IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	10 March 2020
v.	ANSWER AND BRIEF ON BEHALF OF THE UNITED STATES
	CGCMG 0375 Docket No. 1469 Before McClelland, Brubaker, Havranek
Sam O. WEISER, Seaman Recruit (E-1), United States Coast Guard, Appellant	Tried at Norfolk, Virginia by a General Court-Martial convened by Commander, Coast Guard Atlantic Area, on 7-11 January 2019.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

The United States, through undersigned counsel, submits this answer and brief in accordance with Rule 17 of this Honorable Court's Rules of Practice and Procedure.

[redacted]
Lieutenant, U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
2703 Martin Luther King Jr. Ave. SE
Washington, D.C. 20593-7213
[redacted]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

RULES FOR COURTS-MARTIAL

MILITARY RULES OF EVIDENCE

JOINT RULES OF APPELLATE PROCEDURE

MANUAL FOR COURTS-MARTIAL

STATEMENT OF STATUTORY JURISDICTION

This Honorable Court has jurisdiction over this case pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866.[1]

STATEMENT OF THE CASE

Before a panel of officers and enlisted members, Appellant was tried at a General Court-Martial on 7-11 January 2019. Contrary to his pleas, the members found Appellant guilty of one specification sexual assault, under Article 120(b)(1)(B), UCMJ, 10 U.S.C. § 920, one specification of indecent visual recording, under Article 120c(a)(2), UCMJ, 10 U.S.C. § 920c two specifications indecent visual broadcasting, under Article 120c(a)(3), UCMJ, 10 U.S.C. § 920c, and four specifications of indecent conduct, under Article 134, UCMJ, 10 U.S.C. § 934. General Court Martial Promulgating Order 01-19. On 11 January 2019, the members sentenced Appellant to four years' confinement, reduction to E-1, and a dishonorable discharge. Court-Martial Transcript at 925 (Hereinafter R. at 925). On 13 June 2019, the Convening Authority approved the sentence and, with the exception of the dishonorable discharge, ordered it executed. Convening Authority Action.

STATEMENT OF FACTS

In May 2016 LTJG [redacted] graduated Officer Candidate School (OCS) and was assigned to the CGC ACTIVE, stationed in Port Angeles, WA.[2] R. at 238. While LTJG [redacted] had previously been stationed aboard a cutter as an enlisted member, the CGC Active was her first assignment

[1] All citations to the UCMJ, RCM, or MRE refer to their language in the 2016 edition of the *Manual for Courts-Martial, United States* (*MCM*).

[2] LTJG [redacted] was an Ensign at the time of the charged events. R. at 221. To maintain consistency with the record of trial she will be referred to LTJG in the Government's brief.

after graduating OCS. R. at 237-8. LTJG [redacted] worked hard to get up to speed. She quickly became qualified as a coxswain, underway officer of the deck, landing signals officer, boarding officer, and pursuit mission commander. R. at 240. Achieving those qualifications made LTJG [redacted] realize that she was most passionate about her law enforcement duties, and brought her closer to the law enforcement team onboard the CGC ACTIVE. R. at 241.

So when on March 17, 2017, she wanted to celebrate St. Patrick's Day, it was natural LTJG [redacted] invited out other law enforcement team members from the cutter. R. at 245. LTJG [redacted] asked ENS [redacted], MK1[redacted] and two other enlisted members to go out in the small downtown of Port Angeles. *Id*. Ultimately, only MK1[redacted] was available, and the two of them met at the Gastro Pub in downtown Port Angeles at 1900. R. at 246. The pair chose the Gastro Pub because it served some of the better food in Port Angeles, but it was full so they walked down to the Bar Hop to order pizza. R. at 246-7. The only food LTJG [redacted] had eaten that day was a bowl of cereal. R. at 246.

Arriving at the Bar Hop, LTJG [redacted] and MK1[redacted] sat down and ordered drinks. R. at 248. After ordering, they recognized other members of the CGC ACTIVE crew also sitting at the bar, including the Appellant, Mr [redacted], and another CGC ACTIVE crewmember. R. at 249. Initially, the two groups were not interacting, but eventually MK1[redacted] and Mr. [redacted] began talking about CGC ACTIVE and the two groups sat with each other. R. at 249. This was the first time LTJG [redacted] had ever socialized with the Appellant or Mr [redacted]. *Id*. LTJG [redacted] ended up having two beers at Bar Hop. R. at 250.

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[3] While on active duty as a Machinery Technician Third Class at the time of the charged acts, Mr. LF was not in the Coast Guard at the time of trial. R. at 378. To maintain consistency with the record of trial he will be referred to as Mr. LF.

After deciding they did not want pizza, the group moved on to another bar, Station 51, where they met more of MK1 [redacted] friends. *Id*. LTJG [redacted] had two more beers and ate no food while at Station 51. Again deciding to move on, the group arrived at Bar N9NE around 2100. R. at 252. While LTJG [redacted] was starting to feel the impact of the alcohol, she was having a good time and continued to drink when Appellant bought a pitcher for the table. R. at 252-3. LTJG [redacted] drank six or seven alcoholic drinks over the course of the evening. R. at 297-9. The group continued to talk and eventually LTJG [redacted] went to the dance floor. R. at 253-4. Later, Appellant and Mr. [redacted] joined her, but LTJG [redacted] did not specifically dance with either of them. R. at 255. After some time on the dance floor, LTJG [redacted] decided she was done dancing, and wanted to go home. She called a taxi to take her home sometime between 2230-2250. R. at 258. Before LTJG [redacted] left she offered a ride home to Appellant and Mr. [redacted]. R. at 265.

Appellant, Mr. [redacted], and LTJG [redacted] all left in the taxi, with LTJG [redacted] sitting in the middle between Appellant and Mr. [redacted]. LTJG [redacted] told the taxi driver to take her home, and then take Appellant and Mr. [redacted] home. R. at 265. While in the taxi, both Appellant and Mr. [redacted] had their hands on LTJG [redacted] thighs, and in an effort to get them to stop she leaned forward to talk with the driver. R. at 267. After arriving at her house, LTJG [redacted] gave the driver twenty dollars to pay for her ride, and to take the other two home. R. at 267-8. But Appellant and Mr. [redacted] got out of the taxi with LTJG [redacted] and went into her house. R. at 270-3. The taxi driver, Mr. [redacted], testified he observed the Appellant kissing LTJG [redacted] at the doorstep, but LTJG [redacted] testified he did not remember a kiss. R. at 315, 438-9. Once inside her house, LTJG [redacted] realized she had lost her phone. R. at 267. She asked Appellant and Mr. [redacted] to look for her phone but no one could find it. R. at 273. At that point LTJG [redacted] was feeling the effects of the alcohol, went to lay down on the couch, and subsequently did not remember anything until later in the evening.

R. at 273. At some point after LTJG [redacted] laid down, Mr. [redacted] returned to the taxi, which he took home. R. at 392.

LTJG [redacted] next remembered laying on her bed, naked, and seeing what she later realized was a flash from a camera. R. at 274-5. She did not remember going upstairs to her bedroom, getting in her bed, or taking off her clothes. R. at 275. What LTJG [redacted] did not know was that Appellant had been taking pictures of her naked body with the camera on his phone. Pros. Ex. 1-30; R. at 521. While LTJG [redacted] was laying in bed, over the span of an about an hour Appellant took fifteen pictures of her naked body in various positions. Pros. Ex. 1-30. He also took two pictures of his fingers inside LTJG [redacted] vagina, and pictures of his hand on her breast. Pros. Ex. 15-19, 24-30. At some point while he was taking pictures, LTJG [redacted] felt Appellant's hand in her vagina, felt Appellant licking her vagina, felt Appellant kissing her, and felt Appellant manipulating her legs. R. at 277, 320. LTJG [redacted] said "no" and pushed him away when she felt Appellant was attempting to have sex with her. R. at 277-8, 319. Eventually, after Appellant stopped taking pictures of LTJG [redacted] he called his friend, FN [redacted], who came to pick him up. R. 454-7.

Saving the photos he took of LTJG [redacted] in a special password protected folder on his phone, the next day, 18 March 2017, Appellant began showing them to various members of the CGC ACTIVE crew, another Coast Guard member, and a civilian friend. R. at 250-662. Appellant showed various photos of LTJG [redacted] naked body to BM3[redacted] OS2 [redacted], CS2 [redacted], Mr. [redacted], all crew members aboard the CGC Active. R. at 395, 651-3, 667, 682-3, He also sent nude photos of LTJG [redacted] to BM3[redacted], and Mr. [redacted], a civilian, via Snapchat. R. at 696-7, 713. Yet when interviewed by Coast Guard Investigative Service Agents (CGIS), Appellant claimed he

forgot about the pictures of LTJG [redacted] when recounting the events of March 27, 2017. Pros. Ex. 31; R. at 521.

Other facts necessary to the resolution of the issues are discussed below.

SUMMARY OF ARGUMENTS

This Honorable Court should affirm the finding of guilty as to Charge I and the sentence in this case. The only finding Appellant challenges is his conviction on Charge I. Each of Appellant's Assignments of Error fails to show that his conviction on Charge I should be overturned.

Appellant has failed to show he suffered from ineffective assistance of counsel. Trial Defense Counsel chose an objectively reasonable strategy, that LTJG [redacted] had a motive to fabricate, and executed that strategy competently. This strategy did not require expert assistance. Yet this Honorable Court does not need to review Trial Defense Counsel's performance, as Appellant suffered no prejudice because of the overwhelming evidence of his guilt.

[redacted]

Further, there was no apparent unlawful command influence in this case. Appellant has not shown even "some" evidence of unlawful command influence via the fact the prior Staff Judge Advocate was married to the Chief Military Justice and Command Advice Division at the

Legal Service Command that is required to shift the burden to the Government. Even if Appellant could show a conflict of interest, there is no evidence of that conflict impacting any part of Appellant's case. Nevertheless, an objective, disinterested observer would not find unfairness in the proceedings because Appellant's case was transferred to a different Convening Authority with a different SJA.

The evidence of Appellant's guilt as to Charge I was factually sufficient. Appellant took a photo of his hand penetrating the vagina of LTJG [redacted], a fact which she confirmed in her testimony. While he relies on his interview with the Coast Guard Investigative Service to show mistake of fact, Appellant's interview is riddled with contradictions, and he is alsso contradicted by the testimony of other witnesses. Appellant's claim that the Government did not meet its burden to disprove his mistake of fact defense fails.

Finally, Appellant was charged, tried, and convicted of a violation of Article 120(b)(1)(B), UCMJ. Appellant's claim that the Government argued at trial Appellant sexually assaulted LTJG [redacted] when she could not consent is belied by the evidence presented, the Government's arguments, as well as the arguments by Trial Defense Counsel. Appellant was on notice of all the elements of Charge I, and this Court should affirm the finding of Guilt thereto.

I. TRIAL DEFENSE COUNSEL'S DECISION NOT TO MOVE TO COMPEL EXPERT ASSISTANCE DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE DEFENSE COUNSEL'S PERFORMANCE WAS OBJECTIVELY REASONABLE AND DID NOT PREJUDICE THE APPELLANT.

Standard of Review

Ineffective assistance of counsel claims are reviewed *de novo*. *United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011).

Discussion

Military courts review ineffective assistance of counsel claims using the two-part test established in *Strickland v. Washington*, 466 U.S. 668 (1984). *See United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987) (incorporating the *Strickland* test in the context of military justice case law). To prevail on an ineffective assistance of counsel claim, an appellant must show both that (1) counsel's performance was deficient and (2) that this deficient performance prejudiced their defense. *Strickland*, 466 U.S. at 687; *United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F 2009). Each prong may be analyzed independently, and there is no need to examine both if one is not met. *Strickland*, 466 U.S. at 697.

In analyzing an ineffective assistance of counsel claim, Courts are highly deferential to counsel and begin with a strong presumption that defense counsel's performance fell within the wide range of reasonable professional assistance. *Mazza*, 67 M.J. at 475-76. Defense counsel's performance is not judged on the success of their strategy, but on "'whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time.'" *United States v. Dewerell*, 55 M.J. 131, 136 (C.A.A.F. 2001) (quoting *United States v. Hughes*, 48 M.J. 700, 718 (A.F. Ct. Crim. App. 1998). Courts "will not second-guess the strategic or tactical decisions made at trial by defense counsel." *Mazza*, 67 M.J. at 475. To overcome this strong presumption of competence, an Appellant must show that counsel's performance fell "below an objective standard of reasonableness." *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015).

Importantly, the reasonableness of trial defense counsel's performance must be judged from his standpoint at the time of the challenged conduct. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to

reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Further, an Appellant cannot simply assert that trial defense counsel should have done something different. "An appellant must establish the factual foundation for a claim of ineffectiveness; second guessing, sweeping generalizations . . . will not suffice." *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002). Courts recognize that decisions by a defense counsel are complex, and a counsel is not deficient simply because "they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so." *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012).

Finally, "It is not enough to show that the errors had some conceivable effect on the outcome...." *Id*. (citations omitted). "An Appellant is prejudiced when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Akbar*, 74 M.J. at 379 (quoting *Strickland*, 466 U.S. at 694). This requires a "substantial," not just a "conceivable" probability of a different result. *Harrington v. Richter*, 562 U.S. 86, 112 (2001).

a. Appellant's extra-record citations should not be considered.

Before proceeding to the merits of Appellant's claim, it is necessary to address the extra-record citations in Appellant's brief. When reviewing findings, military Courts of Criminal Appeal may only consider evidence presented at trial. *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007); *United States v. Roderick*, 62 M.J. 425, 431 (C.A.A.F. 2006) (holding service courts are constrained by the record of trial when reviewing for innocence or guilt); *United States v. Holt*, 58 M.J. 227, 232 (C.A.A.F. 2003) (limiting a service court to the evidence

presented at trial and precluding it from considering "extra-record" materials). This Honorable Court's rules also limit what may be considered as part of the record of trial. Matters outside the record of trial may only be considered when both parties stipulate, upon this Honorable Court taking judicial notice, upon a granted motion to attach, or upon this Honorable Court's own motion. Joint Rule of Appellate Procedure (JRAP) 6(b).

This Honorable Court should not consider any document, or argument based on said document, not in the record of trial or a granted motion to attach that is cited in Appellant's brief.[4] Appellant cites various journal articles and websites to make factual assertions about LTJG [redacted] level of intoxication, but has not moved this Honorable Court to attach, or otherwise complied with JRAP 6(b), any of the materials to the record of trial.[5] Appellant Br. at 16-7. Appellant claims these assertions are intended to show the evidence "a forensic toxicologist would have provided . . ." Appellant Br. at 15. This evidence violates both the prohibition on extra-record evidence articulated by the C.A.A.F. and JRAP 6(b) because the evidence is used to show facts not located in the record of trial. The Government respectfully requests this Honorable Court not consider any materials, or arguments based on those materials, Appellant cited that are not located in the record of trial.

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[4] The Government asks this Honorable Court to not consider the following materials cited by the Appellant: ADDICTION CENTER, *How Long Does Alcohol Stay in Your System?*, *Commander Thomas P. Belsky, Does it Add Up? Analyzing the use of Extrapolation Calculation to Determine the Ability to Consent in Alcohol-Related Sexual Assault Cases, 62 MIL. JUST. NAVAL L. REV. 2013*, Lawrence Wines, *The Law and Science of Retrograde Extrapolation*, UNDERSTANDING DUI SCIENCE EVIDENCE, 2010 WL 1976216, and NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM, *What is a Standard Drink?*

[5] For example, Appellant uses the cited materials to estimate how much pure alcohol LTJG AW consumed, and her approximate BAC. Appellant Br. at 17.

b. Trial Defense Counsel's strategy did not require expert assistance.

TDC's strategy was objectively reasonable because he had several strategically sound reasons for not filing a motion to compel an expert consultant. TDC's strategy focused on LTJG [redacted] motive to fabricate testimony because of her the risk to her Coast Guard career for fraternizing with an enlisted member, which did not require an expert forensic toxicologist or psychologist. First, as shown in his affidavit, TDC did not move to compel a toxicologist because he believed not having a toxicologist testify would create more uncertainty about conflicting testimony, and leave more doubt in the mind of the members about LTJG [redacted] actual intoxication and credibility. *See* Exhibit 1 at 3, Gov Motion to Attach. TDC believed this uncertainty could add to the reasonable doubt the members may have had about Appellant's guilt. And TDC argued at trial the Government's failure to call a toxicologist was part of their overall failure to meet the beyond a reasonable doubt burden. R. at 805.

Second, TDC decided not to move to compel an expert consultant or witness, either a toxicologist or psychologist, because he could effectively argue based on the facts from the lay witnesses that LTJG [redacted] was not intoxicated enough to black out. Exhibit 1 at 2, Gov Motion to Attach. In fact, he mitigated the risk to his case because a toxicologist could have testified that a person suffering from a blackout may be able to conduct themselves in a manner where they appear relatively sober. Exhibit 1 at 3, Gov Motion to Attach. This testimony would have undercut his theory and evidence from the lay witnesses that LTJG [redacted] was less intoxicated than she let on. *See* R. at 439

Further, TDC was aware of additional risk to Appellant's case if his expert toxicologist was turned on cross-examination, or if the Government had an expert toxicologist testify in rebuttal. One of TDC's strategies was to impeach LTJG [redacted] regarding her motive to fabricate.

Exhibit 1 at 3, Gov Motion to Attach. To do so, TDC needed to highlight the testimony from Mr. VW of Appellant and LTJG [redacted] kissing outside her house. Exhibit 1 at 3, Gov Motion to Attach. TDC was reasonably concerned that if an expert forensic toxicologist testified that expert could explain how LTJG [redacted] could have been suffering from fragmentary memory loss, and therefore provide an explanation of why LTJG [redacted] did not remember kissing Appellant. Exhibit 1 at 3, Gov Motion to Attach. That testimony would undermine TDC's attempt to impeach LTJG [redacted].

Case law supports finding TDC's strategy reasonable. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. The record and TDC's affidavit shows that TDC made a thorough investigation and strategically chose to focus on LTJG [redacted] motive to fabricate. *United States v. Roberts*, 2019 WL 6792460 (A. Ct. Crim. App. 2019) (unpub. op.) exemplifies that choice, and is remarkably similar to this case. There, CWO [redacted] was convicted of sexual assault and indecent recording in violation of both Article 120 and 120c. *Id*. at 1. CWO Roberts' wife and her friend, the victim SB, had returned to his home to go to sleep, but both took a .5 milligram dose of Xanax before going to bed. *Id*. at 3. After going to bed SB next remembered waking up on the downstairs couch, where CWO Roberts had been sleeping, with his penis penetrating her vagina. *Id*. CWO Roberts claimed he believed SB was his wife, but three pictures were later found on his phone of SB laying on the couch, breasts and genitalia exposed, and with her eyes closed. *Id*. On appeal, CWO Roberts asserted his defense counsel was ineffective for failing to file a motion to compel an expert consultant to examine the possible effects of Xanax, to include the possibility of blacking out, passing out, or sleep walking. *Id*. at 4.

Despite CWO Roberts' assertions, the Court found defense counsel "employed a tactically sound theory" when he argued SB was not impacted by the Xanax, as the Government alleged, but "engaged in consensual and adulterous sexual activity with appellant" and was lying to protect her marriage and friendship. *Id*. at 5. The Court stated, "[t]his theory did not require any defense expert testimony on the effects of Xanax," especially when the Government presented no expert testimony. *Id*.

TDC in this case made the same argument as defense counsel in *Roberts*. Both in the record of trial and in his affidavit, it is evident the main defense argument to was claim LTJG [redacted] had a motive to fabricate the allegations over a fear her behavior could lead to negative consequences for her Coast Guard career. R. at 228, 231-2, 294-6, 368, 421, 685-6, 795-801; Exhibit 1, Gov Motion to Attach. Just as in *Roberts*, this theory, that LTJG [redacted] was lying to avoid getting in trouble, did not require an expert consultant or witness to address LTJG [redacted] level of intoxication. The strategy simply required TDC to highlight LTJG [redacted] alleged fraternization, and show evidence she was concerned about who knew she had been allegedly fraternizing with enlisted members. R. at 333-4.

Appellant fails to demonstrate how TDC's performance during trial was deficient. Appellant generally claims TDC was ineffective in not filing the motion to compel an expert because "the critical question involved whether LTJG [redacted] intoxication and fatigue affected her consent or EM3 Weiser's knowledge of her consent." Appellant Br. at 15. But Appellant cites here to the Government's closing argument. Appellant Br. at 15. What is key to the ineffective assistance of counsel analysis is the theory and framing of the case TDC chose, not what the Government argued. *See Mazza*, 67 M.J. at 474-5. As noted, TDC mainly focused on challenging LTJG [redacted] credibility on the basis of motive to fabricate due to her alleged

fraternization with an enlisted member. R. at 228, 231-2, 294-6, 368, 421, 685-6, 795-801. Appellant does not argue that TDC's chosen strategy was ineffective. Instead, he argues TDC should have presented evidence which would support a strategy he did not pursue. Br. at 15. This type of hindsight analysis is prohibited. *Strickland*, 466 U.S. at 689. TDC conducted an investigation, considered using a toxicologist, but rejected that risky tactic in favor of arguing LTJG AW had a motive to fabricate. *See United States v. McIntosh*, 74 M.J. 294, 296 (C.A.A.F. 2015) (finding a TDC may choose to not present potentially helpful evidence if it creates significant risk); *United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011);

The cases Appellant cites in his brief support the Government's position. Appellant cites to the Air Force Court of Criminal Appeals (AFCCA) opinion *United States v. Datavs*, 70 M.J. 595 (A.F. Ct. Crim. App. 2011) to argue TDC should have filed a motion to compel an expert consultant or witness because he was unprepared to cross-examine LTJG [redacted] about the impact of alcohol. Appellant Br. at 21. But in *United States v. Datavs*, 71 M.J. 420, 426 (C.A.A.F. 2012) the CAAF affirmed the AFCCA without examining whether defense counsel in *Datavs* was deficient. The CAAF found since Appellant in that case was not prejudiced, it did not need to address there was a deficient performance by defense counsel. *Id.* This finding calls into question any conclusions the AFCCA came to regarding defense counsel's performance in *Datavs*.

Even if the reasoning is applied from the AFCCA's opinion in *Datavs*, multiple facts distinguish *Datavs* from this case. There, the defense counsel had to cross examine an expert after the expert testified differently than the Government had proffered. *Datavs*, 70 M.J. at 600. In this case, there was no Government expert toxicologist, and no evidence LTJG [redacted] testified differently than TDC believed she would. Most importantly, the strategy TDC chose did not

require an expert witness. In contrast, the defense counsel in *Datavs* admitted he would need an expert if the Government's expert testified as she did at trial. *Id*. This fact distinguishes makes *Datavs* from this case.

Appellant also attempts to distinguish this case from *United States v. McIntosh*, 74 M.J. 294 (C.A.A.F. 2015). Yet in *McIntosh*, the C.A.A.F. found defense counsel effective for some of the same reasons TDC was effective in this case. The C.A.A.F. found that based on defense counsel's previous experience, he correctly assessed that admitting potentially helpful evidence would undermine his theory of the case. *Id*. at 296. Those justifications are very similar to TDC's actions in this case where, TDC, based on his extensive experience, judged that expert testimony was too risky because it could explain why LTJG [redacted] did not remember much of the evening. This would undercut his theory she was fabricating her testimony. Exhibit 1, Gov Motion to Attach.

c. The lack of expert assistance did not prejudice Appellant because the evidence of his guilt was overwhelming.

Whether or not this Honorable Court would find TDC deficient, it need not examine his performance because Appellant suffered no prejudice. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will be often so, that course should be followed." *Strickland*, 466 U.S. at 697. Appellant cannot do more than speculate his case may have been different if that evidence had been introduced. Appellant claims the Government's case hinged on LTJG [redacted] credibility and alcohol consumption. Appellant Br. 24-5. Under this theory, a toxicologist and forensic psychologist could have provided evidence that LTJG [redacted] was not as intoxicated as she claimed and she in fact remembered more than she admitted. Appellant Br. at 24-5.

Despite Appellant's assertions, the most important evidence in this case consisted of the pictures that Appellant took of LTJG [redacted] naked and while he thought she was asleep. R. at 523. While witness credibility and surrounding circumstances are always at issue in sexual assault cases, prosecution exhibits 1-30 display a person who does not appear to be consenting. Pros. Ex. 1-30. These photos are significantly inculpatory because the two pictures of Appellant digitally penetrating LTJG [redacted], prosecution exhibits 15 and 17, are sandwiched between pictures, taken eight minutes apart, where LTJG [redacted] still appears to be in that condition. *See* Pros. Ex. 13-21. For Appellant's version of events to be true, one has to believe in that eight minute span LTJG [redacted] suddenly come out of a drunken stupor, saw Appellant, decided she wanted Appellant to digitally penetrate her vagina, and then after he had done so decide that she wanted to go back to laying down with her eyes closed, right away, and without asking him to leave or to put on any clothes.

Even if that scenario could have happened, the photos Appellant took contradict his statement to CGIS. In his interview, Appellant stated he brought LTJG [redacted] up to her room, she immediately began to take her clothes off, they kissed, and then he penetrated her vagina with his fingers. Pros. Ex. 33; R. at 512-6. Yet the first picture Appellant took of LTJG [redacted], taken at 23:26, does not show her interacting with Appellant. Pros. Ex. 1-2. Appellant digitally penetrated LTJG [redacted] four minutes later, contradicting his statements they immediately engaged in sexual relations, and that she was interacting with him when his fingers penetrated her vagina. Pros. Ex. 15-18; Pros. Ex. 33. Appellant's own photos demonstrate that his version of events lacks credibility as his timeline is inconsistent with the photographic evidence. The combination of Appellant's interview and his own photographs are so damning that expert testimony

regarding LTJG [redacted] intoxication and memory would have not created the "substantial" probability of a different result. *Harrington*, 562 U.S. at 112.

II. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

III. THE MARRIAGE OF THE STAFF JUDGE ADVOCATE TO THE DISQUALIFED CONVENING AUTHORITY AND THE CHIEF OF MILITARY JUSTICE AT THE LEGAL SERVICE COMMAND DID NOT CREATE AN APPEARANCE OF UNLAWFUL COMMAND INFLUENCE.

Standard of Review

Allegations of unlawful command influence (UCI) are reviewed *de novo*. *United States v. Harvey*, 64 M.J. 13, 19 (C.A.A.F. 2006).

Discussion

The military justice system recognizes the appearance of unlawful command influence can unfairly prejudice an accused. *United States v. Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2017). When apparent unlawful command influence is alleged, the focus is not on any actual prejudice to the pending proceedings and the accused, but on the "the damage to the public's perception of the fairness of the military justice system as a whole." *Boyce*, 76 M.J. at 249. To show apparent UCI, an accused has the burden to show "'some evidence'" that unlawful command influence occurred." *Id*. (Quoting *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002). "This burden on the defense is low, but the evidence presented must consist of more than "'mere allegation or speculation.'" *Id*. (Quoting *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013)). The evidence "must show that the unlawful command influence has a logical connection to the court-martial in terms of potential to cause unfairness in the proceedings." *United States v.*

Stoneman, 57 M.J. 35, 41 (C.A.A.F. 2002); *See also United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991) ("proof of [command influence] in the air, so to speak, will not do").

If the defense produces sufficient evidence to meet its burden, the burden then shifts to the government to rebut the allegation by proving beyond a reasonable doubt "that either the predicate facts proffered by the appellant do not exist, or the facts as presented do not constitute unlawful command influence." *Boyce*, 76 M.J. at 249. Even if the government cannot meet its burden of rebutting the UCI allegation at this initial stage, it may still show that there is no apparent UCI by proving beyond a reasonable doubt that the alleged unlawful command influence did not place "'an intolerable strain'" upon the public's perception of the military justice system, and that "'an objective, disinterested observer, fully informed of all the facts and circumstances, would [*not*] harbor a significant doubt about the fairness of the proceeding.'" *Id*. (citing *Salyer*, 72 M.J. at 423 (quoting *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006)) (emphasis in original). If the Government makes this showing, then the accused is not entitled to any remedy or relief. *Id*. at 249-50. Only if the Government cannot demonstrate any of the above is the accused entitled to an appropriate remedy. *Id*. at 250.

a. Appellant fails to meet his burden to show "some" evidence of UCI.

Appellant has not shown any evidence of facts that, if true, would show UCI actually occurred, and therefore has not shifted the burden to the Government. Appellant generally asserts that a conflict of interest exists because of the Adler's marriage and their respective positions, and this "would cause a reasonable observer to doubt CAPT [redacted] impartiality as an SJA . . ." Appellant Br. at 36-8. But here Appellant jumps ahead to the third stage of the apparent UCI analysis without identifying any evidence to shift the burden to the Government.

Appellant skips the initial step in the analysis laid out in *Boyce* in two separate ways. Appellant cites no authority to show two married persons in the [redacted] positions constitutes a conflict of interest. Second, assuming arguendo the mere fact of the marriage between the former SJA and the LSC supervisor raises "some evidence," Appellant fails to show "a 'logical connection' between those facts and unfairness in the proceedings at the pending court-martial." *United States v. Bridges*, 58 M.J. 540, 550 (C.G. Ct. Crim. App. 2003) (Quoting *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F.1999)).

No conflict of interest existed between CAPT and CDR [redacted]. CAPT [redacted] uncontroverted affidavit shows that he acts independently and in the best interest of the Coast Guard when giving legal advice to the Commander of Pacific Area. *See* Appellant Motion to Attach Exhibit A. This evidence is bolstered by the presumption that public officials perform their duties without bias. *United States v. Hagen*, 25 M.J. 78, 84 (C.M.A. 1987) (Citing *Schweiker v. McClure*, 456 U.S. 188, 195 (1982).[6] Appellant bears the burden to rebut that presumption and has only presented conclusory assertions that a conflict exists. *Id; See* Appellant Br. at 36-7.

Further, Appellant cites no case which shows a conflict in this case. Appellant cites only one case addressing conflict of interest and it is not factually applicable. In *United States v. Nix*, the C.M.A. found there was a "cloud" of an alleged conflict of interest because Special Court-Martial Convening Authority (SPCMCA) had an other-than-official interest in his case. *United States v. Nix*, 40 M.J. 6, 8 (C.M.A. 1994). The SPCMCA's fiancé had a personal relationship with the accused which made the SPCMCA jealous, and he had previously ordered the Appellant

[6] While *Hagen* concerned the potential for bias in a Convening Authority, the relevant portion of *Schweiker* itself had to do with civilian administrative law judges. *Schweiker*, 456 U.S. at 195-196. The same principle taken by the C.M.A. from *Schweiker* in *Hagen* can also be applied to a Staff Judge Advocates.

to cease talking with his wife. *Id*. Here, Appellant has presented no evidence to show either CAPT or CDR [redacted] having any personal relationship to anyone involved in the case. And in *Nix*, there was actual evidence of personal bias, the SPCMA's comments to the accused, that caused the conflict of interest. No evidence of a personal bias exists here. *Nix* also involved the decision of a Convening Authority and not an SJA. *Id*. Further, other cases involving marriage in the military justice setting require some other significant action beyond the fact of marriage to show a conflict of interest. *See United States v. Hale*, 76 M.J. 713 (N.M. Ct. Crim. App. 2017).

Assuming there was a conflict which amounted to UCI, Appellant fails to show the logical connection between that conflict and any unfairness in his case. Appellant asserts two facts show UCI, that his pre-trial agreement (PTA) offers were rejected, and that CDR [redacted] was part of the rating chain for the assigned trial counsel. Appellant Br. at 36-7. However, "[i]n cases involving unlawful command influence, the key to our analysis is effect . . ." *Boyce*, 76 M.J. at 251. Appellant does not show how the assumed conflict had an effect on his PTA negotiations. First, Appellant has no right to a PTA. "[A]n accused and the convening authority may enter into a pretrial agreement." Rule for Court-Martial (RCM) 705(a). Second, Appellant pointed to no evidence in the ROT that shows his PTA offers were rejected because of the alleged conflict of interest. And Appellant has not shown evidence that CDR [redacted] sought to influence, or did influence, CAPT [redacted] or the Convening Authority to reject his offer. Similarly, Appellant shows no evidence the alleged conflict of interest had any effect on any Government attorney's evaluation, or that the Government's attorneys did anything differently because they were being evaluated and supervised by CDR [redacted]

The other cases Appellant cites are not factually analogous. In *Boyce*, the C.A.A.F. set aside the Appellant's convictions because the General Court-Martial Convening Authority

(GCMCA) had received significant criticism for his decisions in other sexual assault cases, and may have been influenced in another case. *Boyce*, 76 M.J. at 251-2. Further, a series of actions by various Government actors induced the GCMCA to retire based on his previous military justice decisions. *Id*. In *United States v. Lewis*, the trial counsel and SJA orchestrated a plan to remove the military judge from the case, including reviewing the Military Judge's personnel file, calling the Appellate Government division, calling the Chief Circuit Judge, and conducting a personal and inappropriate voir dire of the Judge. *United States v. Lewis*, 63 M.J. 405, 407-11 (C.A.A.F. 2006). While those improper actions were eventually remedied, the C.A.A.F. found actual and apparent U.C.I. in part because the original trial counsel remained on the case. *Id*. at 415-6.

Nothing similar to *Boyce* or *Lewis* happened in this case. Both cases show intentional, egregious acts by Government actors that undermined the accused's right to a trial free from UCI. The only fact asserted in this case is that CAPT and CDR [redacted] were married. Appellant also cites *Lewis* to argue apparent UCI because even after the Military Judge removed the initial convening authority, and therefore CAPT [redacted] as SJA, CDR [redacted] still remained as the reporting officer for the trial counsels. Appellant Br. at 37. But there is no evidence that CAPT or CDR [redacted] were disqualified as the SJA was in *Lewis*, nor is there authority to show the assigned Trial Counsel should have been removed assuming there was a conflict. Further, Appellant asserts the alleged conflict was apparent to CAPT and CDR [redacted]. Appellant Br. at 37. However, nothing in the record of trial or Appellant's attachments shows CAPT and CDR [redacted] believed a conflict existed. Appellant Br. at 36-8. In sum, the one fact Appellant shows, that the [redacted] were married, "amounts to no more than a claim of [U.C.I] in the air." *United States v. Shea*, 76 M.J. 277, 282 (C.A.A.F. 2017).

b. Even if the burden shifted to the Government, no facts presented by the Appellant constitute UCI, and an objective disinterested observer would not harbor doubts as to the fairness of the proceedings.

Assuming that the burden did shift to the Government, evidence in the record shows both that the facts do not constitute UCI, and even if there was UCI, an impartial, disinterested observer would find the proceedings fair. As part of the Government's reply to the Trial Defense Counsel's motion to compel additional discovery, the Government included an affidavit from the former Convening Authority, VADM [redacted]. Government Motion to Attach, Exhibit 2: App. Ex. 35, at 23-4. VADM Fagan stated nothing had an improper impact on her independent judgment as a Convening Authority, and that she personally found the terms of the Defense offers "unacceptable and not in the interest of justice." App. Ex. 35, at 24; Article 39(a) Transcript of 17 September, at 6. This shows that any alleged conflict-of-interest between CAPT and CDR [redacted] had no impact on VADM [redacted] rejections of the Defense offers.

Further, no disinterested observer would believe the proceedings unfair. In compliance with, and prior to, the Military Judge's order, the former Convening Authority, VADM [redacted] transferred this case to another Convening Authority of the same rank, VADM [redacted] *See* App. Ex. 42, 43. Prior to trial, the Appellant was able to submit new offers to the new Convening Authority, who had a different SJA, free from any alleged conflict of interest. Any conflict due to the prior SJA was extinguished due to the transfer to a new convening authority. Appellant's apparent UCI claim fails because no outside observer would believe there continued

[7] The Military Judge ordered the case transferred to a new Convening Authority because the first Convening Authority had previous knowledge of the case, and her daughter, also on active duty, had been interviewed by CGIS during their investigation of this case. Article 39(a) Transcript of 17 September, 26-8.

to be an "intolerable strain" on the military justice system after the transfer to a new Convening Authority.

IV. APPELLANT'S CONVICTION FOR CHARGE I AND ITS SOLE SPECIFICATION WAS FACTUALLY SUFFICIENT

Standard of Review

This Honorable Court reviews legal and factual sufficiency *de novo*. *United States v. Guitierrez*, 73 M.J. 172, 175 (C.A.A.F. 2014).

Discussion

Article 66(c), UCMJ, 10 U.S.C. § 866, provides the military Courts of Criminal Appeals (CCA) must assess both the legal and factual sufficiency of a conviction. *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003). "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Gutierrez*, 73 M.J. at 175. (Quoting *United States v. Bennitt*, 72 M.J. 266, 268 (C.A.A.F. 2013)). "The test for a factual sufficiency review by the lower courts is 'whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, *the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt.*'" *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)) (emphasis in original).

The evidence convicting Appellant of Charge I was factually sufficient.[8] The question here is whether the Government proved beyond a reasonable doubt that the defense of mistake of fact as to consent did not exist. RCM 916(b)(1). In this case, the Government proved beyond a reasonable doubt that Appellant did not mistakenly believe LTJG [redacted] could consent, and even if he did his mistake was unreasonable. This Honorable Court should uphold Charge I as factually sufficient.

First, Appellant argues the Government did not "disprove [Appellants] reasonable mistake of fact beyond a reasonable doubt" because LTJG [redacted] was competent to consent when the Appellant committed the sexual assault.[9] Appellant Br. 40-1. But since Appellant was charged under the theory that he committed sexual assault through bodily harm, the Government had to prove LTJG [redacted] did not consent, not that she could not consent. *See* Charge Sheet; Article 120(b)(1)(B), 10 U.S.C. § 920; R. at 751. Indeed, the mistake of fact instruction given by the Military Judge states, "The prosecution has the burden of proving beyond a reasonable doubt that the defense of mistake of fact *as to consent* did not exist.[10]" R. at 755 (emphasis added). And, in closing, Trial Counsel specifically stated to the members the Government was not arguing LTJG [redacted] could not consent. R. at 783-4. If the Government had charged Appellant with an offense where it had to prove LTJG [redacted] could not consent, than arguing LTJG [redacted] was competent to consent would mean the Government was arguing against itself. R.

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[8] Appellant's AOE indicates he is challenging legal and factual sufficiency. However, Appellant only argues factual sufficiency, which is what the Government responds to here.

[9] While not a view adopted by every Court of Criminal Appeals, the Army Court of Criminal Appeals (A.C.C.A) found mistake of fact as to consent not applicable in cases charged under Article 120(b)(3), U.C.M.J., because the Government, as part of its burden to prove all the elements, must show the accused knew or reasonably should have known the victim could not consent. "That is, a mistake of fact defense is "baked in" to the elements of the offenses themselves." *United States v. Teague*, 75 M.J. 636, 638 (A. Ct. Crim. App. 2016).

[10] The Military Judge gave the standard Military Judge's Benchbook Instruction on mistake of fact. *Compare* ELECTRONIC BENCHBOOK 2.10.4, https://www.jagcnet.army.mil/ebb/index.html (last visited 27 Jan. 2020) *with* R. at 754-5.

at 783-4. The Government argued LTJG [redacted] did not consent, instead of that she could not consent, because that was an element of the charged offense. *See* Article 120(b)(1)(B). 10 U.S.C. § 920.

In this case, the Government proved beyond a reasonable doubt the mistake of fact defense failed. For that affirmative defense to fail, as the Military Judge instructed, the Government must show that subjectively Appellant did not believe LTJG [redacted] consented, or that if he did believe she consented his belief was objectively unreasonable. R. at 755; RCM 916(j)(1). First, addressing his subjective belief, in his interview with CGIS, prosecution exhibit 33, Appellant admitted he believed LTJG [redacted] was asleep when he took pictures of her that were later admitted as prosecution exhibits 1-30. R. at 523; 533; Pros Ex. 1-30, 33. And prosecution exhibits 15 and 17 show Appellant inserting his fingers into LTJG [redacted] vagina. Pros. Ex. 15, 17. Mr. VW did testify he saw LTJG [redacted] and Appellant kissing at the front door of her house, but even after that kiss Appellant came back out to the taxi and waited for Mr. [redacted] to come out so they could both leave. R. at 439-40. This indicates that even if Appellant and LTJG [redacted] kissed at her front door, he did not subjectively believe she wanted to engage in further sexual relations or else he would not have gone back out to the taxi. Appellant also admitted to CGIS when he was helping LTJG [redacted] up the stairs to her bedroom she was not coherent. R. at 512. The combination of those facts shows Appellant did not subjectively believe LTJG [redacted] consented to the conduct at issue in Charge I.

Even if Appellant had the subjective belief that LTJG [redacted] did consent, his belief was unreasonable. First, LTJG [redacted] testified she did not consent to Appellant inserting his fingers into her vagina. R. at 278. Second, LTJG [redacted] testimony of interactions with Appellant, which is corroborated by other witnesses, on the evening of 17 March 2017 in no way indicates a

reasonable person could have had a reasonable belief she consented to Charge I, or any sexual activity. *See* R. at 248-78. LTJG [redacted] testified she and Appellant were never talking one-on-one, that she danced with the group and not with Appellant, and that she offered to share a taxi with Appellant and Mr. [redacted] so they could have a ride home after she was dropped off. R. at 254-65. In his testimony, MK1 [redacted] verified that LTJG [redacted] was not dancing with Appellant. R. at 358. All the evidence of LTJG [redacted] and Appellant's interactions at the various bars would not cause a reasonable person to believe LTJG [redacted] wanted to engage in sexual activities with Appellant.

After getting in the taxi, LTJG [redacted] testified both Appellant and MK3 [redacted] placed their hands on her thigh so she leaned forward to talk with the driver in an effort to get them to stop touching her. R. at 267. She also gave the taxi driver twenty dollars to take the Appellant and Mr. [redacted] home. R. at 267. Mr. [redacted] verified the plan was to drop of LTJG [redacted] and then take him and Appellant home after she was dropped off. R. at 391. Mr. [redacted], the taxi driver, also verified LTJG [redacted] gave him twenty dollars so he could take Appellant and Mr. [redacted] home. R. at 432. He stated when LTJG [redacted] got out of the cab she asked him to wait for Appellant and Mr. [redacted] to return. R. at 433. A reasonable person in the taxi would not believe LTJG [redacted] was indicating she wanted to engage in sexual acts with anyone that evening.

Once all three were in LTJG [redacted] house, she testified she remembered looking for her phone, but quickly fell asleep on the couch. R. at 273. Her next memory was waking up naked, in her bed to a flash she assumed was from a camera. R. at 274-5. LTJG [redacted] had no memory of getting into her bed or getting undressed. R. at 275. She went on to describe how she next remembered her legs being spread and fingers penetrating her vagina. R. at 277. LTJG [redacted] then stated Appellant attempted to have sex with her, but she tried to push him away and turn over.

R. at 277-8. She stated she may have said no. R. at 278. No credible evidence indicates LTJG [redacted] attempted to show she was interested in having sexual relations with the Appellant. The sum of LTJG [redacted] testimony, supported by other witnesses, shows she did not explicitly or implicitly indicate in any way that she consented to the acts at issue in Charge I. Just as the evidence of their interactions at the various bars, and in the taxi, no reasonable person would believe that LTJG [redacted] actions at her house indicated she wanted to engage in sexual relations with Appellant.

Further, even a cursory examination of prosecution exhibits 1-30 provides further support to show it would be unreasonable for any person to believe LTJG [redacted] consented to any sexual acts. Prosecution exhibits 15 and 17 are pictures showing Appellant committing the charged act. Pros. Ex. 15, 17. Those pictures were taken at 23:30. Pros. Ex. 15-18. Prosecution exhibits 1-14 are additional pictures taken by Appellant between 23:26 and 23:30. Pros. Ex. 1-14. Those pictures depict LTJG [redacted] just minutes before the charged act. There is no indication in those exhibits that LTJG [redacted] consented to Appellant's conduct. In fact, those pictures show that LTJG [redacted] was not engaging or interacting with Appellant. *See* Pros. Ex. 1-14. Once again, no reasonable person would believe LTJG [redacted] consented to Appellant digitally penetrating her vagina.

While Appellant relies heavily on his interview with the CGIS as evidence of how a reasonable person would understand LTJG [redacted] actions, his own contradictions in that interview and evidence and testimony by other witnesses show he is not credible. Multiple omissions or contradictions harm Appellant's credibility. Even though in his interview with CGIS he is asked to thoroughly recount the night in question he fails to mention he took pictures of LTJG [redacted]. R. at 521. Then, when the CGIS agents confronted him with the pictures,

Appellant claimed to forgot about them, even though he placed them in a separate, password protected folder on his phone. R. at 521; R. at 541. Appellant also claims "When I was fingering her, her hand was on top of my hand . . ." R. at 530. Yet as trial counsel pointed out in closing, nowhere does LTJG [redacted] hand appear in prosecution exhibits 15 and 17. Pros. Ex. 15, 17.

Witness testimony also contradicts Appellant's statements to CGIS CS2 [redacted] testified that Appellant showed him prosecution exhibit 13, and told him that LTJG [redacted] "passed out, and then [Appellant] took the picture . . ." R. at 650. As noted, Appellant stated LTJG [redacted] was awake when he was "fingering her." R. at 516. Appellant told CGIS that LTJG [redacted] invited Appellant and Mr. [redacted] inside, but LTJG [redacted], Mr. [redacted], and Mr [redacted] all testified the plan was to drop her off and take Appellant and Mr. [redacted] home. R. at 267, 391, 432, 496.

Finally, Appellant's description of his sexual activity with LTJG [redacted] have no basis in the record. Appellant argues that an eight minute gap between pictures of LTJG [redacted] face shows that she was competent to consent, and was when the sexual activity occurred. Appellant Br. at 40. But that eight minute gap does not conform to how Appellant described his actions in the interview with CGIS. In his interview, Appellant stated the alleged sexual activity occurred as soon as they reached LTJG [redacted] bedroom.[11] R. at 512. All the evidence in the record of trial shows an objective reasonable person would not be mistaken about whether or not LTJG [redacted] consented to Appellant digitally penetrating her vagina. Appellant's mistake of fact defense failed at trial and fails here as well.

[11] Later in the interview, Appellant contradicts himself again when he states LTJG [redacted] was "passed out" when he took the pictures, which include prosecution exhibits 15 and 17. R. at 523.

V. APPELLANT WAS ON NOTICE OF CHARGE I BECAUSE THE ACTIONS BY BOTH TRIAL COUNSEL AND TRIAL DEFENSE COUNSEL SHOW THE CASE WAS LITIGTED UNDER THE THEORY APPELLANT SEXUALLY ASSAULTED LTJG AW BY BODILY HARM

Standard of Review

This Honorable Court reviews allegations of a violation of the Due Process clause under a *de novo* standard of review. *United States v. Saunders*, 59 M.J. 1, 6 (C.A.A.F. 2003).

Discussion

The Due Process clause of the Fifth Amendment to the United States Constitution requires that a military member be on notice of what offense and under what legal theory must defend against. *United States v. Tunstall*, 72 M.J. 191, 192 (C.A.A.F. 2013) (citations omitted). R.C.M. 307(c)(3) requires a specification to allege each element of the charged offense expressly or by implication. An accused cannot be convicted of an offense "with which he has not been charged." *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011). Importantly, how an accused chooses to contest his case can show whether he was on notice of "what he had to defend against." *United States v. Oliver*, 76 M.J. 271, 275 (C.A.A.F. 2017).

Here, Appellant's AOE fails because he was convicted of Charge I, a violation of Article 120(b)(1)(B), under the legal theory that he caused bodily harm when he committed a sexual act upon LTJG AW without her consent. First, Appellant was on notice of all elements as evidenced by his charge sheet, and statutory definitions of his charge. Second, the record of trial, including arguments by trial defense counsel, and the manner in which the case was contested shows Appellant was prosecuted under the bodily harm theory. Finally, case law supports the proposition Appellant was convicted of Charge I under a bodily harm theory.

Appellant's charge sheet shows the Government provided notice of all the elements of an Article 120(b)(1)(B), UCMJ, offense. *Compare* Charge Sheet *and* Article 120(b)(1)(B), UCMJ, 10 U.S.C. § 920. The specification of Charge I alleged he penetrated the vulva of LTJG AW with his finger, "by causing bodily harm to [LTJG AW] . . . committing said sexual act without consent . . ." Charge sheet. Bodily harm means "any offensive touching of another, however, slight including any nonconsensual sexual act . . ." Article 120(g)(3), UCMJ, 10 U.S.C. § 920. Consent is defined, in part, as "a freely given agreement to the conduct at issue by a competent person," and "Lack of consent may be inferred based on all the circumstances of the offense. All the surrounding circumstances are to be considered in determining whether a person gave consent . . ." Article 120(g)(8)(A)-(C), UCMJ, 10 U.S.C. § 920. Based on the definitions of both bodily harm and consent in Article 120, UCMJ, Appellant was on notice that the Government might introduce evidence of LTJG AW's intoxication to show lack of consent. *See United States v. Gomez*, 2018 WL 1616633 (N.M. Ct. Crim. App. 2018) (unpub. op.).; *United States v. Motsenbocker*, 2017 WL 3430569 at *7-8 (N.M. Ct. Crim. App. 2017) (unpub. op.). Consequently, service of the charge sheet put the Appellant on notice that the Government would have to prove lack of consent, and that he was charged under a bodily harm theory of liability. *See Gomez*, 2018 WL 1616633 at *4.

Furthermore, the record is replete with confirmation Appellant was prosecuted under a bodily harm theory. First, in his closing Trial Counsel made this abundantly clear when he stated, "Now we're not arguing that she was so drunk and so tired that she could not consent. But her level of intoxication and level of fatigue are factors you should consider in whether or not she was consenting." R. at 783-4. This fact was quite evident to Trial Defense Counsel, who stated, ". . . the United States Government not at any point are (sic) going to argue she was

incapacitated. They want us to argue, they can't. There is no evidence of severe incapacitation." R. at 806. Trial Defense Counsel went on to state that LTJG AW was "mildly intoxicated," and again later, "I agree with the Government, she was mildly intoxicated." R. at 808; 813. Finally, the Military Judge acknowledged and announced to both parties the case was charged "as sexual assault with bodily harm. There's been no charge concerning the capacity of the alleged victim or the level of intoxication." R. at 741.

In fact, the basis of TDC's mistake of fact argument was founded on the idea the Government was prosecuting Appellant under a bodily harm theory. TDC framed his mistake of fact argument around the idea Appellant thought LTJG [redacted] consented to the sexual acts and photos because she never explicitly told him to stop. "She never said no. She never told him to leave. She never said what are you doing? Nothing. Seven beers, or six and one cider. She knew. She knew and she [never] said no." R. at 814. This argument implicitly acknowledges that LTJG [redacted] was capable of consenting under the standard affirmed in *United States v. Pease*, 75 M.J. 180, 184-5 (C.A.A.F. 2016). If the Government had been prosecuting Appellant under an incapacitation theory, TDC would have argued LTJG [redacted] was *able* to say "no" or ask Appellant a question. But instead TDC assumed she was able appreciate and communicate what was happening, and argued she chose not to do so. *See Id.*

Case law supports the argument Appellant was on notice he was charged of a violation of Article 120(b)(1)(B), U.C.M.J, and convicted under a bodily harm theory. Appellant's argument is the same argument the Navy-Marine Corps Court of Criminal Appeals (NMCCA) rejected in *United States v. Gomez*. In *Gomez*, the accused was charged with four violations of Article 120, three sex assault specifications and one abusive sexual contact specification, under the theory he caused bodily harm. *Gomez*, 2017 WL 3430569 unpub. op. at *3. In *Gomez*, as in this case, the

Appellant argued the Government had charged him with violations of Article 120 under the bodily harm theory, but prosecuted him under the theory the victim was incapable consenting by referencing the intoxication of the victim. *Id*. at 4.

The NMCCA rejected that argument for three relevant reasons. First, as is the case here, the accused was put on notice by the charge sheet and associated definitions. *Id*. Second, again just as here, both parties made arguments consistent with the bodily harm theory. *Id*. at 5. Third, the case was contested based on the theory of bodily harm, as evidenced by the defense counsel Counsel's strategy. *Id*. at 6. In that case, "The appellant's trial strategy focused on [the victim's] pre-sexual encounter behavior, memory gaps and discrepancies attributable to alcohol intoxication . . . and, alternatively, the appellant's alleged mistake of fact as to consent." *Id*. Here, Trial Defense Counsel cross examined LTJG [redacted] about her actions prior to the charged allegations, gaps in her memory due to alcohol intoxication, and argued as an alternative to consent that Appellant had a mistake of fact as to consent. R. at 296-302; 311-321; 809-815. In this way, Trial Defense Counsel's strategy "diminishes any argument that Appellant was not on notice as to what he had to defend against." *United States v. Oliver*, 76 M.J. 271, 275 (C.A.A.F. 2017) *See also Motsenbocker*, unpub. op. at *7-8 (finding Appellant could not claim lack of notice when his trial strategy focused on consent and mistake of fact).

Appellant fails to distinguish *Gomez* from this case. Appellant states, correctly, that the Government asked different witnesses about LTJG [redacted] intoxication and referenced how she appeared in the photos taken by Appellant. Appellant Br. at 46. But Appellant is incorrect in asserting that those questions show the Government was attempting to prove LTJG [redacted] was incapable of consenting. Those questions and argument, just as in *Gomez*, are entirely consistent with the definition of consent and the instructions given in this case, as the members "may infer

lack of consent from all the surrounding circumstances." *See* Article 120(g)(8), UCMJ, 10 U.S.C. § 920; R. at 752-4. Further, a close examination of Appellant's citations show that while Trial Counsel did bring up LTJG [redacted] intoxication, it was not emphasized either in any direct examination or closing argument. *See* R. at 234-286; 342-365; 778-790. And as noted, in his closing argument Trial Counsel explicitly stated the Government was not arguing LTJG [redacted] could not consent.[12] R. at 783-4. Appellant was charged, on notice, and convicted of all the elements of Article 120(b)(1)(B), UCMJ, 10 U.S.C. § 920.

PRAYER FOR RELIEF

WHEREFORE, the United States prays that this honorable Court affirm the findings and sentence.

Respectfully submitted,

Date: 10 March 2020

[redacted]
Lieutenant, U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
2703 Martin Luther King Jr. Ave. SE
Washington, D.C. 20593-7213
[redacted]
[redacted]

[12] Appellant also argues he had a strong mistake of fact defense. Appellant Br. at 46. However, the issue here is whether Appellant was on notice of Charge I, and whether he was prosecuted under a bodily harm theory. The strength of his mistake of fact defense is irrelevant.

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was delivered to the Court, opposing counsel, and a redacted copy to special victim's counsel on 10 March 2020.

[redacted]
Lieutenant, U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
2703 Martin Luther King Jr. Ave. SE
Washington, D.C. 20593-7213
[redacted]