UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman RYAN A. GIBSON
United States Air Force

ACM 38115

09 October 2013

Sentence adjudged 9 February 2012 by GCM convened at Spangdahlem Air Base, Germany. Military Judge: Dawn R. Eflein (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 9 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Nicholas D. Carter.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Daniel J. Breen; Major Rhea A. Lagano; Captain Thomas J. Alford; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and WIEDIE
Appellate Military Judges

OPINION OF THE COURT

WIEDIE, Judge:

A general court-martial composed of a military judge sitting alone convicted the appellant, contrary to his pleas, of making a false official statement and committing sodomy with a child under the age of 16, in violation of Articles 107 and 125, UCMJ, 10 U.S.C. §§ 907, 925. The adjudged sentence consisted of a bad-conduct discharge, confinement for 9 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant argues: (1) His trial defense counsel were ineffective for failing to contact and call to testify favorable witnesses; (2) The evidence is factually and legally insufficient to support his conviction for making a false official statement; (3) The military judge abused her discretion in denying a defense motion for appointment of a "fully competent" expert consultant; (4) The military judge abused her discretion in allowing the Government to introduce as aggravation evidence the "irrational fear" of the victim's mother; (5) His due process right to fair notice was violated because the crime of sodomy with a child under 16 years of age, under Article 125, UCMJ, does not provide for the affirmative defense of reasonable mistake of fact as to age whereas the crime of abusive sexual contact with a child under 16 years of age does; and (6) The Judge Advocate General of the Air Force (TJAG) created apparent unlawful command influence (UCI) when he made comments about the forum in the appellant's case.[1] Finding no error materially prejudicial to the substantial rights of the appellant, we affirm.

Background

In April 2011, the appellant was introduced to "Charlie"[2] by a mutual friend, BG. At the time, the appellant was a 23-year-old Senior Airman, assigned to the 52nd Component Maintenance Squadron, Spangdahlem Air Base (AB), Germany. Charlie, an Air Force dependent, was 15 years old when he first met the appellant. BG, also a military dependent, attended high school with Charlie.

On 18 April 2011, BG and Charlie were sending messages to each other on Facebook. During the course of the conversation, BG sent Charlie a picture of the appellant along with a link to the appellant's Facebook page. Charlie indicated that he thought the appellant was cute. BG and Charlie also discussed the fact that the appellant was either gay or bisexual and that the three of them should hang out together sometime. Charlie sent the appellant a "friend request" which the appellant accepted sometime that same day. Through Facebook, the appellant and Charlie made arrangements for the appellant to pick up Charlie the following day and go to a local, off-base swimming pool. Charlie's Facebook page indicated that he attended Bitburg High School and was born on 27 May 1995.

At the swimming pool, Charlie told the appellant he was excited and could not wait until his 16th birthday "because in Germany, 16 was a big deal." The appellant told Charlie that his brother and his partner had been together 20 years and were ten years apart in age. The appellant also said maybe that was how it works, someone younger and older. Believing the appellant was 24 years old, Charlie responded they were only nine years apart.

[1] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] Charlie is not the victim's real name; however, he introduced himself to people, including the appellant, as "Charlie." For ease of reference, the victim is referred to as Charlie throughout this opinion.

Just a few days after meeting, the relationship between the appellant and Charlie became sexual in nature. Over the course of a week, they engaged in oral and anal sex on three occasions. Each of these incidents of sodomy occurred before Charlie attained the age of 16 years.

On 25 May 2012, the appellant was questioned by Special Agents CS and EF from the Air Force Office of Special Investigations (AFOSI). In the interview, the appellant admitted to engaging in sodomy with Charlie, but denied knowing he was under the age of 16 years.

After the investigation of the appellant was underway, but before charges were preferred, TJAG traveled to Spangdahlem AB for an Article 6, UCMJ, 10 U.S.C. § 806, visit. During the visit the appellant's case was briefed to TJAG. Upon hearing the facts, TJAG opined that a special court-martial might limit the potential sentence in the appellant's case. Following TJAG's visit, the appellant's case was preferred and sent to an Article 32, UCMJ, 10 U.S.C. § 832, hearing and ultimately referred to a general court-martial despite the Article 32, UCMJ, Investigating Officer's recommendation that it be referred to a special court-martial.

Following referral, trial defense counsel requested discovery relating to a potential UCI motion. The military judge granted the motion and, in response, the Government produced five pages of documents. The Government requested that the military judge review the documents in camera to determine which, if any, should be disclosed to the defense. The military judge reviewed the documents in camera and ordered the release of two pages of the documents. The defense also interviewed the commander who preferred the charges against the appellant and, after doing so, represented to the military judge that they were satisfied there was no evidence they would be able to discover that would support a UCI motion.

Prior to trial the defense also made a motion for the appointment of an expert consultant in computer forensics. The basis for the motion was that the defense needed an expert consultant to search the appellant's computer for potentially exculpatory evidence. The military judge denied the defense motion stating the defense had failed to demonstrate why an expert was necessary and what an expert would accomplish.

At trial, the Government called Charlie's mother, Ms. GS, to testify on findings. Without objection, Ms. GS testified that upon learning the nature of her son's relationship with the appellant, she was very upset because she worried her son might have contracted a sexually transmitted disease (STD). Additional evidence introduced at trial indicated that the appellant and Charlie did not use a condom when they had sexual relations, but that Charlie subsequently tested negative for any STD. In his interview with AFOSI, the appellant disclosed he had previously been treated for chlamydia. The defense did not

object to the Government referring to Ms. GS's fear during sentencing argument but did object to any reference to the appellant's previous treatment for an STD. The military judge sustained the defense's objection.

The appellant obtained post-trial declarations from BG and Technical Sergeant (TSgt) MJ, a noncommissioned officer (NCO) with 12 years of military service, neither of whom was called to testify by trial defense counsel. In her post-trial declaration, BG states that "in [her] mind, [Charlie] must have been at least 16 or 17." She also declares that "never once" did she discuss Charlie's age with the appellant. BG also stated that Charlie lied to his mom, telling her that BG and the appellant were brother and sister so that his mom would allow him to hang out with the appellant.[3]

TSgt MJ knew the appellant both personally and professionally. They worked together when TSgt MJ was attached to the 52nd Communications Squadron and they spent time together off-duty. In her post-trial declaration, TSgt MJ states she has formed an opinion about the appellant's character for honesty and she believes the appellant to be an honest person. TSgt MJ also asserts she was familiar with Charlie's reputation in the community and that it was he was a trouble-maker and a liar.

Assistance of Counsel

The appellant argues his trial defense counsel's performance during trial amounted to ineffective assistance. Specifically, the appellant claims his counsel were ineffective for failing to interview and procure BG and TSgt MJ as witnesses at trial. After reviewing the record of trial, we find that trial defense counsel effectively represented the appellant throughout his court-martial.

The Sixth Amendment[4] guarantees an accused the right to effective assistance of counsel. *United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011) (citing *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001)). We review de novo claims that an appellant did not receive the effective assistance of counsel. *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009) (citations omitted).

"In assessing the effectiveness of counsel we apply the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and begin with the presumption of competence announced in *United States v. Cronic*, 466 U.S. 648, 658 (1984)." *Gooch*, 69 M.J. at 361 (citing *Gilley*, 56 M.J. at 124 (citing *United States v. Girgoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000))) (parallel citations omitted). To overcome the presumption of competence, the *Strickland* standard requires an appellant to demonstrate "both (1) that his counsel's performance was deficient, and (2) that this deficiency

[3] During cross-examination, trial defense counsel elicited from Charlie that he had lied to his mother in telling her that the appellant was BG's brother.
[4] U.S. CONST. amend. VI.

resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland*, 466 U.S. at 687).

This Court applies a three-part test to determine whether the presumption of competence has been overcome and asks: (1) Are the allegations true, and, if so, is there any reasonable explanation for counsel's actions; (2) If the allegations are true, did counsel's performance fall measurably below expected standards; and (3) Is there a reasonable probability that, absent the errors, there would have been a different outcome? *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991) (citations omitted).

When assessing *Strickland's* first prong, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. When challenging the performance of trial defense counsel, the appellant "bears the burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance." *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (citing *Polk*, 32 M.J. at 153). Evidentiary hearings are required if there is any dispute regarding material facts in competing declarations submitted on appeal which cannot be resolved by the record of trial and appellate filings. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

Applying these standards, we find that any material conflict in the respective declarations regarding this issue may be resolved by reference to the record and appellate filings without the need for an evidentiary hearing. The comprehensive declarations by trial defense counsel address the alleged deficiencies and provide sound reasons for the decisions now questioned by the appellant.

With respect to calling BG as a witness, none of the information she provided in her post-trial declaration would have impacted the appellant's trial. BG's belief that Charlie was at least 16 or 17 years of age is not relevant to what the appellant knew or believed, especially in light of the fact that BG states she never had any conversations with the appellant about Charlie's age. Assuming BG would have testified that she had an opinion that Charlie was untruthful based on the lie he told his mother about the relationship between the appellant and BG, such an opinion would have been relevant at trial. However, based on the evidence provided by the defense, such an opinion would be based on a single incident of untruthfulness by Charlie and that specific instance of untruthfulness was exposed by trial defense counsel in their cross-examination of Charlie. As such, there was no prejudice to the appellant.

In their post-trial affidavits, trial defense counsel articulate very compelling reasons for not calling TSgt MJ to testify about the appellant's character. First, the Government had a Senior NCO on standby who would testify as to his low opinion of the appellant's military character and character for truthfulness. Second, at the time of trial, the appellant was under investigation by AFOSI for suspicion of possession of child

pornography. Calling TSgt MJ to testify about the appellant's character would have run a very real risk of opening the door to extremely damaging rebuttal evidence. We see no reason to second-guess trial defense counsel's sound tactical decision to avoid the risk of opening the door to damaging rebuttal evidence by calling TSgt MJ to testify as to her opinion of the appellant's character.

TSgt MJ also indicated she could have testified about Charlie's reputation in the community as a troublemaker and a liar. Nothing in her post-trial declaration indicates she was familiar enough with Charlie to offer a personal opinion as to his character. Although Charlie's reputation as troublemaker would not have been relevant to the issues in this case, his reputation for untruthfulness would have been relevant. TSgt MJ's declaration is devoid of any details concerning how she was aware of Charlie's reputation, but she may have been able to testify concerning it assuming the adequate foundation was laid. We do not find, however, a reasonable probability that such testimony would have resulted in a different outcome. The evidence in this case was strong. Charlie himself had admitted to lying and the appellant was nonetheless convicted based on the strength of the other evidence.

Factual and Legal Sufficiency of False Official Statement Charge

The appellant further argues the evidence was factually and legally insufficient to support his conviction for making a false official statement. We review issues of factual and legal sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

"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 *Turner*, 25 M.J. at 324 (citing *Jackson v. Virginia*, 443 U.S. 307 (1979))). The term reasonable doubt does not mean that the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986) (citing *United States v. Steward*, 18 M.J. 506 (A.F.C.M.R. 1984)). "[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). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

The primary litigated issue with respect to the false official statement charge, was whether the appellant knew Charlie was under the age of 16 years when they engaged in oral and anal sodomy. The appellant denied he knew Charlie's age at the time of the sexual activity. The Government, however, introduced significant evidence to the contrary. The evidence showed that the appellant and Charlie "met" on Facebook, mainly communicated through Facebook, and that Charlie's date of birth was prominently displayed on his Facebook page. The content of the conversations between the appellant and Charlie on Facebook were at least circumstantial evidence that the appellant would have been on notice that Charlie was under the age of 16 years. Most significantly, Charlie testified about a conversation he had with the appellant in which he said he was very excited about his upcoming 16th birthday. The appellant responded to this statement and the two discussed their age difference.

We conclude the court-martial could reasonably have found that the prosecution established the appellant was not mistaken about Charlie's age and a reasonable factfinder could have found all the essential elements of making a false official statement beyond a reasonable doubt. Having reviewed the entirety of the record and making allowances for not having personally observed the witnesses, we also are convinced of the appellant's guilt beyond a reasonable doubt.

Denial of Defense Motion to Compel Expert Consultant in Computer Forensics

As noted above, the appellant's trial defense counsel filed a motion to compel the appointment of an expert consultant in the field of computer forensics. The military judge denied the motion stating the defense failed to show that the requested expert assistance was necessary or establish what such an expert would accomplish.

We review a military judge's ruling on a request for expert assistance for an abuse of discretion. *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005). Abuse of discretion is a strict standard that requires more than a difference of opinion, but a finding that the ruling was "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (citations omitted) (internal quotation marks omitted).

Rule for Court-Martial (R.C.M.) 703(d) permits employment of experts at government expense when their testimony would be "relevant and necessary." *United States v. Ford*, 51 M.J. 445, 455 (C.A.A.F. 1999). The defense bears the burden to show (1) why the expert is necessary, (2) what the expert will do, and (3) why counsel cannot

accomplish the same tasks. *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008) (citing *Bresnahan*, 62 M.J. at 143). To meet this burden, the accused must show more than a "mere possibility of assistance" from the expert, and show that a "reasonable probability" exists that the expert will assist the defense and that denial of the request would result in an unfair trial. *Bresnahan*, 62 M.J. at 143 (citations omitted) (internal quotation marks omitted).

We find the military judge did not abuse her discretion when she denied the defense motion to compel. In making the motion at trial, defense counsel failed to provide anything to support the idea there was a reasonable possibility an expert would be able to assist the defense. Rather, their request was based on a desire to explore the appellant's computer and search for potentially exculpatory evidence. In our opinion, the reasons the appellant cites show no more than the mere possibility of assistance in this case. After examining the record, we find no abuse of discretion in the military judge's determination that the appellant failed to show the required necessity.

Admission of Aggravation Evidence

During her testimony on findings, Charlie's mother, Ms. GS, testified concerning her fear that her son could have contracted an STD from engaging in unprotected sodomy with the appellant. The defense did not object to the testimony. In sentencing, trial defense counsel made a motion in limine to preclude the Government from referring to the fact that the appellant told AFOSI he had previously been treated for an STD. Trial defense did not, however, object to trial counsel's reference, during argument, to the fear exhibited by Ms. GS.

We review a military judge's ruling on the admissibility of evidence, including sentencing evidence, for an abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (citing *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995)). We review the record for plain error when an appellant fails to object to evidence at trial. *United States v. Powell*, 49 M.J. 460, 464 (C.A.A.F. 1998).

R.C.M. 1001(b)(4) provides as follows:

> The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person . . . who was the victim of an offense committed by the accused . . . .

Fear is a psychological impact. The fear of a parent of a minor who engaged in unprotected sexual relations with the appellant results directly from the appellant's criminal conduct. A parent's fear that her 15-year-old child may have contracted an STD as a result of unprotected sex with an adult is not, in any way, "irrational" or "stereotypical" as appellant asserts. The prevalence and adverse impacts of STDs is something well within the common knowledge of the ordinary person and fear that a child may have contracted an STD as a result of sex with an adult is understandable, reasonable, and rational. Although unstated, the appellant's contention that Ms. GS's fear was "stereotypical" appears to suggest her fear was based on the fact that the sexual relationship between the appellant and Charlie was a homosexual relationship. There is nothing to indicate the fear experienced by Ms. GS was based on this fact. We reject the notion that the parent of a child who engages in heterosexual relations with an adult would not, likewise, be very concerned with the risk that her child contracted an STD.

Furthermore, we do not find that the military judge erred in allowing the evidence to be argued during sentencing under an R.C.M. 403 analysis. The fear of a parent of a child victim is very probative and relevant aggravation evidence. The risk of unfair prejudice was low in this case, especially since Ms. GS's fears were not realized and Charlie did not contract an STD. The fact that the appellant did not have an STD at the time of the sexual contact or the fact that the victim did not contract an STD does not make the evidence any less probative. Until it was determined that Charlie had not contracted an STD based on his relationship with the appellant, the fear experienced by Ms. GS was proper aggravation evidence in this case.

Due Process and Mistake of Fact as a Defense to Sodomy

The appellant was charged with sodomy with a child under the age of 16 years. At trial, the military judge correctly ruled that mistake of fact as to age is not a defense to an allegation of sodomy with a person between the ages of 12 and 16 under Article 125, UCMJ. *See United States v. Wilson*, 66 M.J. 39 (C.A.A.F. 2008). On appeal, appellant argues his due process right to fair notice was violated because the crime of sodomy with a child under 16 years of age does not provide for the affirmative defense of reasonable mistake of fact as to age, whereas the crime of abusive sexual contact with a child under 16 years of age, under Article 120, UCMJ, 10 U.S.C. § 920, does.

"[D]ue process requires that a person have fair notice that an act is criminal before being prosecuted for it." *United States v. Saunders*, 59 M.J. 1, 6 (C.A.A.F. 2003) (citing *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003)). Our superior court has specifically identified military case law as a source of "fair notice." *Vaughan*, 58 M.J. at 31.

Congress included an explicit mistake of fact defense as to age in Article 120, UCMJ, but did not provide one in Article 125, UCMJ. *See Wilson*, 66 M.J. at 40. We

recognize an inconsistency where the same act could be charged under Article 120, UCMJ, and thus provide a mistake of fact defense, but such a defense would not exist for a violation of Article 125, UCMJ. However, due process only requires fair notice that an act is criminal before it can be prosecuted. The language employed by Congress and the implementing language employed by the President make it clear that the defense of mistake of fact exists to an Article 120, UCMJ, charge but not to an Article 125, UCMJ, charge. Furthermore, our superior court, in *Wilson*, removed any possible confusion when it clearly held that there was no mistake of fact defense to the crime of sodomy with a child under 16 years of age under Article 125, UCMJ, even though such a defense may exist under Article 120. *Wilson* 66 M.J. at 47. As such, the appellant had clear notice his conduct constituted a crime under Article 125, UCMJ, and that the defense of mistake of fact did not exist. Given this clear pronouncement of the law, it cannot be said that he was not on fair notice of the criminal nature of his conduct.

Unlawful Command Influence

The appellant concedes there was not actual UCI in his case, but maintains there was apparent UCI when TJAG noted, during an Article 6, UCMJ, visit to Spangdahlem AB, that a special court-martial might limit the potential sentence in the appellant's case. The appellant asserts the following relevant facts: The staff judge advocate (SJA) and the trial counsel both advised the area defense counsel, prior to the Article 6, UCMJ, visit, that the appellant's case would be referred as a special court-martial. Following TJAG's visit, the legal office contacted the area defense counsel to schedule an Article 32, UCMJ, hearing in the appellant's case. The Article 32, UCMJ, Investigating Officer recommended the case be referred to a special court-martial.

Article 37(a), UCMJ, 10 U.S.C. § 837(a), states, "No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . or any member thereof . . . ." While statutory in form, the prohibition can also raise due process concerns, where, for example, UCI undermines an accused's right to a fair trial or the opportunity to put on a defense.

Allegations of UCI are reviewed de novo. *United States v. Harvey*, 64 M.J. 13, 19 (C.A.A.F. 2006); *United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999); *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994). The appellant, on appeal, bears the initial burden of raising UCI. The "appellant 'must show (1) facts, which, if true, constitute [UCI]; (2) show that the proceedings were unfair; and (3) show that [UCI] was the cause of the unfairness.'" *United States v. Richter*, 51 M.J. 213, 224 (C.A.A.F. 1999) (quoting *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)). While it is more than a mere allegation or speculation, the initial burden of showing potential UCI is low. *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002). The level of evidence necessary to raise UCI is "some evidence." *Id.* (quoting *Biagase*, 50 M.J. at 150) (internal quotation marks omitted).

Once an issue of UCI is raised by some evidence, the burden shifts to the government to rebut an allegation of UCI by persuading the Court beyond a reasonable doubt that (1) the predicate facts do not exist, (2) the facts do not constitute UCI, or (3) the UCI did not affect the findings or sentence. *Biagase,* 50 M.J. at 151.

Allegations of UCI are reviewed for actual UCI as well the appearance of UCI. "Even if there was no actual unlawful command influence, there may be a question whether the influence of command placed an 'intolerable strain on public perception of the military justice system.'" *Stoneman*, 57 M.J. at 42-43 (quoting *United States v. Wiesen*, 56 M.J. 172, 175 (C.A.A.F. 2001)). The test for the appearance of UCI is objective. "We focus upon the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public." *United States v. Lewis,* 63 M.J. 405, 415 (C.A.A.F. 2006). An appearance of UCI arises "where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Id.*

While an SJA is not a commander or a convening authority, our superior court has acknowledged that conduct by an SJA can create UCI, because "a staff judge advocate generally acts with the mantle of command authority." *United States v. Hamilton,* 41 M.J. 32, 37 (C.M.A. 1994) (quoting *United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986)). However, even if we accept the appellant's proffered facts as true, we still find beyond a reasonable doubt that TJAG's comments made in the case before us do not constitute UCI, apparent or otherwise. First of all, TJAG did not speak directly to the preferring commander or the convening authority. He did not attempt to assert influence in order to change the mind of either party. In a discussion with legal office personnel, TJAG expressed an opinion that the intended forum might reduce the possible sentence in the appellant's case. This was lawful counsel provided by a senior, more experienced judge advocate to members of the base legal office.

The record is devoid of evidence to suggest that TJAG overbore the will of the SJA. To the contrary, TJAG merely commented on whether the planned forum was the best choice based on the facts of the case. The SJA and her staff were not compelled to accept this advice. More importantly for purposes of UCI, the preferring commander and the convening authority were free to make their own independent decisions. We find no evidence to conclude they were improperly influenced by TJAG's comments to the SJA.

Open and frank discussion about the proper forum in a particular case is not something that would place an "intolerable strain on public perception of the military justice system." *Stoneman*, 57 M.J. at 42 (quoting *Wiesen,* 56 M.J. at 175). To the contrary, it is what the public should and does expect of the military justice system. Based on the facts of this case, we do not find actual or apparent UCI.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court