UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Major PAUL D. VOORHEES
United States Air Force

ACM 38836

23 November 2016

Sentence adjudged 9 January 2015 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Natalie D. Richardson.

Approved Sentence: Dismissal, confinement for 3 years, and total forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Terri R. Zimmermann, Esquire (argued); Jack B. Zimmermann, Esquire; and Major Jeffrey A. Davis.

Appellate Counsel for the United States: Captain Tyler B. Musselman (argued); Colonel Katherine E. Oler; Gerald R. Bruce, Esquire.

Before

J. BROWN, HARDING, and C. BROWN
Appellate Military Judges

OPINION OF THE COURT

C. BROWN, Judge:

Contrary to his pleas, a panel of officers convicted Appellant of one specification of sexual assault by causing bodily harm, in violation of Article 120, UCMJ, 10 U.S.C. § 920, and five specifications of conduct unbecoming of an officer and gentleman, in violation of

Article 133, UCMJ, 10 U.S.C. § 933. The adjudged and approved sentence was a dismissal, forfeiture of all pay and allowances, and confinement for three years.

Appellant raises seven assignments of error: (1) The military judge abused her discretion by admitting, over Defense objection, evidence covered by Mil. R. Evid. 412 to explain why the victim did not express a lack of consent—specifically, that she had been repeatedly sexually assaulted when she was ten years old; (2) his conviction for a violation of Article 120, UCMJ, is legally and factually insufficient; (3) plain error occurred when the trial counsel engaged in prosecutorial misconduct by injecting his personal opinion as to the credibility of the Government's case, and making inflammatory and derogatory attacks on Appellant and trial defense counsel during findings argument; (4) the military judge abused her discretion when she sua sponte instructed the members that, in assessing the sufficiency of the evidence, they could not presume that evidence the Government failed to present must be detrimental to the Government's case; (5) the specifications alleging violations of Article 133, UCMJ, fail to state an offense because they lack words of criminality; (6) his convictions for five specifications in violation of Article 133, UCMJ, are legally and factually insufficient; and (7) plain error occurred when the Government introduced irrelevant, speculative, and inflammatory evidence at sentencing.[1]

We conclude the evidence underlying Appellant's Article 120, UCMJ, conviction is factually insufficient. We thus set aside this finding of guilt and the sentence. This action moots the first and seventh assignments of error.[2] Finding no further error, we affirm the remaining convictions.

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[1] Appellant did not raise as error the presumptive unreasonable delay for the 143-day period between the conclusion of trial and the convening authority's action. Under *United States v. Moreno*, courts apply a presumption of unreasonable delay "where the action of the convening authority is not taken within 120 days of the completion of trial." 63 M.J. 129, 142 (C.A.A.F. 2006). Appellant did not assert prejudice and we independently find he suffered no prejudice that would authorize *Moreno* relief. Furthermore, having considered the totality of the circumstances and the entire record, we find the post-trial delay in this case is not so egregious as to adversely affect the public's perception of fairness and integrity of the military justice system. *See Toohey*, 63 M.J. at 362. Similarly, we decline to grant relief under *United States v. Tardif*, 57 M.J. 219, 223–24 (C.A.A.F. 2002). Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), this court is empowered "to grant relief for excessive post-trial delay without a showing of 'actual prejudice' within the meaning of Article 59(a), if it deems relief appropriate under the circumstances." *Id*. at 224 (quoting *United States v. Collazo*, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000)). In *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006), our superior court held that a service court may grant relief even when the delay was not "most extraordinary." The court held, "The essential inquiry remains appropriateness in light of all circumstances, and no single predicate criteria of 'most extraordinary' should be erected to foreclose application of Article 66(c), UCMJ, consideration or relief." *Id*. This court set out a non-exhaustive list of factors we consider when evaluating the appropriateness of *Tardif* relief in *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), aff'd, 75 M.J. 264 (C.A.A.F. 2016). On the whole, we find the presumptively unreasonable delay does not merit sentencing relief in this case. .

[2] With regards to Appellant's now-mooted first assignment of error, we recognize that Mil. R. Evid. 412 is arguably ambiguous regarding whether an accused can invoke the rule to prohibit a willing victim from testifying about otherwise relevant sexual abuse history. Nothing prevents the President from clarifying Mil. R. Evid. 412 through amendment. *See Major Shane R. Reeves, Time to Fine-Tune Military Rule of Evidence 412*, 196 Mil. L. Rev. 47 (Summer 2008).

Background

Appellant's convictions for conduct unbecoming are rooted in the sexual comments and actions he directed toward subordinate female Airmen with whom he deployed or went on temporary duty assignments (TDY) on different occasions. Appellant is an EC-130 pilot who performed duty as an aircraft commander and a co-pilot during several deployments to Afghanistan. While TDY, deployed, and transiting to and from deployment, Appellant used electronic communications to make a variety of comments with sexual undertones to a Senior Airman (SrA), a Technical Sergeant (TSgt), and a First Lieutenant (1st Lt). The comments included telling the Senior Airman he wanted to take her back to his hotel room, asking all three individuals if they cheated on their husband or significant other, and asking two of them about the undergarments they were wearing.

The alleged sexual assault took place as Appellant and SrA HB were returning from a deployment to Afghanistan. During the deployment, Appellant served as the aircraft commander for an eight-member aircrew where SrA HB was the only female and the junior member of the crew. While in transit to their home station, the crew stopped in Baltimore, Maryland. Appellant arranged for a friend to bring food and alcohol to their hotel, and the crew ate, drank, and socialized together. SrA HB returned to her hotel room and called her husband. Appellant sent SrA HB a text message asking if he could come to her room to talk. She refused, telling him "it was not a good idea." Appellant persisted, calling SrA HB and telling her that he would not get this opportunity again. When she relented, Appellant knocked on her door, and she let him into her room.

After entering her hotel room, Appellant engaged in conversation with SrA HB, and eventually moved to the bed where SrA HB was lying down and began to rub her hand while he talked to her. Appellant began massaging SrA HB's back and eventually took off her shirt and bra while continuing the massage. The massage led to sexual intercourse. After this first sexual encounter, Appellant and SrA HB lay together in bed and conversed for a period of 20 to 30 minutes. Eventually, Appellant performed oral sex on SrA HB and they engaged in vaginal intercourse a second time. Appellant and SrA HB lay on the bed for a few minutes until receiving a message from another crew member inviting them to breakfast. Appellant was in SrA HB's room for approximately two hours.

SrA HB reported the incident to her husband approximately seven months later, initially telling him she had cheated on him. SrA HB then reported the incident to the Air Force Office of Special Investigations (AFOSI). AFOSI asked SrA HB to conduct a recorded phone call with Appellant. During the call, SrA HB told Appellant she "didn't want [sexual intercourse] to happen" and Appellant asked her why she "didn't say something." She also asked him why he "thought it was OK," and Appellant replied, "[he] didn't."

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

Legal and Factual Sufficiency of Article 120 Specification

We review the factual sufficiency of evidence de novo.[3] Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *see United States v. Cole*, 31 M.J. 270, 271 (C.M.A. 1990). Our assessment of factual sufficiency is limited to the evidence presented 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, [this court is] convinced of [Appellant]'s guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325; *see United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

The Specification of Charge I alleges Appellant committed sexual assault by causing bodily harm in violation of Article 120, UCMJ. To sustain a conviction for sexual assault, the prosecution was required to prove: (1) That Appellant committed a sexual act upon SrA HB, to wit: penetrating the vulva of SrA HB with his penis; and (2) That Appellant did so by causing bodily harm to SrA HB to wit: penetrating her vulva with his penis with an intent to gratify his own sexual desire. *See* Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, 3-45-14c. (10 September 2014).

The Government had the burden to prove beyond a reasonable doubt that SrA HB did not consent to the sexual act and the military judge provided the following definitions at trial regarding consent:

> Consent means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent. Lack of consent may be inferred based on the circumstances. All the surrounding circumstances are to be considered in determining whether a person gave consent or whether a person did not resist or ceased to resist only because of another person's actions.

Similarly, the Government was required to prove beyond a reasonable doubt that Appellant did not have a reasonable mistake of fact defense as to whether SrA HB consented to the sexual acts. As part of the instruction concerning the defense of mistake of fact, the military judge stated:

[3] Because we find the evidence factually insufficient, we do not address legal sufficiency.

> Mistake of fact as to consent means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person consented to the sexual conduct as alleged. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. Additionally, ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances.

The defense of mistake of fact as to consent has both subjective and objective elements. *United States v. Paige*, 67 M.J. 442, 455 (C.A.A.F. 2009) ("[T]he mistake of fact defense requires a subjective, as well as objective, belief that [the victim] consented to the sexual intercourse . . . ."); *United States v. Jones*, 49 M.J. 85 (C.A.A.F. 1998) ("[A] mistake-of-fact defense to a charge of rape requires that a mistake as to consent be both honest *and* reasonable.") (quoting *United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995)); Rule for Courts-Martial 916(j)(1) ("[T]he ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances.").

The bulk of the evidence supporting the sexual assault conviction came from the testimony of SrA HB. The Government also introduced into evidence a recorded pretext phone call made by SrA HB to Appellant and text messages between the parties. SrA HB testified she did not consent to sexual intercourse on either occasion. She stated Appellant initially starting massaging her hand and then straddled her on the bed, massaging her back underneath her shirt. SrA HB stated she lay face down on the bed and did not move as Appellant removed her shirt and bra. On cross-examination, she asserted she may have moved when Appellant took off her shirt and bra, but it was not to assist Appellant in any way. Prior to the initial sexual intercourse, SrA HB told Appellant, "[They] couldn't do this," because they "were both married." When Appellant was removing her shorts, SrA HB pushed her hips forward towards the bed but did not say anything to him. During the initial sexual encounter, SrA HB testified she moaned both in pleasure and in pain. Appellant ejaculated on her back and there was a period of 20 to 30 minutes where they lay in bed and conversed. They later engaged in consensual kissing. Appellant kissed SrA HB's breasts and then performed oral sex on SrA HB by licking her vagina. Appellant and SrA HB had sexual intercourse again with Appellant ejaculating on her stomach.

During her direct examination, SrA HB related she had been repeatedly raped by a foster parent-type figure when she was 10 years old. She further testified that she did not scream or leave the room before or during the sexual encounters with Appellant because

she felt like she was back in her childhood situation and she "knew what was going to happen and [she] just wanted it to be over with." She stated she did not cry out or call 911 while Appellant was straddling her and massaging her back because she "just wanted it over with." She explained she engaged in the consensual kissing between the first and second sexual intercourse because when she was abused during her childhood if she "showed interest or didn't fight . . . it would just be quicker. It would just be over with and that's what [she] wanted to happen."

In this case, factual sufficiency turns on whether Appellant had a reasonable belief that SrA HB consented to the sexual acts. SrA HB testified that she talked with Appellant about her childhood and shared personal issues with him over Facebook while they were deployed. But she did not testify to what, if anything, she told Appellant about her childhood sexual abuse or her learned defense mechanisms of feigning interest or not resisting. We find these brief and fairly broad snippets of testimony concerning Appellant's knowledge of SrA HB's childhood insufficient to overcome a reasonable mistake of fact defense. SrA HB stated she did not say anything to Appellant to indicate she did not want to have sex with him and the only words in the record putting Appellant on notice that she was not a willing participant in the sexual acts were SrA HB saying they "couldn't do this" because they "were both married," while Appellant was massaging her back. SrA HB did testify she moved her hips towards the bed when Appellant initially tried to take off her shorts, but that appears to be the only outward physical behavior which might have put Appellant on notice of her lack of consent to the sexual intercourse. The testimony that SrA HB "showed interest" by consensually kissing Appellant to get the encounter "over with" more quickly coupled with SrA HB's testimony that her body betrayed her and she moaned in pleasure during both instances of sexual intercourse support Appellant's assertion that he was reasonable in believing SrA HB was a willing participant to the sexual intercourse.

Having reviewed the entire record of trial and making allowances for not personally observing the witnesses, we are not convinced of Appellant's guilt beyond a reasonable doubt. We find that the Government failed to prove that the defense of mistake of fact as to consent did not exist. We thus set aside and dismiss with prejudice the Specification of Charge I.

Failure of Article 133 Specifications to State an Offense

Appellant asserts that the five specifications of conduct unbecoming an officer and a gentleman of which he was convicted fail to state an offense.

Whether a specification states an offense is a question of law that we review de novo. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012). Specifications that are first challenged after trial are viewed with greater tolerance than those challenged at trial. *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986). "Where defects in a

specification are raised for the first time on appeal, dismissal of the affected charges or specifications will depend on whether there is plain error . . . ." *United States v. Humphries*, 71 M.J. 209, 213 (C.A.A.F. 2012). "Appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011).

> The military is a notice pleading jurisdiction. Charge(s) and specification(s) will be found sufficient if they, 'first, 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.'

United States v. Fosler, 70 M.J. 225, 229 (C.A.A.F. 2011) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)) (citation omitted).

All five specifications, as charged, allege Appellant engaged in conduct of a sexual nature with military members junior in rank to him and that the conduct "under the circumstances, was unbecoming an officer and a gentleman." Specification 1 of Charge II alleges that Appellant asked SrA HB "inappropriate questions," to wit: "Have you ever cheated on your husband?"; "Have you ever sent him pictures?"; and "Can I have pictures of you?" Specification 2 alleges Appellant massaged SrA HB's back. Specification 1 of the Additional Charge alleges Appellant made an "inappropriate statement" to SrA HB, to wit: "I would like to take you back to my room," or words to that effect. Specification 3 of the Additional Charge alleges Appellant sent "unprofessional" texts to Captain MQ, to wit: "What I want to say could end my career and marriage"; "Your (sic) a very beautiful woman and I would love to be close to you"; "What's your definition of cheating?"; and "So if I asked what color panties you were wearing?" or words to that effect. Specification 4 of the Additional Charge alleges "unprofessional" texts from Appellant to another enlisted subordinate, TSgt BR, to wit: "This is about to become a game to see what else I can say that will slip by you"; "Mind if I ask u (sic) a couple personal questions?"; "What I want to say could end my career so I just want to make sure you can keep what I say between us because you seem really cool?"; "Oh really, what's under there?"; and "I've had a crush on you," or words to that effect.

The elements of conduct unbecoming an officer and a gentleman are as follows: "(1) That the accused did or omitted to do certain acts; and (2) That, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman." *Manual for Courts-Martial, United States* (MCM), pt. IV, ¶ 59(b). Regarding conduct captured under this Article, the *Manual* notes:

> Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty.

MCM, pt IV, ¶ 59.c.(2) (2012 ed.).

Concerning the nature of the conduct for this offense, our superior court has held:

> An officer's conduct need not violate other provisions of the UCMJ or even be otherwise criminal to violate Article 133, UCMJ. The gravamen of the offense is that the officer's conduct disgraces him personally or brings dishonor to the military profession such as to affect his fitness to command the obedience of his subordinates so as to successfully complete the military mission. Clearly, then, the appropriate standard for assessing criminality under Article 133 is whether the conduct or act charged is dishonorable and compromising as hereinbefore spelled out—this notwithstanding whether or not the act otherwise amounts to a crime.

United States v. Schweitzer, 68 M.J. 133, 137 (C.A.A.F. 2009) (quotation marks and citations omitted).

As Appellant did not object at trial, we liberally construe the specifications and only grant relief for plain error. But Appellant cannot show error, let alone plain error. All five specifications contain the elements of the offense of conduct unbecoming an officer and a gentleman. They serve to inform Appellant of the specific acts against which he must defend. Finally, they are charged with sufficient specificity to prevent future prosecutions for the same offenses. This is all that is required. *Fosler*, 70 M.J. at 229.

Legal and Factual Sufficiency of Article 133 Specifications

Appellant asserts the evidence underlying his convictions for violating Article 133 is legally and factually insufficient because the language and conduct alleged do meet the definition of conduct unbecoming an officer and a gentleman. We disagree. Appellant asserts his texts were simply "innocuous chatter," and argues that while the "flirtatious"

and "inappropriate" comments reflect poorly upon Appellant as a husband, they had no serious effect on the public's perception of the Air Force or the military in general. Appellant asks us to follow the rationale in *United States v. Brown*, 55 M.J. 375 (C.A.A.F. 2001), to set aside the specifications. We are not persuaded and instead rely on our superior court's holding in *United States v. Lofton*, 69 M.J. 386 (C.A.A.F. 2011).

In *Lofton*, our superior court found legally sufficient a specification alleging an officer made unsolicited sexual comments to a Chief Master Sergeant. The court noted, "Appellant's words cannot be analyzed in a vacuum. Unlike the appellant in *Brown*, Colonel Lofton was not dealing with fellow officers . . . . [T]he Government established that Appellant . . . made these comments as a means to further his attempt to establish a personal and unprofessional relationship with CMSgt RM, an enlisted woman." *Id.* at 390.

Appellant focuses our attention to the testimony of witnesses who stated they were a "good crew" and they "bragged about being one of the best," further stating there was no evidence Appellant was unable to accomplish the mission. While Appellant asserts his conduct does not rise to the same level of "frequency and intrusiveness" as the conduct in *Lofton*, we are not persuaded.

Appellant's misconduct negatively impacted his subordinates' perception of him and their desire to serve under his command. SrA HB testified that Appellant's comments made her feel uneasy. 1st Lt MQ asked to be removed from the pending deployment where Appellant was to be her aircraft commander. She further testified that the text messages impacted her view of Appellant as a gentleman by making her feel disgusted, and she lost all sense of respect for him. TSgt BR testified that Appellant's messages caused her to not look forward to working for Appellant during the deployment. TSgt BR further testified she did not think of Appellant as a gentleman and that Appellant's actions, including his texts and "vulgar" and "lewd" sexual comments he made while deployed caused her to seek a staff job so she would not have to deploy again.

Despite Appellant's assertion that his actions were a mere failure of good judgment, we have no doubt they disgraced him personally and as an officer such that they compromised his fitness to command and to successfully complete the military mission. The charged conduct was of a sexual nature and occurred with lower ranking military members. The alleged conduct occurred while Appellant was deployed, transiting to or returning from deployment, or TDY with junior members of his unit. For three specifications, Appellant was the senior officer and aircraft commander or co-pilot of the enlisted members with whom it is alleged he committed the conduct unbecoming. For the specification involving the junior officer, Appellant was soliciting her to cheat on his wife with him. At the time, Appellant was scheduled to deploy with her in the near future where he would perform duty as the aircraft commander or co-pilot of her crew. The remaining specification alleges conduct where Appellant told a married Airman from his unit whom he would later command at a deployed location that he wanted to take her back to his hotel

room. We find that there is sufficient evidence to convince a rational trier of fact beyond a reasonable doubt that the Appellant is guilty of all five specifications of conduct unbecoming an officer and a gentlemen, and that the evidence is, therefore, legally sufficient. Furthermore, after our independent review of the record and making allowances for not personally observing the witnesses, we are ourselves convinced beyond a reasonable doubt.

Improper Argument by Trial Counsel

Appellant next asserts trial counsel engaged in prosecutorial misconduct during closing argument by injecting his personal opinion as to the credibility of the Government's case and making inflammatory and derogatory attacks on Appellant and trial defense counsel.

Improper argument is a question of law that is reviewed de novo. *United States v. Pope*, 69 M.J. 328, 334 (C.A.A.F. 2011). Because there was no objection at trial, we review the propriety of trial counsel's argument for plain error. *United States v. Halpin*, 71 M.J. 477, 479 (C.A.A.F. 2013). To prevail under a plain error analysis, Appellant must show "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007) (quoting *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)).

Appellant cites 14 different instances where he believes trial counsel made improper argument, none of which he objected to at trial. Many of the alleged improper arguments are directly related to the sexual assault charge which we have found factually insufficient; we decline to address these as they are mooted by our setting aside of that charge. Rather than address each point individually, we will examine the arguments in terms of the prosecutorial misconduct alleged.

Appellant alleges trial counsel impermissibly attacked him by referring to Appellant as a "perverted individual," a "pig," a "narcissist," a "chauvinist," a "joke of an officer," and referring to his conduct as "disgusting." It is well established that while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *United States v. Frey*, 73 M.J. 246, 248 (C.A.A.F. 2014) (quoting *Berger v. United State*s, 295 U.S. 78, 88 (1935)). Trial counsel is entitled "to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *United States v. Baer*, 53 M.J. 235 (C.A.A.F. 2000). Despite our setting aside the sexual assault conviction, the evidence remains that Appellant, at minimum, as the senior officer of a deployed aircrew had sexual intercourse with the most junior enlisted member of his aircrew while re-deploying. Similarly, the alleged conduct unbecoming took place between a commissioned officer and either enlisted members or a junior officer within his unit. Appellant's conduct in having sexual intercourse with

SrA HB while re-deploying and seeking to engage in personal relationships with his subordinates and making inappropriate comments with sexual undertones to them was at the center of the evidence at trial. Thus, while trial counsel's use of the above adjectives to describe Appellant was perhaps ill-advised,[4] they do not rise to the level of plain error.

Appellant further asserts trial counsel inappropriately expressed his personal opinion regarding the Government's evidence by bolstering witnesses. Appellant claims this occurred when trial counsel called TSgt BR an outstanding Airman and stated that various witnesses, including SrA HB testified truthfully. As our superior court stated in *Baer*, 53 M.J. at 238, "our inquiry should not be on words in isolation, but on the argument as 'viewed in context.'" *Id.* We find trial counsel's argument did not personally vouch for the witnesses, but amounted to fair comment on the evidence presented to include commenting on the witnesses' perception of Appellant's observed behavior and also arguing that Government witnesses, including the sole witness to the sexual assault, were credible.

Appellant alleges trial counsel made multiple arguments impermissibly commenting on Appellant's right to not testify. A trial counsel "may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense." *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005) (quoting *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990)). However, "it is permissible for trial counsel to comment on the Defense's failure to refute Government evidence or to support its own claims." *United States v. Paige*, 67 M.J. 442, 448 (C.A.A.F. 26 2009). A violation occurs "only if either the defendant alone has the information to contradict the Government evidence referred to or the [members] 'naturally and necessarily' would interpret the summation as a comment on the failure of the accused to testify." *Id*. (quoting *Carter*, 61 M.J. at 33) (quoting *United States v. Coven*, 662 F.2d 162, 171 (2d Cir. 1981) (alteration in original).

In *Carter*, our superior court found that trial counsel's reference to the words "uncontroverted" and "uncontradicted" 11 times during argument made Appellant's decision not to testify a "centerpiece of the closing argument." *Carter*, 61 M.J. at 34. The Court also noted that even after the military judge instructed the members that they could not draw any adverse inference from the appellant's failure to testify, trial counsel continued that type of argument. *Id.* The court found the comments "were not isolated or a 'slip of the tongue,'" and cited to *United States v. Moore*, 917 F.2d 215, 225 (6th Cir. 1990) to propose the isolated nature of comments by a prosecutor should be taken into account. *Carter*, 61 M.J. at 34.

Here, trial counsel's closing and rebuttal argument contained three instances where testimony was labeled "uncontradicted." Two of the three instances stem from testimony

[4] *See United States v. Fletcher*, 62 M.J. 175, 182 (C.A.A.F. 2005) ("Disparaging comments are also improper when they are directed to the defendant himself.")

where multiple individuals were present. The final comment occurred when trial counsel stated it was "uncontradicted" that Appellant had told SrA HB she should "be more enthusiastic" with her husband just prior to leaving SrA HB's hotel room. As SrA HB was the only person who heard Appellant's statement, this comment is information that only Appellant could contradict. Our superior court has found that the Government "is permitted to make 'a fair response' to claims made by the Defense, even when a Fifth Amendment right is at stake." *United States v. Gilley*, 56 M.J. 113, 120 (C.A.A.F. 2001) (quoting *United States v. Robinson*, 485 U.S. 25, 32 (1988)). Trial defense counsel appeared to invite this reply through his opening statement where he described Appellant's version of the sexual encounter, highlighting Appellant's "eight-hour statement" to AFOSI. Trial defense counsel also did not challenge SrA HB on the veracity of this statement despite having the opportunity to do so on cross-examination. That said, even if this argument was not an invited response or proper comment on SrA HB's credibility, we do not believe trial counsel was impermissibly drawing the members' attention to Appellant's right not to testify. We further find trial counsel's use of the term "uncontradicted" in this instance did not prejudice Appellant, particularly as we are analyzing this only as it relates to the convictions for conduct unbecoming an officer and a gentleman.

Military Judge's Instruction during Closing Argument

Appellant asserts the military judge abused her discretion when she sua sponte instructed the panel concerning evidence the Government did not present. During closing argument, trial defense counsel argued that evidence the Government had not presented to the members was unfavorable to the Government's case. Specifically, trial defense counsel argued:

> [Y]ou can *assume*, knowing that these are skilled prosecutors, if they had 16 crew members or 15 crew members that could come in here and say this behavior was completely over the top, then we would have heard from, probably from 15 or 16 witnesses. They've picked the ones they had and that really goes to show that a majority of the people *probably don't back up their side of the case*[.] (emphasis added).

Trial defense counsel also argued:

> What about OSI agents? You—this is a lengthy investigation. You—they didn't hear from a single professional investigator; who interviewed the witnesses, who dealt with the—that investigated this case. We know OSI investigates all felonies, and this is a felony-level case. *If they had evidence that was helpful to the Government's case, you would have heard from an OSI investigator*. (emphasis added).

Trial defense counsel also questioned why the Government did not call SrA HB's husband.

> What did she really tell her husband? That's another story. That's another question you have. And it's one of those—and I said they cherry-picked the evidence and they showed you about 30 percent of it. Why wouldn't you—wouldn't it be a relevant witness to talk to, the first person she ever told this story to, for you to make your decision?

After trial defense counsel had finished his argument, but before the trial counsel provided a rebuttal argument, the military judge sua sponte instructed the members as follows:

> Before I allow Government to provide a rebuttal argument, I need to remind you of some of the instructions that I gave. That—I don't believe the argument you heard was consistent with all of my instructions. There's a couple of things I really want to foot stomp and point out to you.
>
> . . .
>
> [I] remind you that only matters properly before the court as a whole should be considered. You may not assume or presume that because the Government did not present some evidence that that evidence must have been detrimental to its case. You cannot presume or assume that that evidence that was not presented would even be legally admissible in this trial. However, the Government does have the burden of proof. So, it is the Government's burden, and the Government's alone, to present you with evidence—legal and competent evidence, that proves each element of each offense beyond a reasonable doubt before you can find the accused guilty of any element—or of any offense.

After the Government's rebuttal argument, the trial defense counsel objected to this instruction, arguing that the absence of evidence could raise a reasonable doubt as to guilt. The military judge stated that trial defense counsel "crossed the line" because he wanted the members to "presume that the Government didn't offer it because it would be detrimental to their case." The military judge noted that one portion of defense counsel's argument referenced inadmissible hearsay.

We review a military judge's decision to provide an instruction for an abuse of discretion. *United States v. Barnett*, 71 M.J. 248, 249 (C.A.A.F. 2012). We review the propriety of the instructions given by a military judge de novo. *United States v. Quintanilla*, 56 M.J. 37, 83 (C.A.A.F. 2001).

A negative inference drawn from missing evidence has its origin in the nineteenth century case of *United States v. Graves*, 150 U.S. 118, 120 (1893). There, the United States Supreme Court reversed a conviction where the prosecution argued for the jury to draw a negative inference against the accused from the lack of evidence from the accused's wife. *Id*. Despite reversing the conviction, the Court stated, "The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." *Id*. at 121.

This missing-witness rule has been applied in courts-martial. In *United States v. Swoape*, 21 M.J. 414, 415 (C.M.A. 1986), the court held that the military judge erred in failing to instruct the members that "no inference could be drawn from the absence of . . . a witness in this case." Like *Graves*, *Swoape* involved a prosecutor's comments about the lack of evidence presented by the accused. In *United States v. Taylor*, 47 M.J. 322, 324 (C.A.A.F. 1997), the court stated, "This Court generally has not permitted a trial counsel to comment on the failure of the defense to produce evidence." The court further stated, "This missing witness inference usually may not be drawn if the witness is 'equally within the power of either party to produce.'" *Id*. (quoting United States v. Pitts, 353 F.2d 870, 871 (D.C. Cir. 1990).

Although originally a shield for an accused from a prosecutor's comments, the missing-evidence instruction may also be used as a sword against the Government.[5] In *United States v. Roberts*, 10 M.J. 308, 313 (C.M.A. 1981), our superior court stated "Under normal circumstances, a possible inference might be drawn from [a witness's] unexplained

[5] The federal circuit courts of appeal provide additional examples of when this might arise as well as additional instruction on when such an instruction might be appropriate. *See, e.g. United States, v. Ramirez*, 714 F.3d 1134, 1138 (9th Cir. 2013) (noting that a missing witness instruction would be appropriate when: "(1) '[t]he party seeking the instruction must show that the witness is peculiarly within the power of the other party' and (2) 'under the circumstances, an inference of unfavorable testimony [against the non-moving party] from an absent witness is a natural and reasonable one'"); *United States v. Myerson*, 18 F.3d 153, 159 (2d Cir. 1994) (highlighting a distinction between a defense counsel arguing missing evidence and the trial judge providing a negative inference instruction and stating that "[u]nder some circumstances, it may be proper for a trial court to refuse to give a missing witness instruction to allow the defendant to argue the inference in summation"); *United States v. Wright*, 722 F.3d 1064 (7th Cir. 2013) (affirming a trial judge's declination to provide a missing witness instruction against the government when a confidential informant did not testify at trial); *United States v. Walcott*, 431 Fed. Appx. 860, 861 (11th Cir. 2011) (affirming a trial judge's refusal to provide a missing witness instruction and decision to limit the defense counsel's closing argument on the inferences that could be drawn from the absent testimony of a witness who had invoked his Fifth Amendment rights); and *United States v. Jimenez-Torres*, 435 F.3d 3, 12 (1st Cir. 2006) (drawing a distinction between a defense counsel's closing argument that highlights the missing proof to argue there was insufficient evidence and argument for the jury to draw a negative inference against the government).

absence that [their] testimony would not support the Government or that it would be favorable to the accused." The concurring opinion rejected this position and stated, "No basis exists for an adverse inference instruction from failure to call a witness unless the party logically expected to call the witness 'has it *peculiarly* within his power to produce' the witness." *Id*. (Cook, Judge, concurring) (quoting *Graves*, 150 U.S. at 121.) "Equal availability 'precludes the inference.'" *Id*. (quoting *United States v. White*, 38 C.M.R. 9, 12 (C.M.A. 1967).

We note there is a difference between trial defense counsel arguing missing evidence as it applies to the Government meeting its burden of proof and arguing the members should make a negative inference from evidence not properly before them as the trier of fact. Had the Defense requested the military judge provide a negative inference instruction prior to argument, she would have been well within her discretion to decline to do so. None of the missing evidence highlighted by the trial defense counsel in closing argument was peculiarly within the Government's control—a necessary prerequisite for such an instruction. However, the question remains whether her sua sponte instruction limiting the trial defense counsel's argument on this point was an abuse of discretion. We hold that it was not.

A military judge has a wide range of options when controlling the presentation of evidence in her courtroom. *See* Mil. R. Evid. 611(a) (requiring the military judge to exercise reasonable control over the mode and order of interrogating witnesses). This includes limiting the closing arguments of counsel. *See* Rule for Courts-Martial (R.C.M.) 919, Discussion ("The military judge may exercise reasonable control over argument.") (citing R.C.M. 801(a)(3)). Perhaps better practice would have been to address the issue outside of the presence of the members; however, trial defense counsel argued the matter directly to the members. Thus, it was within the military judge's discretion to sua sponte instruct the members concerning what she believed to be improper argument.

Moreover, we find that the substance of the instruction was a correct statement of the law. Here, some of the referenced evidence was likely inadmissible under the military rules of evidence. The military judge did not abuse her discretion in sua sponte instructing the members as to what evidence they could properly consider. While the instruction precluded the members from presuming the missing evidence *must* have been detrimental to the Government's case (a mandatory inference), it did not preclude the members from reaching that conclusion if they determined that the evidence otherwise supported it (a permissive inference). In addition, the instruction did not shift the burden of proof or prevent the members for considering the missing evidence as it applied to the Government meeting its burden of proof. After providing the limits of what inferences the members could draw from the evidence that had not been presented, the military judge stated that it was "the Government's burden, and the Government's alone, to present [the members] with evidence—legal and competent evidence, that proves each element of each offense

beyond a reasonable doubt." We find the military judge did not abuse her discretion in providing this limiting instruction to the members.

Sentence Reassessment

Having dismissed the sexual assault specification, we now must decide whether we can accurately reassess Appellant's sentence based solely upon the findings on the affirmed conduct unbecoming specifications, or instead if we must return this case for a rehearing.

This court has "broad discretion" when reassessing sentences. *United States v. Winckelmann*, 73 M.J. 11, 12 (C.A.A.F. 2013). Our superior court has repeatedly held that if we "can determine to [our] satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). In determining whether to reassess a sentence or order a rehearing, we consider the totality of the circumstances with the following as illustrative 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, (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. *Winckelmann*, 73 M.J. at 15–16.

Examining the entire case and applying the considerations set out in *Winckelmann*, we are unable to determine to our satisfaction that Appellant's sentence would have been at least a certain severity without the error. While this court has extensive experience in dealing with conduct unbecoming cases and, as such, are cognizant of the types of punishment and levels of sentence imposed for offenses similar to those alleged against Appellant, the remaining circumstances surrounding this case point towards a rehearing.

The dismissal of the Article 120 specification reduces the penalty landscape and exposure by 30 years, leaving a maximum possible confinement of five years. This factor alone would not automatically require a sentence rehearing. *See Winckelmann*, 73 M.J. 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). However, the reduction in confinement is far from insignificant.

More critical than the reduction in punishment exposure, however, is the fact Appellant no longer stands convicted of sexual assault. Trial counsel's sentencing argument highlighted the impact of the sexual assault on SrA HB who testified about the personal effect of the offense on her and her family. Trial counsel discussed the conduct unbecoming convictions and their impact on the victims involved; however, the focal point

of the argument to support asking members for a significant sentence was how the sexual assault effected SrA HB.

As both the penalty landscape and the available aggravation evidence is significantly reduced after the dismissal of the sexual assault charge, we believe the reassessment of the remaining sentencing evidence in this particular case is better suited for court members and, therefore, remand the case for a sentence rehearing.

Conclusion

The findings of guilt to Charge I and its sole Specification are **SET ASIDE** and **DISMISSED WITH PREJUDICE**. The remaining findings are correct in law and fact, and are **AFFIRMED**. Article 66(c), UCMJ. The sentence is **SET ASIDE**. The record of trial is returned to The Judge Advocate General for remand to the convening authority who may order a sentence rehearing on the affirmed charges and specifications. Article 66(e), UCMJ. Thereafter, Article 66(b), UCMJ, will apply.

FOR THE COURT

KURT J. BRUBAKER
Clerk of Court