UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Lieutenant Colonel STEVEN J. DIMATTEO
United States Air Force

ACM 37552

07 December 2012

Sentence adjudged 15 May 2009 by GCM convened at McChord Air Force Base, Washington. Military Judge: Ronald A. Gregory.

Approved sentence: Dismissal and confinement for 11 months.

Appellate Counsel for the Appellant: Frank J. Spinner (civilian counsel) (argued); Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Shannon A. Bennett; and Major Michael S. Kerr.

Appellate Counsel for the United States: Major Daniel J. Breen (argued); Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel Jeremy S. Weber; Major Megan E. Middleton; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and WEISS
Appellate Military Judges

OPINION OF THE COURT

ROAN, Senior Judge:

Contrary to his pleas, the appellant was convicted by a panel of officer members at a general court-martial of one specification of dereliction of duty, one specification of wrongful sexual contact, one specification of conduct unbecoming an officer and gentleman, and one specification of obstruction of justice, in violation of Articles

92, 120, 133, and 134, UCMJ, 10 U.S.C. §§ 892, 920, 933, 934, respectively.[1] The adjudged and approved sentence consisted of a dismissal and confinement for 11 months.

The appellant raises seven issues for our consideration: (1) Whether the evidence was legally and factually sufficient to sustain the appellant's convictions; (2) Whether the military judge abused his discretion when he denied the defense counsel's challenges for cause against two panel members for implied bias; (3) Whether the appellant's conviction of unlawful sexual contact under Article 120, UCMJ, is unconstitutional; (4) Whether the specifications under Charge I and the specifications under Charge II were multiplicious for findings; (5) Whether the sentence to a dismissal was inappropriately severe; (6) Whether trial counsel's findings argument constituted prosecutorial misconduct; and (7) Whether Specifications 1 and 2 of Charge II fail to state an offense under Article 134,UCMJ.

Background

At the time of the offenses, the appellant was deployed to Incirlik Air Base, Turkey, as the commander of the 817th Expeditionary Airlift Squadron (EAS). Staff Sergeant (SSgt) DMM was a Security Forces Raven leader, specially trained to protect Air Force planes and crews deployed to forward areas. He was also deployed to Incirlik and was a member of the 817th EAS.

SSgt DMM testified that, during the evening of 16 February 2008, he went to the Incirlik Enlisted Club (Club) with several Airmen. The appellant, who was also at the Club, approached SSgt DMM and offered to buy him a drink. The two sat at the bar and began to converse and drink for the next hour and a half. The bar's surveillance video footage showed the appellant and SSgt DMM talking, drinking, high-fiving, and generally enjoying each other's company. SSgt DMM testified that he consumed approximately five to eight alcoholic drinks, which the appellant bought him that evening. SSgt DMM said that he and the appellant were discussing an upcoming marathon that SSgt DMM was going to run and for which the appellant was giving him suggestions to help his preparation. SSgt DMM also said the appellant insisted that he refer to him as "Stevie-D" that evening. SSgt DMM further testified that he wanted to leave but felt obliged to sit and drink with the appellant because he was the commander.

The appellant and SSgt DMM left the Club together between 0215 and 0230 and went back to the appellant's lodging room. SSgt DMM testified that the appellant had offered to show him various charts to help prepare for the marathon. After arriving at the appellant's room, the appellant made him another drink and the two sat side-by-side on the couch. SSgt DMM then claimed that, while he and the appellant were giving each

[1] The appellant was acquitted of one specification of wrongful sexual contact, one specification of assault and battery, and one specification of conduct unbecoming an officer and gentleman, which were charged under Articles 120, 128, and 133, UCMJ, 10 U.S.C. §§ 920, 928, 933, respectively.

other a high-five, the appellant grabbed SSgt DMM's hand and jammed it into the appellant's pants, under his underwear, causing SSgt DMM's fingers to touch the appellant's penis. SSgt DMM said that he immediately pulled his hand back and told the appellant he was not interested. The appellant then unbuttoned his own pants, pulled them down, and pulled out his genitals. The appellant left the room, returning a couple of seconds later with lotion. SSgt DMM testified that he knew he should have left the room but that he was traumatized and his "body wasn't responding at the time."

Upon returning, the appellant leaned over SSgt DMM and told him, "Relax . . . you're going to enjoy this . . . let me take care of you." The appellant rubbed lotion between his hands and then put his hand into SSgt DMM's pants, touching SSgt DMM's penis. SSgt DMM said he pulled the appellant's hand out and hit the appellant on his shoulder with his palm, causing the appellant to spin around. At that point, SSgt DMM said he was able to move and began to leave the room but the appellant grabbed his wrist and arm and flung SSgt DMM from the living room into the bedroom, where SSgt DMM fell onto the bed on his back. The appellant jumped on SSgt DMM and held him down. SSgt DMM said that he struggled against the appellant until the appellant fell asleep or passed out, at which point SSgt DMM was able to extricate himself and leave the appellant's room.

SSgt DMM testified that he went back to his billeting area where he had an "emotional breakdown." He saw several members of his unit and began crying. He specifically told SSgt S and SSgt B that the appellant assaulted him. He also called his parents, saying that he had been sexually assaulted. SSgt DMM further testified that the appellant came to his room later that day and told SSgt DMM that they "need[ed] to keep it between us . . . you're not going to get in trouble. As long as you keep this between us . . . I'm the commander, nobody is going to know but you and me [sic], and I'll protect you. I'll make sure . . . you don't get in trouble, as long as you keep this between us, 'cause if we don't somebody finds out, then you could get in trouble." SSgt DMM testified that he filed a report, with the base Sexual Assault Response Coordinator and then the local Office of Special Investigations (OSI), describing what had occurred. OSI agents set up a pretext phone call between SSgt DMM and the appellant. SSgt DMM testified that the appellant apologized at that time and did not deny the accusations.

Legal and Factual Sufficiency

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). 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 accused's guilt beyond a reasonable doubt. *Id*. at 325.

The appellant avers that the evidence was not legally or factually sufficient to support his conviction. He argues that SSgt DMM's testimony was implausible, inconsistent, conflicted with the testimony of other witnesses, and was not supported by forensic analysis or the video footage from the Club. The appellant argues that, because he was acquitted of several of the allegations that SSgt DMM claimed to have occurred, we should find SSgt DMM lacked all credibility and discount his entire testimony.

The appellant further insinuates that he was improperly convicted because the panel members were prejudiced against homosexual activity. He contends that, due to the Department of Defense (DoD) homosexual policy then in effect, the panel members would be "so uncomfortable with the subject matter [alleged gay sexual activity] that they would be unable to fairly judge the case."[2] The appellant speculates the members "shifted the burden of proof to the defense and those claims that were affirmatively 'disproven' by lack of DNA evidence, lack of corroborating forensic chemical evidence, and lack of physical injury result[ed] in not guilty findings. Those claims that were based solely on SSgt DMM's testimony and could not be affirmatively disproven because the alleged actions had no corroborating evidence result[ed] in guilty findings."

Considering the evidence produced at trial in a light most favorable to the Government, we find that a reasonable fact finder could have found beyond a reasonable doubt all of the elements of the offenses in question. As he did at trial, the appellant tries to impugn SSgt DMM's credibility, arguing his testimony was unbelievable and uncorroborated. The evidence contained within the record of trial does not bear out the appellant's assertions. Various Government witnesses testified about what they observed on the evening of 16 February 2008, and in the hours immediately following. Several testified to seeing SSgt DMM and the appellant in the Club drinking and conversing for a prolonged period. The video footage taken while the two were in the Club supports SSgt DMM's testimony to that effect. While no witness other than SSgt DMM could testify about what took place in the appellant's room, no less than four Airmen testified that they saw SSgt DMM, on the early morning of 17 February 2008, extremely upset and crying. TSgt B testified that he escorted SSgt DMM to SSgt S's room where SSgt DMM told them that he had been violated by the appellant, that the appellant tried to kiss him, and that he should have hit the appellant. SSgt S testified that he saw SSgt DMM and the appellant talking outside of SSgt DMM's room on 17 February 2008, corroborating SSgt DMM's testimony that he spoke with the appellant that morning. SSgt DMM's roommate, SrA R, testified that the appellant repeatedly called and asked to speak with SSgt DMM. He testified that this was the first time the appellant had called the room.

[2] Trial defense counsel made a motion to dismiss for unlawful command influence based on this same argument. The military judge denied the motion.

SrA R also said that the appellant twice came to the room wanting to speak with SSgt DMM. The first time SrA R told him SSgt DMM was sleeping and the second SSgt DMM went outside the room and spoke with the appellant. Although he did not hear the conversation, SSgt DMM was upset when he came back to the room, further supporting SSgt DMM's accounting of that morning. Additionally, SSgt DMM's father, an Air Force colonel (Col), testified that his son called him from Incirlik and was so emotionally upset that he could not fully explain what happened, other than to say he had been assaulted. Having carefully weighed the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced of the accused's guilt beyond a reasonable doubt.

With regard to the appellant's assertion that the members were influenced by the DoD homosexual policy to the point they "shifted the burden to the appellant" to prove his innocence and believed they had no choice but to find the appellant guilty of at least some of the charges, we find this argument without merit. During the course of a thorough voir dire, each member was questioned extensively about their personal views concerning homosexuality and the DoD policy then in effect. Each clearly stated that they were not influenced by the policy and would decide the appellant's case on its merits. We find absolutely no evidence that a panel of very experienced officers did not comply with their duties or follow the military judge's instructions.

Implied Bias

Following a comprehensive voir dire, the appellant challenged two members, Col P, and Lieutenant Colonel (Lt Col) A, on the basis of implied bias. Specifically, the appellant argued that Col P harbored an implied bias against the appellant, as evidenced by Col P's admitted religious beliefs against homosexual conduct coupled with his having been a member of an administrative board that voted to discharge an Air Force member for homosexual conduct, a decision that was later overturned by the separation authority. The appellant also challenged Lt Col A on the grounds that, as a physician, he might "act as an expert in the deliberation room by using his specialized knowledge, regarding 'forensic evidence.'" After hearing argument and expressly applying the liberal grant mandate, the military judge denied the implied bias challenge against both members. The appellant chose not to exercise his peremptory challenge against any members of the panel.

The appellant argues that the military judge abused his discretion by denying his challenges for cause against Col P and Lt Col A. We need not decide the merits of the appellant's claim because the appellant has waived the issue. Rule for Courts-Martial (R.C.M.) 912(f)(4) controls this very situation: "When a challenge for cause has been denied . . . failure by a challenging party to exercise a peremptory challenge against any member [] constitute[s] waiver of further consideration of the challenge upon later review." Therefore, this issue is meritless. *United States v. Medina*, 68 M.J. 587, 592

(N.M. Ct. Crim. App. 2009) (citing R.C.M. 912(f)(4)); *United States v. Leonard*, 63 M.J. 398, 403 (C.A.A.F. 2006), *aff'd*, 69 M.J. 462 (C.A.A.F. 2011); *cf. United States v. Terry*, 64 M.J. 295, 301 (C.A.A.F. 2007) (stating that the "[a]ppellant preserved the issue for appeal by subsequently using his peremptory challenge against another member" where the military judge denied the defense's challenges for cause against two members and the defense exercised a peremptory challenge against a third member).[3]

Constitutionality of Article 120, UCMJ

The appellant was charged and convicted of one specification of unlawful sexual contact under Article 120, UCMJ. At trial, the appellant moved to dismiss this charge on the basis that Article 120, UCMJ, created an unconstitutional burden shift and that the remedy provided in the Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook* (15 January 2008), essentially "overrul[ed] the actual statute." The military judge denied the motion, finding that "the instructions provided by the Military Judge's Benchbook sufficiently address any burden and shifting concerns by not requiring an accused show, by a preponderance, any type of mistake of fact as to consent or that there was consent." In accordance with the Benchbook, the military judge instructed the members that the prosecution had the burden of proving beyond a reasonable doubt that mistake of fact as to consent did not exist.

The appellant now renews his argument before this Court. The constitutionality of a statute is a question of law that we review de novo. *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011). As the appellant acknowledges in his brief, our superior court has already ruled contrary to the appellant's position. *See United States v. Medina*, 69 M.J.

[3] The appellant argues that, notwithstanding Rule for Courts-Martial 912(f)(4), waiver should not apply because the military judge denied two challenges for cause and therefore the appellant was placed in "the impossible dilemma" of having to elect which member to challenge peremptorily and which challenge to preserve for appeal. We do not find the appellant's argument convincing. Had he peremptorily challenged either Colonel P or Lieutenant Colonel A, the appellant would have both preserved the issue and ensured the removal of at least one of the members he objected to. We further note that the appellant's choice in not exercising his peremptory challenge appears to have been made for strategic purposes, as the record reveals:

> MJ: . . . Over to you, Mr. Stevens, any peremptory challenge?
>
> CDC: Sir, can I have one more minute in place?
>
> MJ: Yes. Yes, sure.
>
> [The defense counsel conferred.]
>
> CDC: So right now, sir, we're at seven?
>
> MJ: Right now, correct, we are seven.
>
> CDC: We don't have any peremptory challenges.

462 (C.A.A.F. 2011) (finding that the trial judge's failure to instruct in accordance with the statutory scheme of Article 120(t)(16), UCMJ, was error in the absence of a legally sufficient explanation, but rendered harmless beyond a reasonable doubt when the judge instructed the members that the evidence raised the defense of consent and that the Government had the burden of disproving the defense beyond a reasonable doubt). As in *Medina*, in the case before us, the military judge properly instructed the members as to the Government's burden to prove the offense beyond a reasonable doubt and to disprove the affirmative defense of consent by the same standard. While the military judge did not provide a specific justification on the record as to why he deviated from the statutory scheme outlined in Article 120, UCMJ, we find the error harmless beyond a reasonable doubt.

Multiplicity

The appellant made timely motions at trial to dismiss and/or merge Specifications 1 and 2 of Charge I, and Specifications 1 and 2 of Charge II, arguing they were multiplicious or constituted an unreasonable multiplication of charges.[4] The military judge denied the motion, finding the offenses were properly charged separately since Article 120, UCMJ, required proof of additional elements, namely proof of "without permission" and "specific intent" and that Article 133, UCMJ, required the appellant to be an officer and the conduct to be "wrongful." The appellant was ultimately acquitted of Specification 1 of Charge I and of Specification 2 of Charge II.

The appellant resumes his argument that the specifications of Charge I and the specifications of Charge II were multiplicious for findings and that the military judge abused his discretion in ruling otherwise. He complains that, even though he was acquitted of Specification 1 of Charge I and Specification 2 of Charge II, he nonetheless suffered harm because the inclusion of those specifications amongst the other charges

[4]Specification 1 of Charge I alleged the appellant committed wrongful sexual contact, in violation of Article 120, UCMJ, by: "grabbing [SSgt DMM's] hand and forcing it down the [appellant's] pants and onto [the appellant's] own penis . . . without legal justification or lawful authorization and without the permission of [SSgt DMM]."

Specification 2 of Charge I alleged the appellant committed wrongful sexual contact, in violation of Article 120, UCMJ, by: "touching [SSgt DMM's] penis . . . without legal justification or lawful authorization and without the permission of [SSgt DMM]."

Specification 1 of Charge II alleged the appellant committed conduct unbecoming an officer and gentleman, in violation of Article 133, UCMJ, by: "wrongfully expos[ing] his penis to [SSgt DMM], an enlisted member of [the appellant's] unit, while the two were in the private living quarters of [the appellant], such conduct unbecoming an officer and gentleman."

Specification 2 of Charge II, alleged the appellant committed conduct unbecoming an officer and gentleman, in violation of Article 133, UCMJ, by: "wrongfully lift[ing] the shirt, rub[ing] lotion onto the stomach [of], and touch[ing] the penis of [SSgt DMM], an enlisted member of [the appellant's unit], while the two were in the private living quarters of [the appellant], such conduct unbecoming an officer and gentleman."

exaggerated his criminality, "creating an environment where the members were disposed to convict [him] of something regardless of logic or the facts." We disagree.

We review issues of multiplicity de novo. *United States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007). Multiplicity is an issue of law that enforces the Double Jeopardy Clause. *Blockburger v. United States*, 284 U.S. 299 (1932); *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993); *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012). Accordingly, an accused may not be convicted and punished for two offenses where one is necessarily included in the other, absent congressional intent to permit separate punishments. *See Teters*, 37 M.J. at 376; *see also* R.C.M. 907(b)(3), Discussion. Where legislative intent is not expressed in the statute or legislative history, "it can also be presumed or inferred based on the elements of the violated statutes and their relationship to each other." *Teters*, 37 M.J. at 376-77. Thus, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Blockburger*, 284 U.S. at 304 (citation omitted); *see also Teters*, 37 M.J. at 377 (*Blockburger* rule "is to be applied to the elements of the statutes violated"). Accordingly, multiple convictions and punishments are permitted for a distinct act if the two charges each have at least one separate statutory element from the other.

Applying *Blockburger*, we find the appellant was not subjected to an improper multiplication of charges. The offense of wrongful sexual contact, as charged in Charge I, and the offense of conduct unbecoming an officer and gentleman, as charged in Charge II, carry distinct elements. The elements of wrongful sexual contact are: (a) That the accused had sexual contact with another person, (b) That the accused did so without that other person's permission, and (3) that the accused had no legal justification or lawful authorization for that sexual contact. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 45.b.(13) (2008 ed.). The elements of conduct unbecoming an officer and gentleman are: (a) That the accused did or omitted to do certain acts; and (b) That, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman. *MCM*, Part IV, ¶ 51.b. Clearly, each offense requires proof of an element which is different than the other. Further, each specification for which the appellant was convicted alleges distinctly different acts. Specification 2 of Charge I alleges an improper touching of SSgt DMM's penis while Specification 1 of Charge II alleges the appellant exposed his penis to an enlisted member of the appellant's unit while the two were in the appellant's living quarters. As there are elements of each offense which are not contained within the other and as there is no congressional or presidential guidance to the contrary, we find that the military judge did not err in denying the appellant's motion to dismiss the specifications on grounds of multiplicity.

Application of *Blockburger* does not end the analysis. "[E]ven if offenses are not multiplicious as a matter of law with respect to double jeopardy concerns, the prohibition

against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal standard – reasonableness – to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system." *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001); *see also* R.C.M. 307(c)(4) ("What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person."). "Unreasonable multiplication of charges is reviewed for an abuse of discretion." *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004) (citation omitted). In determining issues of unreasonable multiplication, we apply a five-part test which considers: (1) whether a multiplicity objection was made at trial, (2) whether the specifications are aimed at distinct criminal acts, (3) whether the number of charges and specifications misrepresent or exaggerate the charged criminality, (4) whether the number of charges and specifications unreasonably increase the punitive exposure, and (5) whether the evidence shows prosecutorial overreaching or abuse in drafting the charges. *Id*. (citing *Quiroz*, 55 M.J. at 338). The factors are to be balanced, with no single factor dictating the result. *Id*.

Applying the requisite test, we find the appellant was not subjected to an unreasonable multiplication of charges. As for the first part of the *Quiroz* five-part test, we find that the trial defense counsel did make an objection to the charging language at trial. The other factors, however, weigh against the appellant. Specifically, we note that: (1) each charge and specification is aimed at distinctly different criminal acts, (2) the number of charges and specifications do not misrepresent or exaggerate the appellant's criminality, (3) the number of charges and specifications do not unreasonably increase the appellant's punitive exposure, and (4) there is no evidence of prosecutorial overreaching. In short, the military judge did not abuse his discretion by finding the appellant was not subjected to an unreasonable multiplication of charges.

Trial Counsel's Findings Argument

The appellant asserts that the trial counsel's comments during her findings argument rose to the level of prosecutorial misconduct, by vouching, adding unsolicited personal views, and introducing facts not in evidence.

"The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000) (citations omitted). Whether or not the comments are fair must be resolved when viewed within the context of the entire court-martial. *United States v. Gilley*, 56 M.J. 113, 121 (C.A.A.F. 2001). It is appropriate for counsel to argue the evidence, as well as all reasonable inferences fairly derived from such evidence. *United States v. Nelson*, 1 M.J. 235, 239 (C.M.A. 1975). Further, "trial counsel [are] at liberty to strike hard, but not foul, blows." *Baer*, 53 M.J. at 237. Thus, counsel may not insert matters into argument that "unduly . . . inflame the passions or

prejudices of the court members." *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007) (quoting *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983)). The lack of defense objection is some measure of the minimal impact of the trial counsel's improper argument. *Gilley*, 56 M.J. at 123. Further, "[i]mproper argument does not require reversal unless 'the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone.'" *Schroder*, 65 M.J. at 58 (quoting *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005)).

The appellant points to several comments by trial counsel during argument that he asserts violated the precepts outlined above. He argues that the Government's case relied solely on the credibility of SSgt DMM and, as such, it materially prejudiced him when the trial counsel inserted her personal views, improperly vouched for, and indicated that other witnesses corroborated SSgt DMM's claims. He further argues that the trial counsel introduced facts not in evidence, repeatedly commented on the appellant's guilt, and tried to inflame the passions of the jury by analogizing the alleged victim, SSgt DMM, with a small female as a possible victim. Finally, he argues that the military judge failed to properly admonish trial counsel and, even when he did instruct the members that trial counsel's statements were not to be treated as evidence but only as counsel's view of the facts, such instruction was inadequate to cure the harm.

After a careful review of the entire record, we do not read into the trial counsel's argument the meanings and effects urged by the appellant; rather, we find the argument was based on a fair accounting of the evidence and we find no prejudicial error. Trial counsel's argument essentially amounted to retelling of the case as it evolved throughout the trial, oftentimes recounting it in first person from SSgt DMM's perspective, and her interpretation of the evidence within the context of that perspective. Contrary to the appellant's assertion that the Government's case solely rested on SSgt DMM's testimony, the video footage, a sketch of the room where the offenses occurred, and the testimony of 10 witnesses, including experts, also provided a sufficient evidentiary foundation for trial counsel's theory. And although trial counsel did address the credibility of some of the witnesses, we do not find that she "improper[ly] . . . interject[ed] herself into the proceedings by expressing a 'personal belief or opinion as to the truth or falsity of any testimony or evidence.'" *Fletcher*, 62 M.J. at 179 (quoting *United States v. Horn*, 9 M.J. 429, 430 (C.M.A. 1980)). For example, she did not "use[ ] personal pronouns in connection with assertions that a witness was correct or to be believed," *id.* at 180 (citing *United States v. Washington*, 263 F. Supp. 2d 413, 431 (D. Conn. 2003)), but rather made general statements and proposed explanations for any arguable inconsistencies in the testimony. Further, trial counsel's reference to a four-foot, eleven-inch, 115-pound female witness and invitation to the panel members to "think if your mind would change if [SSgt DMM] were female," was seemingly made in an attempt to illustrate SSgt DMM's vulnerability at the time of his encounter with the appellant, and we do not find this improper considering the male-on-male nature of the

offenses and SSgt DMM's specialized training as a Security Forces Raven, of which the trial defense counsel expressly focused on and drew out as reasons to question SSgt DMM's credibility. We do not find that such commentary "unduly . . . inflame[d] the passions or prejudices of the court members." *Schroder*, 65 M.J. at 58 (quoting *Clifton*, 15 M.J. at 30). We also do not find that trial counsel introduced new facts in her argument but that, to the extent there were any deviations between the language she used and the verbatim testimony of the witnesses, they were reasonably inferred or paraphrased from the testimony. Finally, we note the lack of defense objection at trial to the bulk of the appellant's complaints now as some measure of the minimal impact, if any, of the trial counsel's argument. *Gilley*, 56 M.J. at 123.[5]

Having considered the entire argument in the context of the record as a whole and giving particular attention to those portions of the argument cited by the appellant, we find that the instances of argument cited by the appellant do not rise to the level of either prosecutorial misconduct or plain error, and they merit no relief.

Legal Sufficiency of the Article 134, UCMJ, Offense

The appellant argues that his conviction for obstruction of justice, as alleged in Charge V, should be set aside and dismissed because it does not allege the Article 134, UCMJ, terminal element of being either prejudicial to good order and discipline (Clause 1) or service discrediting (Clause 2).

Whether a charge and specification state an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted). "A specification states an offense if it alleges, either expressly or by [necessary] implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *Id.* at 211 (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)); *see also* R.C.M. 307(c)(3). Because the appellant did not request a bill of particulars or move to dismiss the specification for failure to state an offense, we analyzed this case for plain error and find that the failure to allege the terminal element was plain and obvious error which was forfeited rather than waived. *United States v. Humphries*, 71 M.J. 209, 215 (C.A.A.F. 2012); *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F.), *cert. denied*, 133 S. Ct. 34 (2012) (mem.); *United States v. Fosler*, 70 M.J. 225, 230-231 (C.A.A.F. 2011). But, a finding of error does not alone warrant dismissal, *Ballan*, 71 M.J. at 34, and whether a remedy is required depends on "whether the defective specification resulted in material prejudice to Appellee's substantial right to notice," *Humphries*, 71 M.J. at 215. The appellant has the burden of

[5] The trial defense counsel objected to the trial counsel's arguments at three points: (1) when trial counsel asked the panel members to picture a four-foot, eleven-inch, 115-pound female, who'd testified as a witness, in the place of SSgt DMM; (2) to trial counsel's rebuttal argument regarding SSgt DMM's testimony on the lotion, on the basis that the trial counsel was mischaracterizing SSgt DMM's testimony; and (3) to trial counsel's statement in rebuttal implying that the defense had some duty to prepare SSgt DMM for his trial testimony.

demonstrating such material prejudice. *Id*. (citing *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)).

"Mindful that in the plain error context the defective specification alone is insufficient to constitute substantial prejudice to a material right . . . we look to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Id*. at 215-16. After a close review of the record, we find no such notice "somewhere extant in the trial record." *Id*. As in *Humphries*, several salient weaknesses in the record highlight where notice was missing: (1) the Government presented no evidence or witnesses to show how the conduct satisfied either Clause 1, Clause 2, or both clauses of the terminal element; (2) the Government made no attempt to link evidence or witnesses to either clause of the terminal element in either its opening statement or closing argument; and (3) though the Government addressed the obstruction of justice charge in its closing argument, it mainly focused on the knowledge element (i.e., an accused's existing belief that criminal proceedings were or would be pending), but again failed to mention either terminal element. Additionally, although the military judge's instructions to the members properly delineated the terminal elements of Article 134, UCMJ, this took place after the close of evidence, "and again, did not alert the appelle[nt] to the Government's theory of guilt." *Id*. (citing *Fosler*, 70 M.J. at 230) (internal quotations omitted). In sum, we can find nothing in the record, as required under *Humphries*, that reasonably placed the appellant on notice of the Government's theory as to which clause(s) of the terminal element of Article 134, UCMJ, he had violated. *Id*. at 216.

Consequently, the Government's failure to allege the terminal element in the Specification of Charge V constituted material prejudice to the appellant's substantial rights to notice. *See* Article 59(a), UCMJ, 10 U.S.C. § 859(a). We therefore set aside the findings of guilty for Charge V and its Specification.

Sentence Reassessment

Having set aside the findings of guilty of obstruction of justice, we must assess the impact on the sentence and either return the case for a sentence rehearing or reassess the sentence ourselves. Before reassessing a sentence, we must be confident "that, absent the error, the sentence would have been of at least a certain magnitude." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986)). A "dramatic change in the 'penalty landscape'" lessens our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). Ultimately, a sentence can be reassessed only if we "confidently can discern the extent of the error's effect on the sentencing authority's decision." *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991). If we cannot determine that the sentence would have been at least of a certain magnitude, we must order a rehearing. *Doss*, 57 M.J. at 185 (citing *Sales*, 22 M.J. at 307). Discounting Charge V, the maximum punishment for the appellant's

conviction was a dismissal and two years, 6 months of confinement. The panel sentenced the appellant to a dismissal and confinement for 11 months.

Our review of the record indicates that the primary focus of the court-martial centered on the appellant's sexual misconduct with a subordinate, engaging in conduct unbecoming an officer and dereliction of duty. The obstruction of justice charge, while important, was not central to the determination of an appropriate sentence. Furthermore, the members would have been made aware of the appellant's comments as evidence of consciousness of guilt even if the conduct had not been charged separately.

On the basis of the error noted, the entire record, and applying the principles set forth above, we determine that we can discern the effect of the error and will reassess the sentence. Under the circumstances of this case, and considering the relative severity of the unaffected charges, we are confident that the panel members would have imposed the same sentence. *See Doss*, 57 M.J. at 185.

Sentence Severity

The appellant claims that the confinement he served was more than adequate punishment for his offenses and his sentence to a dismissal is inappropriately severe. This Court reviews sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006); *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c); *see also United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the 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 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *Lacy*, 50 M.J. at 288.

We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all other matters contained in the record of trial. The approved sentence was clearly within the discretion of the convening authority and was appropriate in this case. *See Healy*, 26 M.J. at 395-96. Accordingly, we hold that the approved sentence was not inappropriately severe.

Conclusion

The finding of guilty of Charge V and its Specification is set aside and dismissed. The remaining findings and sentence, following reassessment, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[6] Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

Chief Judge Orr and Judge Weiss participated in this decision prior to their respective retirements.

OFFICIAL

STEVEN LUCAS
Clerk of the Court

[6] We find that the appellate delay in this case was harmless beyond a reasonable doubt. *United States v. Moreno*, 63 M.J. 129, 135–36 (C.A.A.F. 2006) (reviewing claims of post-trial and appellate delay using the four-factor analysis in *Barker v. Wingo*, 407 U.S. 514 (1972)).