its burden of proof on these elements.

ii) KG Had a Reasonable Expectation of Privacy

The Government had the burden to prove Appellant made recordings of KG under circumstances in which she had a reasonable expectation of privacy. ***HN4***[↑] A person has a "reasonable expectation of privacy" when a reasonable person would believe (a) she could disrobe in privacy without being concerned that an image of her private area was being captured; or (b) her private area **[*16]** would not be visible to the public. *10 U.S.C. § 920c(d)(3)*.[14]

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element listed in the *MCM*, but it is required by the statute. *Compare Article 120c(a), UCMJ, 10 U.S.C. § 920c(a)*, *with MCM*, pt. IV, ¶ 45c.b.(3).

[13] We similarly reject Appellant's claim raised as a separate assignment of error that his trial defense counsel were ineffective for failing to question KG about the similarities between sex acts KG performed in videos she created for Appellant and sex acts KG performed in videos Appellant recorded during their Skype sessions. We find that trial defense counsel did explore similarities on cross-examination and that Appellant has not proffered other similarities that counsel were ineffective for failing to confront KG about, and thus, this issue does not require further discussion or warrant relief. *See United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987)*.

[14] Appellant, in his second assignment of error, invites us to

Although not raised as a defense at trial, Appellant argues that KG did not have a reasonable expectation of privacy for two reasons: first, because KG would routinely consent, even invite, Appellant to view her exposed private areas as she performed sexual acts for him during Skype sessions; and second, because KG sometimes recorded herself or was aware of and did consent to Appellant recording them together in a prior relationship with him. We are not persuaded by either argument.

Appellant's first argument invites us to find that a person has no expectation of privacy, or loses what privacy she has, simply by agreeing to expose her private area to another. We disagree. A person who willingly shows her bare breasts, buttocks, and genitalia to an intimate partner would nonetheless have a reasonable expectation that her private area was not under the watchful eye of a camera operated by her partner, or the public. We find that KG's testimony that she was unaware she was being recorded combined with evidence of the private setting in which she exposed her private area to none other than Appellant did not undermine **[*17]** KG's expectation of privacy, much less one held by a reasonable person, and thus defeats this argument.

Appellant's second argument invites us to focus on the circumstances of recorded sexual acts when KG acknowledges she was aware of being recorded instead of the circumstances of the charged recordings when she asserts she was not. But the term, "under circumstances in which" another person has a "reasonable expectation of privacy" directs the factfinder and this court to look no further than circumstances when each recording was made. As properly instructed by the military judge in this case, the term means circumstances in which a "reasonable person would believe" either that "he or she could disrobe in privacy, without being concerned that an image of a private area of the person was being captured" or that "a private area of the person would not be visible to the public." *Id.*

Both alternative definitions in the statute refute Appellant's second argument. KG disrobed in the privacy of her room and exhibited her private areas to Appellant in video-chat sessions during which no one but the two participated. KG had no reason to believe that she was being recorded or that her body and **[*18]** actions would be visible to the public because Appellant never gave notice to KG that he was recording her sexual acts. The evidence established KG was unaware Appellant was recording her while engaged in sexual acts in the privacy of her room.

We find a rational factfinder could conclude that KG reasonably believed the charged recordings were made under circumstances in which she could disrobe in privacy without concern that her private area was being recorded or visible to the public. And, we are convinced that the Government met its burden of proof on the element that the recordings were made under circumstances in which KG had a reasonable expectation of privacy.

iii) No Legal Justification or Lawful Authorization

Appellant similarly argues factual and legal insufficiency because KG's history of recording her own private parts and consensual performance of sexual acts for Appellant followed by sending those recordings to Appellant gave Appellant legal authorization to record her. Appellant also argues KG's history of privately recording herself performing sexual acts when she was away from Appellant, followed by her sending those recordings to Appellant gave Appellant legal authorization **[*19]** to record her. We are not persuaded either circumstance defeats the wrongfulness of Appellant's actions in the videos he recorded of KG without her knowledge or consent.

We find a rational factfinder could conclude that Appellant had no legal justification or lawful authorization that would excuse his culpability for making recordings of KG without her consent under circumstances in which she had a reasonable expectation of privacy. And, we are convinced that the

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use the *Katz* test for determining whether a Government search and seizure is lawful under the *Fourth Amendment to the United States Constitution*, *U.S. Const. amend. IV*, to determine whether a person has a reasonable expectation of privacy under *Article 120c, UCMJ*. *See* *Katz v. United States, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)* (Harlan, J., concurring) (concluding there "is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"). However, we are not at liberty to give new meaning to a term used in an element of an offense beyond its clear, statutorily-supplied definition, and decline to do so now. *See generally* *United States v. Lee, 2017 CCA LEXIS 185, at *15-16* (A.F. Ct. Crim. App. 17 Mar. 2017) (unpub. op.) (citation omitted) (rejecting application of *Fourth Amendment* doctrine to define "reasonable expectation of privacy" in *Article 120c*, UCMJ, different from its statutory definition), *rev. denied*, *76 M.J. 455 (C.A.A.F. 2017)*. Thus, we find no merit to this assignment of error.

Government met its burden of proof on the element that Appellant's actions were wrongful.[15]

Viewing the evidence in the light most favorable to the Prosecution, we find that a rational factfinder could have found Appellant guilty beyond a reasonable doubt of all the elements of the offense of indecent recording of KG on divers occasions, as charged in Specification 1 of Charge II, and that the evidence is legally sufficient to support Appellant's conviction. Having weighed the evidence in the record and made allowances for not having personally observed the witnesses, we also conclude the evidence is factually sufficient and are convinced of Appellant's guilt beyond a reasonable doubt. Therefore, we find Appellant's conviction **[*20]** both legally and factually sufficient.

b. Distribution of Indecent Recordings of KG (Specification 2 of Charge II)

The members convicted Appellant of Specification 2 of Charge II in violation of *Article 120c(a)(3), UCMJ*, which alleged Appellant distributed an indecent recording of KG on divers occasions. Appellant contends his conviction should be set aside because *inter alia*, as part of its proof, the Government was also required to prove that Appellant viewed KG's private area in violation of *Article 120c(a)(1), UCMJ*. It follows then that Appellant's conviction is legally insufficient, Appellant claims, because Appellant viewed KG's private area with her consent, which is not a violation of *Article 120c(a)(1), UCMJ*. Appellant's interpretation of the statute appears to be an issue of first impression, but we are not persuaded.[16]

In her findings instructions to the members on the offense of distribution of an indecent recording, in violation of *Article 120c(a)(3), UCMJ*, the military judge did not instruct the members in the manner in which Appellant interprets the statute: the military judge did not require the Government to prove that Appellant viewed KG's private area without **[*21]** her consent in violation of *Article 120c(a)(1), UCMJ*, as a predicate to finding that Appellant committed the offense of distribution of an indecent recording, as charged in Specification 2 of Charge II, in violation of *Article 120c(a)(3), UCMJ*.

HN5[] An issue of statutory construction is a question of law we review de novo. *United States v. Wilson, 76 M.J. 4, 6 (C.A.A.F. 2017)* (citing *United States v. Atchak, 75 M.J. 193, 195 (C.A.A.F. 2016)*). "Unless ambiguous, the plain language of a statute will control unless it leads to an absurd result." *United States v. King, 71 M.J. 50, 52 (C.A.A.F. 2012)* (citation omitted). "Whether the statutory language is ambiguous is determined 'by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *United States v. McPherson, 73 M.J. 393, 395 (C.A.A.F. 2014)* (quoting *Robinson v. Shell Oil Co., 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997)*). Any ambiguity should be resolved in favor of lenity. *United States v. Murphy, 74 M.J. 302, 310 (C.A.A.F. 2015)* (citing *Cleveland v. United States, 531 U.S. 12, 25, 121 S. Ct. 365, 148 L. Ed. 2d 221 (2000)*) (additional citations omitted). Resort to the rule of lenity, however, is reserved for those situations in which "[a]fter 'seiz[ing] every thing from which aid can be derived,'" a court is "left with an ambiguous statute." *United States v. Bass, 404 U.S. 336, 347, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971)* (second alteration in original) (quoting *United States v. Fisher, 6 U.S. 358, 386, 2 L. Ed. 304 (1805)*).

HN6[] *Article 120c(a), UCMJ*, establishes the three offenses of indecent viewing, recording, or broadcasting, by providing,

> Any person subject to this chapter who, without legal justification or lawful authorization— **[*22]**
>
> (1) knowingly and wrongfully views the private area of another person, *without that other person's consent and under circumstances in which that other person has a reasonable expectation of*

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[15] Appellant argues on appeal that his recording of KG was not wrongful because his conduct met the terms of an exception to the general prohibitions of the *Wiretap Act of 1968, 18 U.S.C. § 2511, et seq.*, which criminalizes secretly recorded electronic communications, unless one party to the communication, i.e., Appellant, consents to the recording. Appellant was not charged with an offense in violation of the Wiretap Act, and thus we conclude this statute cannot be used to shield conduct proscribed by *Article 120c, UCMJ*, from prosecution.

[16] Although Appellant casts his claim as one of legal insufficiency, more fundamentally his claim questions whether the military judge properly instructed the members on the elements of the offense of distribution of an indecent recording, which, like legal sufficiency, is a question of law we review de novo, *see United States v. McDonald, 57 M.J. 18, 20 (C.A.A.F. 2002)* (citation omitted), and one we review for plain error when not objected to at trial, *see United States v. Tunstall, 72 M.J. 191, 193 (C.A.A.F. 2013)* (citation omitted). Our conclusion does not change under plain error review.

privacy;

(2) knowingly photographs, videotapes, films, or records by any means the private area of another person, *without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy*; or

(3) knowingly broadcasts or distributes any such recording that the person knew or reasonably should have known was made under the circumstances proscribed in *paragraphs (1) and (2)*; is guilty of an offense under this section and shall be punished as a court-martial may direct.

10 U.S.C. § 920c(a) (emphasis added).

To prove distribution of an indecent recording in violation of paragraph *(3) of Article 120c(a), UCMJ*, the Government is required to prove an appellant distributed a recording that the appellant "knew or reasonably should have known was made under the circumstances proscribed in *paragraphs (1)* [indecent viewing] *and (2) [indecent recording]" of Article 120c(a), UCMJ*. *See Article 120c(a)(3), UCMJ, 10 U.S.C. § 920c(a)(3)* (emphasis added). Appellant relies on the conjunction, "and," to claim that the Government was required to prove the language **[*23]** of indecent viewing under *Article 120c(a)(1), UCMJ*, and indecent recording under *Article 120c(a)(2), UCMJ*, in addition to the language in *paragraph (3)*, in order to prove an offense of indecent distribution.

We disagree and conclude the "circumstances proscribed" language in *paragraph (3)* means recordings made "without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy," which is language common to *paragraphs (1)* and *(2) of Article 120c(a), UCMJ*, and thus explains the conjunction. Our reasoning is illuminated by the language in *paragraph (3)* that uses the verb "made," and not "viewed" or "made and viewed," to link the act of distribution with the "under the circumstances prescribed in" language at issue.

Even if our plain reading leaves doubt, we find that *Article 120c(a)(3), UCMJ*, is nevertheless unambiguous. Congress and the President could not have intended we read *Article 120c(a), UCMJ*, in the unduly restrictive manner Appellant proposes we should. ***HN7***[⬆] The statute forbids three separate acts—viewing, recording, and broadcasting or distribution of another's private area—that are violations of law when done knowingly and under identically proscribed circumstances. The acts **[*24]** are separated by the disjunctive, "or," in the text of both the header and the substantive paragraphs of the statute.

Appellant's interpretation that prosecutions under *Article 120c(a)(3), UCMJ*, are limited to situations in which an appellant observes, records and distributes an image of an unsuspecting person would preclude application of the statute to all but the narrowest of circumstances. An appellant who surreptitiously made a video recording of a victim's private area under proscribed circumstances might be found guilty of making an indecent recording, but criminal liability for indecent broadcasting or distribution of that same recording would depend on whether or not the appellant also viewed the private area of the victim at the same time the appellant made the recording. This would be an incongruous result. *King, 71 M.J. at 52* (citation omitted).

We conclude that Appellant's interpretation that would require the Government to prove Appellant viewed KG's private area without her consent as necessary to prove that Appellant then distributed recordings he made of her defies a plain reading of the unambiguous statute.[17] Accordingly, we find that the military judge did not err when she instructed the **[*25]** members on the elements of the offense of distribution of an indecent recording as charged in Specification 2 of Charge II. We further find that Appellant's conviction was not legally insufficient on grounds that the Government was required to prove the elements of indecent viewing in violation of *Article 120c(a)(1)* and indecent recording in violation of *Article 120c(a)(2)* in order to prove the offense of distribution of an indecent recording in violation of *Article 120c(a)(3)*.[18]

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[17] Because we can resolve Appellant's claim by examining the text of the statute itself, we do not address Appellant's theory that Congress, by enacting a new offense, *Article 117a, UCMJ, 10 U.S.C. §917a*, to the *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*),"Wrongful broadcast or distribution of intimate visual images," understood that *Article 120c, UCMJ*, would not apply to Appellant's conduct. *See National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 533(a), 131 Stat. 1283, 1389 (2017)* (enacting *Article 117a, UCMJ, 10 U.S.C. § 917a*).

[18] Appellant also claims that an appellant cannot be convicted of indecent recording under *paragraph (2)*, discussed *supra*, without the Government also proving a surreptitious indecent viewing under *paragraph (1)*. Appellant cites no authority for

Appellant's interpretation of Article 120c(a)(3), UCMJ, is also contrary to the elements in the *MCM*, pt. IV, ¶ 45c.b.(4), which the military judge followed in instructing the members, as do we, to determine legal and factual sufficiency of Appellant's conviction. HN8[] In order for the members to find Appellant guilty of distribution of an indecent recording the Government was required to prove beyond a reasonable doubt: (1) that Appellant knowingly distributed a recording of KG's private area on divers occasions; (2) that the recording was made without KG's consent; (3) that Appellant knew or reasonably should have known that the recording was made without KG's consent; **[*26]** (4) that the recording was made under circumstances in which KG had a reasonable expectation of privacy; (5) that Appellant knew or reasonably should have known that the recording was made under circumstances in which KG had a reasonable expectation of privacy; and (6) that Appellant's conduct was without legal justification or lawful authorization.[19] *See MCM*, pt. IV, ¶ 45c.b.(4). The term "distribute" means "delivering to the actual or constructive possession of another, including transmission by electronic means." Article 120c, UCMJ, 10 U.S.C. § 920c(d)(5). The terms "private area" and "under circumstances in which that other person has a reasonable expectation of privacy" are defined by statute the same as they were in our analysis of Specification 1 of Charge II above.

As discussed in our analysis of the elements of the offense of indecent recording, *supra*, we find a rational factfinder could have found beyond a reasonable doubt that Appellant made recordings of KG's private area without her consent, element (2), and under circumstances in which KG had a reasonable expectation of privacy, element (4). And, we are convinced that the Government met its burden of proof on these elements. **[*27]** These findings are pertinent to the Government's proof of Specification 2 of Charge II, which we analyze next.

i) Appellant Knowingly Distributed Recordings of KG

Appellant argues the Government failed to introduce direct evidence that he posted the Skype video recordings of KG to the Internet website and attacks the circumstantial evidence that he did. At trial, Appellant raised the possibility that his girlfriend, MC, had the motive to retaliate against Appellant because of his infidelity with KG, and MC had sufficient familiarity and access to Appellant's computers to post the charged recordings of KG online.

For the first time on appeal, Appellant points out that the Government presented no evidence connecting him to the two usernames used to post the three videos online. And, although it was uncontroverted that Appellant was associated with the IP address used to post the recordings online, Appellant argues that the 31 May 2015 "Lease Start" date for the IP address at issue was two weeks after the three videos were posted to the Internet on 17 May 2015. Nevertheless, we "reject Appellant's attempts to cast the lack of conclusive forensic evidence as a fatal flaw," United States v. King, 78 M.J. 218, 222 (C.A.A.F. 2019), and find the **[*28]** forensic evidence combined with KG's testimony and Appellant's admissions overcame these doubts.

Appellant argues that the 31 May 2015 "Lease Start" date in the record obtained by the Government from Appellant's Internet service provider shows he could not have posted the recordings 14 days earlier on 17 May 2015. We are not similarly convinced that the factfinder, or this court, could attach the same meaning and weight that Appellant assigns to this evidence. Assuming the lease described in the record was for an IP address as Appellant claims, and not one for equipment such as a modem, router, cable box or other property, we find it to be a reasonable inference that Appellant was nevertheless associated with this IP address two weeks earlier. We reach this conclusion because the record also showed a 17 July 2013 "Install Date," which predated by 22 months the date when images of KG were posted online. Evidence that Appellant maintained a longstanding relationship with the Internet service provider that assigned him the IP address at issue is circumstantial evidence that Appellant was associated with this IP address on 17 May 2015 when other evidence showed that images of KG were posted **[*29]** online. Put differently, evidence of a 31 May 2015 "Lease Start" date, assuming this refers to a lease of an IP address, does not exclude the probability that

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this claim, and finding none, we are not persuaded that Appellant's conviction of indecent recording of KG in Specification 1 of Charge II was legally insufficient on these grounds, or on grounds that the military judge failed to properly instruct the members on the elements of the offense.

[19] As noted in our analysis of Specification 1 of Charge II, the requirement for an appellant's conduct to be wrongful, i.e., without legal justification or lawful authorization, is not an element listed in the *MCM*, but it is required by statute. *Compare* Article 120c(a), UCMJ, 10 U.S.C. § 920c(a), *with MCM*, pt. IV, ¶ 45c.b.(4).

Appellant used this IP address two weeks earlier. A rational factfinder could have reached this conclusion as well from the evidence admitted at trial even though the significance, or not, of the lease date and other information from Appellant's Internet service provider was not argued by either party at trial.[20] We conclude that the unexplained lease date does not negate the legal or factual sufficiency of the finding of guilty.

Evidence at trial showed that the charged Skype recordings were saved in an area deep in Appellant's computer's folder structure; some filenames were personalized with KG's initials. The forensic evidence supports a reasonable inference that Appellant maintained exclusive control of the recordings when they were in his possession and negates reasonable doubt that someone other than Appellant would have known these recordings existed, much less could have found them and distributed identical copies to a website. This same evidence of control, combined with evidence that SS received an anonymous text **[*30]** message to visit a link pointing to identical recordings online supports a reasonable inference that Appellant's relinquishment of control of the recordings was by design and not accident. Even in the absence of direct evidence of how Appellant distributed the recordings of KG to "the actual or constructive possession of another," *Article 120c(d)(5), UCMJ*, we find that a rational fact-finder could conclude that Appellant's exclusive control was circumstantial evidence that he did, and did so purposefully.

Appellant did not specifically admit to posting *video* recordings of KG online, however, we find his admission to KG to posting pictures of her online and Amn HM's testimony that Appellant retaliated against KG by uploading photos of KG to a website established motive and intent to post the charged recordings, even if Appellant's statements fell short of acknowledgements of guilt. We find a rational factfinder could consider Appellant's statements along with KG's testimony and the forensic evidence in the case, and conclude that Appellant knowingly distributed recordings of KG. And, we are convinced that the Government met its burden of proof on this element.

ii) Appellant Knew or Reasonably [*31] Should Have Known the Recordings were Made without KG's Consent

Having already concluded in our analysis of Specification 1 of Charge II that Appellant recorded KG without her consent, we further find Appellant knew that she did not consent. KG testified she and Appellant never discussed his recording her during their Skype sessions, and that she was unaware of, and had not consented, to the recordings. We find a rational factfinder could conclude that KG's testimony proved beyond a reasonable doubt that Appellant knew that KG did not consent to the recordings he made of her. And, we are convinced that the Government met its burden of proof on this element.

iii) Appellant Knew or Reasonably Should Have Known the Recordings were Made under Circumstances in which KG Had a Reasonable Expectation of Privacy

Having already concluded in our analysis of Specification 1 of Charge II that Appellant recorded KG under circumstances in which she had a reasonable expectation of privacy, we further find Appellant knew this to be the case. The evidence in the record established that Appellant, as the person who surreptitiously made recordings of KG, knew full well the conditions in which he made the **[*32]** charged recordings. Each recording captured KG and no one else in the privacy of her room. Only she and Appellant participated, and even then, Appellant's participation was not recorded. KG not only believed she could disrobe under these circumstances, but did so, and performed sexual acts that are customarily performed in private either alone or with an intimate partner. KG's bare breasts, buttocks, and genitalia were displayed to Appellant and never to the public.[21]

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[20] We similarly reject Appellant's claim raised as a separate assignment of error that his trial defense counsel were ineffective for failing to use the Government's evidence "to show the IP address used to post the videos of KG did not belong to Appellant on 17 May 2015." Appellant's premise—that there was no direct evidence that Appellant had an IP lease on this date—is correct, but there was circumstantial evidence that he did. We find Appellant has not shown that his counsel were ineffective for failing to use evidence in the manner that Appellant claims they should have, and thus, this issue does not require further discussion or warrant relief. *See Matias, 25 M.J. at 361*.

[21] We reject the claim by Appellant's counsel that "Appellant is a member of 'the public'" under *Article 120c, UCMJ*. If Appellant's interpretation were correct, then there would be no "reasonable expectation of privacy" under *Article*

We find these facts establish the requisite knowledge, and we are not persuaded by Appellant's claim that his knowledge of KG's expectation of privacy was diminished because he knew KG sometimes made recordings of herself or that KG was aware and did consent to Appellant recording them together in a prior relationship. We decline the invitation to consider recordings under dissimilar circumstances when evaluating Appellant's knowledge of the circumstances of the charged recordings, which were unique in that Appellant recorded KG during real-time, i.e., "live," Skype sessions in their current relationship.

We find a rational factfinder could conclude that Appellant knew that the recordings he made of KG were under circumstances **[*33]** in which she could disrobe in privacy without concern that her private area was being recorded or visible to the public. Consequently, a rational factfinder could conclude that Appellant knew that the recordings he made of KG were under circumstances in which she had a reasonable expectation of privacy. And, we are convinced that the Government met its burden of proof on this element.

iv) No Legal Justification or Lawful Authorization

We find a rational factfinder could conclude that Appellant had no legal justification or lawful authorization that would excuse his culpability for distributing recordings of KG without her consent under circumstances in which she had a reasonable expectation of privacy. And, we are convinced that the Government met its burden of proof that Appellant's actions were wrongful.

Viewing the evidence in the light most favorable to the Prosecution, we find that a rational factfinder could have found Appellant guilty beyond a reasonable doubt of all the elements of the offense of distribution of an indecent recording of KG on divers occasions, as charged in Specification 2 of Charge II, and that the evidence is legally sufficient to support Appellant's conviction. **[*34]** Having weighed the evidence in the record and made allowances for not having personally observed the witnesses, we also conclude the evidence is factually sufficient and are convinced of Appellant's guilt beyond a reasonable doubt. Therefore, we find Appellant's conviction both legally and factually sufficient.

B. Legal and Factual Sufficiency — Indecent Recording of Amn HM (Specification 3 of Charge II)

Appellant also challenges the legal and factual sufficiency of the finding of guilty to Specification 3 of Charge II, which alleges that Appellant made an indecent recording of Amn HM on divers occasions. We are not persuaded by Appellant's claims and find the conviction is legally and factually sufficient.

1. Additional Facts

Appellant and Amn HM were assigned to the same flight and worked in the same office. She testified that in approximately April or May 2015, her personal laptop computer fell off her desk at work and she could no longer access her Career Development Course (CDC) and other files she had saved, including "selfies" and other pictures she had taken with her cell phone camera and had backed up onto her laptop. Appellant told her he could fix her laptop and recover her **[*35]** data, which she agreed to because she did not have the time or money to take it to a repair shop, and knew Appellant had the skills to help her because he had built his own computer. The same day, Amn HM gave Appellant her laptop to repair, and he returned it to her about a week and a half later. She testified the only other person who had worked on her laptop was her uncle, who had installed software for her when she had visited family on Christmas in 2014, before Appellant took her laptop to repair.

When he returned her laptop, Appellant told her that the built-in camera was not working, and he explained to her that he had recovered her files and saved them to a new hard drive. Amn HM testified she could not confirm the camera actually had broken from the fall, but the laptop now displayed a green screen when she tried to use the camera. Amn HM testified that Appellant had replaced her hard drive with a Russian substitute, causing software icons to appear in "Russian," and her laptop was now prone to crashing. For these reasons she gave the laptop back to Appellant a few times to try to fix or at least convert program and file names to English so she could use it. Appellant also accessed **[*36]** her laptop to create a username and password for her and he established Internet access in her dorm room using a nearby connection, although she could not recall if Appellant assisted her with these

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120c(d)(3)(B), UCMJ, under circumstances when a person knows that her private area is observed by an intimate partner, such as Appellant. We determine that the factfinder could reasonably conclude that the ordinary meaning of "public" in this context did not include Appellant.

things before or after she first gave him the laptop to repair.

The AFOSI agents seized Appellant's computers and cell phone on 4 September 2015, after they had interviewed several witnesses who shared a close relationship with Appellant, and four days after agents had interviewed Appellant on 31 August 2015, when he asked to speak to them about matters involving KG. Amn HM was not surprised when AFOSI agents called and wanted to speak with her because she was aware they had been interviewing Appellant's closest friends. While eating lunch in a park with Appellant before her third AFOSI interview, Appellant told her that if the agents looked "deep enough" they might find information on his computer that she had on hers "even though [Appellant had] deleted it."

That afternoon at the interview, Amn HM was surprised when the AFOSI agents showed her pictures they obtained from Appellant's media that showed her in various stages of undress, including pictures showing her bare breasts, in the privacy **[*37]** of her on-base dormitory room. Amn HM recognized the clothes she was wearing in one of the pictures as a bathing suit she wore to a pool party in June 2015, and the picture appeared to have been taken from the vantage of her laptop's built-in camera. Amn HM testified she was unaware of, and did not consent to, the pictures being taken, and she had never used her laptop's camera to take still pictures. Amn HM did not know when the pictures of her would have been recorded, but she knew they would not have been on her laptop when she first gave it Appellant to repair in April or May.

The Government presented expert testimony of a computer forensic analyst who explained that 11 pictures of Amn HM were found on Appellant's personal cell phone in a temporary cache folder used to reload remote images quickly after they had been accessed initially. Each picture was date-stamped 20 June 2015, which the expert explained is the date the software recorded that the picture was taken. All were captured during a four minute interval when Amn HM was changing clothes and partially undressed. Five pictures showed her disrobing. Two captured her unclothed front shoulders and face as she appeared to be **[*38]** looking at her laptop's screen. Four pictures showed her bare breasts and chest and were the charged recordings that the Government introduced into evidence to prove the offense of indecent recording on divers occasions.

The Government expert found installation files for three software programs on one of Appellant's computers which, if installed, would have allowed Appellant to access Amn HM's laptop camera and take pictures with her camera. The expert also found digital evidence in the form of "shellbags" on Appellant's computers that were used to browse files and open subfolders nested in a folder named, "[H***]'s[22] Laptop" on 6 July 2015 and earlier. The expert explained, "it appeared that somebody would go into [Amn] H[M]'s laptop, browse the files and open up various folders inside of [her] laptop."

Although Amn HM's laptop was not available for forensic analysis, the expert offered his opinion how the charged recordings could have been saved on Appellant's cell phone. He explained that Appellant could have concealed the remote-access programs he had installed on her laptop by labeling them in "Russian" and then accessed her built-in camera over the Internet using her IP address, **[*39]** password, and user account information that he knew from having set up her Internet access. Appellant could have used a file management program that was found on his cell phone to access remote images, which images were cached, i.e., saved, in a file on his phone. Appellant could have later removed the remote access programs while maintaining the installation files for the software on his computer if Appellant wanted to install the programs again. Appellant's girlfriend, MC, testified that Appellant knew how to establish remote, "two way" access with another computer using "Log***," one of the software programs the expert testified was found on Appellant's computer.

2. Analysis

In order for the members to find Appellant guilty of indecent recording of Amn HM on divers occasions, as charged in Specification 3 of Charge II, the Government was required to prove beyond a reasonable doubt the same four elements of indecent recording as charged in Specification 1 of Charge II. At trial and on appeal, Appellant claims the evidence is insufficient that he knowingly recorded Amn HM. We disagree.

The Government's case at trial relied on this theory and timeline: Amn HM broke her laptop in April **[*40]** or May 2015, and the charged recordings of her had not yet been captured and so were not on her laptop when she gave it to Appellant to repair. While making repairs initially, or in subsequent attempts, but not later than a

[22] The filename included Amn HM's first name.

pool party sometime in June 2015, Appellant installed software on her laptop and on his computer to remotely capture images using her laptop's built-in camera. Appellant recorded her on 20 June 2015, the date-stamp on the pictures, as Amn HM changed into the bathing suit she would wear to the pool party. Appellant remotely viewed one or more of these images as recently as 6 July 2015 using his cell phone. The Government relied on this timeline to show that Appellant had the means and opportunity to uninstall and erase traces of executable remote access software he had installed on his computers before his media was seized on 4 September 2015. In support of this theory, the Government relied on the testimony of its expert who found software to permanently erase programs and files so that the information could not be discovered.

In findings argument, the Defense discounted evidence that remote-access software installation files were found on Appellant's computer because **[*41]** there was no evidence the software programs had been installed. The Defense also discounted circumstantial evidence that Appellant had the means to remotely access Amn HM's computer, also arguing that Appellant had no motive to record Amn HM, a close friend, without her consent, and the Government presented no direct evidence that Appellant actually did. The Defense further argued that the Government failed to disprove the possibility that Amn HM unwittingly clicked on a feature that caused her camera to automatically take pictures, made probable because of Amn HM's testimony that filenames and programs were displayed in a language she could not understand.

On appeal, Appellant similarly asserts the Government failed to disprove that "glitchy" software loaded on Amn HM's computer by her uncle recorded her before she broke her laptop, and crucially, its built-in camera.[23] Appellant also attempts to discredit the Government's timeline and Amn HM's recollection of events on which its timeline depends. Appellant posits that contrary to her testimony, Amn HM broke her laptop and gave it to Appellant to repair after the 20 June 2015 date-stamp on the charged recordings (assuming the pictures **[*42]** of her had not been captured earlier because the Government failed to prove the date stamp was the correct date). This alternative timeline, Appellant claims, explains how the charged recordings would have been captured before the built-in camera broke from the laptop's fall and before she gave it to Appellant to repair. And, it explains how Appellant would have innocently possessed the recordings as a consequence of recovering and then transferring her data to a new hard drive, and not from installing hidden software on her laptop and remote-access software on his computer as the Government claimed he did.

We again "reject Appellant's attempts to cast the lack of conclusive forensic evidence as a fatal flaw," *King, 78 M.J. at 222*, and find Amn HM's testimony, combined with the forensic evidence, overcame these doubts. Amn HM testified that she gave her laptop to Appellant to repair in April or May 2015, and had received it back from him before she was recorded changing clothes for a June pool party. The 20 June 2015 date-stamps on the pictures corroborate Amn HM's testimony that the pictures of her were captured as she prepared for the party, and after **[*43]** she gave her laptop to Appellant to repair.

We find Amn HM's recollection of when these events occurred negates Appellant's contention that he innocently came into possession of the four charged recordings that were captured in late June before she gave him her laptop to repair. Appellant knew how to remotely access a computer. Appellant had installation files for three software programs he needed to remotely access another computer and then take pictures with her laptop's built-in camera.[24] His cell phone, where the charged recordings were found, contained a file management program that saved cached copies of the

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[23] Appellant's counsel avers, "[t]he computer broke when it hit the floor, *breaking the built-in camera*," that the camera was "*still* broken" when Appellant returned the laptop, and that Amn HM "*acknowledged* the camera was *still* broken." (Emphasis added). Although we find these claims to be proper argument, nonetheless, there is no indisputable evidence in the record that the camera was ever broken, much less that it broke from a fall, or that Amn HM acknowledged that it did.

[24] We reject Appellant's claim raised pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, that his trial defense counsel were ineffective for failing to demonstrate in court that one of the software programs found on his computer, "Log***," "cannot be used to remotely access another computer," as Appellant's girlfriend suggested it could. We find counsel were not ineffective because this testimony was not sufficiently developed to contrast with Appellant's position on appeal, and because the Government's expert explained he found installation files for three programs that needed to be installed in order to gain access to Amn HM's computer "and another program," "Log***," which the expert dismissed because, in his words, "I don't know what it did." Thus, this claim does not require further discussion or warrant relief. *See Matias, 25 M.J. at 361*.

11 pictures he had previously recorded and accessed.

While we have the independent authority and responsibility to weigh the credibility of Amn HM in determining factual sufficiency, we recognize that the factfinder saw and heard her testimony. *Moss, 63 M.J. at 239*. We find the circumstantial evidence supports the Government's timeline and Amn HM's testimony on which it depends. The evidence supports a reasonable inference that Appellant accessed the camera in Amn HM's laptop to record pictures of her after he returned the laptop to her as early as April or May, and not later than early June **[*44]** 2015. The nature of the 11 pictures found in Appellant's cell phone's cache, including the four charged recordings, all date-stamped 20 June 2015 during a four-minute period, is highly suggestive of deliberate human involvement. The circumstantial evidence supports a reasonable inference that Appellant purposefully viewed one or more of these images using his cell phone as late as 6 July 2015.[25] All the pictures showed Amn HM either partially nude or disrobing. We agree with the Government that the selective nature of these 11 recorded pictures contradicts Appellant's theory at trial, and his alternative timeline on appeal, that her "glitchy," possibly virus-laden, computer took indecent pictures of her on its own or perhaps owing to software installed by Amn HM's uncle, and that Appellant could have innocently come into possession of the recordings during a file transfer to repair her laptop.[26]

We further find that Appellant had no legal justification or lawful authorization for recording Amn HM without her consent under circumstances in which she had a reasonable expectation of privacy. Viewing the evidence in the light most favorable to the Prosecution, we find that **[*45]** a rational factfinder could have found beyond a reasonable doubt all the elements of the offense of indecent recording of Amn HM on divers occasions, as charged in Specification 3 of Charge II, and that the evidence is legally sufficient to support Appellant's conviction. Having weighed the evidence in the record and made allowances for not having personally observed the witnesses, we also conclude the evidence is factually sufficient and are convinced of Appellant's guilt beyond a reasonable doubt. Therefore, we find Appellant's conviction of Specification 3 of Charge II both legally and factually sufficient.

C. Challenges to the Findings Instructions

Appellant challenges the findings instructions and argues for the first time on appeal that the military judge erred in her instructions to the members on the elements with respect to the indecent recording offense involving KG (Specification 1 of Charge II).[27] Specifically, Appellant contends the military judge failed to give the members an instruction on a *mens rea* requirement for the "consent" and "reasonable expectation of privacy" elements of indecent recording charged as a violation of *Article 120c(a)(2), UCMJ*. Additionally, Appellant **[*46]** contends the military judge failed to instruct the members that they could find Appellant not guilty of Specifications 1 and 2 of Charge II involving KG if Appellant labored under a mistaken belief as regards KG's lack of consent and her reasonable expectation of privacy. We are not persuaded the military judge erred.

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[25] We reject Appellant's claim raised pursuant to *Grostefon*, that his trial defense counsel were ineffective for failing to use their interview notes of the Government's expert who purportedly claimed in an interview with trial defense counsel that on 6 July 2015, Appellant "had to have seen all of the images of Airman HM" in order for them to be in the temporary cache folder on Appellant's phone. Appellant suggests these notes confirm his theory that Amn HM broke her computer sometime around the end of June-beginning of July timeframe, and not in April-May 2015 as Amn HM claimed she did. In fact, the interview notes state, "7/6/2015 is when these selfies were viewed." It is clear from the record that the selfies saved on Amn HM's computer were different from the 11 pictures found in his cell phone's cache, including the four charged recordings. Thus, this claim does not require further discussion or warrant relief. *See Matias, 25 M.J. at 361*.

[26] We similarly reject Appellant's claim raised as a separate assignment of error that his trial defense counsel were ineffective for failing to challenge the Government's timeline with two text messages that AFOSI agents recovered from his cell phone. One message Appellant sent to Amn HM's supervisor on 15 July 2015 about her completing her CDCs, and the second message, dated 27 July 2015, referenced a pool party that evening. We find counsel were not ineffective because neither was material to challenging the Government's timeline, and thus, does not require further discussion or warrant relief. *See Matias, 25 M.J. at 361*.

[27] At first blush, Appellant's assignment of error asks that we examine the *mens rea* requirement without limitation, presumably encompassing the impact of the claimed failure to instruct with regard to the indecent recording offenses involving both KG (Specification 1 of Charge II), and Amn HM (Specification 3 of Charge II). However, Appellant's brief—and consequently our opinion—addresses only the former offense.

1. Additional Background

KG testified that at one time Appellant had made sexual videos of them appearing together, which she had consented to him recording. These videos were not made in their current long-distance relationship, but were made toward the end of a prior intimate relationship, between September 2007 and May 2011, before she graduated from high school and before they began dating again in December 2013. She explained these videos were different from the charged recordings that Appellant made of her between January and August 2014 in that they appeared together. As discussed previously, in their current relationship, KG sometimes sent Appellant sexual pictures and videos she recorded on her laptop computer. Usually at Appellant's request, KG emailed Appellant these photos or transmitted video files too big to email as an attachment using a feature in **[*47]** Skype. Unlike the charged recordings, these video files were dissimilar in that KG made the recordings herself and transmitted them to Appellant at a later time.

At the close of evidence, Appellant did not request, and the military judge did not give, an instruction that would have included a *mens rea* requirement for the "consent" and "reasonable expectation of privacy" elements of the indecent recording offense involving KG. Instead, the military judge instructed on these elements as they appear in the *MCM*, pt. IV, ¶ 45c.b.(2), and the Military Judges' Benchbook.[28]

Appellant also did not request, and the military judge did not give, a mistake-of-fact instruction with respect to either element for either offense involving KG. Appellant did not object to the findings instructions when they were examined by the parties in an *Article 39(a), UCMJ,* session, after the close of evidence, and did not object when the military judge instructed the members.

2. Law

HN9[] "The mens rea applicable to an offense is an issue of statutory construction, reviewed de novo." *United States v. McDonald, 78 M.J. 376, 378 (C.A.A.F. 2019)* (citation omitted). Whether a required instruction on findings is reasonably raised by the evidence is a question of law reviewed de novo, as **[*48]** well. *United States v. Davis, 76 M.J. 224, 229 (C.A.A.F. 2017)* (citations omitted). Because there was no objection to the instructions at trial, we review for plain error. *United States v. Haverty, 76 M.J. 199, 208 (C.A.A.F. 2017)* (citation omitted). Under a plain error analysis, "Appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of [Appellant]." *United States v. Girouard, 70 M.J. 5, 11 (C.A.A.F. 2011)* (citation and footnote omitted).

"A military judge is required to instruct members on any affirmative defense that is 'in issue,' and a matter is considered 'in issue' when 'some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose.'" *United States v. Stanley, 71 M.J. 60, 61 (C.A.A.F. 2012)* (quoting *United States v. Lewis, 65 M.J. 85, 87 (C.A.A.F. 2007)*); *see also* R.C.M. 920(e)(3). Some evidence can be raised "by evidence presented by the defense, the prosecution, or the court-martial." *United States v. Hibbard, 58 M.J. 71, 73* (quoting R.C.M. 916(b), Discussion). If shown by some evidence, mistake of fact is a defense. It requires that an appellant hold, due to "ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the [appellant] believed them, the [appellant] would not be guilty of the offense." R.C.M. 916(j)(1). To be a viable defense, the mistake of fact must have been honest and reasonable under all the circumstances. **[*49]** *See id.*

3. Analysis

a. Mens Rea Not Required for the Consent and Reasonable Expectation of Privacy Elements of Indecent Recording

Appellant argues it was not enough that the military judge instructed the members that to find Appellant guilty they must find Appellant made recordings of KG without her consent and under circumstances in which she had a reasonable expectation of privacy. In addition, Appellant contends, the decision by the United States Supreme Court in *Elonis v. United States, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015)*, required the military judge to instruct that Appellant must have knowledge of the facts alleged in these elements to convict. We are not persuaded.

In *Haverty, 76 M.J. 199*, the CAAF examined *Elonis* and observed "if a court determines that Congress intended,

[28] Dept. of the Army Pamphlet 27-9 at 629-31 (10 Sep. 2014).

either expressly or impliedly, to have a particular mens rea requirement apply to a certain criminal statute, then the court must construe that statute accordingly." *Id. at 204* (citations omitted). It is only if "a statute is silent regarding a mens rea requirement" and "if a court cannot discern the legislative intent in regard to that statute" that the court will then "infer a mens rea requirement." *Id.*

We find no reason to infer a *mens rea* requirement. The military judge gave the members the mandatory **[*50]** instructions for the charged offenses. R.C.M. 920(e)(1). As properly instructed by the military judge, *Article 120c(a)(2), UCMJ*, requires that an appellant *knowingly* record by any means the private area of another person to convict. The military judge explained to the members in her findings instructions that "[a]n act is done knowingly when it is done intentionally and on purpose. An act done as the result of a mistake or accident is not done knowingly." Furthermore, the presence of a "knew or reasonably should have known" *mens rea* in *Article 120c(a)(3), UCMJ*, for these same elements suggests that Congress affirmatively chose not to include identical *mens rea* requirements in *Article 120c(a)(2), UCMJ*. Where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Rodriguez v. United States, 480 U.S. 522, 525, 107 S. Ct. 1391, 94 L. Ed. 2d 533 (1987)* (citation and internal quotation marks omitted).

We discern Congress intended *Article 120c(a)(2), UCM*J, to have one knowledge *mens rea* requirement as the military judge instructed, and no others, and we must construe the statute accordingly. *Haverty, 76 M.J. at 204*. Consequently, the military **[*51]** judge did not err in failing to instruct on a knowledge *mens rea* requirement to the "consent" and "reasonable expectation of privacy" elements of the indecent recording offense involving KG.

b. Mistake of Fact as to Consent

Appellant did not request and the military judge did not *sua sponte* give a mistake-of-fact instruction with respect to the element that the recordings Appellant made of KG were without her consent. Appellant argues that even if KG did not consent to Appellant making recordings of her during their Skype sessions, the military judge erred because there was some evidence Appellant had an honest and reasonably mistaken belief that KG did consent. It follows, Appellant argues, that the military judge was obligated to instruct the members accordingly as to both the offense of indecent recording and distribution of an indecent recording in Specifications 1 and 2, respectively, of Charge II, because both offenses share this common element. We disagree.

Assuming *arguendo* that mistake of fact can be an affirmative defense to the lack of consent element common to both specifications, we nevertheless find there is no evidence Appellant held an honest belief that KG consented to **[*52]** the charged recordings, much less that Appellant reasonably believed that she did. There is no evidence in the record, for example, that KG ever permitted Appellant to record her when she was unaware he was doing so, or invited Appellant to record her at his leisure, or that she had ever manifested approval after the fact upon learning he had recorded her when she was initially unaware and had not initially given her consent.

We distinguish this case from "mixed message" cases where the mistake of fact defense is raised because of prior consensual sexual contact between two individuals. *See, e.g., United States v. DiPaola, 67 M.J. 98, 101-02 (C.A.A.F. 2008)*. Appellant avers KG was aware and consented to sexual recordings on other occasions when she was not using Skype to converse with Appellant; however, consent given under different circumstances on some occasions did not make it reasonable for Appellant to believe that KG had given her consent at other times. KG testified she never discussed with Appellant whether it would be appropriate for him to record her during their Skype sessions, and she never gave him permission to do so. The occasions when KG made recordings of herself, which she was obviously aware, are not equivalent to the charged **[*53]** recordings when she was not. We find no evidence in the record that KG ever consented to *Appellant* making recordings of her in their current relationship, and therefore we find no opportunity for Appellant to mistake recordings that "were off-limits" from those that "were permissible." *Id. at 101*.

On these facts, we decline to find that recordings KG made herself and sent to Appellant—or that Appellant made of them together in a prior relationship—provided any "mixed message" to Appellant that caused him to believe he had her permission to surreptitiously record her private area. Consequently, we find no evidence in the record that Appellant held either an honest or reasonable belief that KG had consented to the Skype

recordings. Thus, we find no plain error by the military judge in failing to give a mistake-of-fact instruction as to consent for either specification.

c. Mistake of Fact as to Reasonable Expectation of Privacy

Appellant did not request and the military judge did not *sua sponte* give a mistake-of-fact instruction with respect to the element that the recordings Appellant made of KG were under circumstances in which KG had a reasonable expectation of privacy. Appellant argues that even **[*54]** if his recordings of KG were made under circumstances in which KG had a reasonable expectation of privacy, the military judge erred because there was some evidence Appellant had an honest and reasonable mistaken belief that KG had no reasonable expectation of privacy at the time the Government claimed he made recordings of her. It follows, Appellant argues, that the military judge was obligated to *sua sponte* instruct the members accordingly as to both the offense of indecent recording and distribution of an indecent recording in Specifications 1 and 2, respectively, of Charge II, because both offenses share this common element. We disagree.

Assuming *arguendo* mistake of fact can be an affirmative defense to the reasonable expectation of privacy element common to both specifications, we nevertheless find that there was no evidence presented at trial from which it may be inferred that Appellant labored under a mistaken belief that KG did not have a reasonable expectation of privacy when he made recordings of her during their Skype sessions. Appellant knew that KG's private area was visible to the two of them, and no others. Appellant alone knew that he was recording KG's private area. **[*55]** There is no evidence that KG would agree to showing her private area to anyone other than an intimate partner, i.e., to the public, much less that Appellant believed this to be so. While KG was aware of and consented to sexual recordings Appellant made of her in the past, no reasonable factfinder could infer that Appellant held a mistaken belief of KG's privacy expectations during their private Skype sessions when she alone was recorded. We find no evidence in the record that Appellant held either an honest or reasonable belief that KG did not have a reasonable expectation of privacy when he would record her during their Skype sessions. Thus, we find no plain error by the military judge in failing to give a mistake-of-fact instruction on this element for either specification.

We conclude the military judge did not err in her findings instructions to the members by failing to attach a *mens rea* requirement to the "consent" and "reasonable expectation of privacy" elements of indecent recording, and Appellant was not entitled to a mistake-of-fact instruction as to these elements.[29]

D. The Military Judge Did Not Err in Failing to *Sua Sponte* Enter a Finding of Not Guilty to Specifications [*56] 1 and 2 of Charge II

Appellant contends on appeal the military judge erred in failing to *sua sponte* enter a finding of not guilty to the indecent recording and distribution of an indecent recording offenses involving KG as charged in Specification 1 and 2 of Charge II.[30] We are not persuaded.

HN10[] We review whether a military judge "correctly understood and applied a legal concept de novo." *United States v. Hughes, 48 M.J. 214, 216 (C.A.A.F. 1998)* (citations omitted) (no error denying appellant's motion for a finding of not guilty). Rule for Courts-Martial 917 requires the military judge, on motion by the accused or *sua sponte*, to enter a finding of not guilty "if the evidence is insufficient to sustain a conviction." R.C.M. 917(a). The military judge grants a motion for a finding of not guilty "only in the absence of some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged." R.C.M. 917(d). The military judge views the evidence "in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses." *Id.*

For the reasons given in our determination of legal

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[29] We similarly reject Appellant's claim raised as a separate assignment of error that his trial defense counsel were ineffective for failing to ask for an instruction regarding Appellant's mistake of fact regarding consent and KG's reasonable expectation of privacy. We find counsel were not ineffective because of the absence of some evidence admitted at trial, which raised the defense, and thus, this issue does not require further discussion or warrant relief. *See Matias, 25 M.J. at 361*.

[30] Appellant's assignment of error alleges the military judge's failure was only with respect to "wrongful broadcasting," but Appellant's brief addresses both the offense of indecent recording (Specification 1 of Charge II) and *distribution* of an indecent recording (Specification 2 of Charge II), as do we.

sufficiency, we find the military judge did not err by declining to *sua sponte* find Appellant **[*57]** not guilty of Specifications 1 and 2 of Charge II. Viewing the evidence in the light most favorable to the Government without an evaluation of the witnesses' credibility, we find there was some evidence at the close of the Government's case which could reasonably tend to establish every essential element of Specifications 1 and 2 of Charge II. Furthermore, given our conclusion, *supra*, that there was no requirement for the Government to prove an indecent viewing as necessary to prove an indecent recording or distribution of an indecent recording, we find the military judge was not obligated to *sua sponte* enter a finding of not guilty of Specifications 1 and 2 of Charge II.

Accordingly, we find that the military judge did nor err by failing to *sua sponte* enter a finding of not guilty under R.C.M. 917.[31]

E. Constitutional Challenges to Article 120c(a)(2), UCMJ

Appellant asserts as a single assignment of error that "the crime of indecent visual recording is unconstitutionally vague and overbroad on its face and as applied to Appellant." As styled, Appellant's facial and "as-applied" claims are not specific to the indecent recording offense involving either KG or Amn HM; however, Appellant's brief in support of his assignment of error **[*58]** is specific to his conviction of indecent recording of KG, and, consequently, so is our analysis and decision.

Accordingly, we separately address Appellant's facial and as-applied challenges to his conviction of Specification 1 of Charge II in violation of Article 120c(a)(2), UCMJ, on grounds of unconstitutional vagueness, and then we address Appellant's challenge to his conviction on grounds of unconstitutional overbreadth. We are not persuaded that Article 120c(a)(2), UCMJ, is unconstitutionally vague or overbroad.

1. Law

HN11[↑] We review the constitutionality of a statute de novo. United States v. Ali, 71 M.J. 256, 265 (C.A.A.F. 2012) (citing United States v. Disney, 62 M.J. 46, 48 (C.A.A.F. 2005)). Because Appellant did not claim at trial that Article 120c(a)(2), UCMJ, is unconstitutional as applied, under a plain error review "Appellant must point to particular facts in the record that plainly demonstrate why his interests should overcome Congress' and the President's determinations that his conduct be proscribed." United States v. Goings, 72 M.J. 202, 205 (C.A.A.F. 2013) (citations omitted).

HN12[↑] The Due Process Clause of the Fifth Amendment[32] "requires 'fair notice' that an act is forbidden and subject to criminal sanction" before a person can be prosecuted for committing that act. United States v. Vaughan, 58 M.J. 29, 31 (C.A.A.F. 2003) (quoting United States v. Bivins, 49 M.J. 328, 330 (C.A.A.F. 1998)). Due process "also requires fair notice as to the standard applicable to the forbidden conduct." *Id.* (citing **[*59]** Parker v. Levy, 417 U.S. 733, 755, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974)). In other words, "[v]oid for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." Parker, 417 U.S. at 757 (citing United States v. Harriss, 347 U.S. 612, 617, 74 S. Ct. 808, 98 L. Ed. 989 (1954)). A void for vagueness challenge requires inquiry into whether a reasonable person in Appellant's position would have known that the conduct at issue was criminal. *See, e.g.,* Vaughan, 58 M.J. at 31 (upholding a conviction under Article 134, UCMJ, for leaving a 47-day-old child alone on divers occasions for as long as six hours; while Article 134 did not specifically list child neglect as an offense, the appellant "should have reasonably contemplated that her conduct was subject to criminal sanction, and not simply the moral condemnation that accompanies bad parenting."); United States v. Sullivan, 42 M.J. 360, 366 (C.A.A.F. 1995) (citation omitted) ("In our view, any reasonable officer would know that asking strangers of the opposite sex intimate questions about their sexual activities, using a false name and a bogus publishing company as a cover, is service-discrediting conduct under Article 134."), *overruled on other grounds by* United States v.

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[31] Appellant's counsel claims as part of the assignment of error that, in the alternative, trial defense counsel were ineffective for failing to move for a finding of not guilty of both specifications involving KG. Specifically, counsel avers that "[a] motion for finding of not guilty would have been successful, and Appellant would not now be convicted." We find counsel were not ineffective because the motion did not have merit, and thus, this issue does not require further discussion or warrant relief. *See* Matias, 25 M.J. at 361.

[32] U.S. Const. amend. V.

Reese, 76 M.J. 297, 302 (C.A.A.F. 2017).

In addition, due process requires that criminal statutes be defined "in a manner that does not encourage arbitrary and discriminatory enforcement." **[*60]** *Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)* (citations omitted). This "more important aspect of the vagueness doctrine" requires that the statute "establish minimal guidelines to govern law enforcement" rather than "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id. at 358* (alteration in original) (quoting *Smith v. Goguen, 415 U.S. 566, 574-75, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974)*).

HN13[] A statute is overbroad under the *First Amendment*,[33] and therefore unconstitutional, if "it prohibits a substantial amount of protected speech." *United States v. Williams, 553 U.S. 285, 292, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008)*; *Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002)*. The challenged statute's overbreadth must be substantial, not only in the absolute sense, but also relative to its plain sweep. *Williams, 553 U.S. at 292* (citations omitted). Appellant bears the burden of demonstrating substantial overbreadth exists from the text of the statute and the facts of the case. *Virginia v. Hicks, 539 U.S. 113, 122, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003)* (citation omitted). The United States Supreme Court has repeatedly recognized that the overbreadth doctrine is "strong medicine" and has, therefore, applied it sparingly. *See New York v. Ferber, 458 U.S. 747, 769, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)* (citation omitted).

2. Analysis

a. Vagueness Challenges

Appellant claims that his convictions of indecent recording of KG in Specification 1 of Charge II is unconstitutional because *Article 120c(a)(2), UCMJ*, does not provide fair notice that Appellant's acts were subject to criminal sanction. **[*61]** We disagree and address Appellant's facial and as-applied vagueness challenges in turn.

[33] *U.S. Const. amend. I*.

In support of Appellant's facial challenge to *Article 120c(a)(2), UCMJ*, Appellant renews his concerns that the elements of "consent" and "reasonable expectation of privacy" contain no *mens rea* requirement and, it follows, the statute is constitutionally infirm after the decision of the United States Supreme Court in *Elonis, 135 S. Ct. 2001, 192 L. Ed. 2d 1*. Appellant argues the absence of a *mens rea* requirement for these elements "criminalize[s] 'a broad range of apparently innocent conduct' and [sweeps] in individuals who had no knowledge of the facts that made their conduct blameworthy," citing *Elonis, 135 S. Ct. at 2009* (quoting *Liparota v. United States, 471 U.S. 419, 426, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985)*). In *Elonis*, the Court concluded that simple negligence was insufficient to support a conviction for communicating a threat where the statute in question was silent as regards the requisite *mens rea*. *Id. at 2012-13*. The CAAF has recognized that where a criminal statute is silent, "the Supreme Court has repeatedly inferred a *mens rea* requirement in instances where it was necessary to separate wrongful conduct from otherwise innocent conduct." *United States v. Gifford, 75 M.J. 140, 143 (C.A.A.F. 2016)* (quoting *Elonis, 135 S. Ct. at 2010*) (internal quotation marks omitted).

We do not share Appellant's concern that an individual would **[*62]** be convicted for apparently innocent conduct. *Article 120c(a)(2), UCMJ*, is not silent as to *mens rea*. The Government was required to prove Appellant knowingly and wrongfully recorded KG's private area. We find the *mens rea* along with the Government's burden to prove Appellant's act of recording was without KG's consent and under circumstances in which KG had a reasonable expectation of privacy is sufficient to separate innocent acts from wrongful conduct, and provides "fair notice" what acts are forbidden and subject to criminal sanction. *Vaughan, 58 M.J. at 31*.

We also find *Article 120c(a)(2), UCMJ*, is not unconstitutional as applied to Appellant's conviction for indecent recording of KG. Appellant claims the definition of "reasonable expectation of privacy," *Article 120c(d)(3)(A), UCMJ*,[34] is unconstitutionally vague as

[34] Appellant's reply brief expands the list of words in the statute he avers to be vague and ambiguous to include "privacy" and "public" as they appear in the definition of the phrase "under circumstances in which that other person has a reasonable expectation of privacy," in *Article 120c(d)(3)(A)* and *(B), UCMJ*, respectively. We disagree and find the members could

applied to Appellant given his and KG's history of consensual recording and practice of sharing intimate videos and pictures. We disagree. In doing so we recognize that sexual acts, done in private by consenting adults, may be protected by the liberty interest identified in *Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)*, as Appellant points out. But the fact that KG exchanged consensually made, intimate video recordings with Appellant **[*63]** in the past where she willingly displayed her private area does not excuse Appellant recording her private area without her knowledge or consent at other times. Therefore, we find that a reasonable person in Appellant's position would have known that the conduct at issue was criminal. *Vaughan, 58 M.J. at 31*. Thus, we conclude that there was no error, plain or otherwise, and reject Appellant's facial and as-applied challenges to *Article 120c(a)(2), UCMJ*, on vagueness grounds.

b. First Amendment Challenge

We similarly find unconvincing Appellant's assertion that his conviction of indecent recording of KG, as charged in Specification 1 of Charge II, should be set aside because *Article 120c(a)(2), UCM*J, is unconstitutionally over-broad on the ground that a prosecution for its violation would infringe upon a right to free speech protected by the *First Amendment*.

We recognize ***HN14***[] "[t]he traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *See Ferber, 458 U.S. at 767* (citations omitted). The overbreadth doctrine is "one of the few exceptions" to this rule of limited standing, and allows a person **[*64]** to "attack [an] overly broad statute[ ] even though the conduct of the person making the attack is clearly unprotected." *Id. at 769*. Even though this doctrine allows an appellant to raise the constitutionally protected expressions of others, "'[w]here conduct and not merely speech is involved' the overbreadth must 'not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" *Parker v. Levy, 417 U.S. 733, 760, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974)* (quoting *CSC v. Letter Carriers, 413 U.S. 548, 580-81, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973))*.

Appellant claims constitutional protection for his recording videos of KG on overbreadth grounds by advocating that *Article 120c(a)(2), UCMJ*, "criminalizes private sexual conduct between two consenting adults," claiming that the statute infringes on "their *First Amendment* rights to record their private[,] consensual sexual conduct" and then "share those recordings with each other for their subsequent 'viewing pleasure.'" We are not persuaded. The statute specifically excludes from criminal liability those recordings made with another's consent even though the recording may have been made under circumstances where another has a reasonable expectation of privacy, thus removing Appellant's "two consenting adults" application from *First Amendment* concern. Here, there was mutual consent only regarding **[*65]** the sexual conduct, not the recording of that conduct.

Furthermore, we are not convinced that prosecutions under *Article 120c(a)(2), UCMJ*, would "chill the exercise of expressive activity," *Ferber, 458 U.S. at 772*, of an adult in a long-distance intimate relationship. Appellant recorded KG's sexual conduct, not his own, and certainly not "their" own conduct with each other. Even the speech in the charged recordings belongs exclusively to KG other than the faint sound of a low-pitch, muffled voice that is presumably the sound of Appellant conversing with KG, though no words can be discerned. Whether Appellant intended the recordings he made of KG for both their viewing pleasure—as he asserts on appeal—or Appellant's own, no evidence was presented of Appellant's intent, and there is no evidence that KG consented to making any of the charged recordings, much less any specific uses of them. We can conceive of no implication to rights guaranteed by the *First Amendment* by attaching a criminal conviction to the nonconsensual recording of sexually expressive activity in a private setting in the manner in which *Article 120c(a)(2), UCMJ*, proscribes, even though the underlying expression involves a willing adult. For these reasons **[*66]** we find that Appellant has failed to demonstrate from the text of the statute and the facts of the case that *Article 120c(a)(2), UCMJ*, is unconstitutionally overbroad. *Hicks, 539 U.S. at 122* (citation omitted).

c. Liberty Interest

Appellant also claims his recording of KG during their

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afford these words their ordinary meaning without unfair prejudice to Appellant. Not every word in a specification requires definition, even when the word is essential to an element of the offense. *See United States v. Glover, 50 M.J. 476, 478 (C.A.A.F. 1999)*.

"private, consensual" Skype sessions is not prosecutable because Appellant's conduct "fell within the liberty interest" of *Lawrence, 539 U.S. at 558*, and *United States v. Marcum, 60 M.J. 198, 207-08 (C.A.A.F. 2004)* (no liberty interest for a superior to engage in a sexual relationship with a subordinate).[35] We are not persuaded by Appellant's as-applied challenge to his conviction of indecent recording of KG. *Lawrence* involved "two adults who, with full and mutual consent from each other," engaged in sexual intimacy in private. *Lawrence, 539 U.S. at 578*. In contrast, this case involves nonconsensual recordings Appellant made of KG's private area under circumstances in which she had a reasonable expectation of privacy.

We decline to place Appellant's conduct of recording KG without her consent "on par with the liberty interest and fundamental right to form intimate, meaningful, and personal bonds that manifest themselves through sexual conduct described in *Lawrence*." *United States v. Meakin, 78 M.J. 396, 403 (C.A.A.F. 2019)* (rejecting "argument that distributing or transmitting obscenity **[*67]** that encourages, describes, and revels in the sexual exploitation of children over the internet falls within the fundamental liberty interest recognized in Lawrence."). Thus, we conclude Appellant's conduct was qualitatively different and fell outside the liberty interest identified by the United States Supreme Court in *Lawrence.*

We are not persuaded to find any constitutional infirmity to criminalizing the nonconsensual recording of the private area of another person under circumstances in which the person has a reasonable expectation of privacy. Accordingly, we conclude that Appellant has not plainly demonstrated that his conviction of indecent recording of KG, as charged in Specification 1 of Charge II in violation of *Article 120c(a)(2), UCM*J, is unconstitutional on grounds that the statute is vague or overbroad.[36] We reach the same conclusions with respect to Appellant's conviction of indecent recording of Amn HM, also charged as a violation of *Article 120c(a)(2), UCMJ*.

F. Challenges to Trial Counsel's Findings Argument

Appellant asserts trial counsel engaged in prosecutorial misconduct during his findings argument, including rebuttal. Specifically, Appellant alleges **[*68]** trial counsel: (1) misstated the law in his recitation of the elements of the offense of distribution of an indecent recording; (2) improperly commented on Appellant's constitutional right to defend himself; (3) inappropriately disparaged Appellant and his defense counsel; (4) argued the members consider facts not in evidence and view evidence on the Internet; (5) mischaracterized and improperly vouched for evidence; and (6) unconstitutionally shifted the burden of proof to Appellant to prove his innocence by referring to Appellant's failure to produce Amn HM's broken computer. We find the complained of portions of trial counsel's argument, none of which were objected to by trial defense counsel, were not plain error.

1. Law

HN15[] Prosecutorial misconduct and improper argument are questions of law that we review de novo. *United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018)* (citing *United States v. Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017)*). Because there was no objection at trial Appellant has forfeited the right to challenge the issue on appeal and we review the propriety of trial counsel's argument for plain error. *Id.* (citing *United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005)*). The burden of proof under plain error review is on Appellant. *Id.* (citation omitted). To prevail under a plain error analysis, Appellant must show "(1) there is error,

[35] Appellant raised the issue in the context of claiming his conviction of Specification 1 of Charge II was legally and factually insufficient because, Appellant claims, he had legal authorization to record KG. However, "[w]hether an act . . . is legal or illegal [in relation to a constitutional or statutory right of an accused] is a question of law, not an issue of fact for determination by the triers of fact." *United States v. Harvey, 67 M.J. 758, 763 (A.F. Ct. Crim. App. 2009)* (alteration in original) (citation omitted) (*Marcum* factors for determining if an appellant has a constitutional as-applied liberty interest are questions of law and not de facto elements to be instructed on and determined by the members).

[36] We reject Appellant's claim raised as a separate assignment of error that his trial defense counsel were ineffective for failing to challenge the constitutionality of *Article 120c, UCMJ*, "related to the specifications involving KG." Appellant's counsel argues that Appellant was denied the opportunity to lose this challenge at trial, and consequently, was prejudiced by having to argue "the more difficult *de novo* 'plain error' standard" on appeal and not "the easier *de novo* standard of review instead." We find this issue identified by Appellant's counsel does not require further discussion or warrant relief. *See Matias, 25 M.J. at 361*.

(2) **[*69]** the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Id. at 401* (quoting *Fletcher, 62 M.J. at 179*).

HN16[] "The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Frey, 73 M.J. 245, 248 (C.A.A.F. 2014)* (quoting *United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000))*. We recognize that "it is . . . improper for a trial counsel to attempt to win favor with the members by maligning defense counsel." *Fletcher, 62 M.J. at 181* (citations omitted).

However, not every improper comment by the prosecution is a constitutional violation. *See generally, United States v. Webb, 38 M.J. 62, 65 (C.M.A. 1993)* (citation omitted). Instead, we evaluate the comment in the context of the overall record and the facts of the case. *Id.* The United States Supreme Court has observed that ***HN17***[] "[i]t is important that both the defendant and prosecutor have the opportunity to meet fairly the evidence and arguments of one another." *United States v. Robinson, 485 U.S. 25, 33, 108 S. Ct. 864, 99 L. Ed. 2d 23 (1988)*. A trial counsel is permitted to make a "fair response" to claims made by the defense, even where a constitutional right is at stake. *Id. at 32*; *United States v. Gilley, 56 M.J. 113, 121 (C.A.A.F. 2001)* (citation omitted).

In assessing prejudice, we evaluate the cumulative impact of any prosecutorial misconduct on Appellant's substantial rights and the fairness and integrity of his trial. We do so by balancing **[*70]** three factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Fletcher, 62 M.J. at 184*. We also recognize that the lack of defense objection is some measure of the minimal prejudicial impact of the trial counsel's argument. *Gilley, 56 M.J. at 123* (citation omitted). In sum, "reversal is warranted only 'when the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone.'" *Sewell, 76 M.J. at 18* (quoting *United States v. Hornback, 73 M.J. 155, 160 (C.A.A.F. 2014))*.

2. Analysis

a. Recitation of the Elements of the Offense of Distribution of an Indecent Recording

Appellant claims that trial counsel twice misstated the law when he argued the elements of the offense of distribution of an indecent recording, as charged in Specification 2 of Charge II. We disagree.

Appellant first claims that trial counsel eliminated the *mens rea* requirement that Appellant "knew or reasonably should have known" that KG did not consent to the making of the recording that Appellant distributed and, second, that under the circumstances at the time of the recording, KG had a reasonable expectation of privacy. During argument, trial counsel **[*71]** displayed slides that showed the required *mens rea* applicable to each of these elements. The slides properly recited the elements that required proof of identical *mens rea*; however, trial counsel did not repeat the *mens rea* after having stated it once.

After the close of evidence and before findings argument by counsel, the military judge instructed the members they "must resolve the ultimate question of whether the accused is guilty or not guilty based upon the evidence presented here in court and upon the instructions" as given by the military judge. After properly instructing on the elements of the offenses, the military judge informed the members that the parties may refer to her instructions during argument and that "any inconsistency between what counsel have said about the instructions and the instructions which I give you" must be resolved by accepting the instructions "as being correct."

We find trial counsel did not misstate the elements of the offense of distribution of an indecent recording, and his recitation of the elements together with his visual aid were accurate. Even if we were to consider trial counsel's argument without benefit of the visual aid as Appellant implies **[*72]** we should, we would nonetheless conclude that the military judge's charge to the members to follow her recitation of the elements was a prophylactic measure that minimized the impact of any apparent inconsistency between what trial counsel said on the one hand, and what his slides showed and the military judge instructed on the other.

Appellant also claims that, during rebuttal, trial counsel "misstated the law by shifting KG's consent to consent to distribution instead of consent to being recorded." During rebuttal, trial counsel highlighted evidence that KG knew the difference between videos she consented to Appellant recording where Appellant appeared with KG from the charged videos where Appellant did not appear and she did not consent to him recording. Trial

counsel then referred to evidence that KG was also unaware Appellant had posted video recordings of her to the Internet. He argued, "And certainly, she didn't consent in May of 2015 for [Appellant] to put videos and post videos of her online."

Although the Government had no obligation to prove that KG did not consent to Appellant distributing the charged recordings, we find trial counsel did not misstate the law, or shift its **[*73]** burden to prove that KG did not consent from the element of making a recording to the element of distribution of the recording. Instead trial counsel was making the point that Appellant never communicated with KG and sought her permission to post the recordings of her online in the same manner that Appellant did not seek her permission to record KG in the first place.

We find trial counsel did not misstate the elements of the offense of distribution of an indecent recording. His recitation of the elements along with his visual aid, were accurate. Trial counsel did not misstate the law in the manner in which he argued that KG did not consent to Appellant posting the charged recordings of her to the Internet. Consequently, there was no error, plain or otherwise.

b. Comments about Appellant's Findings Argument

Appellant claims trial counsel improperly commented on Appellant's constitutional right to defend himself by arguing in rebuttal, "Defense got up here and obviously tried to talk themselves out of everything. Apparently, their client is not currently responsible for anything in this case. He didn't do anything wrong," and, again, that "the [D]efense tries to talk their way out of it." **[*74]**

We view these comments as permissible argument suggesting that the Defense findings argument was not persuasive or worthy of serious consideration, and was proper rebuttal to the Defense claim that Appellant had no culpability and should be found not guilty. In contrast to the prohibition against maligning defense counsel, we find trial counsel's argument was a "fair response" to claims made by the Defense, even where a constitutional right to present a defense was at stake. *Cf*. Robinson, 485 U.S. at 32. We conclude trial counsel's argument was not error, plain or otherwise.

c. Comments Characterizing Appellant's Claims and Defense

Appellant argues that trial counsel impermissibly argued multiple times that Appellant's defense was "ridiculous." At times, trial counsel reminded the members of Appellant's report to his first sergeant and AFOSI investigators that KG sexually assaulted him by inserting a wine bottle into his anus. Appellant invented this allegation, trial counsel implied, to deflect the AFOSI investigation from allegations that Appellant sexually and physically abused KG to his own claim of being a victim. Trial counsel argued that Appellant's claim was false by asking rhetorically, "How ridiculous **[*75]** is that story?" and argued on six separate occasions that Appellant made up a "ridiculous" account of his own sexual assault. We find trial counsel's argument was not an improper personal attack on Appellant, but was permissible commentary on the evidence even if it was debatably ill-phrased. We find trial counsel did not argue that Appellant or his defense was ridiculous, but rather, argued that Appellant's account of what happened to him was unworthy of serious consideration and that his account of having been sexually assaulted showed consciousness of guilt.[37] Furthermore, Appellant has not shown how this argument affected any of the specifications involving KG other than the ones of which he was acquitted.

Appellant also claims trial counsel made disparaging comments about Appellant and his defense in his rebuttal argument by twice directing the members to follow the evidence instead of the "shiny monkey over here," and also by accusing the Defense of "wordsmithing." We have carefully reviewed the context with which trial counsel made his "shiny monkey" comments and conclude he was referring figuratively to weaknesses in the Defense argument and cautioning the members to not be distracted **[*76]** by Defense claims that trial counsel believed were unsupported by evidence. Neither word choice, however, obviously disparaged Appellant personally or accused Appellant of fabricating a defense. *Cf*. Fletcher, 62 M.J. at 182. Appellant was not prejudiced by this argument, and we find it was not plain error.

d. Arguing the Members Consider Facts Not in

[37] The military judge instructed the members that evidence Appellant "may have made an allegation of being sexually assaulted" by KG may be considered "for its tendency, if any, to show [Appellant's] awareness of his guilt of the offense of sexual assault as alleged in Specification 1 of Charge I." Appellant was acquitted of this specification.

Evidence and View Evidence on the Internet

Appellant claims trial counsel made reference to facts not in evidence in his rebuttal argument when he claimed that KG remained in a relationship with Appellant after being abused in the same manner that victims of domestic violence remain in a relationship with an intimate partner although they are abused. Trial counsel argued, "And then they say she would have left. She would have left, members. Well, then I guess if [KG] would have left, then every other battered girlfriend, battered spouse, that's in a difficult relationship, or in a relationship, a complicated relationship, where they love the person but they're mean to them. They stay in it many times. But now, because she didn't leave, because she didn't leave in the midst of when things are going on—it didn't happen at all?"

We find trial counsel's reference to **[*77]** "every other" battered girlfriend or spouse and domestic violence victims generally staying in relationships "many times" was improper argument, but it did not prejudice Appellant. Trial counsel interjected his personal belief, certainly not facts that were in evidence, about how KG behaved consistently with other victims of domestic abuse. *Cf*. *Fletcher, 62 M.J. at 180* (trial counsel cannot argue irrelevant matters such as personal opinions and facts not in evidence). Yet this one statement was but a very small part of the trial counsel's rebuttal argument, and was not a point he focused on. After he made the comment, he did not revisit the issue again. Furthermore, the argument Appellant complains of affected the four specifications involving KG, of which Appellant was acquitted, most significantly the offense of assault consummated by a battery. Thus, we find Appellant was not prejudiced by trial counsel's improper argument.

Appellant also claims trial counsel encouraged the members to do their own research by accessing a website to download video recordings of KG that Appellant was charged with posting online, and that were discussed at trial. Trial counsel argued, Appellant "goes and puts them out there **[*78]** so that anybody can download them. *You* can download them. Anybody in this courtroom, just Google it. Go to [***].com. Download it, for all the world to see." (Emphasis added).

On one hand trial counsel was explaining why KG decided to report Appellant after discovering the recordings, underscoring KG's humiliation from knowing anyone could capably access these recordings because Appellant's conduct made them accessible to anyone. On the other hand, whether he intended to or not, trial counsel's words plainly encouraged "[a]nybody in this courtroom" including *the members* to whom trial counsel was arguing to "just Google" the website and observe the images of KG that were admitted in evidence.

However, assuming this argument was error, we find the comment neither pervasive nor severe. Furthermore, the military judge took appropriate measures to cure the misstep by giving the following instruction after argument:

> During your deliberations, you . . . may not use any electronic device or media to communicate to anyone outside the deliberation room or to conduct any research about this case. So put another way, you will have your phones off. Not silent, you will have it off or just not in the **[*79]** room at all. You can give it to the bailiff if you want.

We are confident that trial counsel's argument that the members consider facts not in evidence and view evidence on the Internet did not amount to prejudicial error and that the members convicted Appellant on the basis of the evidence alone.

e. Characterization of Evidence and Improper Vouching

Appellant claims trial counsel mischaracterized evidence when he argued that records from Appellant's Internet service provider linked Appellant to the same IP address used to upload images of KG to a website, "when in fact, it was not assigned to Appellant until 31 May 2015," or two weeks after videos of KG were posted online. Appellant also claims trial counsel mischaracterized Appellant's admissions in his text message to KG and conversation with Amn HM about posting videos of KG to the Internet, "when Appellant only admitted to posting pictures of KG."

We disagree with Appellant's claims and find that trial counsel argued reasonable inferences from the evidence. Trial counsel did not claim that records from Appellant's Internet service provider linked Appellant to the IP address on a particular date, but instead argued that the record **[*80]** showed an association with Appellant and his physical address on Altus AFB, which it did. Trial counsel's argument that Appellant admitted to posting videos of KG, when the evidence was that he had posted pictures of her online, was also a reasonable inference. In the case of the text message

Appellant sent to KG in which Appellant stated he did "feel bad for posting the pictures online," trial counsel directed the members to review the Prosecution exhibit that contained the text message so they could make the determination themselves. We find these statements were supported by the evidence.

Appellant also claims trial counsel interjected his personal views to misstate and vouch for evidence when he argued that "*we know* the [webcam] was working. *We know*, even though it had a green screen that came up." (Emphasis added). Similarly in rebuttal, the trial counsel argued "*we know* the [web]cam did work. We don't know exactly how [Appellant] made it work, but it certainly worked to take the pictures." (Emphasis added). We disagree that the Government misstated evidence when it argued that Amn HM's built-in camera was functional, in contrast to Appellant's contention on appeal that "[i]n fact, **[*81]** Appellant was unable to take pictures of her with her computer because the webcam on her computer was broken." Mere disagreement about the conclusions to be drawn from the evidence does not amount to mischaracterization.

However, we do agree with Appellant that trial counsel engaged in improper argument in a few instances when he interjected his improper personal assurance, "we know," of the Government's evidence. *See* Fletcher, 62 M.J. at 180 ("trial counsel repeatedly vouched for the credibility of the Government's witnesses and evidence," for example by couching a conclusion with '*we know*'"). In assessing prejudice, we note that these three instances were but a small part of an approximately 21-page findings argument including rebuttal. This stands in marked contrast to *Fletcher*, where trial counsel's argument amounted to plain error when, on more than two dozen occasions, she offered personal commentary on the veracity of the testimony and evidence, and "[s]he repeatedly inserted herself into the proceedings by using the pronouns 'I' and 'we.'" *Id. at 181*. We distinguish those facts from the minimal personal assurances by trial counsel in this case. Consequently, we find the comments neither pervasive nor severe. **[*82]** Furthermore, we find the military judge's prefatory instructions that the arguments by counsel are "an exposition of the facts . . . as they view them," was a prophylactic measure that minimized the impact of trial counsel's vouching. Finally, the improper comments had no logical relationship to the strength of the Government's evidence supporting the findings of guilty, which consisted of the pictures of Amn HM found on his personal cell phone, forensic analysis of his media, and expert opinion testimony explaining how he captured the recordings. After balancing the three *Fletcher* factors, we are confident that the improper comments by trial counsel that vouched for the evidence did not amount to plain error and that the members convicted Appellant on the basis of the evidence alone.

f. "They Didn't Offer You This Computer"

HN18[↑] The Government always has the burden to produce evidence on every element and to persuade the members of guilt beyond a reasonable doubt. *United States v. Czekala, 42 M.J. 168, 170 (C.A.A.F. 1995)* (citation omitted) ("The *Due Process Clause of the Fifth Amendment to the Constitution* requires the Government to prove the defendant's guilt beyond a reasonable doubt."). This burden never shifts to the Defense and the Government "may not comment on the failure of the defense to call witnesses." **[*83]** R.C.M. 919(b), Discussion; *United States v. Mobley, 31 M.J. 273, 279 (C.M.A. 1990)* (citation omitted). A trial counsel's suggestion that an accused may have an obligation to produce evidence of his own innocence is "error of constitutional dimension." *United States v. Mason, 59 M.J. 416, 424 (C.A.A.F. 2004)* (citation omitted).

Appellant complains that trial counsel improperly shifted the burden of proof to Appellant with respect to Specification 3 of Charge II by arguing in rebuttal that Appellant failed to produce Amn HM's broken computer. Appellant observes that trial counsel argued "*they* didn't offer you this computer that had the green screen." (Emphasis added).

We find Appellant has not shown that trial counsel shifted the burden of producing evidence to the Defense. Instead, we find that trial counsel was countering the Defense's findings argument by paraphrasing the Defense's point that "they," meaning the Government, failed to analyze and offer evidence from Amn HM's laptop. Trial counsel stated:

> What makes the most sense is that [Appellant] did it. That makes the most sense, not what defense—its shiny monkey over here—look over here. *He's not guilty*, look over here. *It's somebody else. Don't look at the fact that Airman [HM]'s photos were on his cell phone, that in his media, he has shellbags to [her]* ***[*84]*** *laptop*. Don't look at the fact that they say it's a green screen, so I guess the computer doesn't work. And *they* didn't offer you this

> computer that had the green screen. Well, you have photographs from the 20th of June in her room and she knows when they were taken. So we know the cam[era] did work. We don't know exactly how [Appellant] made it work, but it certainly worked to take the pictures. And they all ended up on [Appellant's] cell phone.

(Emphasis added).

Just as trial counsel was not arguing the Government's position that, "[h]e's not guilty," "somebody else" recorded Amn HM, or "Don't look at the fact that" photos of Amn HM were found on Appellant's cell phone, which were opposite to the Government's position throughout trial, it stands to reason that "*they* didn't offer" Amn HM's computer was trial counsel's parroting the Defense's claim that the Government failed to produce evidence, and not a burden shift to the Defense to produce evidence as Appellant claims it was.

Even if some members may not have understood that trial counsel was essentially deriding the Defense's earlier points that the Government's case involving Amn HM was weak because the Government failed to produce **[*85]** her laptop, we do not find this single comment was prejudicial. The record establishes that each member understood in voir dire that the burden of proof to establish Appellant's guilt rested solely on the Government and that the burden never shifted to the Defense to establish Appellant's innocence. The military judge similarly instructed the members after the close of evidence that the burden never shifted to Appellant to establish innocence or to disprove the facts necessary to establish each element of an offense. We conclude trial counsel's argument, "[T]hey didn't offer you this computer," was not plain error.

After evaluating the entirety of trial counsel's findings argument, including his rebuttal argument when many of the comments Appellant complains of occurred, we find no plain or obvious error that prejudiced Appellant. We further conclude that Appellant was not prejudiced by the cumulative impact of any error. *United States v. Pope, 69 M.J. 328, 335 (C.A.A.F. 2011)* (citation omitted) (Cumulative error occurs when "a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding."). Accordingly, we decline to grant Appellant relief for any prosecutorial misconduct and improper **[*86]** comments during findings argument.[38]

G. Allegations of Ineffective Assistance of Counsel

Appellant submitted declarations in which he asserted that his trial defense counsel were ineffective in 16 allegations of error. In response to Appellant's claims, we ordered and received declarations from Appellant's trial defense counsel, Major (Maj) AH and Captain (Capt) DC, which refute Appellant's claims and are generally consistent with one another. We have considered whether a post-trial evidentiary hearing is required to resolve any factual disputes and are convinced such a hearing is unnecessary. *See United States v. Ginn, 47 M.J. 236, 248 (C.A.A.F. 1997)*; *United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411, 413 (C.M.A. 1967)*.

Appellant alleges his trial defense counsel were ineffective in nine assignments of error which we address in our opinion.[39] We find no prejudicial error warranting relief with respect to these issues. Appellant also contends that his trial defense counsel were ineffective in an additional five assignments of error, which we considered and summarily resolve here. Appellant claims his counsel failed to: (1) challenge the legality of the searches and seizures of Appellant's computers, hard drives, and phones; (2) object to the *Article 32, UCMJ, 10 U.S.C. § 832*, report of the preliminary hearing officer (PHO) **[*87]** on grounds that the PHO's recitation of the elements of wrongful distribution of recordings of KG and the timeline regarding the alleged offense involving Amn HM were incorrect; (3) question KG about her report to civilian law enforcement that pictures and videos posted online were ones KG took herself and voluntarily gave to Appellant; (4) provide Appellant copies of their notes of an interview with the Government's digital forensic expert witness so that Appellant could have assisted his counsel in the preparation of his defense; and (5) consult with Appellant about their interview of Amn

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[38] We similarly reject Appellant's claim raised as a separate assignment of error that his trial defense counsel were ineffective for failing to object to trial counsel's improper closing argument, including rebuttal. We find counsel were not ineffective because the objectionable comments were limited and counsel's level of advocacy did not fall measurably below the performance ordinarily expected of fallible lawyers, *United States v. Gutierrez, 66 M.J. 329, 331 (C.A.A.F. 2008)* (citations omitted), and thus, Appellant's claim does not require further discussion or warrant relief. *See Matias, 25 M.J. at 361*.

[39] *Supra* nn.13, 20, 24-26, 29, 36, 38, and *infra* n.59.

HM.[40],[41] We find these issues do not require further discussion or warrant relief. *See* United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987).

Appellant also alleges his trial defense counsel were ineffective in two further assignments of error in that they failed to (1) correctly advise Appellant on his right of allocution in findings[42] and (2) inform Appellant, and argue to the members during sentencing, that a punitive discharge could result in consequences relating to naturalization, citizenship, and deportation.

We disagree and address Appellant's allegations in turn.

1. Law

HN19[↑] The Sixth Amendment to the United States Constitution[43] guarantees an accused the right **[*88]** to effective assistance of counsel. Gilley, 56 M.J. at 124 (C.A.A.F. 2001). In assessing the effectiveness of counsel, we apply the standard set forth in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (citation omitted), and begin with the presumption of competence announced in United States v. Cronic, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (citations and footnote omitted). *See* Gilley, 56 M.J. at 124 (citing United States v. Grigoruk, 52 M.J. 312, 315 (C.A.A.F. 2000)). Accordingly, we "will not second-guess the strategic or tactical decisions made at trial by defense counsel," United States v. Mazza, 67 M.J. 470, 475 (C.A.A.F. 2009) (quoting United States v. Anderson, 55 M.J. 198, 202 (C.A.A.F. 2001)), and consider "whether counsel's performance fell below an objective standard of reasonableness." United States v. Gutierrez, 66 M.J. 329, 331 (C.A.A.F. 2008) (citations omitted).

HN20[↑] We review allegations of ineffective assistance of counsel de novo. Gooch, 69 M.J. at 362 (citing Mazza, 67 M.J. at 474). "To prevail on an ineffective assistance claim, the appellant bears the burden of proving that the performance of defense counsel was deficient and that the appellant was prejudiced by the error." United States v. Captain, 75 M.J. 99, 103 (C.A.A.F. 2016) (citing Strickland, 466 U.S. at 698). We utilize the following three-part test to determine whether the presumption of competence has been overcome:

> 1. Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
> 2. If the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers"?
>
> 3. If defense counsel was ineffective, is there "a reasonable **[*89]** probability that, absent the errors," there would have been a different result?

Gooch, 69 M.J. at 362 (alteration in original) (quoting United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)).

2. Trial Defense Counsel's Advice about Testifying in Findings

a. Additional Background

Appellant claims his trial defense counsel were ineffective because they did not advise him he could "pick and choose" which "topics" to testify about in findings. Instead, according to Appellant, trial defense counsel presented his right to testify as "all or nothing" and were adamant that he not testify. Appellant now claims that if he knew he could testify about "working on Amn HM's computer without testifying about the allegations involving KG," he would have contradicted Amn HM's timeline and explained that he did not record Amn HM because the charged photographs existed on her laptop computer before he worked on it.

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[40] Appellant personally asserts issues (4) and (5) pursuant to *Grostefon*.

[41] We have considered the five issues raised by Appellant and find as follows. With respect to issue (1), Appellant has not shown there is a reasonable probability that a motion to exclude evidence would have been meritorious. *See* United States v. Loving, 41 M.J. 213, 244 (C.A.A.F. 1994). With respect to issue (2), trial defense counsel's decision not to challenge the PHO's report did not fall below an objective standard of reasonableness. *See* Gutierrez, 66 M.J. at 331. With respect to issue (3), Appellant has not shown a reason for us to second-guess the decisions made by trial defense counsel not to question KG differently. *See* Mazza, 67 M.J. at 475 (C.A.A.F. 2009). With respect to issues (4) and (5), we find that trial defense counsel had a reasonable explanation for their actions, their performance was not deficient, and Appellant suffered no prejudice. *See* Gooch, 69 M.J. at 362 (C.A.A.F. 2011).

[42] Appellant personally asserts this issue pursuant to *Grostefon*.

[43] U.S. Const. amend. VI.

In response, trial defense counsel stated that they comprehensively advised Appellant of his right to testify. Capt DC explained to Appellant that he could testify on "any combination of specifications or [c]harges he wanted to." In a pretrial advisement memo, Appellant initialed that he understood his right to testify, the risks of testifying, and the fact it was his **[*90]** decision whether to testify in any portion of the trial. In his right to counsel advisement, Appellant initialed he understood the importance of discussing questions, issues, and concerns with trial defense counsel and that he should not enter the courtroom with "unresolved concerns [or] questions." Trial defense counsel encouraged Appellant to raise "any questions or concerns about trial preparation, trial strategy or trial decisions." Trial defense counsel advised Appellant not to testify, but emphasized it was his choice.

b. Analysis

The record in Appellant's case, to include the declarations, "compellingly demonstrate[s]" the improbability of Appellant's contention that he was inadequately advised on his right to testify and refutes his claim that he was inadequately represented. *Ginn, 47 M.J. at 248*. Thus, we can resolve the issue of the advice he received without ordering a fact-finding hearing. *Id.* ***HN21***[] The right to testify in one's own behalf is a choice that belongs exclusively to an appellant, not his lawyer. *See, e.g., United States v. Belizaire, 24 M.J. 183 (C.M.A. 1987)*. Both trial defense counsel stated they advised Appellant of this right, and Capt DC stated they advised Appellant of his right to testify selectively. Trial defense counsel's pretrial **[*91]** advisements support their declarations. Although these advisements did not specifically state that Appellant had the right to testify about some offenses and not others, it is reasonable to conclude trial defense counsel discussed this option while reviewing these documents with Appellant. We further find trial defense counsel made an informed and effective recommendation that Appellant not testify even if they were adamant he not do so.

Even if we were to credit Appellant's claims over the declarations of his trial defense counsel, we nonetheless find Appellant has failed to meet his burden to establish prejudice, *Captain, 75 M.J. at 103*, and so we reject Appellant's claims without regard to the assertions in his declaration. *Ginn, 47 M.J. at 248* ("[I]f the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on that basis."). We have considered the possibility that Appellant misunderstood the consequences of testifying about one topic, and not others. Had he chosen to testify about working on Amn HM's computer, the scope of cross-examination could have challenged Appellant with evidence he knowingly recorded **[*92]** KG's private area. The Government could have confronted Appellant with the 11 images of Amn HM disrobing and of her partially nude body that Appellant selectively viewed on his cell phone, which negated Appellant's claims he innocently came into possession of the recordings by working on her computer. The Government also could have confronted Appellant with the evidence of installation files that were the means by which the Government argued that Appellant gained remote access to and control over her computer. Accordingly, if Appellant limited his testimony on direct examination to working on Amn HM's computer, his testimony as a whole would not likely have been confined to a select topic.

We find that the purported failure to advise Appellant of his right to testify about the work he performed on Amn HM's computer, whether or not owing to a miscommunication about the consequences of that decision, did not constitute ineffective assistance of counsel. Appellant has not shown there was a reasonable probability that there would have been a different result assuming the performance of trial defense counsel fell measurably below the performance ordinarily expected of fallible lawyers. *Gooch, 69 M.J. at 362 (C.A.A.F. 2011)* **[*93]** . We therefore conclude that Appellant was not denied effective representation in the advice he received about testifying in findings.

3. Consequences Relating to Naturalization, Citizenship, and Deportation

a. Additional Background

Appellant submitted a declaration to this court stating he immigrated with his family to the United States from Russia in 1999 and became a naturalized citizen "on or about January 2017" on account of his military service. Appellant contends he was inadequately represented in sentencing because trial defense counsel failed to inform Appellant, introduce evidence, and argue to the panel during sentencing, that a punitive discharge could

result in Appellant's naturalization being revoked,[44] confinement of 180 days or more could prevent Appellant from reacquiring United States citizenship for at least five years,[45] and his conviction could result in deportation to Russia.[46]

In response to Appellant's claims, we ordered and received declarations from Appellant's trial defense counsel. Capt DC explained that the Defense advised Appellant of these potential consequences "multiple times prior to trial and again between his conviction and . . . sentencing." Trial defense **[*94]** counsel were concerned that highlighting the possibility that Appellant's legal status could change or that he could be deported depending on his conviction and sentence could work to Appellant's detriment. Trial defense counsel explained this was because of the Government's successful theory in findings that Appellant had replaced the hard drive in Amn HM's laptop with a Russian substitute and caused software icons to appear in a language she could not understand, thereby facilitating his making recordings of her without her knowledge or consent. Consequently, trial defense counsel decided against emphasizing the possible consequences his conviction and a particular sentence could have on his naturalization or that Appellant could be deported reasoning that doing so could convince the members to adjudge a harsh sentence "in order to guarantee" that very result. Instead, trial defense counsel argued a proposed sentence that included only three months confinement that "would likely allow" Appellant "to stay in the United States."

Both counsel declared they advised Appellant to talk in general terms about his immigration and naturalization in his unsworn statement. In a pretrial advisement **[*95]** memo completed a week before sentencing, Appellant initialed he understood his right of allocution in sentencing to include presenting an unsworn statement about himself. In addition to initialing that he understood the importance of discussing questions, issues, and concerns with trial defense counsel and that he should not enter the courtroom with "unresolved concerns [or] questions," as noted previously, Appellant indicated none of these things in the space provided to do so. Appellant also acknowledged that trial defense counsel discussed "sentencing strategy" with him and that his "attorney[s] and [Appellant had] discussed possible sentencing, including unsworn statements, witnesses and evidence." Trial defense counsel encouraged Appellant to raise "any questions or concerns about trial preparation, trial strategy or trial decisions."[47]

Appellant gave both a verbal and written unsworn statement that did not mention the possible consequences relating **[*96]** to naturalization, citizenship, or deportation. He relayed the hardships of living in Russia and the process of immigrating with his family. Appellant stated, "I became an American citizen in early 2016,"[48] and "I am currently in the process of denouncing my Russian citizenship."[49] Although he did not concede that a punitive discharge was appropriate, Appellant remarked, "Whether you decide to discharge me or not, I know my Air Force career is likely to come to an end," and "I know that my continued service will not be allowed."

b. Analysis

The record in Appellant's case, to include the declarations of his trial defense counsel and the memoranda that Appellant initialed and signed, compellingly demonstrates the improbability of Appellant's ineffective assistance of counsel allegation. *Ginn, 47 M.J. at 248*. Appellant was advised about his right to present information to the members in sentencing and was specifically advised and encouraged to discuss any concerns with trial defense counsel. We find it improbable that Appellant would have had even a lingering question about possible

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[44] Citizenship granted because of military service "may be revoked . . . if the person is separated from the Armed Forces under other than honorable conditions before the person has served honorably for a period or periods aggregating five years." *8 U.S.C. §§ 1439(f)*, *1440(c)*.

[45] *See 8 U.S.C. §§ 1101(f)(7)*, *1427(d)*.

[46] *See 8 U.S.C. § 1227(a)(2)(A)(ii)*.

[47] Appellant also initialed acknowledgement of the following: "*If you have any questions*,*issues, concerns at all, it is extremely important that you indicate what those are now and allow us to discuss them before trial starts. I don't want you to enter your trial with unresolved concerns/questions*."

[48] As noted, Appellant's declaration states he became a naturalized citizen "on or about January 2017," and not a year earlier; however, the discrepancy is not significant to our analysis.

[49] In Appellant's declaration he avers somewhat differently, "I could have talked [in the unsworn statement] about what would happen to me, as a former US service-member who *renounced* his Russian citizenship." (Emphasis added).

adverse consequences relating to naturalization, citizenship, and deportation as his case proceeded to trial—the type of **[*97]** question his counsel encouraged him to resolve by discussing the matter before trial. Appellant's declaration is conspicuously silent about when and how he became aware of these possible adverse consequences, and why he was not already aware of the five-year honorable service requirement having undergone naturalization proceedings specifically conditioned on honorable military service.[50] Consistent with their declarations, trial defense counsel argued for a sentence to avoid these possible consequences. Even if we were to assume the truth of Appellant's allegations, we nonetheless find trial defense counsel provided a sound tactical explanation for their advice to Appellant about his unsworn statement, their actions in preparing and presenting the defense sentencing case were reasonable, and their level of advocacy was within the performance ordinarily expected of fallible lawyers. *Gooch, 69 M.J. at 362*.

We also reject Appellant's claims because they amount to speculative and conclusory observations about the consequences of his conviction and sentence on his legal status. *Id.* ***HN22***[↑] Citizenship through expedited naturalization "may be revoked" if a servicemember has not served honorably in the Armed **[*98]** Forces for an aggregate of five years.[51] Appellant avers that if his citizenship were revoked then he would be deportable on grounds that he had been convicted of two or more offenses involving moral turpitude[52] and would be restricted from naturalizing anew after having served confinement for at least 180 days.[53]

We find that Appellant's claims—hinged on the statutory condition that his naturalization "may be revoked"—are not so certain as to be the "direct and proximate consequence" of his sentence that included a punitive discharge and greater than 179 days confinement, *see United States v. Talkington, 73 M.J. 212, 217 (C.A.A.F. 2014)* (emphasis added) (quoting *United States v. Griffin, 25 M.J. 423, 424 (C.M.A. 1988)*, as opposed to a direct and proximate consequence of the conviction, *see id. at 216-17* ("Collateral consequences" of a court-martial conviction are ordinarily not germane to determining an appropriate sentence because the collateral consequence "operates independently of the sentence adjudged."). At most, Appellant identifies the possibility of an adverse effect on his legal status, much less so a direct and proximate one.

Appellant claims the decision by the United States Supreme Court in *Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)*, requires a servicemember "be advised of adverse immigration consequences related to criminal charges and convictions." **[*99]** *Padilla* does not sweep so broadly and resolved different issues than the one at hand. Unlike *Padilla*, which involved deportation consequences of a plea of guilty and, therefore, waiver of a constitutional right, it is not obvious that Appellant's revocation of naturalization would be "presumptively mandatory," or "could easily be determined" from the statute;[54] and, unlike Padilla's defense attorney, trial defense counsel did not give Appellant false assurances about the effect of a trial decision on his legal status. *Id. at 369*. The United States Supreme Court observed that *deportation* of a non-citizen is "practically inevitable but for the possible exercise of limited remnants of equitable

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[50] *See 8 U.S.C. § 1440(a)*; *see also United States v. Moulton, 47 M.J. 227, 230 (C.A.A.F. 1997)* ("When factual information is central to an ineffectiveness claim, it is the responsibility of the defense to make every feasible effort to obtain that information and bring it to the attention of the appellate court.").

[51] *8 U.S.C. §§ 1439(f)*, *1440(c)*. Appellant entered active duty on 19 February 2013, and had completed four years and three months of service when the sentence was adjudged.

[52] *8 U.S.C. § 1227(a)(2)(A)(ii)* ("Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable."). Appellant, who was a naturalized citizen when he committed the offenses and was convicted, asserts he is subject to this provision without explaining its applicability to anyone other than an alien, i.e., a non-citizen of the United States.

[53] An applicant for citizenship must show good moral character during the five years preceding the filing of an application. *8 U.S.C. § 1427(d)*. A noncitizen is disqualified from showing good moral character if "confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more." *8 U.S.C. § 1101(f)(7)*.

[54] Although expedited citizenship granted to servicemembers "may be revoked in accordance with *section 1451* of this title," *see 8 U.S.C. §§ 1439(f)*, *1440(c)*, we note that the revocation statute, *8 U.S.C. § 1451*, makes no provision for grounds other than concealment of material evidence, refusal to testify, membership in certain organizations, and procuring citizenship unlawfully, none of which the facts in the record plainly implicate.

discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses." *Id. at 364*.

HN23[] In contrast to the practical inevitability of deportation of a non-citizen, petitions by the United States to revoke a citizen's naturalization, which are similarly cognizable under the *Immigration and Nationality Act, 8 U.S.C. § 1101 et seq.*, are nonetheless the subject of civil proceedings in federal district court. *See, e.g., United States v. Sommerfeld, 211 F.Supp 493 (E.D. Pa. 1962)*; *United States v. Tarantino, 122 F. Supp. 929 (E.D.N.Y. 1954)*. The Government bears the burden of proof in a revocation proceeding by clear, **[*100]** convincing, and unequivocal evidence. *See Kungys v. United States, 485 U.S. 759, 768, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988)* (citation omitted).

We conclude that the consequences to Appellant's naturalization, and ultimately citizenship, and possible deportation, if any, are not so obviously the direct and proximate consequence of Appellant's sentence that trial defense counsel were ineffective for failing to pursue an alternative strategy. Furthermore, we conclude that even if trial defense counsel—or Appellant in a sworn or unsworn statement—presented the members with the possible repercussions of a punitive discharge and greater than 179 days confinement to his legal status, in all probability trial counsel would have presented rebuttal evidence, or the military judge would have instructed the members, that such repercussions were at best uncertain.

Even if trial defense counsel's representation was ineffective as alleged by Appellant, and the possible consequences relating to naturalization, citizenship, and deportation were a direct and proximate consequence of the sentence, we would nonetheless afford Appellant no relief. We find no reasonable probability that presenting this information to the members would have produced a different, more favorable result for **[*101]** Appellant, *Gooch, 69 M.J. at 362*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland, 466 U.S. at 694*. On these facts we find that a strategy of emphasizing potential consequences relating to Appellant's legal status was not likely to have resulted in a sentence of both no punitive discharge and at least 66 fewer months of confinement. To the contrary, and as Appellant's trial defense counsel explain in their declarations, had the sentencing authority known of the possible consequences of Appellant's conviction and their sentencing options, a reasonable probability existed that the members would have adjudged a sentence Appellant sought to avoid.

Trial defense counsel's explanation of the defense sentencing strategy included reasonable considerations that we will not second-guess, *Mazza, 67 M.J. at 475*, and so we reject Appellant's claims without regard to the assertions in his declaration. *Ginn, 47 M.J. at 248* ("[I]f the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on that basis."). In our view, it is not reasonably probable Appellant would have avoided the possible consequences Appellant complains **[*102]** his counsel were ineffective for failing to elude.[55]

While Appellant's counsel may have chosen a different sentencing strategy, it does not mean that the strategy used at trial was objectively unreasonable. ***HN24***[] We evaluate trial defense counsel's performance not by the success of their strategy, but rather by whether the counsel made reasonable choices from the alternatives available at trial. *United States v. Dewrell, 55 M.J. 131, 136 (C.A.A.F. 2001)* (quoting *United States v. Hughes, 48 M.J. 700, 718 (A.F. Ct. Crim. App. 1998)*. We find that they did, and therefore conclude that Appellant was not denied effective representation in sentencing under applicable standards of review.

We further conclude from our review of all 16 allegations of ineffective assistance of counsel, the record, and all post-trial declarations that Appellant was neither deprived of a fair trial nor was the trial outcome unreliable. *See Strickland, 466 U.S. at 698*. Accordingly, we find Appellant's claims of ineffective assistance of counsel to be without merit.

H. Sentence Severity

Appellant claims his sentence that included confinement for six years and a dishonorable discharge was

[55] We would reach the same conclusion if the members had been informed of these possible consequences and adjudged a sentence that included a punitive discharge and greater than 179 days confinement. "Defense counsel do not perform deficiently when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so." *United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012)* (citing *Gooch, 69 M.J. at 362-63*) (additional citation omitted).

inappropriately severe. However, Appellant provides no factual basis for this claim and except for his argument that "Appellant may not have been an ideal airman, [but] he did not deserve a **[*103]** punitive discharge," his brief is a renewed attack on the findings and sentence recast as sentence severity and appropriateness.[56]

1. Additional Background

Testimony at trial revealed KG felt violated, embarrassed, and upset that Appellant posted images of her online, and was "crying" and "hysterical" when she talked about it with her boyfriend, SS. In her unsworn statement she described concern that the videos would be discovered by future employers or children.

Amn HM and Appellant worked and spent off-duty time together. She considered Appellant her wingman and best friend. She testified being "shell-shocked" learning that pictures of her disrobing and partially nude were found on Appellant's media. In her unsworn statement she described the effect Appellant's misconduct had on her personally, to include impact to her friendships, trust in others, sense of community, and work environment.

2. Law

HN25[] We review sentence appropriateness de novo. *United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006)*. We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we] find correct in law and fact and determine[ ], on the basis of the entire record, should be approved." *Article 66(c), UCMJ, 10 U.S.C. § 866(c)*. "We assess sentence **[*104]** appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009)* (per curiam) (citations omitted). While we have great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Nerad, 69 M.J. 138, 142-48 (C.A.A.F. 2010)*.

3. Analysis

We have given individualized consideration to Appellant, the nature and seriousness of his offenses, his record of service, and all other matters contained in the record of trial. The offenses of which Appellant was convicted resulted in his victims suffering direct emotional harm. Evidence at trial suggests that videos Appellant distributed of KG will remain accessible in the public domain.

Appellant faced a maximum term of confinement of 17 years. Trial counsel recommended a sentence of a dishonorable discharge, confinement for ten years, and total forfeiture of pay and allowances. The adjudged sentence included a dishonorable discharge and confinement for six years, which was substantially more severe than trial defense counsel's recommendation of three months confinement, total forfeitures, and reduction **[*105]** to the grade of E-1. Notwithstanding disparities in the recommendations of both counsel compared to the adjudged sentence, we find Appellant's approved sentence of a dishonorable discharge, confinement for six years, forfeiture of all pay and allowances, and reduction to the grade of E-1 is not inappropriately severe.

I. Error in the Staff Judge Advocate's Recommendation

We also reviewed an error in the staff judge advocate's recommendation (SJAR) that misstated the convening authority's power to take action and ordered the Government to show cause why the court should not remand the case for new post-trial processing.

1. Additional Background

The SJAR misadvised the convening authority: "[Y]ou do not have the authority to disapprove, commute or suspend in whole or in part the confinement or punitive discharge" and recommended the sentence be approved as adjudged. In his clemency submission, Appellant requested the convening authority "reinstate my rank, upgrade my current discharge to a Bad Conduct Discharge, and do whatever is in your power to

[56] Appellant's counsel (1) argues "[a]ny sentence is too harsh . . . because [Appellant] should not be convicted of anything;" (2) claims trial defense counsel failed to provide justification for the members to adjudge the Defense's recommended sentence; (3) reasserts that trial defense counsel's failure to argue the consequence of a particular sentence on naturalization, citizenship, and deportation was prejudicial error; and (4) reminds us of our authority to reassess a sentence or remand for a rehearing.

reduce my excessive 6 year sentence in any way possible." Trial defense counsel requested the convening authority "review [Appellant's] attached **[*106]** clemency request and grant the requested relief." In the addendum to the SJAR the SJA advised the convening authority that his previous recommendation to approve the adjudged findings and sentence remained unchanged.

2. Law

HN26[] We review de novo alleged errors in post-trial processing. *See* *United States v. Kho, 54 M.J. 63, 65 (C.A.A.F. 2000)* (citation omitted); *United States v. Sheffield, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004)*. Although the threshold for establishing prejudice in this context is low, the appellant must nonetheless make at least "some colorable showing of possible prejudice." *United States v. Scalo, 60 M.J. 435, 436-37 (C.A.A.F. 2005)* (quoting *Kho, 54 M.J. at 65*).

HN27[] The National Defense Authorization Act (NDAA) for Fiscal Year 2014 (FY14) modified *Article 60, UCMJ, 10 U.S.C. § 860*, and limited the convening authority's ability to affect an adjudged sentence of confinement for more than six months or a sentence of dismissal, dishonorable discharge, or bad-conduct discharge. *Pub. L. No. 113-66, § 1702, 127 Stat. 672, 954-58 (2013)*; *see* *Article 60(c)(4)(A), UCMJ, 10 U.S.C. § 860(c)(4)(A) (2014)*. The effective date of the change was 24 June 2014. *Pub. L. No. 113-66, § 1702, 127 Stat. at 958*. The NDAA for Fiscal Year 2015 clarified that, where a court-martial includes a conviction for an offense committed before 24 June 2014 and an offense committed on or after 24 June 2014, the convening authority has the same clemency power under **[*107]** *Article 60, UCMJ*, as was available before 24 June 2014, except with respect to a mandatory minimum sentence under *Article 56(b), UCMJ, 10 U.S.C. § 856(b)*. Pub. L. No. 113-291, § 531, 128 Stat. 3292, 3365 (2014).

3. Analysis

The SJA misadvised the convening authority and this was error. Appellant was found guilty of the wrongful and knowing recording of the private area of KG between on or about 1 December 2013 and on or about 31 July 2014. Appellant was convicted of an offense committed before 24 June 2014, and thus the FY14 NDAA changes to *Article 60, UCMJ*, did not operate to limit the convening authority in Appellant's case as the SJA advised that it did.[57] *See* *United States v. Rogers, 76 M.J. 621, 626 (A.F. Ct. Crim. App. 2017)* ("We will not conduct a post-trial dive below the charged dates to attempt to determine with certitude when an offense occurred for *Article 60, UCMJ*, purposes."). The convening authority had the authority to dismiss any charge or specification by setting aside a finding of guilty. The convening authority also had the authority to disapprove a sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature so long as the severity of the punishment was not increased.[58]

The SJAR was incorrect in that the convening authority had plenary authority to disapprove, commute, or suspend in whole or in part the adjudged sentence. This error is not addressed in the clemency submission or addendum to the SJAR. Yet, finding error does not end our inquiry, as Appellant must demonstrate a colorable showing of possible prejudice in order to prevail on this issue. *Scalo, 60 M.J. at 436-37*. ***HN28***[] Whether an appellant was prejudiced by a mistake in the SJAR generally requires a court to consider whether the convening authority "plausibly may have taken action more favorable to" the appellant had he or she been provided accurate or more complete information. *United States v. Johnson, 26 M.J. 686, 689 (A.C.M.R. 1988)*, *aff'd*, *28 M.J. 452 (C.M.A. 1989)* (mem.); *see also* *United States v. Green, 44 M.J. 93, 95 (C.A.A.F. 1996)*.

We find Appellant has not met his burden of establishing prejudice. Responding to a show-cause order of this court, the Government submitted a declaration from the SJA who conceded the advice he gave to the convening authority was incorrect because he "did not inform the [convening authority] of his full power to grant clemency under *Article 60, UCMJ*." However, the SJA asserted that even with the convening authority's broader discretion, he still would have advised the convening authority "to deny [Appellant]'s clemency **[*109]** request and approve the sentence as adjudged." The convening authority also submitted a declaration noting that he would not have provided Appellant with relief on the adjudged sentence even if he had "been properly advised of the options available" during clemency.

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[57] Furthermore, a punitive discharge was not a mandatory minimum sentence. *MCM*, pt. IV, ¶ 45c.e.(2) and (3).

[58] This reflects the language of R.C.M. 1107(d)(1) in effect prior to 24 June 2014, and as it appeared in the *Manual for Courts-Martial, United States* ***[*108]*** (2012 ed.).

Relying on these declarations, we find it was not plausible that the convening authority may have taken action more favorable to Appellant had the SJA provided accurate information to the convening authority about his full power to grant clemency. *Johnson, 26 M.J. at 689*. As Appellant is unable to demonstrate a colorable showing of possible prejudice, we find he cannot prevail on this issue. *Scalo, 60 M.J. at 436-37*.[59]

J. Timeliness of Appellate Review

HN29[↑] We review de novo whether an appellant has been denied the due process right to a speedy post-trial review and appeal. *United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)* (citations omitted). A presumption of unreasonable delay arises when appellate review is not completed and a decision is not rendered within 18 months of the case being docketed. *Id. at 142*. When a case is not completed within 18 months, such a delay is presumptively unreasonable and triggers an analysis of the four factors laid out in *Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)*: "(1) the length of the delay; (2) the reasons for the delay; **[*110]** (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Moreno, 63 M.J. at 135* (citations omitted).

Appellant's case was originally docketed with the court on 15 September 2017. The delay in rendering this decision by 15 March 2019 is presumptively unreasonable. However, we determine no violation of Appellant's right to due process and a speedy post-trial review and appeal.

Analyzing the *Barker* factors, we find the length of the delay—three months—is not excessively long. The reasons for the delay include the time required for Appellant to file his brief on 10 September 2018 and the Government to file its answer on 20 November 2018. Along with Appellant's reply on 14 December 2018, Appellant submitted a declaration identifying six additional allegations of ineffective assistance of counsel, which the Government answered on 15 March 2019, and Appellant replied on 22 March 2019. On 17 January 2019, after all pleadings were filed, the court ordered the Government to show good cause why the court should not set aside the action of the convening authority and direct new post-trial processing, which the Government answered on 19 February 2019.

The court affirms the findings and **[*111]** sentence in this case. We recognize that Appellant began serving his six years of confinement on 19 May 2017; however, Appellant has not asserted his right to speedy appellate review or pointed to any particular prejudice resulting from the presumptively unreasonable delay for the court to complete appellate review of his case, and we find none.

Finding no *Barker* prejudice, we also find the delay is not so egregious that it adversely affects the public's perception of the fairness and integrity of the military justice system. As a result, there is no due process violation. *See United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006)*. In addition, we determine that Appellant is not due relief even in the absence of a due process violation. *See United States v. Tardif, 57 M.J. 219, 223-24 (C.A.A.F. 2002)*. Applying the factors articulated in *United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015)*, *aff'd*, *75 M.J. 264 (C.A.A.F. 2016)*, we find the delay in appellate review justified and relief for Appellant unwarranted

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. *Articles 59(a)* and *66(c), UCMJ*, *10 U.S.C. §§ 859(a)*, *866(c)*.

Accordingly, the findings and the sentence are **AFFIRMED**.

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[59] We similarly reject Appellant's claim raised pursuant to *Grostefon* that his trial defense counsel were ineffective for failing to inform Appellant he could request the convening authority reduce his sentence by five and a half years or more, and disapprove the dishonorable discharge "to avoid consequences relating to Appellant's naturalization, citizenship, and deportation." We find the counsel who advised Appellant in clemency proceedings was not ineffective because Appellant has not shown that there was a reasonable probability that there would have been a different result assuming counsel's advice had been deficient, *see Gooch, 69 M.J. at 362*, and thus, Appellant's claim does not require further discussion or warrant relief. *See Matias, 25 M.J. at 361*.

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1. *United States v. Lewis, 2020 CCA LEXIS 269*

Client/Matter: -None-
Search Terms: United States v. Lewis, 2020 CCA LEXIS 269
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	-None-

United States v. Lewis

United States Navy-Marine Corps Court of Criminal Appeals

August 17, 2020, Decided

No. 201900048

Reporter
2020 CCA LEXIS 269 *; 2020 WL 4745289

UNITED STATES, Appellee v. Maurice J. LEWIS, Sergeant (E-5), U.S. Marine Corps, Appellant

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF APPELLATE PROCEDURE 30.2.

Subsequent History: Motion granted by *United States v. Lewis, 80 M.J. 460, 2020 CAAF LEXIS 665, 2020 WL 8172700 (C.A.A.F., Dec. 1, 2020)*

Motion granted by *United States v. Lewis, 80 M.J. 474, 2020 CAAF LEXIS 705, 2020 WL 8182669 (C.A.A.F., Dec. 22, 2020)*

Review denied by *United States v. Lewis, 2021 CAAF LEXIS 387 (C.A.A.F., Mar. 4, 2021)*

Prior History: [*1] Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judges: John L. Ferriter (arraignment), Jeffrey V. Munoz (trial). Sentence adjudged 12 October 2018 by a general court-martial convened at Marine Corps Air Station Yuma, Arizona, consisting of officer and enlisted members. Sentence approved by the convening authority: dishonorable discharge.

Core Terms

sexual act, specification, offensive touching, bodily harm, disclose, beyond a reasonable doubt, factual sufficiency, sexual partner, transmission, convinced, assault, asleep, mouth, penis, sex, barracks, bathroom, inform, shower, sexual assault, consummated, convicted, engaging, alcohol, battery, viewing, informed consent, private area, sexual activity, shower curtain

Case Summary

Overview

HOLDINGS: [1]-Appellant's conduct satisfied both elements of UCMJ art. 128(b)(2), *10 U.S.C.S. § 928(b)(2)*, because however low the risk of HIV transmission may have been, appellant was diagnosed with HIV prior to the act, was advised to inform prospective sexual partners of his HIV status, and failed to so inform the victim prior to engaging in unprotected oral sex and thus, his conduct was an offensive touching of another, however slight, to which the victim did not provide meaningful informed consent; [2]-Evidence was legally and factually sufficient to sustain appellant's conviction for indecent viewing, UCMJ art. 120c(a)(1), *10 U.S.C.S. § 920c(a)(1)*, where he entered the victim's barracks room uninvited then opened the shower curtain and viewed the victim naked, as the victim had a reasonable expectation of privacy in his own shower, which was located inside his private residence.

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

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN1 **Trial Procedures, Burdens of Proof**

A military court of criminal appeals reviews whether the evidence is legally and factually sufficient to support a conviction de novo. Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*. To determine legal sufficiency, the court asks whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt. In conducting this analysis, the court must draw every reasonable inference from the evidence of record in favor of the prosecution.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN2 **Trial Procedures, Burdens of Proof**

In evaluating factual sufficiency, a military court of criminal appeals determines whether, after weighing the evidence in the record of trial and making allowances for not having observed the witnesses, the court is convinced of the appellant's guilt beyond a reasonable doubt. In conducting this unique appellate function, the court takes a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt. Proof beyond a reasonable doubt, however, does not mean the evidence must be free from conflict.

Military & Veterans Law > Military Offenses > Assault

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

HN3 **Military Offenses, Assault**

In order to prove the offense of assault consummated by a battery, the Government is required to prove that (1) the accused did bodily harm to the victim; and (2) the bodily harm was done with unlawful force or violence. Unif. Code Mil. Justice art. 128(b)(2), *10 U.S.C.S. § 928(b)(2)*. "Bodily harm" is defined to mean any offensive touching of another, however slight. Manual Courts-Martial pt. IV, para. 54.c.(1)(a) (2016).

Military & Veterans Law > Military Justice > Defenses

HN4 **Military Justice, Defenses**

"Consent" is defined as a freely given agreement to the conduct at issue by a competent person. Manual Courts-Martial pt. IV, para. 45.a.(g)(8)(A).

Military & Veterans Law > Military Offenses > Assault

HN5 **Military Offenses, Assault**

The United States Court of Appeals for the Armed Forces has held that failure to disclose one's human immunodeficiency virus (HIV)-positive status before engaging in sexual activity constitutes an offensive touching.

HN6 Under the principle of vertical stare decisis, courts must strictly follow the decisions handed down by higher courts.

Labor & Employment Law > Discrimination > Disparate Treatment > Family Status Discrimination

HN7 **Disparate Treatment, Family Status Discrimination**

Without disclosure of human immunodeficiency virus (HIV) status, there cannot be true consent.

Criminal Law & Procedure > Defenses > Consent

Military & Veterans Law > Military

Offenses > Assault

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Military & Veterans Law > Military Offenses > Sodomy

Military & Veterans Law > Military Justice > Defenses

HN8 **Defenses, Consent**

"Bodily harm" in the context of Unif. Code Mil. Justice (UCMJ) art. 120, 10 U.S.C.S. § 920, means any offensive touching of another, however slight, including any nonconsensual sexual act. UCMJ art. 120(g)(3). "Consent" is defined as a freely given agreement to the conduct at issue by a competent person. UCMJ art. 120(g)(8)(A). Lack of consent may be inferred based on the circumstances of the offense. UCMJ art. 120(g)(8)(C).

Criminal Law & Procedure > Trials > Verdicts > Inconsistent Verdicts

HN9 **Verdicts, Inconsistent Verdicts**

Even if a genuine inconsistency in a verdict exists, it would provide no relief. In part because inconsistent verdicts may be the result of lenity, and the fact that the Government is unable to invoke review, inconsistent verdicts are not generally reviewable. Inconsistent verdicts prevent the identification of any issue of ultimate fact, and thus deprive acquittals of any preclusive effect.

HN10 So long as the evidence supports one of the potential theories of liability beyond a reasonable doubt, a conviction will stand, even where the panel itself may not agree on a single means of commission.

Criminal Law & Procedure > Defenses > Consent

HN11 **Defenses, Consent**

It is the failure to inform a victim of the human immunodeficiency virus (HIV)-positive status that vitiates meaningful consent and causes the touching to be offensive.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > Military Offenses

HN12 **Trial Procedures, Burdens of Proof**

In order to prove the act of unlawfully viewing a private area of another, the Government is required to prove that appellant (1) knowingly and wrongfully viewed the private area of the other person, (2) that such viewing occurred without the consent of that other person, and (3) under circumstances in which the other person had a reasonable expectation of privacy. Unif. Code Mil. Justice (UCMJ) art. 120c(a)(1), 10 U.S.C.S. § 920c(a)(1). "Private area" is defined as including the naked or underwear-clad genitalia, anus, and buttocks. UCMJ art. 120c(d)(2). A "reasonable expectation of privacy" means under circumstances in which a reasonable person would believe that a private area of the person would not be visible to the public. UCMJ art. 120c(d)(3)(B).

Counsel: For Appellant: Lieutenant Commander William L. Geraty, JAGC, USN.

For Appellee: Major Kyle D. Meeder, USMC; Lieutenant Kimberly Rios, JAGC, USN.

Judges: Before GASTON, STEWART, and BAKER Appellate Military Judges. Judge BAKER delivered the opinion of the Court, in which Senior. Judge GASTON and Judge STEWART joined.

Opinion by: BAKER

Opinion

BAKER, Judge:

Appellant was convicted, contrary to his pleas, of three specifications of failure to obey a lawful order or regulation for fraternization and wrongfully providing alcohol to a person under the age of 21, one specification of sexual assault by causing bodily harm, one specification of indecent viewing, and one specification of assault consummated by a battery in violation of Articles 92, 120, 120c, and 128, Uniform

Code of Military Justice [UCMJ], *10 U.S.C. §§ 892*, *920*, *920c*, *928 (2012)*.[1] He asserts that the evidence is legally **[*2]** and factually insufficient to support his convictions for assault consummated by a battery, sexual assault, and indecent viewing.

We find no prejudicial error and affirm.

I. Background

Appellant worked with the victim, Corporal [Cpl] "Harris,"[2] from at least November 2015 through the summer of 2016. At the time they met, Cpl Harris was a Lance Corporal and Appellant was a Sergeant.[3] While working professionally with Cpl Harris, Appellant socialized with him at noncommand events and invited Cpl Harris to meet up with him off-duty, including to consume alcohol together.

In November 2015 Cpl Harris, who was then underage, asked Appellant to purchase alcohol for him.[4] After purchasing and providing the alcohol to Cpl Harris, Appellant joined Cpl Harris and others in a barracks room where Marines were playing a videogame. Cpl Harris became tired and went back to his barracks room to take a shower. As he typically did, he left the door to his room bolted open so that friends could come and go from the room. He had no plans to see Appellant again that night and did not invite Appellant to come to his room.

While Cpl Harris was taking a shower, Appellant entered his room. Appellant then **[*3]** entered the bathroom and began pulling open the shower curtain, startling Cpl Harris, who stopped the curtain from being opened fully. Appellant asked permission to join Cpl Harris in the shower. Cpl Harris testified he could see Appellant's body, and that from where Appellant was positioned it was possible for Appellant to see Cpl Harris's naked body, including his buttocks. He asked Appellant to leave, and Appellant left the bathroom.

During March 2016, Appellant was diagnosed with human immunodeficiency virus [HIV]. He responded well to treatment, and by mid-May Appellant's viral load tested at an undetectable level (albeit not zero). Near in time to his diagnosis, he was informed by medical personnel that prior to engaging in any sexual acts, he was required to verbally advise any prospective sexual partner that he was HIV-positive. Covered sexual acts would include acts involving Appellant's mouth and a bare penis. He was also presented with a document entitled, "HIV Evaluation Treatment Unit Counseling Statement."[5] Because of Appellant's HIV-positive status, this document advised him, in pertinent part, that

> prior to engaging in sexual activity in which my bodily fluids may be transmitted **[*4]** to another person, I must verbally advise any prospective sexual partner that I am HIV positive and that there is a risk of infection. If my partner consents to sexual relations, I shall not engage in sexual activities without the use of a condom.[6]

Thus, regardless of how low his viral load was, Appellant was advised he must inform prospective sexual partners of his HIV status prior to engaging in a sex act. While oral sex is a covered sex act, it is generally considered a low-risk sexual activity for transmission of HIV, largely because HIV is not found in saliva; however, if there is a lesion or other manner whereby blood could be introduced into saliva, then there would be a risk of conveying the virus to an uninfected sexual partner.

In late-May or early-June 2016, Cpl Harris and Appellant were at a party together at an off-base residence where they had been drinking alcohol late into the night. Cpl Harris fell asleep on a couch; Appellant was next to him while he fell asleep. When Cpl Harris fell asleep, he had his jeans on. He awoke to find his jeans had been pulled down and were around his ankles, and Appellant's head was between his legs and his penis was in Appellant's mouth. **[*5]** Cpl Harris reported yelling, "Get off. What are you doing?"[7] Appellant ceased, and Cpl Harris got up, pulled up his pants, and left the residence.

In August 2016, Cpl Harris made a restricted report regarding the incident; he conveyed that he made the report not to involve law enforcement but in an effort to seek help, such as the opportunity to see a counselor. However, he had also disclosed the information to a

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[1] Appellant was acquitted of an additional specification charging him with unlawfully committing a sexual act when he knew or reasonably should have known the victim was asleep, in violation of *Article 120*, UCMJ, *10 U.S.C. § 920 (2012)*.

[2] The names used in this opinion are pseudonyms.

[3] Cpl Harris has since separated from the Marine Corps.

[4] Cpl Harris turned 21 in July 2016. R at 546.

[5] Pros. Ex. 12.

[6] *Id.*

[7] R. at 561.

friend; that friend, in turn, conveyed Cpl Harris's allegations to the Naval Criminal Investigative Service [NCIS], which opened an investigation. When interrogated by NCIS, Appellant denied any consensual sexual activity with Cpl Harris. At trial, Cpl Harris testified that he did not consent to Appellant placing his penis in Appellant's mouth; that he did not allow Appellant to do it; that he would not have consented; and that there was no amount of alcohol that would have made him consent to allowing Appellant to perform oral sex on him. Cpl Harris testified that he was first informed of Appellant's HIV status by his Victims' Legal Counsel after the investigation into Appellant's actions began. Cpl Harris added that had he known Appellant was positive for HIV, that would have **[*6]** made his denial of consent "absolute."[8]

II. Discussion

Appellant asserts the evidence is legally and factually insufficient to support three of his convictions. ***HN1***[] We review such questions de novo. *UCMJ art. 66(c)*; *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*. To determine legal sufficiency, we ask whether, "considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner, 25 M.J. 324, 324-25 (C.M.A. 1987)* (citing *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*). In conducting this analysis, we must "draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Gutierrez, 74 M.J. 61, 65 (C.A.A.F. 2015)*.

HN2[] In evaluating factual sufficiency, we determine whether, after weighing the evidence in the record of trial and making allowances for not having observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. *Turner, 25 M.J. at 325 (C.M.A. 1987)*. In conducting this unique appellate function, 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*. Proof beyond a "[r]easonable doubt, however, does not mean the evidence must **[*7]** be free from conflict." *United States v. Rankin, 63 M.J. 552, 557* (N-M. Ct. Crim. App. 2006).

A. Legal and Factual Sufficiency of Assault Consummated by a Battery

In the Specification of Charge IV, Appellant was convicted of assault consummated by a battery. ***HN3***[] In order to prove this offense, the Government was required to prove that (1) Appellant did bodily harm to Cpl Harris; and (2) the bodily harm was done with unlawful force or violence. *See UCMJ art. 128(b)(2)*. "Bodily harm" is defined by the *Manual for Courts-Martial, United States* (2016 ed.) [*MCM*] to mean "any offensive touching of another, however slight." *MCM*, pt. IV, ¶ 54.c.(1)(a). As charged, the bodily harm alleged in the second element is Appellant's touching of Cpl Harris's penis with his mouth while knowingly being HIV-positive, without disclosing such status to Cpl Harris.

Appellant argues his failure to disclose his HIV status does not prove that a nonconsensual sexual act or an assault consummated by a battery occurred. His argument centers on the fact that his viral load had dropped to an undetectable level, as demonstrated by a test conducted on 13 May 2016, just prior to committing the sexual act upon Cpl Harris.

HN4[] "Consent" is defined as "a freely given agreement **[*8]** to the conduct at issue by a competent person." *United States v. Forbes, 78 M.J. 279, 281 (C.A.A.F. 2019)* (quoting *MCM*, pt. IV, ¶ 45.a.(g)(8)(A)). In *Gutierrez*, the appellant failed to disclose his HIV-positive status to sexual partners and was convicted of aggravated assault. *74 M.J. at 64-67*. The Court of Appeals for the Armed Forces [CAAF] reversed his conviction for aggravated assault, concluding the appellant's conduct was not likely to cause death or grievous bodily harm where the risk of HIV transmission was estimated to be a 1-in-500 occurrence for unprotected vaginal sex and "almost zero" for unprotected oral sex. *Id. at 66-67*. However, the court determined that Gutierrez was guilty of the lesser included offense of assault consummated by a battery, because by failing to disclose his HIV status, "Appellant's conduct included an offensive touching to which his sexual partner[ ] did not provide meaningful informed consent." *Id. at 68* (citing *R. v. Cuerrier*, [1998] 2 S.C.R. 371, 372 (Can.) ("Without disclosure of HIV status there cannot be true consent.")).

CAAF subsequently extended this reasoning to support

[8] R. at 565.

a conviction for sexual assault by a nonconsensual sexual act, stating ***HN5***[] it has "long held . . . that failure to disclose one's HIV-positive status before engaging **[*9]** in sexual activity constitutes an offensive touching. . . ." *Forbes, 78 M.J. at 281* (citing *United States v. Joseph, 37 M.J. 392, 395 (C.M.A. 1993))* (concluding consistent with *Article 120(b)(1)(B)*, UCMJ, that the appellant committed a sexual assault each time he had sexual intercourse with one of the victims without first informing her of his HIV status and thereby lawfully obtaining her consent to the intercourse).

Appellant learned that he was HIV-positive in March 2016. By the middle of May 2016, his viral load was undetectable. Subsequently, between late-May and early-June of that same year, Appellant placed Cpl Harris's penis in his mouth without first advising him of his HIV status. Thus, it is uncontested that Appellant knew he was diagnosed HIV-positive prior to the occurrence of the sexual act in question and failed to disclose his HIV status to Cpl Harris prior to engaging in that sexual act. He was charged with a violation of *Article 128*, UCMJ, for an offensive touching in that he did not disclose his HIV status to Cpl Harris prior to engaging in the sexual act, which per *Gutierrez* and *Forbes* constitutes an offensive touching.

Appellant invites us to consider the likelihood of transmission of HIV as an additional element to the charged misconduct. **[*10]** We decline this invitation, which would require us to depart from binding precedent by our superior court. *See United States v. Andrews, 77 M.J. 393, 399 (C.A.A.F. 2018)* (quoting *United States v. Quick, 74 M.J. 332, 343 (C.A.A.F. 2015))* (stating ***HN6***[] the well-settled principle of vertical *stare decisis* that "courts 'must strictly follow the decisions handed down by higher courts'"). While we recognize that the improvement of treatment regimens over the years has steadily lowered the risk of transmission for those who are HIV-positive, it is the prerogative of our superior court, not this one, to determine whether this presents a "significant change in circumstances" warranting a departure from its prior precedents. *See Andrews, 77 M.J. at 399*; *United States v. Davis, 76 M.J. 224, 228 n.2 (C.A.A.F. 2017)* ("It is this Court's prerogative to overrule its own decisions.").

Nor do we find this case distinguishable from *Gutierrez*. In making his argument, Appellant cites to *R. v. Cuerrier*, a decision of the Supreme Court of Canada (which in turn was cited by CAAF in *Gutierrez*), wherein the court stated:

> Without disclosure of HIV status there cannot be a true consent. The consent cannot simply be to have sexual intercourse. Rather, it must be consent to have intercourse with a partner who is HIV-positive. *The extent of the duty to disclose will increase with the risks attendant upon the act* ***[*11]*** *of intercourse*. The failure to disclose HIV-positive status can lead to a devastating illness with fatal consequences and, in those circumstances, there exists a positive duty to disclose.

Cuerrier, 2 S.C.R. at 371 (emphasis added). Appellant argues that if there is no risk of transmission (due to both an undetectable viral load and a sexual act with virtually no risk of transmission), then there is no lack of meaningful informed consent. However, in *Gutierrez*, as here, the charges encompassed unprotected oral sex, for which, as here, the risk of HIV transmission was determined to be "almost zero." *Gutierrez, 74 M.J. at 64*. Despite the virtually zero risk of transmission, our superior court plainly held that this conduct constituted "an offensive touching to which [Gutierrez's] sexual partners did not provide meaningful informed consent," and affirmed his conviction for assault consummated by a battery. *Id. at 68*.

Thus, we echo the conclusion of the Supreme Court of Canada, that ***HN7***[] without disclosure of HIV status, there cannot be true consent. Following the binding holding of *Gutierrez*, we conclude that however low the risk of HIV transmission may have been, Appellant was diagnosed with HIV prior to the act, was advised **[*12]** to inform prospective sexual partners of his HIV status, and failed to so inform Cpl Harris prior to engaging in unprotected oral sex; thus, his conduct was "an offensive touching of another, however slight . . . to which [Cpl Harris] did not provide meaningful informed consent." *Gutierrez, 74 M.J. at 68*. Appellant's conduct therefore satisfies both elements of *Article 128 (b)(2)*, UCMJ.

Considering the evidence in a light most favorable to the Prosecution, we conclude that a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt. The evidence is thus legally sufficient to support the conviction. Regarding factual sufficiency, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt.

B. Legal and Factual Sufficiency of Sexual Assault

by Bodily Harm

In Specification 1 of Charge II, Appellant was convicted of committing a sexual act upon Cpl Harris by causing penetration of Appellant's mouth with Cpl Harris's penis without his consent. In order to prove this offense, the Government was required to prove that (1) Appellant caused penetration of his **[*13]** mouth with Cpl Harris's penis; and (2) Appellant did so by causing bodily harm to Cpl Harris. *UCMJ art. 120(b)(1)(B)*.

HN8[] "Bodily harm" in the context of *Article 120*, UCMJ, means "any offensive touching of another, however slight, including any nonconsensual sexual act." *UCMJ art. 120(g)(3)*. Consent is defined as "a freely given agreement to the conduct at issue by a competent person." *UCMJ art. 120(g)(8)(A)*. "Lack of consent may be inferred based on the circumstances of the offense." *UCMJ art. 120(g)(8)(C)*.

Appellant challenges the legal and factual sufficiency of his conviction, arguing that the only evidence presented at trial to prove a lack of consent was the testimony of Cpl Harris. Cpl Harris testified he had fallen asleep on a couch after a house party, and awoke to find his penis in Appellant's mouth. He exclaimed, "Get off. What are you doing?"[9] A few months later, he filed a restricted report. Cpl Harris made clear that he did not consent to the sex act in question, and that he found the nonconsensual act to be an offensive touching. He added that had he known Appellant was positive for HIV, that would have made his denial of consent "absolute."[10]

Appellant argues that because the **[*14]** members specifically acquitted him of committing this sexual act when he knew or reasonably should have known Cpl Harris was asleep, they "rejected [Cpl Harris's] factual narrative of the sexual encounter . . . ."[11] If this factual narrative was rejected, Appellant suggests, the Government is left with only an "*ex post facto*" argument that Cpl Harris did not consent to the sexual act at issue.[12] However, Appellant's acquittal of the other specification does not necessarily imply that the members rejected a narrative that Cpl Harris was *in fact* asleep at the time of the sexual act. That specification required that the Government demonstrate Appellant *knew or reasonably should have known* that Appellant was asleep at the time of the act. Thus, it is possible that the members believed Cpl Harris was asleep at the time of the sexual act, but were not convinced beyond a reasonable doubt that Appellant knew, or should have known, that this was the case. Accordingly, Appellant's acquittal of that specification is not necessarily inconsistent with his conviction on Specification 1 of Charge II.[13]

Regardless of any theory of liability based on Cpl Harris being asleep, the elements of sexual **[*15]** assault by causing bodily harm only require that we be convinced beyond a reasonable doubt that Cpl Harris did not consent to the sexual act at issue. At trial, the Government's theory of liability as to Specification 1 of Charge II included both a general lack of consent and a lack of informed consent, in that Appellant committed a sexual act upon Cpl Harris without informing him of his HIV status.[14] Of course, we do not know with precision on which lack-of-consent theory the members convicted, as the panel properly returned a general verdict without specifying the particular theory of liability on which the conviction was based. *See United States v. Brown, 65 M.J. 356, 359 (C.A.A.F. 2007)* (citation omitted). ***HN10***[] Nevertheless, so long as the evidence supports one of the potential theories of liability beyond a reasonable doubt, a conviction will stand, even where the panel itself may not agree on a single means of commission. *Id.* (citing *Schad v. Arizona, 501 U.S. 624, 631, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991)* (plurality opinion)).

Regardless of which theory the members may have used to convict, we are convinced beyond a reasonable doubt that Appellant committed the sexual act without Cpl Harris's consent. Cpl Harris gave compelling testimony that he woke up on the morning of the sexual act to find his jeans around **[*16]** his ankles, and his penis in Appellant's mouth. He immediately expressed his shock and left the premises. He later reported the incident as a sexual assault, and testified that following

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[9] R. at 561.

[10] R. at 565.

[11] App. Reply Br. at 2.

[12] *Id.* at 3.

[13] ***HN9***[] Even if a genuine inconsistency existed, it would provide no relief. *United States v. Powell, 469 U.S. 57, 63-68, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984)* (in part because inconsistent verdicts may be the result of lenity, and the fact that the Government is unable to invoke review, inconsistent verdicts are not generally reviewable); *see also United States v. Hutchins, 78 M.J. 437, 445 (C.A.A.F. 2019)* (inconsistent verdicts prevent the identification of any issue of ultimate fact, and thus deprive acquittals of any preclusive effect).

[14] R. at 974; App. Ex. XVII at 22.

the incident he began to abuse alcohol in an effort to cope with the experience. Given Cpl Harris' testimony, and the generally corroborative evidence presented at trial, we are convinced that the sexual act was nonconsensual. We are equally convinced that Appellant committed the sexual act without Cpl Harris's consent based on Appellant's failure to inform Cpl Harris of his HIV status prior to commission of the sexual act, after Appellant had been made aware that he was HIV-positive and was advised to inform prospective sexual partners of his HIV status. Thus, for the reasons discussed above, Appellant's commission of the sexual act was "an offensive touching to which [Cpl Harris] did not provide meaningful informed consent." *Gutierrez, 74 M.J. at 68*; *Forbes, 78 M.J. at 281* (***HN11***[↑] "[I]t is the failure to inform the victim[ ] of the HIV-positive status that vitiates meaningful consent and causes the touching to be offensive.") Appellant's conduct therefore satisfies each element of *Article 120(b)(1)(B)*, UCMJ.[15]

Considering the evidence in a light most favorable to the Prosecution, we conclude that a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt. The evidence is thus legally sufficient to support the conviction. Regarding factual sufficiency, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt.

C. Legal and Factual Sufficiency for Indecent Viewing

Appellant was convicted of indecent viewing of the private area of Cpl Harris without his consent while he was in his own shower. ***HN12***[↑] In order to prove the act of unlawfully viewing a private area of another, the Government was required to prove that Appellant (1) knowingly and wrongfully viewed the private area of Cpl Harris, (2) that such viewing occurred without the consent of Cpl Harris, and (3) under circumstances in which Cpl Harris had a reasonable expectation of privacy. *UCMJ art. 120c(a)(1)*. "Private area" is defined as including the "naked or underwear-clad genitalia, anus, [and] buttocks." *UCMJ art. 120c(d)(2)*. A "reasonable expectation of privacy" means under "circumstances **[*18]** in which a reasonable person would believe that a private area of the person would not be visible to the public." *UCMJ art. 120c(d)(3)(B)*.

Appellant challenges the legal and factual sufficiency of his conviction, arguing that the only evidence presented at trial by the Government to prove its case was the testimony of Cpl Harris. On the evening in question, Cpl Harris had departed the company of Appellant and others in order to return to his barracks room to shower. Cpl Harris's shower was inside his bathroom, which had a door, and the bathroom, in turn, was inside his barracks room. His barracks room was separated from the hallway by a door. Appellant entered Cpl Harris's barracks room uninvited, then entered the bathroom, and upon entering the bathroom, he acted to open the shower curtain, on the other side of which was Cpl Harris, who was then naked and showering. Appellant's actions of knowingly and wrongfully entering Cpl Harris's barrack's room, his bathroom, and then opening the shower curtain and viewing Cpl Harris all happened without the permission or consent of Cpl Harris.

Cpl Harris testified that when Appellant pulled back the shower curtain, he could see Appellant's body; **[*19]** that Appellant was in a position to see his (Cpl Harris') body, including his exposed private area (specifically, his naked buttocks); and that it was possible Appellant saw his buttocks. Cpl Harris did not invite Appellant to enter his barracks room, nor his bathroom, nor to pull

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[15] We have considered whether the mere possibility that the members convicted based on a "failure to inform" theory renders Specification 1 of Charge II multiplicious or unreasonably multiplied vis-à-vis the assault consummated by a battery specification under Charge IV. *See generally United States v. Quiroz, 55 M.J. 334 (C.A.A.F. 2001)* (explaining the distinct doctrines of multiplicity and unreasonable multiplication of charges). We conclude it does not. First, the Charge IV specification directly charged Appellant with failing to inform Mr. Harris of his HIV status and thus facially requires proof of an element that the other specification, charging Appellant with committing a nonconsensual sexual act, does not; hence, the specifications are not multiplicious. *See United States v. Armstrong, 77 M.J. 465, 469-70 (C.A.A.F. 2018)* (explaining two tests for assessing multiplicity, the first based both on the statutory elements, and the second based on the elements as charged). Second, we agree with the trial judge's conclusion that the *Quiroz* factors weigh against finding an *unreasonable* multiplication of charges in this instance, given our conclusion that the evidence supports a lack of consent for the sexual act that is distinctly separate from Appellant's non-disclosure of his HIV status. *See generally* ***(*17)*** *United States v. Rodriguez, 66 M.J. 201, 204 (C.A.A.F. 2008)* (explaining the "longstanding common law rule" on general verdicts that a verdict attaches to all theories charged); *Brown, 65 M.J. at 359* ("A factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence supports at least one of the means beyond a reasonable doubt.").

the shower curtain back and view his unclothed buttocks. We find that Appellant did so, and further find that Cpl Harris had a reasonable expectation of privacy in his own shower, which was located inside his own private residence. Consequently, the evidence in the record satisfies each element of *Article 120c(a)(1), UCMJ*.

Considering the evidence in a light most favorable to the Prosecution, we conclude that a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt. The evidence is thus legally sufficient to support the conviction. Regarding factual sufficiency, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt.

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the approved **[*20]** findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred. *UCMJ arts. 59*, *66*. The findings and sentence as approved by the convening authority are **AFFIRMED**.

Senior Judge GASTON and Judge STEWART concur.

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Document (1)

1. *United States v. Shea, 2015 CCA LEXIS 235*

Client/Matter: -None-
Search Terms: 2015 CCA LEXIS 235
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	-None-

United States v. Shea

United States Air Force Court of Criminal Appeals

June 4, 2015, Decided

ACM S32220

Reporter
2015 CCA LEXIS 235 *

UNITED STATES v. Staff Sergeant MICHAEL R. SHEA JR., United States Air Force

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.
NOT FOR PUBLICATION

Prior History: [*1] Sentence adjudged 13 December 2013 by SPCM convened at Luke Air Force Base, Arizona. Military Judge: Joseph S. Kiefer (sitting alone). Approved Sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of $500.00 dollars pay per month for 3 months, and reduction to E-1.

Core Terms

recording, viewing, sentence, Specification, indecent, private area, visual, circumstances, reasonable expectation of privacy, legal sufficiency, reassess, argues, camera, knowingly

Case Summary

Overview

HOLDINGS: [1]-Where a servicemember placed a digital video camera in a bathroom hoping to record a female airman while she changed her clothes and where the servicemember watched the video later, his conviction for indecent viewing in violation of Unif. Code Mil. Justice art. 120c(a)(1), *10 U.S.C.S. § 920c(a)(1)*, was dismissed, as the specification was legally insufficient; [2]-Congress intended to proscribe the knowing and wrongful viewing, by direct or indirect means, of the private area of another person, without that other person's consent during the existence of circumstances in which that other person had a reasonable expectation of privacy; [3]-As the servicemember did not watch the recording until later that evening, this was not under the existence of circumstances in which the other person had a reasonable expectation of privacy.

Outcome
The court dismissed a specification of the charge and reassessed the sentence. The approved findings and sentence were affirmed.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN1[] **Judicial Review, Courts of Criminal Appeals**

A military court of criminal appeals reviews issues of legal sufficiency de novo.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial

Review > Standards of Review

HN2[] Judicial Review, Courts of Criminal Appeals

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. In resolving questions of legal sufficiency, a military court of criminal appeals is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. The court's assessment of legal sufficiency is limited to the evidence admitted at trial.

Governments > Legislation > Interpretation

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN3[] Legislation, Interpretation

As in all statutory construction cases, a military court of criminal appeals begins with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.

Governments > Legislation > Interpretation

HN4[] Legislation, Interpretation

Whether the statutory language is ambiguous is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.

Military & Veterans Law > Military Offenses > General Overview

HN5[] Military & Veterans Law, Military Offenses

See Unif. Code Mil. Justice art. 120c(a), *10 U.S.C.S. § 920c(a)*.

Military & Veterans Law > Military Offenses > General Overview

HN6[] Military & Veterans Law, Military Offenses

Unif. Code Mil. Justice art. 120c(a), *10 U.S.C.S. § 920c(a)* proscribes knowingly and wrongfully viewing the private area of another person, without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy. Manual Courts-Martial pt. IV, para. 45c.a.a(1).

Governments > Legislation > Interpretation

Military & Veterans Law > Military Offenses > General Overview

HN7[] Legislation, Interpretation

Reading the language of Unif. Code Mil. Justice art. 120c(a)(1), *10 U.S.C.S. § 920c(a)(1)*, in the context of the remainder of Unif. Code Mil. Justice art. 120c, *10 U.S.C.S. § 920c*, the United States Air Force Court of Criminal Appeals finds that Congress intended to proscribe the knowing and wrongful viewing, by direct or indirect means, of the private area of another person, without that other person's consent during the existence of circumstances in which that other person has a reasonable expectation of privacy.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Sentences > General Overview

HN8[] Judicial Review, Courts of Criminal Appeals

A military court of criminal appeals has broad discretion when reassessing sentences. However, before reassessing a sentence, the court must be confident that, absent the error, the sentence would have been of at least a certain magnitude.

Counsel: For the Appellant: Major Nicholas D. Carter and Major Isaac C. Kennen.

For the United States: Major Daniel J. Breen; Captain Richard J. Schrider; and Gerald R. Bruce, Esquire.

Judges: Before ALLRED, HECKER, and TELLER, Appellate Military Judges.

Opinion by: TELLER

Opinion

OPINION OF THE COURT

TELLER, Judge:

The appellant was convicted, after mixed pleas, at a special court-martial composed of a military judge sitting alone, of two specifications of attempted indecent visual recording and one specification of indecent visual recording and indecent viewing, in violation of Articles 80 and 120c, UCMJ, *10 U.S.C. §§ 880*, *920c*. The court sentenced him to a bad-conduct discharge, 3 months of confinement, forfeiture of $500.00 pay per month for 3 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

The appellant argues that the conviction for indecent viewing should be reversed because the *Article 120c(a)(1), UCMJ*, proscription on knowingly **[*2]** and wrongfully viewing the private area of another does not criminalize viewing a recording of a person's private area. While we do not reach the issue of whether viewing such a recording can ever violate *Article 120c(a)(1), UCMJ*, we agree that the appellant's viewing of the recording did not violate the statute. Accordingly, we dismiss Specification 1 of Charge II and reassess the appellant's sentence below.

Background

On 19 August 2013, the appellant placed a small digital video camera in a bathroom of the squadron building, hoping to record a female Airman while she changed her clothes. The recording briefly showed the appellant setting up the camera, and then captured the female Airman as she changed from her uniform into physical fitness apparel. The images met the legal definition for a recording of the Airman's private area. At the time of the recording, the Airman had a reasonable expectation of privacy in the bathroom and she did not consent to being viewed or being recorded. While the appellant had no means of observing the recording as the victim was changing, he recovered the video camera and later watched the video on his wife's laptop computer.

In addition to the successful **[*3]** recording on 19 August, the appellant tried to record the same female Airman on two other occasions, in December 2012 and August 2013. During the final attempt, the victim spotted the camera and, due to her suspicions related to the previous incident, confronted the appellant via text message. The appellant denied involvement. After unsuccessfully trying to see what was on the camera, the victim turned it over to her first sergeant. An investigation ensued and after some initial denials, the appellant made a full confession.

The appellant pled guilty to one specification of attempted indecent visual recording for the incident where the victim seized the camera and one specification of making an indecent visual recording for the 19 August incident. He pled not guilty to, but was convicted of, attempted indecent visual recording for the December 2012 incident and indecent viewing of the 19 August recording.

Legal Sufficiency

The appellant argues that the conviction for indecent viewing is legally insufficient because that offense does not encompass the viewing of a recording of someone's private area.[1] ***HN1***[] We review issues of legal sufficiency de novo. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*.

HN2[] "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. Turner, 25 M.J. 324, 325 (C.M.A. 1987)*, *as quoted in* *United States v.*

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[1] Although the appellant phrases the issue **[*4]** presented as whether this court "should adopt the position taken by the United States Navy-Marine Corps Court of Criminal Appeals in *United States v. Quick, 74 M.J. 517 (N.M. Ct. Crim. App. 2014)"*, we note that the court resolved *Quick* on the basis of whether the specification in that case failed to state an offense. The specification in *Quick* used language that differed materially from Article 120c, UCMJ, *10 U.S.C. § 920c*. *Id. at 520*. Because the specification at issue here mirrors the statutory language exactly, we construe the appellant's argument as challenging the legal sufficiency of the evidence admitted at trial to prove a violation of the statute. The analysis section of the appellant's brief takes that approach.

Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002). "[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 admitted at trial. *United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)*.

Our analysis of the legal sufficiency of the evidence **[*5]** turns upon the meaning of the word "views" in *Article 120c, UCMJ,* which is a question of statutory construction.

> ***HN3***[] As in all statutory construction cases, we begin with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.

Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002), *as quoted in United States v. McPherson, 73 M.J. 393, 395 (C.A.A.F. 2014)*. ***HN4***[] "Whether the statutory language is ambiguous is determined 'by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *McPherson, 73 M.J. at 395* (quoting *Robinson v. Shell Oil Co., 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997)*.

HN5[] *Article 120c(a)*, UCMJ, reads:

> *Indecent Viewing, Visual Recording, or Broadcasting*. Any person subject to this chapter who, without legal justification or lawful authorization—
> (1) knowingly and wrongfully views the private area of another person, without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy;
>
> (2) knowingly photographs, videotapes, films, or records by any means the private area of another person, without that other person's consent **[*6]** and under circumstances in which that other person has a reasonable expectation of privacy; or
> (3) knowingly broadcasts or distributes any such recording that the person knew or reasonably should have known was made under the circumstances proscribed in paragraphs (1) and (2); is guilty of an offense under this section and shall be punished as a court-martial may direct.

Manual for Courts-Martial, United States (*MCM*), Part IV, ¶ 45c.a.(a) (2012 ed.).

Here, the parties argue two different meanings of the word "views" in *Article 120c(a)(1), UCMJ*. The appellant argues that viewing a person does not include viewing a recording (and presumably any indirect visual representation) of a person. The government argues a broader interpretation, that viewing includes viewing a recorded image of the person as well as viewing that person directly. Since both are plausible interpretations of the word "view" in the context of this statute, we find that the term is ambiguous and proceed to an examination of the overall statutory scheme to derive congressional intent.

The appellant, in support of his interpretation, adopts two lines of reasoning from the recent United States Navy-Marine Corps Court of Criminal Appeals decision **[*7]** in *United States v. Quick, 74 M.J. 517 (N.M. Ct. Crim. App. 2014)*. First, he argues the explicit proscription of making and broadcasting visual recordings suggests that the absence of any similar proscription of viewing a recording indicates congressional intent not to proscribe such conduct. *See id. at 520-21*. Second, without application to the facts of this case, the appellant quotes *Quick*'s discussion of the potential that any construction of *Article 120c, UCMJ*, that criminalizes viewing a visual recording would be so overbroad that it would render the statute constitutionally infirm. *See id. at 521*.

We are not convinced by the appellant's first argument. While its absence from *Article 120c(a)(3), UCMJ*, may indicate Congress intended to exclude viewing a recording from the reach of that section, it does not reasonably exclude the possibility Congress intended it to be covered by an earlier section of the same statute. Indeed, the government argues that Congress intended to prohibit all wrongful, nonconsensual viewing of a person's private area in *Subsection (1)*. If so, there would be no need to include a redundant proscription in *Subsection (3)*. We find both potential interpretations plausible. Accordingly, we must turn to other analytical tools to determine Congress' intent.

We are similarly **[*8]** unconvinced by the appellant's argument that we must interpret *Article 120c(a)(1), UCMJ*, to exclude viewing of a recorded image to avoid

giving the statute an unconstitutionally overbroad reach. Applying the statutory requirement of knowledge to both the consent and expectation of privacy elements would abate the concern raised in the *Quick* decision that the statute would criminalize "the mere viewing of a recording of indecent material." *Id. at 521*.

We are also unconvinced by the government's argument that Congress intended to criminalize the appellant's viewing of the recorded image no matter how far removed in time such viewing occurred from the underlying breach of privacy. ***HN6***[] The statute proscribes "knowingly and wrongfully view[ing] the private area of another person, without that other person's consent and *under circumstances in which that other person has a reasonable expectation of privacy." MCM*, Part IV, ¶ 45c.a.a(1) (emphasis added). We find it significant that the statute specifies the circumstances under which the viewing must occur.[2] In order to credit the government interpretation of the statute, we would not only have to interpret the term "view" to include direct and indirect viewing, but **[*9]** also read into the statute words that are not there. We would have to find, despite the lack of any such language, that Congress intended to say "under circumstances in which that other person has, *or at the time of the making of an image or recording had*, a reasonable expectation of privacy." Congress explicitly used such language in *Subsection (3)*, and we therefore decline to read such an intent into *Subsection (1)*.[3]

HN7[] Reading the language of *Article 120c(a)(1), UCMJ*, in the context of the remainder of *Article 120c, UCMJ*, we find that Congress intended to proscribe the knowing and wrongful viewing, by direct or indirect means, of the private area of another person, without that other person's consent during the existence of circumstances in which that other person has a reasonable expectation of privacy.[4] All of the evidence at trial indicated that the appellant did not view the recording until later that evening. Accordingly, even though we consider the evidence in the light most favorable to the prosecution and draw every reasonable inference in their favor, we find Specification 1 of Charge II legally insufficient and dismiss the specification.

Sentence Reassessment

HN8[] This court has "broad discretion" when reassessing sentences. *United States v. Winckelmann, 73 M.J. 11, 12 (C.A.A.F. 2013)*. However, before reassessing a sentence, we must be confident "that, absent the error, the sentence would have been of at least a certain magnitude." *United States v. Doss, 57 M.J. 182, 185 (C.A.A.F. 2002)* (citing *United States v. Sales, 22 M.J. 305, 307 (C.M.A. 1986)*).

In this case, the military judge merged Specification 1 and Specification 2 of Charge II for sentencing purposes. Since our findings do not affect Specification 2 of Charge II, we can be confident that the military judge would have imposed the same sentence. Accordingly, we reassess the sentence to the adjudged and approved sentence.

Conclusion

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[2] Although not dispositive, we note that the standard *Benchbook* element concerning the victim's expectation of privacy reads: "That under the circumstances at the time of the charged offense, (state the name of the alleged victim) had a reasonable expectation of privacy." Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 3-45c-1 (1 January 2010).

[3] Even if we adopted the interpretation advanced by the government, the conviction would still be legally insufficient. Although the government offered evidence the appellant viewed the recording during the evening of 29 August 2015, they produced no evidence at trial of the victim's expectation of privacy at the time the appellant viewed the recording. Accordingly, no reasonable finder of fact could have found that the appellant viewed the **[*10]** recording "under circumstances in which [the victim] has a reasonable expectation of privacy" because no evidence of the victim's circumstances at the time of the viewing was admitted. *Article 120c(a)(1), UCMJ*. We concede that expecting such evidence seems absurd. The absurdity, however, illustrates the improbability that Congress intended the language of *Subsection (1)* to criminalize viewing such recordings after the invasion of privacy ended.

[4] While making a recording **[*11]** under circumstances in which the victim has a reasonable expectation of privacy would also violate the plain language of *Article 120c(a)(3), UCMJ*, there may be circumstances where the contemporaneous viewing of a recorded image constitutes a separately punishable offense. For example, viewing may entail a larger risk of discovery and confrontation, or in a case where the recording is constantly overwritten or not otherwise retained, the contemporaneous viewing may constitute the more harmful breach of privacy than the transitory recording itself.

We find the conviction of Specification 1 of Charge II legally **[*12]** insufficient, and we set aside that finding. The remainder of the findings and the sentence, as reassessed, 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, *10 U.S.C. §§ 859(a)*, *866(c)*. Accordingly, the approved findings and sentence are **AFFIRMED**.

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1. *United States v. Walker, 2011 CCA LEXIS 352*

Client/Matter: -None-
Search Terms: 2011 CCA LEXIS 352
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	-None-

United States v. Walker

United States Air Force Court of Criminal Appeals

March 30, 2011, Decided

ACM S31788

Reporter
2011 CCA LEXIS 352 *; 2011 WL 6010813

UNITED STATES v. Staff Sergeant O'MARSHARIF K. WALKER, United States Air Force

Notice: THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL RELEASE.

Prior History: [*1] Sentence adjudged 15 December 2009 by SPCM convened at Al Udeid Air Base, Qatar. Military Judge: William E. Orr, Jr. (sitting alone). Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Core Terms

shower, indecent exposure, indecent act, indecent, military, exposed, mirror, legal sufficiency, reasonable doubt, shower stall, specification, genitalia, sentence, sexual, shorts, male, substantial rights of appellant, light most favorable, violation of article, factual sufficiency, finding of guilt, guilt beyond, no error, circumstances, bad-conduct, confinement, frustration, perpetrator, prejudicial, convinced

Case Summary

Overview

Evidence that a servicemember used a mirror in an attempt to watch other servicemembers shower, and that he pulled the waistband of his shorts out about four to five inches when he was confronted by another servicemember who was looking for the mirror and said "You can check here if you want," was sufficient to sustain the servicemember's convictions for attempted indecent acts, in violation of UCMJ art. 80, *10 U.S.C.S. § 880*, and indecent exposure, in violation of UCMJ art. 120, *10 U.S.C.S. § 920*.

Outcome

Findings and sentence affirmed.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN1[] **Judicial Review, Standards of Review**

In accordance with Unif. Code Mil. Justice ("UCMJ") art. 66(c), *10 U.S.C.S. § 866(c)*, the United States Air Force Court of Criminal Appeals reviews issues of legal and factual sufficiency de novo. 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. In resolving questions of legal sufficiency, the court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. The court's assessment of legal sufficiency is limited to the evidence produced at trial. 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, the court itself is convinced of the accused's guilt beyond a reasonable doubt. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. UCMJ art. 66(c), *10 U.S.C.S. § 866(c)*.

Military & Veterans Law > Military Offenses > Indecent Exposure

HN2 **Military Offenses, Indecent Exposure**

Indecent exposure requires that the exposure occur in a place where it could reasonably be expected to be viewed. Manual Courts-Martial pt. IV, para. 45.a.(n) (2008).

Military & Veterans Law > Military Offenses > Indecent Exposure

HN3 **Military Offenses, Indecent Exposure**

The surrounding circumstances must be considered in determining whether certain conduct is indecent.

Military & Veterans Law > Military Offenses > Indecent Exposure

HN4 **Military Offenses, Indecent Exposure**

Indecent conduct is that form of immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. Manual Courts-Martial pt. IV, para. 45.a.(t)(12) (2008).

Counsel: For Appellant: Lieutenant Colonel Gail E. Crawford, Lieutenant Colonel Frank R. Levi, and Major Darrin K. Johns.

For United States: Colonel Don M. Christensen, Major Charles G. Warren, Captain Scott C. Jansen, and Gerald R. Bruce, Esquire.

Judges: Before BRAND, GREGORY, and ROAN, Appellate Military Judges.

Opinion by: GREGORY

Opinion

OPINION OF THE COURT

GREGORY, Senior Judge:

Before a special court-martial composed of military judge alone, the appellant entered mixed pleas of (1) guilty to one specification of committing indecent acts on divers occasions by surreptitiously viewing the genitalia of others while they were showering and (2) not guilty to one specification of indecent exposure in violation of Article 120, UCMJ, *10 U.S.C. § 920*. The military judge rejected the appellant's plea to indecent acts but accepted a modified plea of guilty to attempted indecent acts in violation of Article 80, UCMJ, *10 U.S.C. § 880*. The government went forward on the greater offense as well as the indecent exposure **[*2]** specification. The military judge found the appellant guilty of attempted indecent acts in accordance with his plea and guilty of indecent exposure contrary to his plea. He sentenced the appellant to a bad-conduct discharge, confinement for six months, and reduction to the grade of E-1. The convening authority approved the bad-conduct discharge, confinement for four months, and reduction to E-1. The appellant argues that the evidence does not support the finding of guilty of indecent exposure. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

HN1 In accordance with Article 66(c), UCMJ, *10 U.S.C. § 866(c)*, we review issues of legal and factual sufficiency de novo. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*. 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, 324 (C.M.A. 1987)*). In resolving questions of legal sufficiency, we are "bound to draw every reasonable **[*3]** 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 [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner, 25 M.J. at 325*. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea, 22 C.M.A. 223, 46 C.M.R. 223, 224-25 (C.M.A. 1973)*. With these standards in mind we turn to the evidence in this case.

The appellant confessed to law enforcement investigators that to relieve sexual frustration in the deployed environment at Al Udeid Air Base, Qatar, he used a mirror to watch other Airmen shower. On one of

those occasions, the victim, Staff Sergeant (SSgt) TM, saw "a black hand with a mirror come over my shower." He screamed, grabbed his towel, put on **[*4]** his shorts, and checked all the shower stalls for the perpetrator. Of five occupied shower stalls, only one had a black male. SSgt TM waited in the sink area for the individual to exit the shower stalls. When the appellant approached, SSgt TM asked if he had a mirror he could borrow. The appellant replied, "No, you can check my bag if you want." SSgt TM searched the bag and a toiletry kit but found no mirror. The appellant then pulled the waistband of his shorts out about four to five inches and said, "You can check here if you want." SSgt TM testified that he was only "a sink away" from the appellant and could see that the appellant was not wearing underwear under his shorts but averted his gaze so as not to see the appellant's exposed genitalia. During argument on findings, the military judge clarified with counsel that the issue is not whether the victim actually saw the genitalia of the perpetrator but whether the victim *could* have done so.[1]

The appellant argues that the evidence is legally and factually insufficient to support his conviction of indecent exposure, focusing his argument on the requirement that the exposure be indecent. Here, he claims, the exposure occurred in a male shower facility where "communal male nudity is expected and not considered indecent." As appellant correctly notes, ***HN3***[↑] the surrounding circumstances must be considered in determining whether certain conduct is indecent. *United States v. Graham, 54 M.J. 605, 610 (N.M. Ct. Crim. App. 2000)*, *aff'd*, *56 M.J. 266 (C.A.A.F. 2002)*. Here, when confronted by an Airman who the appellant had just tried to see naked in the shower in order to relieve his sexual frustrations, the appellant exposed his genital area to the Airman and offered him a look. Contrary to the appellant's argument, this is not a case of unclothed persons simply passing one another in a common shower facility. Rather, the circumstances clearly show that, motivated by sexual desire, **[*6]** the appellant deliberately exposed himself to a targeted victim in a manner that was vulgar, obscene, and repugnant to common propriety or was, in a word, indecent.[2] Viewed in the light most favorable to the prosecution, the evidence is legally sufficient to support the findings of guilt. We also find the evidence factually sufficient: having considered the evidence in the record with particular attention to issues highlighted by the appellant, we are convinced of the appellant's guilt beyond a reasonable doubt.

Conclusion

The approved findings and the sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. *Article 66(c), UCMJ*; *United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000)*.

Accordingly, the approved findings and the sentence are

AFFIRMED.

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[1] ***HN2***[↑] Indecent exposure requires that the exposure occur in a place where it could "reasonably be expected to be viewed." *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 45.a.(n) (2008 ed.); *United States v. Griggs, 51 M.J. 418, 420 (C.A.A.F. 1999)* **[*5]** (evidence is sufficient to sustain conviction of indecent exposure where victim averted her gaze so as not to see perpetrator's genitalia but perpetrator positioned his body so that genitalia could be seen).

[2] ***HN4***[↑] Indecent conduct is "that form of immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." *MCM*, Part IV, ¶ 45.a.(t)(12).