UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman MICHAEL S. TUNSTALL
United States Air Force

ACM 37592

28 March 2012

Sentence adjudged 19 November 2009 by GCM convened at Hurlburt Field, Florida. Military Judge: Michael J. O'Sullivan.

Approved sentence: Bad-conduct discharge, confinement for 6 months, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Major Phillip T. Korman; and Major Nicholas W. McCue.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Scott C. Jansen; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

The appellant was tried by a general court-martial comprised of officer members at Hurlburt Field, Florida, from 16-19 November 2009. Contrary to his pleas, the appellant was convicted of one specification of aggravated sexual assault[1] and one specification of indecent acts,[2] in violation of Article 120, UCMJ, 10 U.S.C. § 920; and

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[1] In Specification 1 of Charge I, the appellant was charged with aggravated sexual assault by engaging in sexual intercourse with A1C KS, who was substantially incapable of declining participating in the sexual act.

[2] The appellant pled not guilty to Specification 2 of Charge I, aggravated sexual assault by digitally penetrating the vagina of A1C KS, who was substantially incapable of declining participation in the sexual act. The members found

one specification of adultery, in violation of Article 134, UCMJ, 10 U.S.C. § 934.[3] The members sentenced the appellant to confinement for six months, reduction to E-1, a reprimand, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.[4]

On appeal, the appellant has assigned the following errors before this Court: (1) the evidence is legally and factually insufficient to support his conviction for aggravated sexual assault with someone substantially incapable of declining participation, (2) the military judge erred when he instructed the members that consent ceases to exist if a person becomes substantially incapable of physically declining participation in the sexual conduct at issue, (3) the military judge erred when he instructed the members that an indecent act with another is a lesser included offense of aggravated sexual assault, (4) the record of trial must be remanded for a new action because it is unclear if the convening authority reviewed the appellant's clemency submissions,[5] and (5) the appellant's sentence is inappropriately severe.[6] We will also address the legality of the appellant's conviction for adultery under Article 134, UCMJ, in light *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). Finding no prejudicial error, we affirm the findings and sentence.

Background

At the time of the offense, the appellant was a first-term Airman assigned to the 1st Special Operations Equipment Squadron at Hurlburt Field, Florida. Although married, the appellant was getting a divorce and lived on-base. On 17 April 2009, the appellant and Airman First Class (A1C) KS, A1C WD, and A1C TJ were hanging out at the dorms. All had been drinking alcohol except for WD, who is a non-drinker. At some point, the Airmen decided to go to the beach. WD was the designated driver.

The appellant, KS, and TJ continued to drink alcohol while at the beach. WD testified that the appellant and KS were flirting with each other. After several hours, the group returned to the dorms and reconvened in KS's room, where they drank more shots

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the appellant not guilty of this specification, but guilty of indecent acts with another, in violation of Article 120, UCMJ, 10 U.S.C. § 920.

[3] The appellant was also charged with one specification of false official statement, in violation of Article 107, UCMJ, 10 U.S.C. § 907. He pled not guilty, and the members found him not guilty.

[4] We note that the Specification of Charge III in the court-martial order (CMO) is missing the date the offense occurred. We direct the promulgation of a corrected CMO.

[5] Initially, the appellant argued that the record of trial did not contain an addendum indicating that the convening authority reviewed and considered the clemency matters submitted by the appellant prior to taking action. As such, the appellant asked this court to remand the case for a new Action. The Government submitted affidavits from the convening authority and the convening authority's staff judge advocate that clearly show the convening authority considered the appellant's entire clemency petition prior to taking action. Affidavits and declarations received from the convening authority or the staff judge advocate are "reliable means of verifying that the convening authority actually considered the appellant's submissions." *United States v. Godreau*, 31 M.J. 809, 812 (A.F.C.M.R. 1990). In light of these affidavits, the appellant now concedes that there is no longer a need to remand this case for a new Action. We agree.

[6] The appellant raises this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

of rum. Eventually, the group moved to TJ's room and played a drinking game called "ring of fire" or "king's cup." The game rules included the possibility that a player might have to undress for game violations.

During the card game, the appellant and KS continued their flirting. Although the appellant initially violated the game rules, KS volunteered to take off her clothes, which she did without difficulty. KS then straddled the appellant, who initially seemed embarrassed but then started making out with KS on the table where the group was playing cards. The appellant digitally penetrated her vagina. One witness testified that KS was the aggressor and the digital penetration was consensual. After about 10 minutes, KS said she didn't feel good. She then fell from the table to the floor and began to vomit. Although conscious, she was neither moving nor talking. After several minutes, TJ and the appellant assisted KS to the nearby bathroom sink. The appellant digitally penetrated KS's vagina again while she was leaning over the sink. TJ told the appellant "[i]t's not time for that. I mean she's sick, we need to take care of her." The appellant stopped and helped KS to the bathroom toilet.

TJ text-messaged Senior Airman HD for assistance. HD lived in the suite next to TJ's room, and they shared a kitchen and bathroom area. HD, who had not been drinking alcohol that day, testified that he saw KS in the bathroom naked. Concerned, he told the appellant and TJ to rinse her down in the shower. The appellant then closed and locked the door and was alone with KS in the bathroom. Witnesses heard a female voice coming from the bathroom, which one witness characterized as a "get away from me" sound.

Upset that the appellant had a "drunk" female in his bathroom, HD began banging on the door and shouting for the appellant to unlock it. The appellant opened the door after about 20-25 minutes wearing only a towel. KS was lying in the bathtub curled up into a ball. HD testified that KS appeared very drunk, could neither talk nor walk, and was "rolling in and out of consciousness." He also testified that she was "out of it," was "basically limp," and that her "eyes were rolling to the back of her head." HD dressed KS and carried her to her room. One witness testified that KS was, at this time, "almost passed out," and "her head was moving" but not her arms or legs. Another witness testified that KS was not "completely unconscious, but she was at the point where she wasn't able to do anything herself, really."

KS testified that she did not remember anything after the beginning of the card game. She remembered drinking rum with TJ and the appellant before going to the beach. After returning from the beach, she recalled that she and the others drank more rum before moving over to TJ's room to play cards. She testified that her next memory was waking up the next morning in bed wearing clothes that did not belong to her. She also noticed some bruises on her inner thigh. Although she felt sick, KS went to work, where a friend told her what had happened the night before. KS testified that she was "shocked and embarrassed upon hearing this news." After work, KS saw the appellant,

who said to her "we're not going to tell anyone about last night, correct?" She also testified that she only drinks alcohol once or twice a year.

When questioned by the Air Force Office of Special Investigations (AFOSI), the appellant initially denied having sex with KS, but then admitted that he digitally penetrated her and had consensual sexual intercourse with her in the bathroom shower. He also admitted to a co-worker that he had sexual intercourse with KS on the night in question.

Legal and Factual Sufficiency of the Article 120, UCMJ, Evidence

The appellant argues that the evidence is legally and factually insufficient to sustain his conviction for aggravated sexual assault in Specification 1 of Charge I. We disagree.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In resolving legal-sufficiency questions, "[we are] bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993) (quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)). *See also United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

The elements of aggravated sexual assault in this case required the Government to prove beyond a reasonable doubt that: (1) the appellant engaged in a sexual act, and (2) the appellant did so when the other person was substantially incapable of declining participation in the sexual act. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 45.b(3)(c)(i), (iv) (2008 ed.).

The evidence is legally and factually sufficient to find that the appellant did engage in a sexual act with KS. The appellant admitted to AFOSI that he had sexual intercourse with KS in the bathroom, and she testified that the appellant asked her the

next day not to tell anyone "about last night." Additionally, the appellant also told a co-worker that he had sexual intercourse with KS. The record of trial contains enough evidence about the flirting and petting between KS and the appellant to sufficiently corroborate his statements. *See United States v. Melvin*, 26 M.J. 145 (C.M.A. 1988) (holding that the amount of corroboration required is slight and need only raise an inference of truth concerning the essential facts admitted in the confession).

The evidence is also legally and factually sufficient to find that KS was substantially incapable of participating in the sexual act. By her own admission, KS only drinks alcohol once or twice per year and had been drinking heavily the day of the incident. Witnesses testified that KS initially seemed fine during the card game but then became sick, vomiting on the bathroom floor and in the sink. At this point, she seemed incoherent and unable to care for herself. HD described KS as "out of it," "unresponsive," and "almost passed out." She could neither talk nor walk and was "rolling in and out of consciousness." He also testified that she was "basically limp," and that her "eyes were rolling to the back of her head." Other witnesses described KS as "almost passed out," "her head was moving" but not her arms or legs, and "she was at the point where she wasn't able to do anything herself, really." Finally, KS has no memory of what happened after the card game began and does not remember having sex with the appellant at any point.

The military judge instructed the members on direct and circumstantial evidence as well as their duty to weigh the evidence and evaluate the credibility of the witnesses. The appellant's admissions to AFOSI, KS, and co-workers, combined with witness testimony and circumstantial evidence provide sufficient evidence to conclude that the appellant and KS had sexual intercourse in the bathroom and that KS was substantially incapable of declining participation. We have carefully considered the evidence with particular attention to the matters raised by the appellant. Having considered the evidence in the light most favorable to the prosecution, and making allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt that the appellant is guilty of aggravated sexual assault as set forth in Specification 1 of Charge I.

Instructions on Consent and Substantial Incapacitation

The appellant next argues that the military judge erroneously instructed the members that if KS consented to the sexual intercourse in Specification 1 of Charge I, her consent had to be given at the time of the alleged offense. We disagree.

At the beginning of trial, the trial defense counsel brought a motion to dismiss on the ground that Article 120, UCMJ, is facially unconstitutional.[7] The military judge denied the motion. The military judge instructed the members that aggravated sexual

[7] The defense argued that Article 120, UCMJ, was unconstitutional because it created a double burden shift.

assault, as charged in Specification 1 of Charge I, required proof beyond a reasonable doubt that the appellant engaged in an act of sexual intercourse with KS when she was substantially incapacitated. He further instructed the members that consent and mistake of fact were defenses to the charge and that the Government had the burden to prove beyond a reasonable doubt that consent did not exist. The military judge explained that consent is a freely given agreement to sexual activity by a competent person and that a person who is substantially incapacitated cannot consent. He further instructed that mistake of fact as to consent is a defense if the appellant believed as a result of ignorance or mistake that KS consented, but the appellant's belief must be reasonable under all the circumstances. The military judge also instructed the members about the appellant's state of voluntary intoxication.[8]

During deliberations, the members returned with several questions, one of which was: "Is there a time limit on consent. If consent was given, then during the act (or just prior) one party was unable to consent later, can the initial consent carryover?" Trial counsel proposed answering this question by instructing the members that "there is not a time limit on consent and that they should consider all the facts and circumstances when making the determination on whether consent existed." Trial defense counsel concurred. Later, trial counsel also suggested that the military judge refer the members back to the consent instruction, which stated in part, that "a person cannot consent to sexual activity if that person is substantially incapable of physically declining participation in the sexual conduct at issue." Trial defense counsel neither objected nor agreed with this language, but did ask the military judge to refer the members back to the instruction on mistake of fact.

The military judge then provided the following instruction to the members in response to their question:

> There is no time limit on consent per se and the existence of consent at the time of the alleged sexual acts is a question of fact for your determination. You must consider all the facts and circumstances to determine whether consent was given at the time of the alleged offenses. I refer you back to

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[8] In his ruling, the military judge stated that he was convinced that the 2007 interim changes to instructions in the Department of the Army Pamphlet (D.A. Pam) 27-9, *Military Judges' Benchbook* (15 September 2002) [hereinafter Benchbook], adequately protected the appellant's rights under the Fifth and Sixth Amendment to the Constitution. He further stated that he intended to instruct the members consistent with the interim changes to the Benchbook on the affirmative defense of consent and mistake of fact. *See* D.A. Pam. 27-9, ¶ 3-45-5, n. 9, 10. These instructions comport with our superior court's holding in *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011). In *Medina*, the military judge instructed the members on consent using the procedural instruction from the Benchbook rather than using the language from Article 120(t)(16), UCMJ. In affirming a conviction for aggravated sexual assault under Article 120(c)(2), the Court held that the instruction "was clear and correctly conveyed to the members the Government's burden" to prove the elements of the offense beyond a reasonable doubt and to disprove the affirmative defense of consent. *Id.* at 465-66 (citing *Martin v. Ohio*, 480 U.S. 228, 234 (1987)). The Court concluded that even though the military judge erred by not explaining on the record why he deviated from the statutory language of Article 120, UCMJ, the error was harmless beyond a reasonable doubt. *Id.*

> the language at lines 22 through 24 of page 2 of the written instructions in Appellate Exhibit XV, which states that a person cannot consent to sexual activity if that person is substantially incapable of physically declining participation in the sexual conduct at issue. Additionally, I refer you to lines 27 through 29 of page 2 of the written instructions: in order to find the accused guilty of the aggravated assault specifications, you must be convinced beyond a reasonable doubt that, at the time of the sexual acts alleged, A1C KS did not consent. Finally, I also refer you to the mistake of fact as to consent instructions immediately following the discussion of consent, beginning at line 33 of page 2.

Whether members were properly instructed is a question of law reviewed de novo. *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011). In this case, we find the military judge did not err when he used the language "at the time of the alleged offense" in his instruction. To the contrary, the record shows that the military judge engaged in an extensive colloquy with trial and defense counsel before crafting his instruction and responding to the question from the members. He specifically instructed the members that "there is no time limit on consent per se" and reminded members that consent is a question of fact for their consideration. Moreover, the military judge referred the members back to instructions on consent, substantial incapacity, and mistake of fact. When read as a whole, this instruction permitted the members to consider the issue of consent within legally permissible boundaries. *See id.* As such, we find the military judge's instruction was not erroneous.

Indecent Acts as a Lesser Included Offense of Aggravated Sexual Assault

The military judge instructed the members without objection[9] that they could consider indecent acts under Article 120(k), UCMJ, as a lesser included offense of aggravated sexual assault under Article 120(c)(2)(B), UCMJ. Specifically, the military judge instructed the members: on the elements of indecent acts; on the definitions of the terms "indecent conduct," "sexual act," and "wrongful"; that private, consensual, sexual activity is not punishable as an indecent act absent aggravating circumstances; and that a possible aggravating circumstance is that the sexual activity was "open and notorious."[10]

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[9] After reviewing the proposed instructions with the trial and defense counsel, the following colloquy took place:

> MJ: Any other objections to the instructions as drafted in Appellate Exhibit XV?
> DC: No, sir.
> MJ: All right. Any requests for additional instructions that are not in Appellate Exhibit XV?
> TC: No, Your Honor.
> DC: No, Sir.

[10] The military judge defined "open and notorious" as follows:

> Sexual activity may be open and notorious when the participants know that someone else is present. This presence of someone else may include a person who is present and witnesses the sexual activity, or is present and aware of the sexual activity through senses other than vision. On the other hand, sexual activity that is not performed in the close proximity of someone else, and which passes unnoticed, may not be considered open and notorious. Sexual activity may also be

Finally, the military judge instructed the members that the offense of indecent acts did not *require* that they find that the appellant digitally penetrated KS while she was substantially incapable of declining participating in the act, but did require them to find that the act itself was indecent. The members convicted the appellant of the lesser offense of indecent acts. The appellant now argues that the instruction on indecent acts as a lesser included offense of aggravated sexual assault was error because it fails the "elements test" for determining when one offense is included in another. Accordingly, the appellant asserts that his conviction for indecent acts under Specification 2 of Charge I must be set aside. We disagree.

We review de novo whether an offense is a lesser included offense. *United States v. Miller*, 67 M.J. 385, 387 (C.A.A.F. 2009) (citations omitted). Military judges have a sua sponte duty to instruct members on lesser included offenses reasonably raised by the evidence. *United States v. Miergrimado*, 66 M.J. 34, 36 (C.A.A.F. 2008). Here, the record contains sufficient evidence for the military judge to have reasonably concluded that it was appropriate to instruct the members of the offense of indecent acts as a lesser included offense. The appellant and TJ helped KS to the sink when she became sick. He digitally penetrated KS's vagina from behind as she vomited into the sink and stopped only when TJ told him they needed to help her.

"The military is a notice pleading jurisdiction." *Fosler*, 70 M.J. at 229 (citing *United States v. Sell*, 3 C.M.R. 202, 206 (C.M.A. 1953)). This requires the charge and specification "contain[ ] the elements of the offense charged and fairly inform[ ] a defendant of the charge against which he must defend, and, second, enable[ ] him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *Id.* (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). To determine whether a charged offense provides sufficient notice of a lesser included offense, both the United States Supreme Court and the Court of Appeals for the Armed Forces apply an elements test. This test analyzes whether the elements of the lesser offense are a subset of the charged offense:

> Under the elements test, one compares the elements of each offense. If all of the elements of offense X are also elements of offense Y, then X is an LIO of Y. Offense Y is called the greater offense because it contains all of the elements of offense X along with one or more additional elements.

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considered open and notorious when the act occurs under circumstances in which there is a substantial risk that the acts could be witnessed by someone else, despite the fact that no such discovery occurred.

United States v. Jones, 68 M.J. 465, 470 (C.A.A.F. 2010) (citing *Schmuck v. United States*, 489 U.S. 705 (1989)).[11] *See also United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011); *United States v. McMurrin*, 70 M.J. 15 (C.A.A.F. 2011).

The analysis, however, does not stop with a strict application of the elements test. In *Schmuck*, the United States Supreme Court opined that "[t]o be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser." *Schmuck,* 489 U.S. at 719 (quoting *Giles v. United States*, 144 F.2d 860 (9th Cir. 1944) (internal citation omitted)). Moreover, the elements test does not require that the two offenses "employ identical statutory language." *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010). *See also United States v. Bonner*, 70 M.J. 1, 2 (C.A.A.F. 2011). "Instead, the meaning of the offenses is ascertained by applying the 'normal principles of statutory construction.'" *Alston*, 69 M.J. at 216 (quoting *Carter v. United States*, 530 U.S. 255, 263 (2000)). As such, our task is to compare the elements of the greater and lesser offenses using normal principles of statutory construction to determine if the elements of the lesser included offense are a subset of the charged offense. *Bonner*, 70 M.J. at 2.

Applying the above principles to this case, we find that the military judge did not err. The specification at issue alleged the offense of aggravated sexual assault, under Article 120(c)(2)(B), UCMJ, in that the appellant did "engage in a sexual act, to wit: digital penetration of the vagina, with KS, who was substantially incapable of declining participation in the sexual act." *See MCM*, Part IV, ¶ 45.g.(3)(c). The *Manual* lists the elements for this offense as follows: (a) "That the accused engaged in a sexual act with another person, who is of any age;" and (b) "That the other person was substantially incapable of declining participation in the sexual act." *MCM*, Part IV, ¶ 45.b.(3)(c)(i), (iv). The UCMJ defines "sexual act," in relevant part, as "the penetration, however slight, of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person." Article 120(t)(1)(B), UCMJ. The UCMJ defines "consent," in relevant part, as "words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person . . . [a] person cannot consent to sexual activity if . . . substantially incapable of . . . physically declining participation in the sexual conduct at issue." Article 120(t)(14)(B)(ii), UCMJ.

The offense of indecent acts occurs when "[a]ny person . . . engages in indecent conduct." Article 120(k), UCMJ. The *Manual* lists the elements for indecent acts as follows: "(a) [t]hat the accused engaged in certain conduct; and (b) [t]hat conduct was indecent conduct." *MCM*, Part IV, ¶ 45.b.(11). The UCMJ defines "indecent conduct,"

[11] In *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010), the Court held that indecent acts with another under Article 134, UCMJ, was not a lesser included offense of rape under Article 120, UCMJ, because the two offenses did not share any common elements and there was "nothing in that charge that put Appellant on notice that he also needed to defend against indecent acts." *Id*. at 473.

in relevant part, as "that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." Article 120(t)(12), UCMJ.

Comparing the elements of the offenses in this case, we find that an indecent act under Article 120(k), UCMJ, is a lesser included offense of this alleged aggravated sexual assault under Article 120(c)(2)(B), UCMJ. In reaching this conclusion, we further find that the appellant was on notice that he had to defend against the elements of both the greater and lesser offenses.

The greater offense, aggravated sexual assault, required that the appellant engage in a "sexual act" – by penetrating KS's genital opening by hand, finger, or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. Article 120(t)(1)(B), UCMJ. It further required that he commit the act while KS "was substantially incapable of declining participation," and thus without her permission. *See* Article 120(c)(2)(B), (t)(14)(B)(ii), UCMJ.

The offense of indecent acts required that the appellant engage in "certain conduct" that was "indecent" – conduct that is sexually immoral by virtue of being grossly vulgar, obscene, and repugnant to common propriety and that tends to excite sexual desire or deprave morals with respect to sexual relations. Article 120(k), (t)(12), UCMJ. Surely "it is impossible to" penetrate someone's genital opening without their permission in order to abuse, humiliate, harass, or degrade or to arouse or gratify a sexual desire "without first having committed" conduct that is also sexually immoral by virtue of being grossly vulgar, obscene, and repugnant to common propriety and that tends to excite sexual desire or deprave morals with respect to sexual relations. *Schmuck,* 489 U.S. at 719 (quoting *Giles*, 144 F.2d at 861 (citation and internal quotation marks omitted)).

Moreover, the appellant was on notice he had to defend against an allegation of indecency. The charges themselves apprised the appellant that the trial would include an allegation that KS did not give him permission to digitally penetrate her vagina. Indeed, facts revealed at trial included that the appellant chose to digitally penetrate her vagina while KS was vomiting at the sink and that the appellant did so in the presence of a third person – TJ – who told him to stop with the words, "[i]t's not time for that. I mean she's sick, we need to take care of her."

Under the facts of this case, we conclude that one cannot engage in a "sexual act" with someone who was vomiting in a sink in the presence of a third party without also engaging in an indecent act. Such conduct would, at a minimum, be indecent by the ordinary understanding of what it means for conduct to be indecent and thus does meet the statutory standard for indecency, i.e., "that form of immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to

excite sexual desire or deprave morals with respect to sexual relations." Article 120(t)(12), UCMJ. This is particularly true when the act was committed in the presence of a third party, as occurred in this case. For these reasons, we conclude that, under the specific facts of this case, an indecent act under Article 120(k), UCMJ, is a lesser included offense of aggravated sexual assault under Article 120(c)(2)(B), UCMJ.

Legality of the Article 134, UCMJ, Offense

The appellant was convicted of adultery, in violation of Article 134, UCMJ because he had sexual intercourse with KS while married to another woman. Article 134, UCMJ, criminalizes three categories of offenses not covered by other articles of the UCMJ: Clause 1 offenses require proof that the alleged conduct be prejudicial to good order and discipline; Clause 2 offenses require proof that the conduct be service discrediting; Clause 3 offenses involve noncapital Federal crimes made applicable by the Federal Assimilative Crimes Act, 18 U.S.C. § 13. Because the specification at issue does not reference the Assimilative Crimes Act, it necessarily involves Clauses 1 or 2. The language of the specification complies with the model specification in effect at the time but does not expressly allege the terminal element that such conduct was either prejudicial to good order and discipline or service discrediting.

In *Fosler*, our superior court invalidated a conviction of adultery under Article 134, UCMJ, because the military judge improperly denied a defense motion to dismiss the specification on the basis that it failed to expressly allege the terminal element of either Clause 1 or 2. *Fosler*, 70 M.J. at 233. Although recognizing "the possibility that an element could be implied," the Court stated that "in contested cases, when the charge and specification are first challenged at trial, we read the wording more narrowly and will only adopt interpretations that hew closely to the plain text." *Id*. at 230. The Court implied that the result would have been different had the appellant not challenged the specification: "Because Appellant made an R.C.M. 907 motion at trial, we review the language of the charge and specification more narrowly than we might at later stages." *Id*. at 232.

More recently, our superior court addressed the failure to allege the terminal element in an Article 134, UCMJ, specification where the appellant was convicted on the basis of his guilty pleas. *United States v. Watson*, No. 11-0523/NA (C.A.A.F. 20 March 2012); *United States v. Ballan*, No. 11-0413/NA (C.A.A.F. 1 March 2012). *Watson* relied on a key passage in the *Ballan* holding:

> while it is error to fail to allege the terminal element of Article 134, UCMJ, expressly or by necessary implication, in the context of a guilty plea, where the error is alleged for the first time on appeal, whether there is a remedy for the error will depend on whether the error has prejudiced the substantial rights of the accused.

Ballan, slip op. at 3-4. The Court further states that, where the military judge describes Clauses 1 and 2 of Article 134, UCMJ, for each specification during the plea inquiry "and where the record 'conspicuously reflect[s] that the accused clearly understood the nature of the prohibited conduct'" as a violation of Clause 1 or 2 of Article 134, UCMJ, there is no prejudice to a substantial right. *Watson*, slip op. at 11 (alterations in original) (quoting *Ballan*, slip op. at 17). Although *Ballan* and *Watson* involved guilty plea inquiries, and this case involves a not guilty plea, we will apply the substantial prejudice test as set forth in those cases.

We recognize that the *Fosler* Court invalidated the adultery conviction in that case because the defense challenged the specification as defective for failing to allege the terminal element. In this case, the appellant did not make a Rule for Courts-Martial 907 motion to dismiss the adultery charge or otherwise assert that he was not on notice of the terminal element at any time during the court-martial. In fact, trial defense counsel offered evidence of the appellant's petition for dissolution of marriage to counter the prosecution's evidence that the adultery was prejudicial to good order and discipline or service discrediting. The military judge admitted the document and instructed the members that they could only consider it when deciding if the appellant's sexual intercourse with KS was service discrediting or constituted conduct prejudicial to good order and discipline. Likewise, the appellant's trial defense counsel did not object to the military judge instructing the members on the terminal element. Moreover, when the members returned during deliberations with a question about the time limit for the effect on good order and discipline with respect to adultery, both trial counsel and trial defense counsel suggested additional language for the military judge to use to address the members' question on this matter.[12] Under the particular facts of this case, we find the specification and charge of adultery, for which the appellant was convicted, are legally sufficient under *Fosler*. We find that the failure to allege the terminal element was error but, under the facts of this case, the error was insufficient to show prejudice to a substantial right of the accused. *Watson*, slip op. at 12; *Ballan*, slip op. at 18.

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[12] In response to the military judge's request for comments, the trial defense counsel made the following remarks:

> Your honor, we had no objection to the question being posed and somewhat answered. Again, I'm not really sure how this question gets answered. There is no time limit; I agree there. And they just have to look at the instruction you've given them to decide if there was, you know, if there's prejudice to good order and discipline occurred or not . . . [a]nd one of the factors you have—which kind of hits upon this that we could have them take into consideration is "whether adultery involves an ongoing or recent relationship or is remote in time." That's where, you know, how it was so long ago in April and now they're here today. If that is where the question is going, I think you could instruct them from the model instructions as one of the factors to consider when deciding if adultery was committed . . . [w]hether the adultery involves an ongoing or recent relationship or is remote in time. We actually request that you actually give that instruction because of the question.

Severity of Sentence

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. 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. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). 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. Accordingly, we hold that the approved sentence is not inappropriately severe.

Post-Trial Processing Delay

In this case, the overall delay between the date this case was docketed with the Court and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to timely review and appeal, and (4) prejudice. *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in this case. The post-trial record shows no evidence that the delay has had any negative impact on the appellant. Having considered the totality of the circumstances and entire record, we conclude that any denial of the appellant's right to speedy post-trial review and his appeal was harmless beyond a reasonable doubt and that no relief is warranted.

Conclusion

We have reviewed the record in accordance with Article 66, UCMJ. The findings and the sentence are determined to be correct in law and fact and, on the basis of the entire record, should be approved. *United States* v. *Reed*, 54 MJ. 37, 41 (C.A.A.F. 2000).

Accordingly, the findings of guilty and the sentence, as approved below, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court