

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

**Before
B.L. PAYTON-O'BRIEN, R.Q. WARD, J.R. MCFARLANE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MATTHEW R. GIFFORD
MASTER-AT-ARMS SEAMAN RECRUIT (E-1), U.S. NAVY**

**NMCCA 201200169
GENERAL COURT-MARTIAL**

Sentence Adjudged: 3 December 2011.

Military Judge: CAPT Tierney Carlos, JAGC, USN.

Convening Authority: Commander, Navy Region Mid-Atlantic,
Norfolk, VA.

Staff Judge Advocate's Recommendation: CDR F.D. Hutchison,
JAGC, USN.

For Appellant: LT Gregory Morison, JAGC, USN; LT Jared
Hernandez, JAGC, USN.

For Appellee: Maj Paul Ervasti, USMC; LT Ian D. MacLean,
JAGC, USN.

14 February 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.**

MCFARLANE, Judge:

The appellant was tried before a general court-martial composed of members with officer and enlisted representation. The appellant was found guilty, contrary to his pleas, of one specification of aggravated sexual assault and one specification of adultery in violation of Articles 120 and 134, Uniform Code

of Military Justice, 10 U.S.C. §§ 920 and 934.¹ The appellant was sentenced to confinement for seven years and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant alleges the following nine assignments of error:

- I. The military judge should have recused himself because he sentenced the appellant to a bad-conduct discharge in a prior court-martial;
- II. The military judge failed to grant a challenge for cause for a member who was a prior Sexual Assault Victim Intervention (SAVI) representative and victim advocate;
- III. The Article 134 charge resulted in an ambiguous verdict because the specification was pled in the conjunctive but was instructed in the disjunctive;
- IV. The Article 120 specification was fatally defective because it was pled in the disjunctive;
- V. The military judge committed plain error by not correcting the defective Article 120 specification and his instructions to the members resulted in an ambiguous verdict;
- VI. The finding of guilt for the Article 120 charge was factually insufficient;
- VII. The finding of guilt for the Article 134 charge was legally insufficient;
- VIII. The court-martial order incorrectly states the disposition and date of sentencing; and
- IX. The appellant's sentence was disproportionate.²

After carefully considering the record of trial and the submissions of the parties, we conclude that the findings and sentence are correct in law and fact and that no errors materially prejudicial to the substantial rights of the appellant were committed. Arts. 59(a) and 66(c), UCMJ. We do, however, find merit in the appellant's argument that the court-martial order incorrectly states the disposition and date of sentencing. We will address that error in our decretal paragraph.

Background

¹ The appellant was found not guilty of one specification of forcible sodomy, Article 125, UCMJ, 10 U.S.C. § 925.

² This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

The appellant, Master-at-Arms Seaman Recruit (MASR) Gifford, engaged in a romantic relationship with Master-at-Arms Seaman (MASN) CH from November of 2010 to January of 2011 while they were both stationed in Bahrain. Because the appellant was married at the time, he and MASN CH kept their romantic relationship secret. During this timeframe, they engaged in consensual sexual intercourse on several occasions.

On 31 December 2010, the appellant and MASN CH went to an off-base nightclub to ring in the New Year. They were accompanied by Master-at-Arms Third Class (MA3) L and his civilian friend, AT, who had volunteered to be the designated driver. The club was charging a hefty entrance fee that night, but was offering "free" drinks until midnight. MASN CH took advantage of this policy and drank to the point of being visibly intoxicated. When they left the club at 0130, MASN CH was slurring her words, having trouble walking, and she fell asleep on a couch while waiting for a second club to open at 0200. When the group decided to return to MA3 L's residence instead of going to the second club, MASN CH needed assistance to get to the car. Once there, she had to be placed in the back seat, to include having someone else put her feet inside the car. MASN CH then slept for the duration of the ride.

When the group arrived at MA3 L's apartment, the appellant and AT helped MASN CH inside and placed her unconscious body on one of the guest beds. The appellant then suggested to AT that AT leave the apartment to find MA3 L, who had become separated from the group. AT did as he was asked, but once he reached his car he decided to use his cell phone to find MA3 L instead of driving around town. After making several unsuccessful attempts to reach MA3 L by phone, AT returned to the apartment. Not finding the appellant elsewhere in the apartment, AT looked for him in the guest bedroom. When AT pushed open the door to the guest bedroom, he observed the appellant on top of MASN CH, in what AT described as the "missionary position." Both the appellant and MASN CH were naked from the waist down, and the appellant was thrusting his pelvic area between MASN CH's legs. MASN CH, on the other hand, was not moving at all. AT observed MASN CH lying perfectly still on the bed, her eyes shut, and her hands at her sides. Upon observing this scene, AT said "What the f***?," retreated from the bedroom, and went to the living room. In response to the interruption, the appellant got off of MASN CH, walked over to the bedroom door, closed the door, locked it, and then went back to having intercourse with MASN CH.

Several minutes later, MASN CH realized that the appellant was having vaginal intercourse with her. Seeing that MASN CH had become aware of the situation, the appellant moved to the other bed in the room and said that he was "sorry," "stupid," and a "bad person." MASN CH then fell trying to get out of the bed, and while crying and screaming, stumbled into the living room, where she told AT "that bastard raped me." MASN CH and AT then left the apartment and went to AT's car, where AT attempted to comfort her. Sometime thereafter, MASN CH became angry and decided to return to the apartment to confront the appellant. When AT and MASN CH entered the apartment they found the appellant passed out on the bathroom floor, surrounded by both vomit and blood, the latter apparently coming from the appellant's bloody nose. MASN CH and AT made sure that the appellant was not seriously injured and then put the appellant to bed. MASN CH then asked AT not to say anything about what had happened that evening.

The following day, the appellant apologized to MASN CH for hurting her, and presented her with flowers and a diamond ring. Although MASN CH was angry and confused about what had happened on New Year's Eve, she nonetheless resumed her relationship with the appellant and socialized with him on a daily basis until he left Bahrain to return to the United States on 7 January 2011.

Shortly after the appellant left Bahrain, MASN CH made comments to her co-workers about being raped on New Year's Eve. Those comments led to her being interviewed by the Naval Criminal Investigative Service (NCIS). Although MASN CH initially refused to provide NCIS with any details of the assault, she later changed her mind and made a full report. This change of heart was based, at least in part, upon a telephone conversation that MASN CH had with the appellant wherein she warned him of NCIS's involvement, but found him unconcerned about being charged with a crime. The appellant's attitude offended MASN CH, and led her to conclude that she should no longer cover for him. Further relevant facts are developed below as necessary.

Recusal of the Military Judge

Several weeks prior to the events recounted above, the appellant plead guilty at a special court-martial to committing an orders violation and making a false official statement, in violation of Articles 92 and 107, UCMJ. The presiding military judge accepted the appellant's guilty pleas and sentenced the

appellant to 60 days confinement, reduction to pay grade E-1, forfeiture of two-thirds pay per month for two months, and a bad-conduct discharge. That same military judge presided over this case a year later, thus providing the basis for the appellant's first assignment of error.

For this court-martial, the appellant was arraigned on 31 August 2011 by another military judge in Norfolk. At the arraignment, the defense reserved the right to *voir dire* or challenge any other military judge detailed to the case because they were aware the trial would take place in Bahrain. At an Article 39(a), UCMJ, session on 10 November 2011, the defense conducted *voir dire* of the newly assigned military judge about his having presided over the appellant's first court-martial. After *voir dire*, the defense made a motion pursuant to RULE FOR COURTS-MARTIAL 902(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), for the military judge to recuse himself from the present case. After hearing argument and reviewing several cases provided by the defense, the military judge denied the motion.

This court reviews a military judge's decision on the issue of recusal for an abuse of discretion. *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001). In general, a military judge must disqualify himself "in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(a). A military judge also must recuse himself if he has a "personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding." R.C.M. 902(b)(1).

Whether the military judge should recuse himself under R.C.M. 902(a) is an objective test, so it is "assessed not in the mind of the military judge himself, but rather in the mind of a reasonable man . . . who has knowledge of all the facts." *United States v. Wright*, 52 M.J. 136, 141 (C.A.A.F. 1999) (citations and internal quotation marks omitted). However, a military judge need not recuse himself "solely on the basis of prior judicial exposure to an accused and his alleged criminal conduct." *United States v. Soriano*, 20 M.J. 337, 340 (C.M.A. 1985). If a judge is disqualified to sit as judge alone, he is also disqualified to sit with members. *United States v. Sherrod*, 26 M.J. 30, 33 (C.M.A. 1988).

In this case, the military judge did not abuse his discretion by not recusing himself from the appellant's court-martial. His knowledge of the appellant came solely from prior judicial exposure unrelated to the present case. Moreover, the

military judge noted for the record that the two courts-martial were not related, that he knew nothing about the current case beyond the motions that had been filed, that he had not formed an opinion as to the appellant's guilt or innocence, and that he had no opinion on the appellant's credibility. Based on these facts, we find that a reasonable person with knowledge of all the facts presented above would not find that the military judge should have recused himself under the circumstances of this case.

Challenge for Cause of Member

The appellant next alleges that it was error for the military judge to deny a challenge for cause, based upon implied bias, against Personnel Specialist First Class (PS1) K. The factual basis set forth at trial to support the challenge was that PS1 K was a former SAVI representative, had been a victim advocate, abstained from alcohol use, and had minored in criminal justice 15 years prior to the appellant's court-martial. PS1 K served as a victim advocate in the Navy's SAVI program at three different commands, most recently from 2007 to 2010. Over the course of those additional duty assignments, PS1 K assisted two alleged victims of sexual assault, neither of whom had their case go to court-martial while PS1 K served as their victim advocate. While serving as a SAVI representative, PS1 K attended quarterly SAVI training and provided command training. PS1 K unequivocally stated that she could set aside her training and experiences as a SAVI representative and victim advocate and follow the military judge's instructions.

This court reviews a challenge for cause of a member for implied bias under a standard of review that is "less deferential than abuse of discretion, but more deferential than de novo" *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010) (citation and internal quotation marks omitted). If a military judge applies the liberal grant mandate on the record when deciding the challenge, we give his decision "more deference on review" than if he had not. *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007).

R.C.M. 912(f) lays out the reasons that a member shall be excused for cause. Specifically, a member shall be excused if it appears that he or she, "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). The possible implied bias of a member is analyzed under an objective standard, which is viewed through the eyes of

the public. *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996). In considering this issue, we ask whether "most people in the same position would be prejudiced [i.e. biased]" considering the "totality of the factual circumstances." *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004) (citation and internal quotation marks omitted).

When the military judge rules on implied bias, the record must reflect "a clear signal that the military judge applied the right law." *United States v. Terry*, 64 M.J. 295, 305 (C.A.A.F. 2007) (quoting *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)). Therefore, the military judge must conduct an objective implied bias test on the record and must consider the effect, if any, that the liberal grant mandate should have upon his ruling. *Clay*, 64 M.J. at 278.

In this case, the military judge stated on the record that PS1 K's alcohol abstinence was not an issue because she merely was on a "health kick" and had consumed alcohol in the past. The military judge also recognized that while she had been a SAVI representative, she only had two cases and neither reached the court-martial process while she was involved. The military judge specifically mentioned the liberal grant mandate and found that a reasonable member of the public would not doubt the impartiality of PS1 K. We find that under the circumstances, the military judge did not err by denying the challenge for cause.

Article 134 General Verdict

The appellant next alleges that there was an ambiguous verdict for the Article 134 charge because it was charged in the conjunctive, but instructed in the disjunctive. The specification alleged that the adultery was "prejudicial to good order and discipline *and* was of a nature to bring discredit upon the armed forces." Charge Sheet (emphasis added). The military judge's instructions on this specification, however, stated that the Government needed to prove that the appellant's conduct was "prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces." Appellate Exhibit XLIII at 6 (emphasis added).

We review whether the military judge properly instructed the panel *de novo*. *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008). We also review the sufficiency of a general verdict *de novo*. *United States v. Rodriguez*, 66 M.J. 201, 203

(C.A.A.F. 2008); *United States v. Brown*, 65 M.J. 356, 358-59 (C.A.A.F. 2007).

"The crux of the issue is whether a fact constitutes an element of the crime charged, or a method of committing it." *Brown*, 65 M.J. at 359. If a fact is a theory of liability and not an element, then it is "well established that when the Government charges in the conjunctive, and the statute is worded in the disjunctive, the [court] can instruct the jury in the disjunctive." *United States v. Perry*, 560 F.3d 246, 256 (4th Cir. 2009) (citations omitted); see also *United States v. Farish*, 535 F.3d 815 (8th Cir. 2008); *United States v. Brown*, 504 F.3d 99 (D.C. Cir. 2007); *United States v. Haymes*, 610 F.2d 309 (5th Cir. 1980); *United States v. Gunter*, 546 F.2d 861 (10th Cir. 1976). This court has recognized this general principle by stating, "when a statute provides for alternative means by which an offense can be committed, the charge should use the conjunctive 'and' rather than the disjunctive 'or'." *United States v. Woode*, 18 M.J. 640, 641 (N.M.C.M.R. 1984) (citations omitted).

To begin, we must determine if the terminal element of Article 134 is composed of separate elements or merely different theories of liability. This court recently addressed this issue in an opinion that was published after the parties had already filed their briefs. As stated in *United States v. Miles*, 71 M.J. 671, 673 (N.M.Ct.Crim.App. 2012), clauses 1 and 2 of Article 134 are two different theories of liability under which an accused can be found guilty; they are not two separate elements.

Next, we must review the military judge's instructions to the members. It was proper for the military judge to instruct in the disjunctive even though the offense was charged in the conjunctive because Article 134 itself is worded in the disjunctive. The specification here put the appellant on notice that he had to defend against two different theories of criminal liability, namely that: (1) his conduct was prejudicial to good order and discipline, and; (2) his conduct was of a nature to be service discrediting. A finding of guilty under Article 134 is not dependent on the members finding the appellant guilty of *both* theories, but rather only one theory, and merely charging the specification in the conjunctive does not change the Government's burden or the requirements under the law. The appellant was on notice that the Government was pursuing both theories, and under the recognized principle of "plead in the

conjunctive, prove in the disjunctive" the military judge's instructions were proper. See e.g. *Perry*, 560 F.3d at 246.

Lastly, we review whether there was an ambiguous verdict. "When the charge presents multiple or alternate theories of liability, a general guilty verdict to the charge attaches a guilty verdict to all of the theories." *Miles*, 71 M.J. at 673 (citing *United States v. Rodriguez*, 66 M.J. 201, 204 (C.A.A.F. 2008)); see also *Turner v. United States*, 396 U.S. 398, 420 (1970) (holding that if a "jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged"). It is not necessary for the panel members to agree on one theory of liability; as long as they agree that the Government has proven all the elements of the offense. *United States v. Vidal*, 23 M.J. 319, 325 (C.M.A. 1987). Accordingly, we find no ambiguous verdict here.

Article 120 Specification

In his fourth and fifth assignments of error, the appellant alleges that the Article 120 charge was fatally defective because it was plead in the disjunctive, and that the military judge erred by not correcting the resulting duplicitous specification, thus leading to an ambiguous verdict. Because these assignments of error are closely related, we will address them together.

As noted previously, we review whether a specification is defective *de novo*. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012). When this issue of a defective specification is raised for the first time on appeal, the issue is forfeited in the absence of plain error. *United States v. Humphries*, 71 M.J. 209, 211 (C.A.A.F. 2012). Plain error can be established if the appellant can show: "(1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011) (citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998)).

We turn first to the allegation that the specification was duplicitous. In order to determine whether the specification is duplicitous we need to resolve whether Article 120(c)(2) lists different elements, and therefore states more than one offense, or if that section merely lists different theories of criminal liability. The actual text of the statute reads, in pertinent part, as follows:

(c) *Aggravated Sexual Assault*. Any person subject to this chapter who --

(2) engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of --

- (A) appraising the nature of the sexual act;
- (B) declining participation in the sexual act; or
- (C) communicating unwillingness to engage in the sexual act; is guilty of aggravated sexual assault

Art. 120(c)(2), UCMJ.

Based upon the wording and structure of the statute, we find that Article 120(c)(2) creates one offense, composed of the following two elements:

- (1) engaging in a sexual act with another; and
- (2) doing so when that person is substantially incapacitated or substantially incapable of appraising the nature of the sexual act, declining participation in the sexual act, or communicating unwillingness to engage in the sexual act.

More precisely, we find that the four forms of substantial incapacity listed under Article 120(c)(2) are alternate ways of committing the same offense, not varying terminal elements for four separate offenses.³ See *United States v. Prather*, 69 M.J. 338, 342 (C.A.A.F. 2011) (noting that "[t]he essential elements of [an Article 120(c)(2)] offense are (1) that the accused engaged in a sexual act with another person; and (2) that person was substantially incapacitated"). See also *United States v. Wilkins*, 71 M.J. 410 (C.A.A.F. 2012) (expressing no concerns about the fact that the specification in question alleged that

³ We recognize that this holding is arguably inconsistent with the President's listing of the elements for *Aggravated Sexual Assault* in the *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), Part IV, ¶45b(3)(c). While we believe that the MCM provision can be read in a manner that is consistent with our opinion, to the extent it cannot we "note that we are not bound by the President's interpretation of the elements of substantive offenses." *United States v. Davis*, 47 M.J. 484, 486 (C.A.A.F. 1998). Accord *United States v. Mance*, 26 M.J. 244, 252 (C.M.A. 1988).

the victim "was substantially incapable of declining participation in the sexual act or communicating unwillingness to engage in the sexual act").

Given our holding, the specification in this case was not duplicitous. Because the specification was not duplicitous, the military judge did not need to take curative action. Lastly, under the same analysis that we discussed in the prior section regarding general verdicts, the finding of guilt with respect to this specification is not ambiguous.

We turn next to the allegation that the Article 120 specification was fatally defective because it was pled in the disjunctive. As discussed in the prior section, charging in the disjunctive is disfavored. See *Miles*, 71 M.J. at 673; *United States v. Gonzalez*, 39 M.J. 742, 749 (N.M.C.M.R. 1994), *aff'd*, 42 M.J. 469 (C.A.A.F. 1995). Assuming, without deciding, that it was error to charge in the disjunctive in this case, we review this issue under the remaining prongs of the plain error test.

As the United States Supreme Court noted many years ago, there are two problems with pleading criminal charges in the disjunctive: 1) lack of required notice; and Double Jeopardy concerns. *Confiscation Cases*, 87 U.S. 92, 104 (1874) ("[A]n indictment or a criminal information which charges the person accused, in the disjunctive, with being guilty of one or of another of several offences, would be destitute of the necessary certainty, and would be wholly insufficient. It would be so for two reasons. It would not give the accused definite notice of the offence charged, and thus enable him to defend himself, and neither a conviction nor an acquittal could be pleaded in bar to a subsequent prosecution for one of the several offences.") However, in this case, neither of those issues is present.

The appellant was charged with sexually assaulting MASN CH on a particular date, and at particular place, while she "was substantially incapable of declining participation in the sexual act or communicating unwillingness to engage in the sexual act." Charge Sheet. These two legal theories of liability are so closely related that the appellant could not have been prejudiced by the Government's failure to plead in the conjunctive. The critical point that the appellant had to defend against was whether the victim was substantially incapacitated. Whether that incapacity left her unable to decline participation in the sexual act, or unable to communicate her unwillingness to engage in the sexual act, was

of little consequence. As for Double Jeopardy concerns, the pleading included sufficient specificity as to time, place, the alleged victim, and the nature of the sexual offense as to preclude any chance of the appellant facing a second trial on the same offense. For these reasons, we find the appellant's assignment of error regarding the disjunctive Article 120, UCMJ, pleading to be without merit.

Factual Sufficiency of the Article 120 Charge

Under Article 66(c), UCMJ, we review issues of factual sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency is whether "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses" this court is "convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

From the record, we can discern that the appellant engaged in sexual intercourse with MASN CH, that before the time of the intercourse MASN CH had consumed a large quantity of alcohol and displayed significant indicia of impairment, and that MASN CH had memories of the sexual activity that occurred that night. MASN CH testified that she consumed numerous alcoholic beverages over a few hours. MASN CH also testified that she thought she was dreaming and was unable to move or resist at the time of the assault. MASN CH stated that while her eyes were closed for most of the assault, she still remembered sounds and the way things felt during the sexual assault, including the appellant penetrating her vagina. Lastly, MASN CH had an immediate emotional reaction after she came to and escaped the assault, and the appellant made incriminating statements to her immediately following the assault.

The testimony from AT, who did not consume any alcohol, also corroborates MASN CH's account of the assault. AT stated that MASN CH was drinking at Club Taboo, was falling asleep outside of another club, needed assistance to the car, was non-responsive during the drive home, and was also non-responsive while he and the appellant were putting her to bed. Importantly, AT walked into the bedroom during the sexual assault and saw that MASN CH's eyes were closed, she was not moving, and had no emotion on her face. AT testified that in his opinion, "[MASN CH] was just literally unconscious." Record at 455.

The defense had a forensic toxicology expert testify about the MASN CH's actions during the night in question. The expert testified that MASN CH's testimony was not consistent with a person who was passed out because of the level of detail she was able to recall and because she had no lingering motor function degradation after she became aware of the assault occurring. However, on cross-examination the expert stated that a "hypothetical" person who was semi-conscious, who needed to be carried, who was falling asleep, and who was not responding to external stimuli, would be substantially incapacitated. Accordingly, the expert's testimony was not enough to create a reasonable doubt as to appellant's guilt in light of the testimony of MASN CH and AT.

We likewise find that the appellant did not reasonably have a mistaken belief that MASN CH consented to sexual activity. The record shows that MASN CH was completely unresponsive during the sexual assault. The reasonably careful, ordinary, prudent, sober adult would not have thought that MASN CH, who appeared to be passed out after consuming a large amount of alcohol, would have consented to sexual activity under those circumstances - despite the fact that the appellant and MASN CH had a sexually active dating relationship at the time. After reviewing the record of trial, we are convinced of the appellant's guilt of the Article 120, UCMJ, charge beyond a reasonable doubt.

Legal Sufficiency of the Article 134 Charge

Article 66(c), UCMJ, requires the court to review issues of legal sufficiency *de novo*. *Washington*, 57 M.J. at 399. The test for legal sufficiency is, considering the evidence in the light most favorable to the Government, whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Winckelmann*, 70 M.J. 403, 406 (C.A.A.F. 2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

It was clear and undisputed that the appellant was married and the appellant had sexual intercourse with MASN CH. The only remaining element of the adultery charge is whether the appellant's conduct was prejudicial to good order and discipline or of a nature to be service discrediting. Given the facts and circumstances of this case, as set forth in great detail in the preceding sections of this opinion, we find that a rational trier of fact could have found the essential elements of the

adultery charge beyond a reasonable doubt, and therefore the finding of guilt to the adultery charge is legally sufficient.⁴

Court Martial Order Errors

Next the appellant alleges that his court-martial order (CMO) contains two errors. The appellant states that the CMO: (1) indicates a sentencing date of December 4, 2011, when he was actually sentenced on December 3, 2011; and (2) indicates that Specification 1 of Charge I was "withdrawn/dismissed," when he was actually found guilty of that specification, and conversely, Specification 2 of Charge I shows him having been found guilty, whereas that specification was the one that was dismissed by the military judge. See General Court-Martial Order No. 10-12, 13 April 2012. We agree that these entries were made in error, and in keeping with the principle that military members are entitled to records that correctly reflect the results of their court-martial proceedings, we will order corrective action in our decretal paragraph. See *United States v. Crumpley*, 49 M.J. 538, 539 (N.M. Ct. Crim. App. 1998).

Sentence Appropriateness

Lastly, the appellant alleges that his sentence was disproportionate to the crimes he was convicted of and the evidence presented at sentencing. "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This process requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

After carefully reviewing the entire record we conclude that the adjudged sentence is appropriate for this particular offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005). In reaching this decision, we considered the fact that the appellant sexually assaulted a fellow Sailor who both loved and trusted him, after knowing that she had previously been the victim of sexual assault, and even resumed

⁴ Although the issue of factual sufficiency was not raised by the appellant with respect to the adultery charge, the court notes that "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses" we are also "convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325.

the assault after he was interrupted by AT. In this case, granting any sentence relief would be to engage in clemency, which is a function reserved for the CA, and we decline to do so. *Healy*, 26 M.J. at 395-96.

Conclusion

The findings and sentence are affirmed. The supplemental Court-Martial Order shall reflect that the correct date of the sentence was 3 December 2011 and that the appellant was found guilty of Specification 1 of Charge I and that Specification 2 of Charge I was "withdrawn/dismissed."

Senior Judge PAYTON-O'BRIEN and Judge WARD concur.

For the Court

R.H. TROIDL
Clerk of Court