UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic ELIS M. LASALLE
United States Air Force

ACM 38831

23 November 2016

Sentence adjudged 3 April 2014 by GCM convened at Sheppard Air Force Base, Texas. Military Judge: Matthew S. Ward (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 15 years, and total forfeiture of pay and allowances.

Appellate Counsel for Appellant: Major Jeffrey A. Davis, Major Michael A. Schrama, and Joseph M. Owens, Esquire

Appellate Counsel for the United States: Major Jeremy D. Gehman and Gerald R. Bruce, Esquire

Before

J. BROWN, SANTORO, and MINK
Appellate Military Judges

OPINION OF THE COURT

SANTORO, Judge:

A military judge sitting alone as a general court-martial convicted Appellant, pursuant to his plea, of attempting to persuade a child to engage in sexual activity that violated state law, contrary to 18 U.S.C. § 2422(b), a crime or offense not capital in violation of Article 134, UCMJ, 10 U.S.C. § 934. Contrary to his plea, the military judge convicted Appellant of using force to cause Airman First Class (A1C) MR to engage in

sexual intercourse in violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] The adjudged and approved sentence was a dishonorable discharge, confinement for 15 years, and forfeiture of all pay and allowances.

Appellant raises six assignments of error: (1) he was denied his right to a speedy trial for the offense to which he pleaded guilty, (2) his guilty plea was improvident, (3) his conviction of sexually assaulting A1C MR is legally and factually insufficient, (4) destruction of exculpatory evidence merits relief, (5) he received ineffective assistance of counsel, and (6) he is entitled to relief for post-trial processing delay. We find Appellant's guilty plea improvident and set aside the related findings of guilt, affirm his conviction on the contested charge and specification, and return the record to the convening authority.

Background

This was Appellant's second court-martial. In his first (LaSalle I), he was charged with several sexual assaults against JJ (a minor), possession of child pornography, communicating indecent language to JJ and GL (also a minor), and using a means of interstate commerce to attempt to persuade three children (JJ, KS, and CR) to engage in sexual activity of a criminal nature. After arraignment but before evidence was introduced, the convening authority withdrew and dismissed without prejudice the charges related to JJ.

Consistent with his pleas, Appellant was convicted of one specification of communicating indecent language to a child under the age of 16 years and one specification of attempting to persuade a minor to engage in sexual activity under 18 U.S.C. § 2422(b), each in violation of Article 134, UCMJ, 10 U.S.C. § 934. Contrary to his pleas, he was convicted of an additional specification of attempting to persuade a minor to engage in sexual activity under 18 U.S.C. § 2422(b) in violation of Article 134, UCMJ. He was sentenced to a dishonorable discharge, confinement for 28 months, reduction to E-1, and a reprimand. We affirmed his convictions in an unpublished opinion. *United States v. LaSalle*, ACM 38323, (A.F. Ct. Crim. App. 10 February 2014) (unpub. op.).

In the instant trial (LaSalle II), Appellant was charged with causing A1C MR to engage in sexual intercourse by using strength sufficient that she could not avoid or escape it, extorting A1C MR, and attempting to persuade JJ to engage in criminal sexual activity (one of the JJ-related specifications dismissed in LaSalle I).

A1C MR testified that she first met Appellant at technical training in the spring of 2011, about two weeks before her 21st birthday, and they became friends. A1C MR had planned a gathering with her friends to celebrate her birthday, which would include drinking at the stroke of midnight and staying at a hotel off-base. Appellant told A1C MR

[1] The military judge found Appellant not guilty of extortion in violation of Article 127, UCMJ, 10 U.S.C. § 927.

that he did not think her plan was a good idea because "good girls didn't do things like that." A1C MR and her friends went out anyway and had no contact with Appellant that evening.

However, the next day, A1C MR and her friends went to another club. Appellant showed up unexpectedly and told A1C MR that he was there to keep an eye on her to make sure she "didn't do anything stupid." Appellant watched A1C MR throughout the night. A1C MR asked Appellant if he wanted to dance; he declined and remained at the bar watching her. A1C MR consumed a drink Appellant brought her, which made her feel "weird" and distorted sounds and shapes. She tried to walk off the dance floor and had to grab a handrail to steady herself.

Appellant stayed with A1C MR for the remainder of the evening and eventually brought her back to the hotel. At some point, she realized she was in her pajamas but could not recall who took her clothes off or when. A1C MR felt sick and vomited into a waste basket while Appellant watched. Appellant then ran his fingers through her hair, told her she was pretty, kissed her, forcibly separated her legs, and began having intercourse with her. A1C MR remembered crying and telling him to stop but was unable to move. The intercourse ended when they heard A1C MR's friends trying to get into the room.

In the days that followed, A1C MR had the sense that Appellant was always nearby. She felt he was watching her. A1C MR confronted Appellant more than once about what had happened on her birthday. On one of those occasions, Appellant told A1C MR that nobody would believe her if she reported being assaulted, that they would think she was "easy" and "a slut," and that her daughter would think less of her. He also told her that he had pictures of her which he would distribute.

Concerned about Appellant's threats and wanting not to be held over in training status if she reported being assaulted, A1C MR did not notify law enforcement about what had occurred. The incident came to light months later when A1C MR received a telephone call from an attorney in the legal office investigating the conduct that led to LaSalle I.

In support of his guilty plea, Appellant told the military judge that he met JJ on Facebook then continued their conversation via text messaging. He admitted sending what he considered sexual and vulgar messages to her in the hope of persuading her to engage in sexual activity. JJ told Appellant she was 14 years old and that she lived not far from him in Pennsylvania. Appellant admitted that the Internet (Facebook) and cellular telephones (text messaging) were means of interstate commerce and that the conduct he was hoping to engage in with JJ would have violated Pennsylvania state law.

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

Providence of Guilty Plea

Appellant entered a guilty plea to the specification of Charge III, which alleged that he "use[d] a facility and means of interstate commerce, to knowingly attempt to persuade [JJ], a child who had not attained the age of 18 years, to engage in sexual activity of a criminal nature in violation of Pennsylvania state laws, in violation of 18 United States Code Section 2422(b), a crime or offense not capital," in violation of Article 134, UCMJ. During the inquiry required by *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969), the military judge advised Appellant that the elements of the offense were:

> (1) that, at the time and placed alleged, Appellant knowingly attempted to persuade JJ to engage in sexual activity;
> (2) that Appellant did so by using a means of interstate commerce;
> (3) that Appellant believed JJ was a person of less than 18 years of age;
> (4) that Appellant intended to engage in sexual activity with JJ that would constitute criminal offenses for which a person could be charged under Pennsylvania state laws; and
> (5) that 18 U.S.C. § 2422(b) was in effect during the relevant time.

Thereafter, Appellant admitted that those elements accurately and correctly described his conduct and explained how his conduct established each of those elements. There was no stipulation of fact.

While authenticating the record of trial, the military judge realized that he neglected to include as an element that Appellant's conduct had to constitute a substantial step toward the commission of the offense. *See United States v. Schell*, 72 M.J. 339, 346 (C.A.A.F. 2013) (guilty plea to a violation of 18 U.S.C. § 2422(b) improvident when military judge failed to instruct on the substantial step requirement).

Approximately seven months after Appellant's trial, the military judge convened a post-trial proceeding in revision pursuant to Rule for Courts-Martial 1102. Appellant appeared and was represented by new counsel. The military judge reopened the *Care* inquiry and told Appellant that the elements of the offense to which he pleaded guilty were:

> (1) that, at the time and place alleged, Appellant attempted to persuade JJ, a child who had not attained the age of 18 years, to engage in sexual activity of a criminal nature, in violation of Pennsylvania state laws;
> (2) that the acts were done with the specific intent to commit the offense of attempted enticement or persuasion of a minor, in violation of 18 U.S.C. 2422(b);
> (3) that the acts amounted to more than mere preparation; that is, they were a substantial step and a direct movement toward the commission of the intended offense; and

(4) that such acts apparently intended to bring about the commission of the offense of attempted enticement or persuasion of a minor, in violation of 18 U.S.C. § 2422(b).

The military judge provided Appellant additional instructions and definitions and, in doing so, correctly explained that

> the fact finder, in order to find you guilty, must find beyond a reasonable doubt that you went beyond mere preparatory steps and your acts amounted to a substantial step and direct movement toward the commission of the intended offense. A 'substantial step' is one that is strongly corroborative of your criminal intent and is indicative of your resolve to commit the offense.

With respect to whether Appellant's conduct constituted a substantial step toward the commission of the offense, the following colloquy ensued:

> MJ: And again, we talked about what your intent was before, but do you believe that texting her and asking if you could perform sexual acts on her and whether she would engage in sexual activity with you, do you believe that was a substantial step in convincing her to actually engage in those—to agree to engage in those acts?
>
> ACC: Your Honor, honestly, no.

The military judge made no further attempt to clarify or resolve Appellant's denial that his conduct satisfied the elements of the offense to which he pleaded guilty. Instead, the military judge said,

> I mean, the *Care* inquiry is what it is. So it's on the record now. The appellate courts will have to take a look at it and make a determination of, you know, based on the entirety of the record, how they want to handle that. . . . I've reopened the *Care* inquiry. It hasn't sufficiently resolved the issue, I think to say, one way or the other. However, based on *U.S. v. Dawson*, my understanding of the way we proceed from here is we just send it up to the appellate courts. . . . [W]e'll just let them sort it out.[2]

[2] In *United States v. Dawson*, 65 M.J. 848, 853-54 (A.F. Ct. Crim. App. 2007), we held that

Prior to concluding the session, the military judge noted that although Appellant admitted engaging in certain acts, "it defies common sense, in the Court's view, that an accused could admit that he committed the *actus reus*, with the required intent, but somehow not understand or believe that meant he must have completed a substantial step toward that *actus reus*." It appears the military judge believed that he could conclude as a matter of law that Appellant's conduct constituted a substantial step, and thus the plea remained provident, notwithstanding Appellant's refusal to admit that element of the offense.[3]

We review a military judge's acceptance of a guilty plea for an abuse of discretion and questions of law arising therefrom de novo. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). To prevail on appeal, Appellant has the burden to demonstrate a substantial basis in law or fact for questioning the guilty plea. *Id*. The "mere possibility" of a conflict between the accused's plea and statements or other evidence in the record is not a sufficient basis to overturn the trial results. *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996) (quoting *Prater*, 32 M.J. at 436). "The providence of a plea is based not only on the accused's understanding and recitation of the factual history of the crime, but also on an understanding of how the law relates to those facts." *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008) (citing *Care*, 40 C.M.R. at 250–51). "We examine the totality of the circumstances of the providence inquiry, including the stipulation of fact, as well as the relationship between the accused's responses to leading questions and the full range of the accused's responses during the plea inquiry." *United States v. Nance*, 67 M.J. 362, 366 (C.A.A.F. 2009).

This is not a difficult issue to "sort out." Appellant entered a guilty plea. The military judge advised him of the elements of the offense to which he pleaded guilty. Appellant denied that his conduct satisfied one of the elements of the offense.[4] The military judge was aware of a substantial basis on which to question the providence of the plea and failed to resolve the matter. He therefore abused his discretion in accepting

---

> when an accused has entered a plea of guilty and the military judge fails to complete an inquiry to some or all of the elements but nothing inconsistent with guilt has been raised, we believe that the military judge can order a post-trial Article 39(a) session under [Rule for Courts-Martial (R.C.M.) 1102] and complete the necessary inquiry prior to the authentication of the record.

Dawson simply reaffirms a military judge's authority to conduct a post-trial session to complete the plea inquiry.

[3] Appellant's denial may have been a tactical response based on the posture of the case. Nevertheless, the military judge should have made some attempt to resolve the issue.

[4] The Government argues that the colloquy excerpted above was not a discussion of whether Appellant's conduct was a substantial step toward the commission of the offense but rather whether his conduct was a substantial step toward completing the sexual acts themselves. As this was the only discussion about the substantial step element, and the military judge held the proceeding in revision specifically to advise and inquire about the substantial step element, we are not persuaded.

Appellant's plea. We set aside the findings of guilt with respect to the specification of Charge III and of Charge III.[5]

The military judge noted that if he were sentencing Appellant only for the aggravated sexual assault charge, the sentence would have been a dishonorable discharge, confinement for seven years, and total forfeiture of pay and allowances. Because of the seriousness of the Article 134, UCMJ, offense, we decline to dismiss the charge and specification and instead authorize a rehearing.

Factual and Legal Sufficiency

The specification of Charge I alleged that Appellant caused A1C MR to engage in sexual intercourse "by using strength, sufficient that she could not avoid or escape the sexual act." The military judge found Appellant not guilty of those words and instead found Appellant guilty of causing A1C MR to engage in sexual intercourse "by force, to wit: penetrating her vulva with his penis." Appellant argues that the evidence is factually and legally insufficient to support his conviction for sexually assaulting A1C MR because A1C MR was not credible.

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 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 applying this test, "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); *see also United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of [Appellant]'s guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. 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 term reasonable doubt, however, 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). Our assessment of legal and

[5] In our decretal paragraph we return this charge and specification to the convening authority for further action. We therefore decline to address Appellant's first assignment of error, that he was denied a speedy trial with respect to this charge and specification, particularly where this claim was not litigated prior to his unconditional guilty plea. *See* R.C.M. 707(e), 905(e), *United States v. Tippit*, 65 M.J. 69, 75 (C.A.A.F. 2007).

factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

If believed, the victim's testimony established each element of the offense. Although prior to trial she made differing statements about what happened, we cannot say that when viewing the evidence in the light most favorable to the prosecution a reasonable fact-finder could not credit the victim's in-court testimony. We therefore conclude that the evidence is legally sufficient to support Appellant's convictions.

In addition to the victim's testimony, the Government called a witness who thought the victim was "kind of freaked out" when he saw her the following morning. When he asked what was wrong, the victim told him that "she couldn't remember everything that happened," but that "something might have happened in the hotel room." The witness did not ask for additional detail.

The Government also introduced text messages between the victim and Appellant in which Appellant acknowledged that the victim was not "into" having sexual intercourse but that he "forced" her anyway and was sorry for hurting her.

Although we recognize our authority to find the victim not credible based simply on a cold reading of the record, the trial court was in a better position to make that assessment. *Washington*, 57 M.J. at 399. We agree with our Army colleagues who have noted that "the degree to which we 'recognize' or give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witness is at issue." *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015) (en banc).

We have reviewed the evidence offered at trial, paying particular attention to the inconsistencies and arguments Appellant noted.[6] None of the inconsistencies, either standing alone or taken together, causes us to believe that the victim's in-court testimony was not credible. Giving appropriate deference to the trial court's ability to see and hear the witnesses, and after our own independent review of the record, we are ourselves convinced of Appellant's guilt beyond a reasonable doubt.

There is one additional issue related to the military judge's findings that neither party raised on appeal. The military judge found Appellant not guilty of "using strength sufficient that [A1C MR] could not avoid or escape the sexual act." He then found him guilty of using "force, to wit: penetrating her vulva with his penis." Force was an element of the charged offense of rape, whereas bodily harm was an element of the lesser-included offense of aggravated sexual assault. On their face, the military judge's findings appear to

[6] We decline Appellant's invitation to consider matters that were not before the fact-finder. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

indicate that he found Appellant guilty of rape by force, albeit a type of "force" not found within the Article 120(t)(5) definition.[7]

The military judge made a special finding, however, in which he clarified that it was his intent to find Appellant guilty of the lesser-included offense of aggravated sexual assault. While it is unclear why the military judge announced the findings as he did, his intended findings are apparent from the record and are not disputed on appeal. We therefore modify the findings as to this specification as follows: that Appellant did, at the time and place alleged, cause A1C MR "to engage in a sexual act, to wit: sexual intercourse, by causing bodily harm upon her, to wit: penetrating her vulva with his penis." *See United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010) (a finding of force necessarily includes a finding of bodily harm).[8]

Assistance of Counsel

Appellant argues that his trial defense counsel were ineffective by (1) failing to assert Appellant's speedy trial right with respect to the Article 134, UCMJ, offense; (2) failing to contact Appellant's defense counsel from LaSalle I; (3) failing to present suggestive photographs allegedly sent by A1C MR to Appellant after the assault occurred; and (4) failing to conduct an adequate investigation.[9] In reviewing claims of ineffective assistance of counsel, we look at the questions of deficient performance and prejudice de novo. *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012); *United States v. Gutierrez*, 66 M.J. 329, 330-31 (C.A.A.F. 2008).

To establish ineffective assistance of counsel, "an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Under the first prong, Appellant has the burden to show that his "counsel's performance fell below an objective standard of reasonableness—that counsel was not functioning as counsel within the meaning of the Sixth Amendment." *United States v. Edmond*, 63 M.J. 343, 351 (C.A.A.F. 2006) (quoting *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005)). The question is, therefore, "did the level of advocacy 'fall[] measurably below the performance . . . [ordinarily expected] of fallible lawyers?'" *United States v. Haney*, 64 M.J. 101, 106 (C.A.A.F. 2006) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)) (alterations in original). Under the second prong, the deficient performance must prejudice the accused through errors "so

[7] Because of the date of the offense, the applicable law is the version of Article 120, UCMJ, that was in effect on 25 June 2011. *Manual for Courts-Martial, United States*, app. 28 at A28-1 (2012 ed.).

[8] The court-martial order (CMO) erroneously notes that there were findings by exceptions and substitutions to the charge as well as the specification. As a new CMO will be accomplished upon remand, we do not order correction of the existing CMO to reflect properly the finding of guilt as to the charge.

[9] Appellant's brief outlines other ways he apparently believes his counsel could have better performed but he has limited his ineffective assistance claim to these four issues. None of the other matters he noted warrant additional discussion or relief.

serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (quoting *Strickland*, 466 U.S. at 687). Counsel is presumed competent until proven otherwise. *Strickland*, 466 U.S. at 690.

Additionally, in the guilty plea context, "[t]o satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *United States v. Bradley*, 71 M.J. 13, 16 (C.A.A.F. 2011) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' That requires a 'substantial,' not just 'conceivable,' likelihood of a different result." *Id*. at 16-17 (quoting *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011)). Appellant must satisfy an objective inquiry: he must show that if he had been advised properly, then it would have been rational for him to reject the benefits of the pretrial agreement and to plead not guilty. *Id*. at 17.

Appellant submitted his own affidavit as well as an affidavit from the lead defense counsel in LaSalle I. We ordered affidavits from both defense counsel from LaSalle II, now-Mr. (then Major (Maj)) PC and Captain (Capt) SK.

a. Failing to assert Appellant's right to a speedy trial

As we have found Appellant's guilty plea to the Article 134 offense improvident, we consider this claim only to the extent that it informs our conclusion about the assistance Appellant received related to the A1C MR specification. Appellant argues that his counsel were ineffective by failing to raise this issue.

Appellant's affidavit makes no mention of the speedy trial issue. Mr. PC's affidavit states that he and Capt SK discussed the speedy trial issue but concluded there was little likelihood of success. Capt SK called Appellant, who was then incarcerated as a result of LaSalle I, explained the speedy trial issue and the attorneys' opinions about the likelihood of success and the potential negative outcomes (such as additional investigation, victim identification, and charges) should they succeed but have the charges dismissed without prejudice. Capt SK's affidavit is consistent with Mr. PC's and further states that Appellant knew, fully understood, and concurred in the decision not to raise the speedy trial issue. As there is no evidence before us to the contrary, and there were sound tactical reasons for the decision not to raise the issue, there is no merit to this allegation.

b. Failing to contact Appellant's defense counsel from his first trial

Appellant's affidavit states that he repeatedly asked his defense counsel to contact his LaSalle I defense counsel because of overlap of issues and witnesses, including JJ and A1C MR. Appellant, however, does not have personal knowledge of whether any contact was made.

Mr. PC's affidavit states that he spoke with now-Major CD, one of the LaSalle I defense counsel, on at least two occasions regarding the first court-martial. Mr. PC received the record of trial from LaSalle I and additional information about the defense from Maj CD. Capt SK's affidavit states that she also spoke with Maj CD about LaSalle I several times, although by the time of the drafting of her affidavit she could not recall specific details about the discussions. She further stated that both she and Mr. PC had access to Maj CD's entire file from LaSalle I and used it to prepare their defense for LaSalle II. Finally, Maj CD's affidavit states that he recalled speaking with and exchanging email with Capt SK about LaSalle II. He did not recall speaking with Mr. PC but could not rule out that he had, as many of his records had been lost due to computer failures. The military judge allowed the Defense to examine Mr. PC in the post-trial proceeding in revision. Consistent with his affidavit, Mr. PC testified that both he and Capt SK spoke with Maj CD in preparation of their defense for LaSalle II.

The evidence conclusively establishes that Appellant's defense counsel for LaSalle II spoke on several occasions with his defense counsel from LaSalle I, received their case file, and reviewed the record of trial. This allegation is therefore without merit.[10]

c. Failing to present photographs

As noted above, A1C MR and Appellant continued to have contact after the night of the assault. Appellant's affidavit states that investigators and his trial defense counsel possessed nude and sexually-suggestive photographs that A1C MR sent Appellant weeks or months after the assault. Appellant further asserts that his trial defense counsel had the photographs printed and available in the courtroom but elected not to use them, squandering an opportunity to undercut A1C MR's credibility.

Both Mr. PC and Capt SK's affidavits were consistent, specific, and detailed with respect to the decision not to use the images. First, they did not believe it would be in Appellant's best interest that he testify and he accepted that advice, eliminating him as a means of establishing the foundation for the photos. Second, the Air Force Office of Special Investigations agent who performed the extraction from Appellant's cell phone could not establish when the photographs were sent or received. Third, both defense counsel felt that if they requested a computer forensic examiner to examine the phone and

[10] Based on the examination of Major PC at the proceeding in revision, it appears that Appellant's true claim is that his LaSalle II defense counsel were ineffective in not speaking with his *civilian* defense counsel from LaSalle I (one of whom is also his counsel in the instant appeal). We decline to find counsel ineffective for not speaking with every member of the previous defense team absent some indication that such a conversation was necessary based on the facts of the case. *See United States v. Boone*, 42 M.J. 308, 313 (C.A.A.F. 1995) (citing *United States v. Walker*, 45 C.M.R. 150, 154 (C.M.A. 1972)) (civilian and military counsel together constituted the defense team and their combined efforts constitute the assistance Appellant received).

possibly establish the foundation, the Government would also obtain a forensic examiner and uncover evidence of other crimes.[11]

The only remaining way to introduce the photographs was through A1C MR herself. During cross-examination, Capt SK asked A1C MR whether she had ever seen any pictures Appellant had of her. She said she had not. A1C MR also testified that she could not recall ever sending Appellant any pictures. At least one of the photographs in question appeared to have been taken in a room with brown walls. Based on A1C MR's responses to other questions during the examination, Capt SK elected to ask A1C MR about details in the photograph rather than simply confronting her with the image, and she began by asking about the color of walls at A1C MR's home. A1C MR denied that the walls were brown. After additional back-and-forth, the military judge ended that line of questioning.

The evidentiary value of the photographs largely depended upon when they were taken. A1C MR was either unable or unwilling to provide that information and trial defense counsel had valid tactical reasons for not seeking an expert witness who might be able to do so. The real issue here is not that trial defense counsel failed to use the photographs, but rather that trial defense counsel was unsuccessful in laying a foundation for their admission. Whether a different approach to A1C MR's cross-examination would have yielded different results is speculative and is insufficient to establish that trial defense counsel's performance fell measurably below that expected of fallible lawyers. Moreover, we do not believe that the trier of fact's inability to consider the photographs calls into question the reliability of the verdict, particularly when Appellant's text message admitted that he knew A1C MR was not "into" sexual intercourse and that he forced intercourse upon her.

d. Failing to conduct an adequate investigation

Appellant's affidavit states that he provided his defense counsel the names of witnesses he thought could provide favorable testimony, all of whom were fellow trainees and some of whom attended the birthday party at which the alleged assault occurred. Appellant states that his attorneys told him they had contacted the witnesses but that they were not helpful. Appellant also states that after trial concluded, he spoke to each of them and was told that they had not been contacted. Although Appellant asserts that their testimony would have been helpful to his case, he does not identify what relevant and admissible information they may have possessed.

[11] Trial defense counsel's review of the evidence suggested that further investigation may lead to charges related to Appellant's requesting nude images from his young niece, inappropriate contact with Airman First Class (A1C) MR's younger sister, and his asking a fellow Airman not to report other questionable conduct to the chain of command. It was both counsel's opinion that any delay in the trial would expose Appellant to greater criminal liability as the Government continued to investigate.

Appellant's brief sheds no additional light on what these potential witnesses would have said. Instead, he appears to be asking that we find *per se* ineffective assistance of counsel when a defense attorney fails to interview everyone a client suggests.

Mr. PC's affidavit stated that the defense team interviewed or attempted to interview each person Appellant named. Mr. PC generally recalled speaking with several of them and having to schedule telephone conversations with people at installations around the world. He also recalled that the conversations were of such a vague nature that they would not assist the defense theory of the case.

Capt SK specifically recalled interviewing three of the four people Appellant identified. One said he had nearly no recall of the night in question. A second provided no relevant information whatsoever. The third had little recall of significant events and added nothing to assist the defense case. Capt SK's affidavit also outlined the unsuccessful steps the defense team took to identify other witnesses who might have strengthened their case.

Appellant has not met his burden to establish that his counsel were ineffective. Appellant himself fails to articulate what benefit any of these witnesses would have provided. Even assuming arguendo that such a showing were not required, we would still conclude that counsel's investigation did not fall below that which would ordinarily be expected of fallible lawyers.

Remaining Assignments of Error

Appellant raised two other assignments of error: that he is entitled to relief for dilatory post-trial processing and that potentially exculpatory evidence was lost. Because we return this record to the convening authority for further action, the post-trial processing claim is not yet ripe for appellate review. With respect to the allegation of loss of evidence, the only relief Appellant seeks is that we preclude a retrial on the Article 120 offense. As we have resolved the A1C MR-related issues adversely to him, and affirm his conviction on that charge and specification, this assignment of error has been rendered moot.[12]

[12] Although we decline to write separately on this assignment of error because it has been rendered moot, we note that Appellant's only request for the possibly-lost evidence (notes from the prosecutor's interview with A1C MR) was made after findings and sentence had been announced and the court-martial adjourned. There is no indication that the notes were requested prior to trial but had been withheld.

Conclusion

The findings of guilt as to Charge III and its specification are **SET ASIDE**. The findings of guilt as to Charge I and its specification, as modified, are **AFFIRMED**. The sentence is **SET ASIDE**. The record is remanded to the convening authority. A rehearing is authorized as to Charge III and its specification and as to sentence.

FOR THE COURT

KURT J. BRUBAKER
Clerk of Court