UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
M.D. MODZELEWSKI, F.D. MITCHELL, M.K. JAMISON
Appellate Military Judges

UNITED STATES OF AMERICA

v.

MATTHEW H. COOK
MIDSHIPMAN FIRST CLASS, U.S. NAVY

NMCCA 201200518
GENERAL COURT-MARTIAL

Sentence Adjudged: 1 May 2012.
Military Judge: CAPT Eric C. Price, JAGC, USN.
Convening Authority: Superintendent, U.S. Naval Academy, Annapolis, MD.
Staff Judge Advocate's Recommendation: CAPT Robert J. O'Neill, JAGC, USN.
For Appellant: Capt Jason R. Wareham, USMC.
For Appellee: LT Philip S. Reutlinger, JAGC, USN.

31 December 2013

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

MODZELEWSKI, Chief Judge:

A panel of members sitting as a general court-martial convicted the appellant, contrary to his pleas, of one specification of wrongful sexual contact, in violation of Article 120(m), Uniform Code of Military Justice, 10 U.S.C. § 920(m) (2006). The members sentenced the appellant to dismissal, and the convening authority approved the findings and sentence as adjudged.

The appellant raises five assignments of error:

(I) that the evidence is legally and factually insufficient to sustain the conviction; (II) that the military judge erred in failing to instruct on the impact of voluntary intoxication on a specific intent crime; (III) that it was plain error to allow witnesses to use the words "victim" and "rape"; (IV) that a witness provided improper human lie detector testimony; and, (V) that the President's comments regarding sexual assault, made after the appellant's trial, amount to apparent unlawful command influence in the appeal process.

After considering the pleadings and the record of trial, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

I. Factual Summary

During the summer of 2010, the appellant was among a group of first class midshipmen from the U.S. Naval Academy (USNA) who were temporarily assigned on a training detail to the Naval Academy Preparatory School (NAPS) in Newport, R.I. The appellant roomed with a classmate, Midshipman (MIDN) B, in the King Hall barracks. MIDN J, a female, was also assigned to the detail, and was berthed in a room by herself at King Hall. Prior to the summer assignment at NAPS, MIDN J did not know the appellant or his roommate.[1]

Over the course of the summer assignment, MIDN J had one relevant encounter with the appellant prior to the charged incident. After a group of midshipmen returned to the base from an evening out, the appellant asked MIDN J to go to a secluded location. Following a brief conversation, the appellant kissed her; MIDN J initially kissed back, but then told the appellant to stop when he attempted to become more physical. Record at 740-41.

On the final evening of their assignment at NAPS, several of the midshipmen ended up at a local off-base bar. At trial, MIDN J testified that she arrived sometime at the bar between 2100 and 2200 with a group of midshipmen that did not include the appellant, and that she stayed until closing at 0100. Over the course of the evening, MIDN J consumed several beers and several mixed drinks, and then three shots of alcohol near the

[1] By the time of trial, MIDN J was commissioned as an Ensign in the U.S. Navy, and MIDN B was commissioned as a 2ndLt in the U.S. Marine Corps. For clarity, we refer to them by their rank at the time of the incident.

end of the night. MIDN J testified at trial that she had difficulty standing upon leaving the bar, ate lightly while waiting for a ride, had difficulty walking when back at the barracks, and had to use the hand-rail to navigate the stairs to her room.

At trial, MIDN B testified that he and the appellant were at the same bar that evening: having arrived at the bar between 2000 and 2100, they too stayed until closing. Both of them were drinking: he recalls being "drunk" and thought the appellant was as well. Record at 683-84. MIDN B did not recall seeing the appellant and MIDN J together at any point at the bar. When MIDN B and the appellant returned to their barracks, they had a brief conversation before MIDN B went to his room and went to sleep.

When MIDN J entered her room, she found the appellant waiting for her. MIDN J testified that the appellant asked her if she had a condom and whether she was on birth control. She testified that she then blacked out, and woke up to find herself unclothed and on the bed. She described feeling and seeing the appellant on top of her, his penis in her vagina, and her head hitting the wall or desk. MIDN J further testified that she tried to get away, but could not do so, and that she has no further recollection until she awoke the following morning. Finding the appellant beside her on the bed, she told him that he needed to be gone from the room when she returned from the bathroom.

At trial, MIDN B testified that the appellant did not return to their barracks room that evening. When he later recounted the events of the evening to MIDN B, the appellant stated that he went to MIDN J's room, and that they were "romantic" with one another. The appellant told MIDN B that, at some point, MIDN J was no longer interested in being "romantic" and rolled over to sleep. *Id.* at 687-88.

MIDN J did not immediately report the assault, instead delaying the report until she returned to the Naval Academy approximately ten days later for the start of the academic year. In late August 2010, MIDN J initially made a restricted report; the following spring, she changed the report to unrestricted.[2]

II. Background

[2] At trial, a restricted report was defined as one that allowed access to medical and counseling services without a report to law enforcement, and an unrestricted report was defined as one made to law enforcement, precipitating an investigation. Record at 943-44.

The appellant was charged with both aggravated sexual assault (substantial incapacitation) and wrongful sexual contact, both in violation of Article 120.[3] Prior to trial, the appellant moved to dismiss the wrongful sexual contact specification based upon multiplicity and upon unreasonable multiplication of charges (UMC). The military judge denied the motion, with the caveat that he would reconsider the issue of UMC if the appellant were convicted of both specifications. The members, however, acquitted the appellant of the aggravated sexual assault specification.

Further facts are developed below as necessary.

III. Legal and Factual Sufficiency

The test for legal sufficiency is whether any rational trier of fact could have found that the evidence met the essential elements of the charged offenses, viewing the evidence in a light most favorable to the Government. *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987). The test for factual sufficiency is whether we ourselves are convinced of the appellant's guilt beyond a reasonable doubt, allowing for the fact that we did not personally observe the witnesses. *Id*. at 325.

The appellant first argues that this court cannot properly conduct a factual sufficiency review because the conviction for wrongful sexual contact is rendered ambiguous by the acquittal of aggravated sexual assault. Said differently, the appellant argues that his acquittal of aggravated sexual assault implicitly acquitted him of penile penetration of MIDN J, which was the only act of touching to which she testified.[4] Therefore, he argues, this court cannot review, or affirm, his conviction for wrongful sexual contact, as we would potentially be affirming a conviction for conduct of which he was acquitted. Relying on *United States v. Stewart*, 71 M.J. 38 (C.A.A.F. 2012),

[3] The wrongful sexual contact specification alleged that the appellant "engage(d) in sexual contact with [MIDN J], to wit: intentionally touching her genitalia, and such sexual contact was without legal justification or lawful authorization and was without the permission of [MIDN J]."

[4] During the pretrial multiplicity/UMC motion, the Government noted that the evidence may show touching by the hand in addition to penile penetration. As the trial unfolded, MIDN J did not testify to any contact other than the incident described above, in which she testified that she awoke to find the appellant on top of her, felt her head repeatedly hitting the desk, and also felt penile penetration.

the appellant contends that such a factual sufficiency review violates the double jeopardy clause.

We disagree. The facts of *Stewart* are indeed unique and inapposite here. In *Stewart*, the Government initially charged the accused with one specification of aggravated sexual assault for engaging in a sexual act with a person "who was substantially incapacitated or substantially incapable of declining participation in the sexual act." *Id.* at 39. The military judge severed the single specification into two separate specifications that were identical except that Specification 1 alleged that the victim was "substantially incapacitated" and Specification 2 alleged that she was "substantially incapable of declining participation in the sexual act." *Id.* at 42.

When instructing the members, the military judge in *Stewart* provided exactly the same definition for the two different terms. Moreover, the military judge instructed the members that they could return a finding of guilty for only one specification, and his instructions are fairly read to instruct the members to vote first on Specification 1 before proceeding to Specification 2. The members subsequently returned a verdict of guilty only as to Specification 2, implicitly having made a finding of Not Guilty as to Specification 1. Under the "unique circumstances" of *Stewart*, the Court of Appeals for the Armed Forces (CAAF) found that "the principles underpinning the Double Jeopardy Clause . . . made it impossible for the CCA to conduct a factual sufficiency review of Specification 2 without finding as fact the same facts that the members found *Stewart* not guilty of in Specification 1." *Id.* at 43.

These unique circumstances are not present in this case. Here, the military judge properly instructed the members on the elements of the two specifications under Article 120. He instructed the members that to convict the appellant of aggravated sexual assault, they must find two elements beyond a reasonable doubt: (1) that the appellant engaged in a sexual act with MIDN LJ; and (2) that he did so when MIDN LJ was substantially incapacitated. Record at 1284. He then instructed them that to convict the appellant of wrongful sexual contact, they must find beyond a reasonable doubt that: (1) the appellant engaged in a sexual contact with MIDN LJ by intentionally touching her genitalia; (2) the sexual contact was without permission; and (3) the sexual contact was wrongful, that is, without legal justification or lawful authorization. *Id.* at 1287-88. The instructions by the military judge as to

the two separate offenses were not overlapping, and clearly articulated two distinct offenses for the members to deliberate upon.[5]

We are not persuaded by the appellant's argument that the acquittal on Specification 1 was *per se* a finding by the members that penile penetration had not occurred. A simple reading of the mixed verdict is that the members were not convinced beyond a reasonable doubt that the appellant committed a sexual act with MIDN J when she was substantially incapacitated, but were convinced beyond a reasonable doubt that he engaged in sexual contact with her without her permission and without any type of justification or authorization.

Turning now to the question of legal sufficiency, we are convinced that a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. First, the evidence at trial was sufficient to support a determination beyond a reasonable doubt that appellant touched MIDN J's genitalia with the intent of arousing or gratifying his own or her sexual desires: the appellant appeared in MIDN J's barracks room asking whether she had a condom or was on birth control, and the circumstances of the subsequent sexual contact leave no doubt that it was both an intentional touching and with a sexual intent. Secondly, the evidence clearly established that there was no legal justification or authorization for the sexual contact, and that MIDN J had not given her permission for this touching.

Moreover, we are convinced that a rational trier of fact had sufficient evidence to be convinced beyond a reasonable doubt either: 1) that the appellant was not under a mistaken belief that MIDN J consented to the touching; or 2) if he was under such a mistaken belief, that belief on his part was unreasonable. After reviewing the record of trial and briefs of the parties, we are ourselves convinced of the appellant's guilt of this offense beyond a reasonable doubt.

IV. Failure to Instruct On Intoxication vis-à-vis Intent

[5] The argument by trial counsel appears to conflate the two specifications: in arguing the evidence on the wrongful sexual contact charge, the trial counsel twice referenced that MIDN J could not give permission or consent as she was "substantially incapable" or "substantially incapacitate(ed)." Record at 1309-10. However, he also highlighted that MIDN J had been asked whether she had given the appellant permission, and had responded "No." *Id.* at 1310.

The appellant contends that the military judge erred in failing to instruct on voluntary intoxication as a defense to the specific intent crime of wrongful sexual contact.[6] We review allegations of instructional error *de novo*. *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003).

Shortly after the members found the appellant guilty of wrongful sexual contact, the military judge *sua sponte* raised the issue of whether he had erred in failing to instruct the members on voluntary intoxication and its potential to raise reasonable doubt as to specific intent. Earlier in the trial, the parties had on three occasions discussed whether such a defense might exist or whether such an instruction might be given. Record at 392-94, 1009-10, 1269. When the defense submitted its proposed instructions, however, it had not requested any such instruction, and did not object to the judge's draft instructions when given an opportunity to do so, or to his final instructions.

After raising the issue post-verdict, the military judge allowed the parties to brief and argue their positions on the issue. In response, the defense moved for a mistrial, which motion the military judge ultimately denied, finding that the evidence was insufficient to require an unrequested instruction on intoxication. We agree. Moreover, assuming *arguendo* that the judge erred, we find any such error harmless beyond a reasonable doubt.

The appellant failed to request an instruction that the members should consider the effect of intoxication in deciding whether the appellant touched MIDN J with the intent to gratify or arouse sexual desires.[7] Moreover, he raised no objection when the military judge failed to give any such instruction. His failure to object to the omission of any such instruction forfeited the objection absent plain error, unless the

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[6] The parties agreed at trial, and the Government does not contest on appeal, that the offense of wrongful sexual contact is a specific intent offense. Although the elements do not themselves contain an intent requirement, the statutory definition of sexual contact does: "The term 'sexual contact' means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person . . . with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person." Article 120(t)(2), UCMJ (2006). *See also United States v. Bonner,* 70 M.J. 1, 2-3 (C.A.A.F. 2011).

[7] *See* Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at 5-12 (2012).

instruction was required. RULE FOR COURTS-MARTIAL 920(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). *See also United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000).

Although voluntary intoxication is not a defense, "evidence of any degree of voluntary intoxication may be introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or a premeditated design to kill, if actual knowledge, specific intent, willfulness, or premeditated design to kill is an element of the offense." R.C.M. 916(l)(2). However, "(w)hen raising an issue of voluntary intoxication as a defense to a specific intent offense, 'there must be some evidence that the intoxication was of a severity to have had the effect of rendering the appellant incapable of forming the necessary intent,' not just evidence of mere intoxication." *United States v. Peterson*, 47 M.J. 231, 233 (C.A.A.F. 1997) (quoting *United States v. Box*, 28 M.J. 584, 585 (A.C.M.R. 1989)). *See also United States v. Bright*, 20 M.J. 661, 664-65 (N.M.C.M.R. 1985) ("Voluntary intoxication alone is not a defense unless it is to such a degree that the mental faculties of an accused have been so impaired that a specific intent cannot be formed.")

At trial, the only direct evidence of the appellant's intoxication came from his roommate, MIDN B, who testified that he and the appellant consumed a number of drinks at the bar on the evening in question, beginning somewhere between 2000 and 2100 and continuing until closing. MIDN B did not recall seeing the appellant consume any mixed drinks. He testified that he himself was "drunk" and thought the appellant was as well. Record at 683-84.

MIDN B's testimony that he believed the accused was drunk was "some evidence" that the appellant was intoxicated at some point during the evening. However, there is no evidence that the appellant's intoxication was of such a level that he was incapable of forming the necessary intent. On the contrary, there is a plethora of evidence that suggests the appellant was perfectly capable of forming the required intent: his cogent conversation with MIDN B back in King Hall, his questions to MIDN J about condoms and birth control, and his recollection of the encounter months later to MIDN B. We find that the record contains some evidence of "mere intoxication" but that there was no evidence that the intoxication was of a severity to have had the effect of rendering the appellant incapable of forming the necessary intent to intentionally touch MIDN J with an intent to arouse of gratify either party's sexual desire.

In our consideration of whether an instruction was required, we also take into account the manner in which this issue was litigated at trial. *See Hibbard*, 58 M.J. at 76. Of note, the defense at no time introduced evidence of the appellant's intoxication "for the purpose of raising a reasonable doubt as to the existence of . . . specific intent . . . ." R.C.M. 916(l)(2). The only evidence of intoxication came from the Government's witness, MIDN B, upon direct examination. Trial defense counsel did not cross-examine MIDN B, or MIDN J, regarding the appellant's level of intoxication, and did not in any way imply in his closing argument that the appellant's intoxication impacted his ability to form the specific intent required to commit the offense. Although the defense's theory of the case is certainly not dispositive of whether a particular instruction is required, it is appropriate for an appellate court to take into account the absence of such a presentation in assessing the significant of the evidence. *Hibbard,* 58 M.J. at 76.

We conclude that the appellant has not met his burden in establishing error, in that the military judge was not required *sua sponte* to give the instruction.

Even if the military judge erred, we conclude any such error to be harmless beyond a reasonable doubt. *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007). Had the military judge given the instruction, the members would have been instructed that they could consider the appellant's voluntary intoxication in determining whether they were convinced beyond a reasonable doubt that he had formed the specific intent to arouse or gratify sexual desires. The only evidence they had been given on the appellant's level of intoxication was that he may have been intoxicated at some point in the evening. On the contrary, they had a wealth of evidence that the appellant touched MIDN J with the requisite sexual intent. He entered MIDN J's room, waited for her to return, and asked her if she had a condom or was on birth control. Most importantly, the contact with her was unquestionably sexual in nature, in fact it was sexual intercourse, leaving scant room for doubt as to whether his intent was to arouse or gratify sexual desires. "Frequently, as here, the conduct of an accused is sufficiently focused and directed so as to amply demonstrate a particular *mens rea* or other state of mind." *Peterson*, 47 M.J. at 234 (citations omitted). Assuming error *arguendo*, we find beyond a reasonable doubt that any error did not contribute to the appellant's conviction.

V. The Testimony of CAPT C

We turn next to the appellant's contention that the military judge did not properly remedy "human lie detector testimony."

In its case on the merits, the Government called Captain (CAPT) C, who was assigned at the USNA as an instructor and also served as the Sexual Assault Response Coordinator (SARC). CAPT C testified that she interacted with MIDN J both in her capacity as an instructor and in her capacity as the SARC. Under direct examination, CAPT C testified first about her interactions as SARC with MIDN J, explaining the timeline between MIDN J's first restricted report in August 2010 to her subsequent unrestricted report in March 2011. The trial counsel then pivoted the questions to the instructor/student relationship, and elicited from the witness a foundation for her opinion as to MIDN J's character for truthfulness: MIDN J had been a student in her ethics class. CAPT C testified that, as a result of her interactions with MIDN J over the sixteen-week course in the spring of 2009, she had an "excellent" opinion of MIDN J's character for truthfulness. Defense counsel did not object to either line of testimony and, on cross-examination sought primarily to clarify that not all people who report sexual offenses are in fact "victims." Record at 951-52.

Shortly thereafter, the military judge *sua sponte* raised a concern that the witness's opinion evidence may be viewed as "human lie detector" testimony, in light of her duties as SARC. Record at 976. By that term, the military judge appears to have meant that the members may somehow confuse her opinion that MIDN J is a truthful person to arise from her SARC duties, and not her relationship with MIDN J as an instructor, and that the members may believe CAPT C was testifying that she believed the report of sexual assault. In light of the concerns voiced by the military judge, the defense counsel agreed with him that limiting instruction was necessary, but declined to request a mistrial. The military judge reviewed a draft instruction with the parties, and neither party objected.

At the conclusion of CAPT C's testimony, the military judge provided that detailed instruction to the members. He advised them that the witness testified as to two distinct issues. With regard to CAPT C's opinion evidence, the military judge instructed the members:

> Only you, the members of the court, determine the credibility of the witnesses and what the facts of the case are. No witnesses can testify that the alleged victim's account of what occurred is true or credible. To the extent you believe that Captain [C] testified or even implied that the alleged victim, [MIDN J], was a victim of sexual assault or that she believes the alleged victim, . . . or that [MIDN J's] account or complaint was credible, you may not consider this evidence that a crime occurred or that the alleged victim is credible. I repeat, only you, the members of the court determine the credibility of the witnesses and what the facts of this case are.

Record at 1043-44.

In his later instructions on findings, the military judge again repeated the full instruction. Record at 1295-96.

MILITARY RULE OF EVIDENCE 608(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), provides that a witness may testify as to the reputation or opinion of an individual for truthfulness when the witness's character "for truthfulness has been attacked by opinion or reputation evidence or otherwise." The CAAF has indicated that, "when there is a 'slashing cross-examination,' the term 'or otherwise' has been met." *United States v. Toro*, 37 M.J. 313, 317 (C.M.A. 1993) (quoting *United States v. Everage*, 19 M.J. 189, 192 (C.M.A. 1985) (additional citation omitted). Additionally, rehabilitation as to truthfulness has been allowed when the cross-examination of a witness was done "in such a manner as to induce the belief of untruthfulness." *Toro*, 37 M.J. at 318 (citing *United States v. Allard,* 19 M.J. 346 (C.M.A. 1985)). We need not decide whether the proper foundation for an opinion was laid or whether there was a slashing cross-examination that allowed for rehabilitation because the defense failed to object. *Toro*, 37 M.J. at 318. Reviewing for plain error, we find none.

Moving to the assigned error, trial defense counsel failed to object to the presentation of character evidence through a witness who was also testifying about her SARC duties. The military judge, apparently concerned that this was plain error that may materially prejudice a substantial right of the appellant, exercised his prerogative to take notice of the error and to take corrective action. The appellant now contends that the military judge's remedy was insufficient to cure the error. Appellant's Brief of 17 Jun 2013 at 23. We disagree.

The CAAF has consistently rejected the admissibility of so-called human lie detector testimony. No witness may offer "an opinion as to whether [another] person was truthful in making a specific statement regarding a fact at issue in the case." *United States v. Kasper*, 58 M.J. 314, 315 (C.A.A.F. 2003) (citations omitted). This prohibition applies both to expert and lay witness testimony. *Id. See also United States v. Mullins*, 69 M.J. 113, 117 (C.A.A.F. 2010) (holding that it was error for the military judge to permit testimony that could lead a trier of fact to infer that there was a 1 in 200 chance that a child victim was lying about being sexually abused).

Because defense counsel in this case did not object either to the initial testimony or to the military judge's remedial instruction, we test for plain error. *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007); *see also* MIL. R. EVID. 103(d). To prevail, the appellant must show: "(1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the [appellant]." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (citation omitted). In light of the limited nature of CAPT C's testimony and the clear bifurcation between her interactions with MIDN J as SARC and those as instructor, we decline to find plain error in allowing her testimony with regard to MIDN J's character for truthfulness.

Even assuming error *arguendo*, the appellant has failed to show material prejudice to his substantial rights. Prejudice results when there is "undue influence on a jury's role in determining the ultimate facts in the case." *United States v. Birdsall,* 47 M.J. 404, 411 (C.A.A.F. 1998). We look at the testimony in context to determine if the witness's opinion amounts to prejudicial error. *Mullins*, 69 M.J. at 117 (citing *United States v. Eggen*, 51 M.J. 159, 161 (C.A.A.F. 1999)). Context includes such factors as an immediate instruction, the standard instruction, and the strength of the Government's case. *Id*. The military judge twice instructed the members to keep the two aspects of CAPT C's testimony distinct and separate, and to limit their consideration of her testimony to very narrow parameters. He did so first with a limiting instruction immediately after her testimony, and then again prior to deliberations. Members are presumed to follow the military judge's instructions absent evidence to the contrary. *United States v. Rushatz,* 31 M.J. 450, 456 (C.M.A. 1990).

We find that the military judge did not err in his allowing CAPT C to testify as to MIDN J's character for truthfulness. And, assuming *arguendo* that there was error in not telling the members simply to completely disregard the opinion testimony, we find that there was no material prejudice to the substantial rights of the appellant in light of the affirmative measures taken by the military judge.

IV. Remaining Assignments of Error

The appellant alleges that remarks by the President of the United States concerning sexual assaults, made a full year after the appellant's trial, constitute apparent unlawful command influence upon his appeal. We review allegations of unlawful command influence *de novo*. *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994).

The appellant has the initial burden of producing sufficient evidence to raise unlawful command influence. *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994). This threshold is low, but it must be more than "a bare allegation or mere speculation." *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994). The appellant must meet this initial burden before the burden shifts to the Government to demonstrate beyond a reasonable doubt either that there was no unlawful command influence or that the proceedings were untainted. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). Even assuming that the President falls within Article 37's prohibition against the exertion of unlawful command influence, we find nothing more than "a bare allegation" that those remarks could in any way influence the appellate review of this appellant's case. Accordingly, we find that the appellant has failed to meet his initial burden. *Stombaugh*, 40 M.J. at 213.

Finally, we turn to the appellant's contention that the use of the terms "rape" and "victim" eroded the presumption of innocence. As there was no objection at trial, we test for plain error and find none. MIL. R. EVID. 103(a).

Conclusion

The findings and the sentence are affirmed.

Senior Judge MITCHELL and Judge JAMISON concur.

For the Court

R.H. TROIDL
Clerk of Court