UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant DORIAN K. OWENS
United States Air Force

ACM 38834

16 December 2016

Sentence adjudged 3 March 2015 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: L. Martin Powell (arraignment) and Matthew P. Stoffel.

Approved Sentence: Dishonorable discharge, confinement for 35 years, and reduction to E-1.

Appellate Counsel for Appellant: Major Michael A. Schrama.

Appellate Counsel for the United States: Major Clayton H. O'Connor; Major Mary Ellen Payne; Major J. Ronald Steelman III; and Gerald R. Bruce, Esquire.

Before

DUBRISKE, HARDING, and C. BROWN
Appellate Military Judges

OPINION OF THE COURT

DUBRISKE, Senior Judge:

Contrary to his pleas, Appellant was convicted by a panel of officer members of rape, sexual assault, and abusive sexual contact, in violation of Article 120, UCMJ, 10 U.S.C. § 920. Appellant was acquitted of one specification of attempted abusive sexual contact under Article 80, UCMJ, 10 U.S.C. § 880. Appellant was also found not guilty of two specifications of sexual assault. These respective specifications were charged in the alternative to the rape and sexual assault offenses that Appellant was convicted of at trial.

Appellant was sentenced to a dishonorable discharge, 35 years of confinement, total forfeiture of pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged, with the exception of total forfeiture of pay and allowances. Mandatory forfeitures of pay were waived to the maximum extent for the benefit of Appellant's spouse and children.

Appellant raises seven allegations of error on appeal: (1) the evidence supporting his convictions was legally and factually insufficient; (2) the military judge erred in failing to release mental health records for one of the victims under Military Rule of Evidence (Mil. R. Evid.) 513; (3) the military judge erred in prohibiting the Defense from presenting a pretext communication between one of the victims and Appellant for purposes of impeachment; (4) the military judge erred in denying Appellant's motion to dismiss due to the Government's failure to preserve evidence; (5) the trial counsel engaged in improper argument; (6) the military judge erred in instructing the panel on reasonable doubt; and (7) his sentence was inappropriately severe. As noted within the opinion, three of these assignments of error are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

We find one of Appellant's factual sufficiency claims merits relief. Given our determination, we modify the findings and reassess the sentence below. We affirm the remainder of the findings.

Background

The sexual assault offenses charged in this case surrounded Appellant's misconduct with three different women from January 2014 until September 2014. The victims did not know each other before the investigation of Appellant by the Air Force Office of Special Investigations (AFOSI).

Staff Sergeant (SSgt) LF was the first individual to report Appellant had sexually assaulted her. Appellant and SSgt LF knew each other through mutual friends and associated social events. On 18 January 2014, SSgt LF, Appellant, and others attended a party at the on-base home of a mutual friend. At some point during the party, Appellant took SSgt LF's cellular phone, promising to give it back to her if she listened to Appellant's relationship advice. SSgt LF complied with Appellant's request, but he did not return her cellular phone as promised. After all of the other guests left the party, SSgt LF left without her cellular phone.

As she was walking to her car, SSgt LF was met by Appellant, who lived across the street from the party. Appellant eventually entered SSgt LF's car and asked her to drive to a nearby cul-de-sac so they could continue their conversation from the party. Appellant promised to return SSgt LF's cellular phone if she complied with his request.

After driving to the cul-de-sac and parking her car, SSgt LF requested Appellant return her cellular phone as promised. Appellant again refused, advising SSgt LF he was not done talking with her. Appellant then informed SSgt LF of his romantic feelings for her and began touching and kissing her without her consent, which was the basis for the abusive sexual contact charge. SSgt LF reported Appellant's misconduct the next day to her chain of command, which resulted in an AFOSI investigation and preferral of charges against Appellant.

Appellant submitted a request for discharge in lieu of trial by court-martial based on the offenses alleged by SSgt LF. This request was initially approved, but later withdrawn by the convening authority when a local civilian, SR, reported Appellant had sexually assaulted her.

SR informed local authorities she became sick at a local bar during an evening out with friends at the end of September 2014. After vomiting in the restroom, SR went to the parking lot of the establishment and fell asleep or passed out in her vehicle when she was unsuccessful in contacting a friend to give her a ride home. At some point, Appellant opened the door of the vehicle and asked SR, "What's a gorgeous girl like you doing passed out in a truck?" Appellant eventually shut the door and walked away, but came back later and sat down in the passenger's seat of SR's vehicle. SR felt sick again at this point and vomited outside of her vehicle door while Appellant held her hair.

Appellant, whom SR had never met before, then offered to give SR a ride home. SR agreed as she needed to get home at some point to care for her 11 year-old daughter. Appellant removed SR's keys from her vehicle, grabbed her purse, and assisted her in getting into Appellant's vehicle for the ride home. SR reported she was dizzy and physically unstable during this time, which was later confirmed by security camera footage.

After arriving at SR's apartment complex, Appellant insisted he would walk SR to her front door. SR reported she became sick again immediately after opening her apartment door and went directly to her bathroom to throw up. Appellant entered the apartment at the same time and held SR's hair as she vomited in the bathroom. SR then went to her bedroom to lay down. Appellant also entered the bedroom and eventually started to remove SR's clothing without her consent. SR then passed out, but later awoke to Appellant having sexual intercourse with her. SR reported the incident to a friend shortly after Appellant left her apartment.

Although SR did not know Appellant prior to the assault and could not provide his name to civilian law enforcement authorities, Appellant was eventually identified through security camera footage of the bar parking lot. Appellant's subsequent arrest for the assault of SR garnered local media attention. Based on one media article, a third victim, JS, informed local authorities that Appellant had sexually assaulted her approximately two weeks prior to the assault of SR.

JS reported she met Appellant through social media and eventually agreed to meet him for a date. After visiting a few bars for drinks, JS decided to end the date and drive home. Prior to departing the last bar, however, Appellant informed JS he wanted to take her home and have sex with her. JS specifically told Appellant she was not interested in a sexual relationship.

Appellant insisted that he ensure JS arrived home safely, so he followed her home in his vehicle. Appellant walked JS to the door of her apartment and asked if he could come inside. JS acquiesced as she did not believe Appellant was dangerous.

Appellant and JS then sat down on a couch and started kissing each other. When Appellant attempted to remove her shirt, JS excused herself and went to the bathroom to secure her shirt and bra. When JS returned, Appellant again tried removing JS's clothing, eventually removing her pants even though JS struggled to keep them on. JS attempted to prevent Appellant from having sexual intercourse with her by blocking her vaginal area with her hands. However, Appellant moved her hands and eventually engaged in sexual intercourse with JS without her consent.

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

Sufficiency of the Evidence

Referencing the same arguments made during clemency, Appellant claims that the evidence produced at trial was factually and legally insufficient to support his convictions. *Grostefon*, 12 M.J. at 431.

We review issues of factual and legal 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). 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).

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); *see also 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." *Turner*, 25 M.J. at 324; *see also*

United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002). 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). "[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).

We are convinced the offenses involving SSgt LF and SR are factually and legally sufficient. Regarding SSgt LF, her testimony covered all of the requisite elements for the offense of abusive sexual contact. Her testimony also causes us to determine, after weighing all of the evidence in the record and making allowances for not having personally observed the witnesses, that Appellant is, in fact, guilty of the offense as alleged by SSgt LF. While the Defense did attack SSgt LF's motive, trustworthiness, and lack of consistent reporting, this attack was sufficiently offset by evidence documenting SSgt LF's character for truthfulness and her contemporaneous report of the abuse.

Likewise, the evidence produced at trial is sufficient for us to uphold Appellant's conviction for sexual assault of SR under the theory she was incapable of consenting to the sexual activity due to impairment by an intoxicant. SR's testimony regarding her physical and mental impairments were corroborated by security camera footage taken shortly before the charged incident. Moreover, the facts surrounding SR's immediate reporting of the assault to a friend solidifies our belief as to factual and legal sufficiency. While Appellant also attacks SR's inability to remember whether Appellant engaged in a penetrative act on the evening in question, the forensic evidence admitted by the prosecution convinces us Appellant committed the requisite sexual act while SR was incapable of consenting.

We are not, however, convinced the evidence admitted by the prosecution at trial is sufficient to support Appellant's conviction for rape of JS. To sustain a conviction for rape, the prosecution was required to prove: (1) that Appellant engaged in a sexual act with JS by penetrating her vulva with his penis; and (2) that he did so by using unlawful force. *Manual for Courts-Martial (MCM), United States*, ¶ 45.a.(a)(1) (2012 ed.). Force is statutorily defined as the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person. Article 120(g)(5)(B), UCMJ. Unlawful force is simply an act of force done without legal justification or excuse. Article 120(g)(6), UCMJ. While we are convinced that JS did not consent to the sexual act and clearly and repeatedly expressed this to Appellant, we do not find testimony or other evidence that convinces us beyond a reasonable doubt that Appellant used physical strength sufficient to *overcome, restrain, or injure* JS.

Although we have determined the evidence is factually insufficient to sustain the charged offense, we may nonetheless affirm so much of the finding that includes a lesser included offense. Article 59(b), UCMJ, 10 U.S.C. § 859(b). Here, we are convinced beyond a reasonable doubt that Appellant committed a non-consensual sexual act with JS through bodily harm as originally charged by the Government in the alternative.

Accordingly, we affirm Appellant's conviction to the offense of sexual assault. *See United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010).

Failure to Disclose Mental Health Records

The Defense moved at trial for the military judge to order the production of records for two of the victims who previously received mental health treatment. One victim consented to the military judge's review of her records in camera. The military judge released portions of this victim's records to the Defense after completing his review. In doing so, the judge noted the court could release additional information depending on how the trial progressed.

The other victim did not consent to an in camera review of her records. After receiving evidence on the Defense's motion, the military judge found an in camera review of the records was appropriate. However, after reviewing the records, the military judge declined to release any records to the Defense for this victim. The military judge determined there was neither evidence of an exculpatory nature within the records, nor information specifically requested by trial defense counsel in their motion to compel the production of such records.

During sentencing, the three victims each provided an unsworn statement about the personal impact Appellant's conduct had on them. Trial defense counsel did not object to the admission of this evidence during sentencing. However, trial defense counsel requested the military judge reevaluate his earlier Mil. R. Evid. 513 ruling given the information contained in the unsworn statements. The military judge, after taking a recess to review the victim-impact statements, declined to release any additional mental health records to the Defense in sentencing.

On appeal, Appellant claims the military judge erred in failing to release mental health records for the one victim for whom no records were released to the Defense at trial. Appellant specifically identifies two entries which should have been disclosed. These entries document the victim's counseling sessions after being physically assaulted by a civilian female in August of 2012.[1] The victim initially reported to her mental health provider that she suffered reduced sleep and nightmares, decreased concentration, decreased appetite, and general anxiety because of this assault. The victim's mental health treatment for this incident was terminated approximately three weeks after the assault given her physical and emotional symptoms had sufficiently dissipated.

In arguing error, Appellant notes the victim's symptoms after this physical assault were sufficiently similar to those she reported after Appellant's sexual assault. As such,

[1] Appellant's counsel was provided access to these sealed records on appeal pursuant to Rule for Courts-Martial (R.C.M.) 1103A.

Appellant opines testimony from the victim's mental health providers could have contradicted her unsworn statement which attributed the full extent of her physical and emotional troubles to Appellant's misconduct. Appellant also appears to argue this same evidence shows the victim exaggerated Appellant's misconduct over time, and was, therefore, relevant in establishing a motive to misrepresent. It is unclear from Appellant's brief whether this latter attack is focused on the victim's testimony during findings, or instead relates only to the unsworn statement she provided during the sentencing proceedings.

We review a military judge's ruling on a discovery request for abuse of discretion. *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015). "A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law." *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004). "Our review of discovery/disclosure issues utilizes a two-step analysis: first, we determine whether the information or evidence at issue was subject to disclosure or discovery; second, if there was nondisclosure of such information, we test the effect of that nondisclosure on the appellant's trial." *Id.* at 325.

In *Roberts*, our superior court clarified the respective tests and burdens articulated in a number of their decisions dealing with materiality of undisclosed, discoverable evidence. They adopted two appellate tests for determining materiality with respect to the erroneous nondisclosure of discoverable evidence; the first test applies to those cases in which the defense either did not make a discovery request or made only a general request for discovery. *Id.* at 326. In those instances, once the appellant demonstrates wrongful nondisclosure, "the appellant will be entitled to relief only by showing that there is a 'reasonable probability' of a different result at trial had the evidence been disclosed." *Id* at 326–27. "The second test is unique to our military practice and reflects the broad nature of discovery rights granted the military accused under Article 46." *Id.* at 327. In those situations, where an appellant demonstrates that the Government failed to disclose discoverable evidence in response to a specific request for information, "the appellant will be entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt." *Id.* "Harmless beyond a reasonable doubt is a high standard, but it is not an impossible standard for the Government to meet." *United States v. Gonzalez*, 62 M.J. 303, 306 (C.A.A.F. 2006).

Contrary to the apparent claim in Appellant's brief, we do not find these mental health entries were relevant and material to Appellant's defense against the charged offense involving this specific victim. We see no basis for Appellant to claim the previous physical assault, or the short-term physical and psychological symptoms resulting from it, were somehow admissible to impeach the victim during trial on the merits. As such, we hold the military judge did not abuse his discretion.

Assuming, *arguendo*, the victim's mental health records were material for sentencing, the relief requested by Appellant is still not warranted as any nondisclosure was harmless beyond a reasonable doubt. Evidence the victim suffered similar physical and psychological symptoms after a second traumatic event does not in our opinion mitigate Appellant's assaultive conduct towards this victim. In fact, one could argue Appellant's conduct was actually aggravating in nature as it exposed the victim to physical and psychological symptoms that had previously been treated and resolved.

Additionally, we note the Government did not emphasize the victim-impact evidence in their relatively short sentencing argument. The focus instead was on the frequency and seriousness of Appellant's predatory misconduct. Considering the entire record, including the records withheld by the military judge, we find there is no reasonable probability that, had the evidence been disclosed, the result of Appellant's trial would have been different. *See United States v. Coleman*, 72 M.J. 184, 186 (C.A.A.F. 2013).

Failure to Allow Presentation of Pretext Communication

Pursuant to *Grostefon*, 12 M.J. at 436–37, Appellant next claims the military judge erred in failing to allow his counsel to cross-examine SSgt LF about statements she made during a pretext communication with Appellant. In alleging error, however, Appellant's brief primarily focuses on his own statements during the communication with SSgt LF, whereby he denied any inappropriate conduct. He appears to claim his statements should have been admitted as they refuted aspects of SSgt LF's testimony at trial and, therefore, undermined her credibility.

After the Government declined to offer Appellant's pretext communication with SSgt LF as an admission of a party opponent under Mil. R. Evid. 801(d)(2), trial defense counsel inquired about the pretext conversation during his cross-examination of an AFOSI agent. After an objection was lodged by the Government, trial defense counsel informed the military judge during an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session that they did not intend at that time to discuss specific statements made by either Appellant or SSgt LF. Instead, trial defense counsel believed the questioning was appropriate to show the thoroughness of AFOSI's investigation. The military judge sustained the Government's objection, finding the mere fact that a pretext conversation was conducted not relevant to a substantive issue before the court.

Later, the Government moved *in limine* to prohibit the Defense from discussing the pretext conversation during SSgt LF's testimony. In addition to their initial position, the Defense now claimed SSgt LF's statements to Appellant in the pretext conversation were either false or inconsistent with other statements she made during the course of the investigation. As such, trial defense counsel argued their inquiry into these statements was proper impeachment. Conversely, the Government argued SSgt LF should not be held

accountable for statements made during a pretext conversation as her communications were being directed by AFOSI.

The military judge agreed with the Government that, in the context of a pretext conversation, the fact an individual makes a statement that is directed by someone else, like AFOSI, is not probative of their character for truthfulness. The military judge also found this inquiry failed the Mil. R. Evid. 403 balancing test given the likelihood for confusion of the relevant issues before the panel members.

After trial defense counsel raised yet another theory of admissibility, the military judge requested to hear the testimony of SSgt LF in an Article 39(a) session to determine AFOSI's involvement in the crafting of messages sent to Appellant. After hearing SSgt LF's testimony and entertaining additional argument from counsel, the military judge allowed the Defense to inquire into three specific statements made by SSgt LF to Appellant. These statements were not directly attributable to AFOSI based on their guidance to SSgt LF. The military judge prohibited any additional inquiry into statements made by SSgt LF during the pretext conversation with Appellant.

We review a military judge's ruling on the admissibility of evidence for abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010). A trial judge will typically have a great deal of discretion to determine whether trial testimony is inconsistent with a prior statement. *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007).

The right to cross-examination is broad, and the rules of evidence should be read to allow liberal admission of bias-type evidence. *United States v. Moss*, 63 M.J. 233, 236 (C.A.A.F. 2006) (citing *United States v. Williams*, 40 M.J. 216, 218 (C.M.A. 1994)). However, cross-examination must comply with applicable rules of evidence, and a trial judge may set reasonable limits on cross-examination that intends to attack a witness's credibility based on concerns such as harassment, prejudice, confusion of issues, witness safety, repetitiveness, or marginal relevancy. *United States v. Velez*, 48 M.J. 220, 226 (C.A.A.F. 1998) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)); *United States v. Gonzalez*, 16 M.J. 423, 425 (C.M.A. 1983).

In this case, we do not believe the military judge abused his discretion in limiting trial defense counsel's use of SSgt LF's statements during the pretext conversation with Appellant.[2] We agree with the military judge that statements made by SSgt LF at the behest of AFOSI were not probative of SSgt LF's character for truthfulness. We likewise find the various statements attributable to AFOSI that were repeated by SSgt LF in the course of a pretext conversation do not rise to inconsistent statements subject to Mil. R Evid. 608(c) and Mil. R Evid. 613.

[2] We also reject any claim the military judge erred in prohibiting trial defense counsel from admitting Appellant's statements made during the course of the pretext conversation with SSgt LF.

Failure to Preserve Evidence

Appellant, also pursuant to *Grostefon*, 12 M.J. at 436–37, next argues the military judge erred in failing to dismiss the charges against him due to the Government's failure to preserve relevant evidence that would have likely possessed exculpatory value for the Defense. As previously noted above, this court employs an abuse of discretion standard when reviewing a military judge's ruling on discovery matters. *Stellato*, 74 M.J. at 480.

Prior to the entry of pleas, the Defense filed a motion to dismiss, alleging the Government failed to secure the cellular phones belonging to the two civilian victims, SR and JS, as well as preserve cellular phone data and records maintained by the victims' respective cellular providers. The Defense alleged this failure violated Article 46, UCMJ, 10 U.S.C. § 846, and Rule for Court-Martial (R.C.M.) 703, as the Government had sufficient opportunity to secure data and records documenting communications the two victims had with either Appellant or others after the incidents that gave rise to the charges before the court-martial.

To establish a violation of Article 46, UCMJ, for lost or destroyed evidence, an accused must satisfy the test announced in *California v. Trombetta*, 467 U.S. 479 (1984). *See United States v. Kern*, 22 M.J. 49, 51 (C.M.A. 1986) (noting the *Trombetta* test satisfies both constitutional and military standards of due process and is applicable to trial by courts-martial). The test articulated in *Trombetta*, and further refined in *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988), provides that the destruction of, or failure to preserve, potentially exculpatory evidence does not entitle an accused to relief on due process grounds unless: (1) the evidence possesses an exculpatory value that was apparent before it was destroyed; (2) it is of such a nature that the accused would be unable to obtain comparable evidence by other reasonably available means; and (3) the Government acted in bad faith when it lost or destroyed such evidence. *United States v. Terry*, 66 M.J. 514, 517 (A.F. Ct. Crim. App. 2008). If "material exculpatory evidence" is lost, as opposed to merely "potentially useful" evidence, the requirement to demonstrate the Government acted in bad faith does not apply. *Illinois v. Fisher*, 540 U.S. 544, 547–48 (2004).

To be entitled to relief under R.C.M. 703, an accused must show: (1) the evidence is relevant and necessary; (2) the evidence has been destroyed, lost, or otherwise not subject to compulsory process; (3) the evidence is of such central importance to an issue that it is essential to a fair trial; (4) there is no adequate substitute for such evidence; and (5) the accused is not at fault or could not have prevented the unavailability of the evidence. R.C.M. 703(f)(1)–(2).

In support of their motion, the Defense called one civilian detective and three AFOSI agents to discuss the investigative steps they took based on the allegations made by SR and JS. With regard to SR, the detective testified he never attempted to secure SR's phone, as he did not believe he had probable cause to do so given SR had never

communicated with Appellant by any electronic means either before or after the assault. SR had communicated with four friends after the assault by voice or text message; these individuals were interviewed by the detective as part of his investigation. The detective did obtain text messages between SR and one friend, but he failed to secure copies of actual conversations with the other three individuals SR contacted after the assault. The civilian detective also noted he issued a preservation letter to SR's cellular carrier prior to relinquishing jurisdiction of the case to the United States Air Force. However, as the preservation letter was issued more than five days after SR's communications with her friends, the detective was notified by the cellular carrier that it would be unable to produce any relevant text messages for SR.

Once receiving jurisdiction, AFOSI was denied access by SR to her phone and social media account. SR did provide an electronic message documenting one of her discussions with a friend about the assault. Months later, however, SR allowed AFOSI to extract data from two phones, including the phone in her possession on the night of the assault. The extraction yielded little information relevant to SR's allegation against Appellant.

Regarding the investigation of JS's allegations, an AFOSI agent testified that JS provided agents with text messages and social media records documenting discussions with Appellant leading up to and after the assault. JS did not consent to a data extraction from her cellular phone or an examination of her social media account. JS informed AFOSI there were other "meaningless" text message communications with Appellant after the assault that were no longer stored on her phone. These additional communications were confirmed by Appellant's cellular phone records, which were secured by the Government, although the content of these messages could not be obtained by AFOSI.

The military judge rendered factual findings on this motion, which we adopt for the purposes of our review as they are not clearly erroneous. *See United States v. Robinson*, 58 M.J. 429, 433 (C.A.A.F. 2003). Applying the factual findings to the relevant legal standards, the military judge found SR's phone possessed no exculpatory value given the lack of communication between SR and Appellant. With regard to SR's communications with friends, the military judge determined the Defense was provided with information about SR's statements to these individuals and was therefore afforded the opportunity to confront SR about any inconsistencies in her reporting of the assault by Appellant. Finally, in declining to grant relief for a violation of Article 46, UCMJ, the military judge determined there was no evidence the Government acted in bad faith to suppress exculpatory or apparently exculpatory materials. The military judge also found Appellant was not entitled to relief under R.C.M. 703 as the Defense had failed to show the information sought was relevant and necessary.

The military judge came to a similar conclusion when examining the investigation of JS's allegations. In addition to finding the Defense failed to show the missing text

messages were exculpatory in nature, the military judge noted the records from Appellant's phone gave the Defense information to establish JS's minimization of the contact she had with Appellant after the assault. As these records provided Appellant with comparable evidence to confront JS, the military judge declined to grant relief as requested by Appellant.

Having reviewed the evidence offered in support of the motion at trial, we find no abuse of discretion by the military judge in this case. Appellant failed to meet his burden of establishing the missing evidence was potentially exculpatory. Moreover, examining the request for relief under R.C.M. 703, we agree with the military judge that Appellant has failed to establish that the sought-after material was relevant and necessary, or that there was no adequate substitute for such evidence available to the Defense at trial.

Improper Findings Argument

Appellant next claims trial counsel's findings argument was improper as it argued Appellant's propensity to commit sexual acts.[3] In asking this court to set aside the findings, Appellant asserts trial counsel's statements were highly prejudicial as they suggested Appellant should be convicted based solely on the number of similar sexual offenses charged at trial showing Appellant was a serial offender. In claiming both error and prejudicial impact, Appellant also faults the military judge for failing to provide a curative instruction in response to trial counsel's argument.

Whether argument is improper is a question of law we review de novo. *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011) (citing *United States v. Pope*, 69 M.J. 328, 334 (C.A.A.F. 2011)). "[T]rial counsel is at liberty to strike hard, but not foul, blows." *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007) (quoting *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000)). Trial counsel is limited to arguing the evidence in the record and the inferences fairly derived from that evidence. *See United States v. Paxton*, 64 M.J. 484, 488 (C.A.A.F. 2007); *United States v. White*, 36 M.J. 306, 308 (C.M.A. 1993). Whether or not the comments are fair must be resolved when viewed within the entire court-martial. *United States v. Gilley*, 56 M.J. 113, 121 (C.A.A.F. 2001).

At the start of trial counsel's findings argument, the following colloquy took place between the parties:

> TC: Quite simply, he doesn't take no for an answer. The accused, Staff Sergeant Dorian Owens, doesn't take no for an

[3] Although there were initial discussions about the appropriateness of a propensity instruction during findings, the military judge did not instruct the members they could use the three charged offenses to show Appellant's propensity to commit sexual misconduct. *See United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016).

> answer. And it's no coincidence that three different women who don't know each other . . . .
>
> DC: Objection, propensity, Your Honor.
>
> MJ: Response?
>
> TC: Sir, it's not arguing a propensity. It's arguing the coincidental facts apparent in the case.
>
> MJ: Overruled.
>
> TC: It's no coincidence that three different women who don't know each other, who have never met, were able to credibly describe the accused's depraved and disgusting conduct. A coincidence, members, is a remarkable concurrence of events with no apparent causal connection. This case is a remarkable concurrence of events. And the accused is the causal connection. The causal connection is Staff Sergeant Dorian Owens. He's guilty. He is guilty members, and that's been proven by the credible accounts of all three women; entirely supported by the objective evidence. Make no mistake, the United States has proven its case beyond a reasonable doubt . . . .

We need not address the propriety of trial counsel's argument as noted above because we find Appellant suffered no material prejudice. There were no additional references to coincidences or Appellant's causal connection to the three victims in the remaining 23 pages of counsel's argument. Instead, trial counsel focused on the evidence admitted at trial supporting the individual offenses as alleged by each victim.

Moreover, contrary to Appellant's claim in his brief, the military judge did provide a curative instruction prior to the Defense beginning their findings argument. The military judge again reminded the panel members that they could only consider evidence before the court—and not evidence of Appellant's criminal disposition—in deciding whether the Government had proven their case beyond a reasonable doubt. For these reasons, we find Appellant did not suffer prejudice from trial counsel's argument.

Reasonable Doubt Instruction

Prior to deliberations, the military judge instructed the members with respect to proof beyond a reasonable doubt:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of any offense charged, you must find him guilty. If, on the other hand, you think there is a real possibility that the accused is not guilty, you must give him the benefit of the doubt and find him not guilty.

Although he did not object to this instruction at trial, Appellant now argues the instruction violates Supreme Court precedent prohibiting a trial judge from "directing the jury to come forward with a [guilty verdict], regardless of how overwhelmingly the evidence may point in that direction." *See United States v. Martin Linen Supply Company*, 430 U.S. 564, 572–73 (1977).

We review de novo the military judge's instructions to ensure that they correctly address the issues raised by the evidence. *United States v. Maynulet*, 68 M.J. 374, 376 (C.A.A.F. 2010); *United States v. Thomas*, 11 M.J. 315, 317 (C.M.A. 1981). Where, as here, trial defense counsel made no challenge to the instruction contested on appeal, Appellant forfeits the objection in the absence of plain error.[4] R.C.M. 920(f). If we find error, we must determine whether the error was harmless beyond a reasonable doubt. *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011).

The language used by the military judge in Appellant's case is—and has been for many years—an accepted reasonable doubt instruction used in Air Force courts-martial. *See, e.g., United States v. Sanchez*, 50 M.J. 506, 509–10 (A.F. Ct. Crim. App. 1999). It was also offered by our superior court as a suggested instruction. *See United States v. Meeks*, 41 M.J. 150, 157 n.2 (C.M.A. 1994) (citing Federal Judicial Center, Pattern Criminal Jury Instruction 17-18 (1987)). Based on this legal landscape, we cannot say that the military judge committed error, plain or otherwise, in his reasonable doubt instruction to the panel in this case. *See United States v. McClour*, ACM 38704 (A.F. Ct. Crim. App. 11 February 2016) (unpub. op.), *rev. granted*, 75 M.J. 376 (C.A.A.F. 2016); *see also United*

[4] Although we recognize that the rule speaks of "waiver," this is, in fact, forfeiture. *United States v. Sousa*, 72 M.J. 643, 651–52 (A.F. Ct. Crim. App. 2013).

States v. Rendon, __ M.J. __, NMCCA 201500408 (N.M. Ct. Crim. App. 1 November 2016).

Sentence Reassessment

Because we have reduced Appellant's degree of guilt from rape to sexual assault, we must determine whether we can reassess the sentence, or instead must order a rehearing.

This court has "broad discretion" in deciding to reassess a sentence to cure error, as well as arriving at the reassessed sentence. *United States v. Winckelmann*, 73 M.J. 11, 12 (C.A.A.F. 2013). To reassess the sentence, we must be able to reliably conclude that, in the absence of error, the sentence "would have been at least of a certain magnitude," and the reassessed sentence must be "no greater than that which would have been imposed if the prejudicial error had not been committed." *United States v. Sales*, 22 M.J. 305, 307–08 (C.M.A. 1986). We must be able to determine this to a "degree of certainty." *United States v. Eversole*, 53 M.J. 132, 134 (C.A.A.F. 2000); *see also United States v. Taylor*, 51 M.J. 390, 391 (C.A.A.F. 1999) (holding we must be able to reach this conclusion "with confidence"). "The standard for reassessment is not what would be imposed at a rehearing but what would have been imposed at the original trial absent the error." *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997); *see also United States v. Davis*, 48 M.J. 494, 495 (C.A.A.F. 1998) (holding no higher sentence than that which would have been imposed by the trial forum may be affirmed). A reassessed sentence "must be purged of prejudicial error and also must be 'appropriate' for the offense[s] involved" based on our sentence approval obligation under Article 66(c), UCMJ. *Sales*, 22 M.J. at 308.

In determining whether to reassess a sentence or order a rehearing, we consider the totality of the circumstances, including the following illustrative, but not dispositive, factors: (1) dramatic changes in the penalty landscape and exposure, (2) the forum, (3) whether the remaining offenses capture the gravamen of the criminal conduct included within the original offenses, (4) whether significant or aggravating circumstances remain admissible and relevant, and (5) whether the remaining offenses are the type with which we, as appellate judges, have the experience and familiarity to reliably determine what sentence would have been imposed at trial by the sentencing authority. *Winckelmann*, 73 M.J. at 15–16.

Examining the entire case and applying the considerations set out in *Winckelmann*, we are able to reliably determine to our satisfaction that Appellant's sentence would have been at least a certain severity based on his conviction of the lesser offense. In so holding, we recognize Appellant's punishment exposure has decreased from confinement for life without the possibility of parole to 67 years of confinement. This reduction is somewhat significant; however, this factor alone would not automatically require a sentence rehearing. *See id.* at 13, 16 (holding that it was not an abuse of discretion to reassess the

sentence where the maximum amount of confinement decreased from 115 years to 51 years). We also recognize Appellant's forum choice weighs against reassessment.

However, the remaining factors here weigh heavily in favor of reassessment. This court has extensive experience in dealing with sexual assault cases and, as such, are cognizant of the types of punishment and levels of sentence imposed for offenses similar to those alleged against Appellant. Moreover, our modification of the findings did not substantially change Appellant's culpability in this case as Appellant remains convicted of sexual assault by causing bodily harm. Finally, the lesser included offense consists of the same conduct admitted in support of the greater offense. Thus, all of the aggravating circumstances remain admissible and relevant when evaluating the lesser offense.

In consideration of the factors discussed above, we conclude that we can reassess the sentence. We are satisfied that, based on the facts and circumstances surrounding the commission of the lesser offense, the panel would have imposed a sentence not less than a dishonorable discharge, confinement for 30 years, and reduction to E-1.

We have also concluded the reassessed sentence is appropriate. We assess sentence appropriateness by considering Appellant, the nature and seriousness of the offenses, Appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (2007). Appellant's sexual misconduct against three different victims over a short period of time convinces us the reassessed sentence is not inappropriately severe.

Conclusion

We find the conviction for rape, as alleged in the specification of the Additional Charge, factually insufficient, and we instead approve the finding of guilt to the lesser included offense of sexual assault as originally charged by the Government in Specification 4 of Charge II. We reassess the sentence to a dishonorable discharge, confinement for 30 years, and reduction to E-1. The findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred.[5] Articles 59(a) and 66(c), UCMJ. Accordingly, the findings, as

[5] Although we find Appellant ultimately did not suffer any prejudice, we note the addendum to the staff judge advocate's recommendation (SJAR) did not specifically advise the convening authority of his mandatory requirement to consider the SJAR and the report of result of trial before taking action. *See* R.C.M.1107(b)(3)(A); Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 9.20.1.2 (6 June 2013).

modified, and the sentence, as reassessed, are **AFFIRMED**.

FOR THE COURT

KURT J. BRUBAKER
Clerk of Court