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

Before
R.Q. WARD, E.C. PRICE, J.R. MCFARLANE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

VINCENT M. SANANTONIO
CHIEF WARRANT OFFICER 3 (W-3), U.S. NAVY

NMCCA 201200396
GENERAL COURT-MARTIAL

Sentence Adjudged: 15 May 2012.
Military Judge: CAPT Kevin O'Neil, JAGC, USN.
Convening Authority: Commander, Navy Region Southwest, San Diego, CA.
Staff Judge Advocate's Recommendation: CDR J.M. Nilsen, JACG, USN.
For Appellant: Peter J. Van Hartesveldt, Esq.; LT David Dziengowski, JAGC, USN.
For Appellee: Maj David Roberts, USMC; Capt Samuel Moore, USMC.

31 October 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:

A panel of officers sitting as a general court-martial convicted the appellant, contrary to his pleas, of one specification of violating a general regulation prohibiting fraternization, two specifications of aggravated sexual assault, one specification of assault consummated by a battery, and one

specification of adultery, in violation of Articles 92, 120(c), 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920(c), 928, and 934. The members sentenced the appellant to eighteen months confinement and a dismissal. The convening authority approved the sentence as adjudged and, except for the dismissal, ordered it executed.

The appellant alleges eight assignments of error: (1) that the military judge violated his Fifth Amendment and Sixth Amendment rights by allowing evidence of the alleged victim's prior sexual encounter contingent on the appellant taking the stand; (2) that the military judge erred in admitting the recording of a telephone call during which the appellant gave an uncorroborated admission; (3) that trial defense counsel was ineffective for failing to object to the admission of the telephone call because it was uncorroborated; (4) that the evidence of aggravated sexual assault and adultery was insufficient because there was no evidence of penile penetration; (5) that trial counsel committed prosecutorial misconduct; (6) that the Article 134 charge of adultery was fatally defective because it alleged the terminal element in the disjunctive; (7) that dismissal is an inappropriately severe sentence; and (8) that the guilty finding to fraternization is factually insufficient and fundamentally inconsistent with guilty findings to aggravated sexual assault.[1]

After considering the pleadings of the parties, the record of trial, and oral argument, we conclude that the findings and 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.

Background

[1] To assist in the logical flow of the opinion, we will address the appellant's assignments of error out of order, starting with the factual sufficiency allegation as to the aggravated sexual assault and adultery offenses.

On 10 March 2011, the appellant's unit, Explosive Ordnance Disposal Mobile Unit THREE, was returning from deployment in Afghanistan. The return trip included a one-night layover in Germany, during which a number of unit personnel happened to gather at a local pub. Both the appellant, a chief warrant officer 3, and the alleged victim, Intelligence Specialist Second Class (IS2) K, were among those at the pub.

While at the pub, IS2 K consumed a large amount of alcohol over a short period of time. Although she had no memory of much of the evening due to alcohol induced amnesia, she testified that she remembered having five or six mixed drinks over a two-hour period. The German bartender who waited on her that night testified that IS2 K may have had as many as 10 mixed drinks during the evening. The bartender also testified that she and her boss discussed the large amount of alcohol that IS2 K consumed, which they found surprising given her relatively small size.

During the evening, IS2 K was observed by unit leadership engaging in questionable behavior, such as dirty dancing with another unit member, Explosive Ordnance Disposal First Class (EOD1) S. She was also seen sitting on EOD1 S's lap, face-to-face, and kissing his neck. Sometime thereafter she was found in the restroom, on her knees, vomiting into the toilet, gagging and crying. At that point, the unit's command master chief asked the senior enlisted female, Chief Hospital Corpsman (HMC) D, to get IS2 K and another intoxicated female back to their hotel. With the help of the German bartender, HMC D helped IS2 K, who was unable to walk entirely on her own, outside to an awaiting cab.

The appellant, who was also intoxicated but not to the same extent as IS2 K, was outside while HMC D was putting IS2 K into the cab, and was standing in a position to observe her actions. At that point, the appellant got into the cab and insisted on going back to the hotel with them. Upon arriving at the hotel, HMC D had to physically turn IS2 K's legs and body before pulling her out of the cab. She did this with the appellant's assistance.

During a lengthy walk from the parking lot to the hotel building both the appellant and HMC D were guiding and supporting IS2 K. Upon arriving at the building, IS2 K staggered ahead, supporting herself with one hand and quickly entered an unlocked room. Once inside and in full view of the appellant, IS2 K removed her pants, lay down on top of the bed wearing only a sweater and thong underwear, and appeared to fall fast asleep.

Believing IS2 K to be safe and needing to get outside to meet a cab that was supposed to be arriving shortly carrying another intoxicated unit member, HMC D turned to the appellant and suggested they both leave. The appellant refused. He stated that he wanted to stay to make sure IS2 K was okay. When HMC D indicated that it was inappropriate for the appellant to be in the room alone with IS2 K in her drunken and partially disrobed state, an argument ensued. The appellant told HMC D that she was being "ridiculous," gave her a playful shove toward the door, and told her to go get the other drunken female. *Id*. at 566. The last words that HMC D said to the appellant before she left the room were "[y]ou better not do anything." *Id*.

After meeting the second cab and safely placing the other intoxicated Sailor in her room, HMC D returned to the first room, walked through the unlocked door, and found the appellant standing naked in the middle of the room. When she looked to the bed IS2 K was gone and the blankets on the bed were "messed up." *Id*. at 569. HMC D then heard crying, which led her to the bathroom where she found IS2 K curled up naked on the floor, sitting next to a pool of vomit.

A heated argument then ensued between HMC D and the appellant. HMC D repeatedly told the appellant to leave, but he refused. Eventually the appellant became very upset, grabbed HMC D, and "tossed" her in such a way that she fell to the ground. *Id*. at 575-76. Within a minute or two of the physical altercation, and nearly five to ten minutes after the screaming started, IS2 K came into the room and attempted to put her fingers to the appellant's mouth to "shh" him. She then told them both to stop arguing, tried to kiss the appellant, and then

staggered out into the hallway – still completely naked. *Id*. at 578-81.

During the argument with HMC D, the appellant realized that the hotel room was not IS2 K's room; rather, it belonged to the unit's executive officer (XO). HMC D then helped IS2 K dress and brought her to HMC D's room. While HMC D was placing IS2 K on the bed, the appellant entered the room uninvited. When the appellant failed to comply with HMC D's demands to leave, HMC D punched the appellant twice in the jaw, to no avail. The appellant still refused to leave.

Unable to raise the front desk on the telephone, HMC D decided to take IS2 K to the lobby in an effort to locate her room. With the appellant following them the entire way, saying that he needed to talk to IS2 K, HMC D brought her across the compound to the lobby, secured a key to IS2 K's room from the front desk, and then assisted her to yet another building where her room was located. During this evolution, IS2 K alternated between trying to kiss the appellant and not talking to him. Once HMC D reached IS2 K's room she used the key to lock her in, which caused the appellant to scream profanities at HMC D. HMC D then returned the key to the hotel front desk and went to bed.

Not to be deterred, the appellant later returned to the lobby and persuaded the hotel clerk to give him the key to IS2 K's room. The following morning, IS2 K awoke to find both herself and the appellant naked, with the appellant sleeping in a bed pushed up against hers. She had no memory of anything that happened after a point much earlier in the evening, prior to her becoming sick at the bar.

During an ensuing Naval Criminal Investigative Service (NCIS) investigation, IS2 K participated in a pretext telephone call with the appellant, which NCIS recorded without the appellant's knowledge. During this call, IS2 K told the appellant that she didn't remember anything that happened that night and that she woke up feeling like she had sex. The appellant originally denied having sex with her, but when pressed regarding her claimed tenderness admitted to "sticking [his] finger in [IS2 K]" and further admitted that they "had sex

for a little bit." Prosecution Exhibit 16; Appellate Exhibit LX at 3.

Additional facts are developed below as needed.

Analysis

Factual Sufficiency

The appellant argues that the evidence contained in the record of trial is factually insufficient to sustain a conviction for aggravated sexual assault and adultery. Specifically, the appellant claims that the evidence failed to prove penile penetration. We disagree.

Issues of factual sufficiency are reviewed *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, the members of [this court] are themselves convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007). Moreover, in cases of sexual assault, direct testimony as to actual penetration is not required. *United States v. Sobenes*, 2011 CCA LEXIS 82, 15-16, unpublished op. (N.M.Ct.Crim.App. 28 Apr 2011) *vacated and remanded on other grounds*, 70 M.J. 356 (C.A.A.F. 2011) (summary disposition), *on remand*, 2012 CCA LEXIS 546, unpublished op. (N.M.Ct.Crim.App 28 Dec 2011); *aff'd*, 71 M.J. 195 (C.A.A.F. 2012) (summary disposition); *United States V. Bright*, 6 C.M.R. 309, 314 (A.B.R. 1952).

This case presents us with both direct and circumstantial evidence of penetration. The appellant's admission that "we had sex for a little bit," made during the pretext telephone call recorded by NCIS is, in and of itself, sufficient evidence of penetration to support the findings, despite his later recantation. In addition to the direct evidence, the record is

replete with circumstantial evidence of penetration, to include: 1) the appellant's admission that he wanted to have sex; 2) IS2 K's alcohol-induced, openly sexual behavior with the appellant (as noted by HMC D's observation of her kissing the appellant on several occasions despite being told not to); 3) the fact that HMC D found the appellant naked in IS2 K's room; 4)the fact that he was so motivated to have sex with her, that even after having a physical altercation with HMC D about his encounters with IS2 K, he still went down to the lobby and secured a key to her room; and 5) the fact that IS2 K awoke to find them together, stark naked, with the two beds pushed together to form one large bed. These facts all provide strong circumstantial evidence that the appellant engaged in acts that would have invariably achieved the minimal amount of penetration required to satisfy that element.

Considering the record before us, we are convinced of the appellant's guilt beyond a reasonable doubt, and therefore find that the evidence is factually sufficient to sustain his convictions to aggravated sexual assault and adultery.

Corroboration of the Appellant's Admissions

As noted above, the military judge admitted into evidence the recorded pretext telephone call wherein the appellant admitted to "sticking [his] finger in [IS2 K]" and further admitted that they "had sex for a little bit." PE 16; AE LX at 3. While the appellant's trial defense counsel objected to the admission of the call on various grounds, they did not object on the basis that the call was uncorroborated. On appeal, the appellant argues that the military judge erred in admitting the call because no corroborating evidence was present, as required by MILITARY RULE OF EVIDENCE 304(g), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). He also asserts that his trial defense counsel were ineffective due to their failure to make a timely objection to the lack of corroboration.

Given the lack of a timely objection, we review the admission of the appellant's statements during the pretext call for plain error. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007). To demonstrate plain error, the appellant must

show that an error was committed, the error was plain, or clear, or obvious, and that the error resulted in material prejudice to a substantial right. *Id.*

An admission by the accused may be considered "only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth." MIL. R. EVID. 304(g)(1). However, "the quantum of evidence needed to raise such an inference is slight." *United States v. Yeoman*, 25 M.J. 1, 4 (C.M.A. 1987) (citations and internal quotation marks omitted). Adequate corroboration "does not require independent evidence of the *corpus delicti* of the confessed offense . . . but instead . . . it requires independent evidence which establishes the trustworthiness of the confession." *United States v. Maio*, 34 M.J. 215, 218 (C.M.A. 1992) (citations and internal quotation marks omitted).

The circumstantial evidence, discussed in detail *supra*, that supported our finding that the appellant had achieved the penetration required to sustain guilty findings for aggravated sexual assault and adultery also serve as corroboration for his admissions during the pretext call. Given this corroboration we find no error by the military judge in admitting the telephone call. Since any such motion at trial would have been without merit, there was no deficiency by trial defense counsel in failing to object to the evidence on that basis. *Strickland v. Washington*, 466 U.S. 668, 687 (1984)

Admission of Victim's Prior Sexual Encounter

During the NCIS investigation, evidence came to light that IS2 K had sexual intercourse earlier the same evening with EOD1 S, the Sailor she had been dancing with in the pub. The defense sought to admit this evidence on two grounds: (1) it was constitutionally required to impeach the credibility of IS2 K, who claimed that she could not remember the encounter;[2] and (2)

[2] Pursuant to the same pretrial motion, the defense also sought to impeach IS2 K's credibility by introducing evidence that, despite her claims of not remembering having done so, she: 1) was kissing EOD1 S in the pub; 2) was straddling EOD1 S's lap in the same pub during the same time period,; 3) was dancing provocatively with EOD1 S at the pub; and 4) was dancing with the

to establish an alternate source of her vaginal soreness, as referenced during the pretextual telephone call with the appellant.

The military judge denied the appellant's motion regarding the prior sexual intercourse. With respect to its impeachment value, the military judge found that, given the timing and amount of her alcohol consumption, IS2 K's "assertion of no memory of the prior sexual intercourse is consistent with, not in conflict with, her assertion of no memory of subsequent sexual conduct with the accused." AE XVII at 2. Moreover, the military judge found an "extremely high danger that the evidence [would] be considered as evidence of [IS2 K's] sexual predisposition that evening, notwithstanding a limiting instruction to the contrary" thus causing the danger of unfair prejudice to substantially outweigh the evidence's limited probative value. *Id*. at 3. As for the alternative source of injury argument, the military judge addressed those concerns by ordering the Government to "redact any references made by [IS2 K] during the pretext call that she thought or felt like she had had sex, or words to that effect, during the evening in question." *Id*. (footnote omitted).

Subsequently, the appellant asked the military judge to clarify, or partially reconsider, his ruling. AE XVIII. The appellant's primary argument during the Article 39(a), UCMJ, session on the motion to reconsider revolved around how difficult it would be for the members' to put the appellant's admissions into context given the military judge's order to redact any statements by IS2 K that she was sore or otherwise felt like she had had sex. The appellant argued that his admission of having had "sex for a little bit" was false, prompted by, and only could be understood in relationship to, IS2 K's claims of vaginal soreness. Moreover, the appellant's civilian defense counsel repeated his proffer that the appellant was "going to testify that he did not penetrate, does not recall

---

appellant in the pub during the same time period. The military judge conditionally granted the appellant's motion regarding items 1 through 3, contingent on the appellant showing that IS2 K was pursuing a commissioned officer program, thus giving her a motive to lie about whether she remembered those events. The military judge unconditionally granted the defense motion with respect to item 4.

ever penetrating the victim here, that he was unable to get erect due to his state of intoxication." Record at 51.

In light of the appellant's argument, and his invocation of the Rule of Completeness, the military judge amended his ruling so as to allow all of the pretext telephone call, to include those portions dealing with IS2 K's soreness or tenderness, to be played for the members. However, the military judge found that the even if those portions of the call were played, the "inferential probative value" of that evidence was not sufficient to open the door to the excluded 412 evidence – namely the earlier sexual intercourse with EOD1 S. *Id*. at 92.

However, the military judge went on to rule that:

> If the accused testifies at trial and offers the following evidence, that he believed he never had sexual intercourse with [IS2 K] because he was too intoxicated that evening and was, therefore, unable to perform any act of sexual intercourse and he states that he admitted to her only when she confronted him that she felt like she had had sex, that he did engage in sexual intercourse with her, believing that he must have been the actor, [then the defense] may subsequently offer the testimony of [EOD1 S] and, if they so choose, testimony from [IS2 K], whatever that testimony may be, as evidence of the prior intercourse to explain the accused's in-court testimony and support it with independent evidence and to explain the basis of [IS2 K's] inducement during the pretext call and to afford the members then the opportunity to understand that inducement for what it actually was or may have been, specifically, that her belief that she had sex may have had an alternative source.

Id. at 93-94.

This court reviews a military judge's evidentiary rulings for an abuse of discretion. *United States v. Staton*, 69 M.J. 228, 230 (C.A.A.F. 2010). When performing such a review, we examine a military judge's findings of fact using a clearly-

erroneous standard and conclusions of law *de novo*. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). If we find error, we review the prejudicial effect of that error, to include a determination of whether the error was of a constitutional dimension, *de novo*. *See United States v. Toohey*, 63 M.J. 353, 358 (C.A.A.F. 2006). "For constitutional errors, the Government must persuade us that the error was harmless beyond a reasonable doubt." *United States v. Hall*, 56 M.J. 432, 436 (C.A.A.F. 2002). The determination of whether an error of constitutional dimension is harmless beyond a reasonable doubt is a question of law that we review *de novo*. *United States v. Othuru*, 65 M.J. 375, 377-78 (C.A.A.F. 2007).

Evidence offered by an accused to show that the alleged victim engaged in other sexual behavior is inadmissible except when specific instances of sexual behavior by the victim are offered to prove that someone other than the accused was the source of some evidence, when the behavior is offered to prove consent, or when exclusion would violate the appellant's constitutional rights. MIL. R. EVID. 412(b)(1)(A-C); *see also United States v. Banker*, 60 M.J. 216, 221 (C.A.A.F. 2004). As the Court of Appeals for the Armed Forces stated in *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011), "evidence must be admitted within the ambit of [the constitutionally required exception] when the evidence is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice." (Citation omitted). The dangers of unfair prejudice include concerns about "'harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *Id.* at 319 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, (1986)). The review includes consideration of the appellant's constitutional rights of confrontation, including the right to impeach and discredit the witness. *Davis v. Alaska*, 415 U.S. 308 (1974). If the evidence survives the inquiry, the final consideration is whether the evidence in the record supports the inference that the moving party is relying on. *Ellerbrock*, 70 M.J. at 319.

The appellant contends on appeal, as he did at trial, that the military judge's initial ruling precluding him from

introducing evidence of IS2 K's prior sexual intercourse with EOD1 S violated his constitutionally protected right to impeach the alleged victim. In support of his argument, the appellant relies heavily on this court's decision in *United States v. Tiller*, 41 M.J. 823 (N.M.Ct.Crim.App. 1995). In *Tiller,* the military judge precluded the defense from questioning the victim about her inability to remember consensual sexual intercourse that occurred 30 minutes prior to the alleged assault, even though she remembered, and testified to, details about the assault itself. *Id*. at 826. We found that ruling an abuse of discretion, given our belief that the "encounter of sexual intercourse, so totally forgotten by [the victim], yet so proximate in time, space, and nature to the charged offense, dramatically draws into question the mental condition, perceptive abilities, and memory of [the victim] - unlike other impeachment evidence available." *Id*. (citations omitted).

The appellant argues that the facts of his "case are virtually indistinguishable from those in *United States v. Tiller* . . . ." Appellant's Brief at 15. We disagree. Rather than presenting with the "selective memory" argued by the appellant, *id*. at 17, the victim in this case claimed to be suffering from alcohol-induced amnesia that left her without any memory of the events that occurred from a point early in the evening until she awoke the following morning – to include a complete lack of memory regarding the alleged sexual assault. Given these facts, the military judge correctly held that IS2 K's "assertion of no memory of the prior sexual intercourse is consistent with, not in conflict with, her assertion of no memory of subsequent sexual intercourse with the accused." AE XVII at 3. Given these differences, as well as the "time elapsed and the intervening circumstances," *id*., that occurred between the prior sexual intercourse and the sexual assault, we find that the military judge did not abuse his discretion by excluding, in the first instance, evidence of IS2 K's earlier sexual intercourse with EOD1 S under Military Rule of Evidence 412.

The appellant next contends that the military judge's ruling that evidence of IS2 K's prior intercourse with EOD1 S would only be relevant and admissible to show an alternative

source of injury if the appellant testified, or otherwise introduced evidence of the defense theory that he was tricked into admitting that they had sex, when they had not, violated his Fifth Amendment right to remain silent.

To successfully claim a Fifth Amendment violation, the appellant must show "some kind of compulsion." *Hoffa v. United States* , 385 U.S. 293, 304 (1966). In the military context, compulsion may be shown through an order from a superior to testify. *United States v. Castillo*, 29 M.J. 145, 154-55 (C.M.A. 1989). Compulsion also occurs where a witness is "required to answer over his valid claim of privilege." *United States v. Vangates*, 287 F.3d 1315, 1320 (11th Cir. 2002) (citation and internal quotation marks omitted).

A review of the record yields no evidence that the appellant was compelled to testify. To the contrary, the evidence clearly shows that it was the appellant's trial defense counsel who first raised the issue, stating "[t]he accused is going to testify . . . ." Record at 51-52.[3] However, even if that had not been the case, there still would be no compulsion in this case. The military judge's ruling that he would not allow certain evidence in without other evidence first being put before the trier of fact does not amount to coercion, even if the only logical source of that other evidence is testimony by the appellant. The appellant chose to testify, vice testing the legality of the military judge's exclusionary ruling on appeal. He cannot now turn that choice into a Fifth Amendment violation.

Prosecutorial Misconduct

The appellant alleges that "trial counsel improperly accused Appellant of rape before the members, harassed and bullied a key defense witness before and during trial, failed to turn over relevant discovery to the defense, and mocked civilian

[3] This position, that the appellant was "going to testify," was raised by the appellant's civilian defense counsel during pretrial motions, and was the defense's unwavering strategy throughout trial. Nothing in the record suggests that the appellant or his counsel ever considered exercising the appellant's right to remain silent, or that their trial strategy was influenced by the military judge's ruling at issue here.

defense counsel in front of the members." Appellant's Brief at 30.

Whether prosecutorial misconduct occurred, and whether the misconduct rose to prejudicial error, are both questions of law reviewed *de novo*. *United States v. Edmond*, 63 M.J. 343, 347 (C.A.A.F. 2006). Where we find prosecutorial misconduct, we evaluate the prejudicial impact by weighing three factors: (1) the severity of the misconduct; (2) the measures adopted to cure the misconduct; and (3) the weight of the evidence supporting the conviction. *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005). In measuring the severity of misconduct, we look to the record to gauge to pervasiveness of the misconduct. We consider "the raw numbers," the length of the trial, and "whether the trial counsel abided by any rulings from the military judge." *Id.* (citation omitted).

Of the four instances of alleged prosecutorial misconduct, only trial counsel's use of the word "rape" and his failure to turn over the witness statement were improper.[4] Moreover, after applying the factors set forth in *Fletcher*, we find that appellant did not suffer prejudice from trial counsel's improprieties. *Id*. Trial counsel used the term "rape" only one time in a trial that lasted seven days. Record at 1284. The military judge immediately admonished the trial counsel in front of the members, and instructed the members to disregard it. *Id.* at 1285-86. These actions adequately resolved the issue. As for the missing witness statement, after checking his discovery records the trial counsel admitted that the statement had not been produced, and voluntarily opted not call the witness, a result beneficial to the appellant. Accordingly, we find no prejudice to the appellant resulting from the trial counsel's errors.

The Disjunctive Terminal Element

[4] In examining the two other instances of misconduct alleged by the appellant, we find no improper actions by the trial counsel. In the arena of witness preparation, prosecutorial misconduct results in a decision by a witness not to testify. *Edmond*, 63 M.J. at 343. Here, EOD1 S testified as a defense witness. Record 1304–37. In the other instance of alleged misconduct, the comments by trial counsel in closing do not rise to the level of personal attack required by *Fletcher*. 62 M.J. at 181.

Charge V alleges that the appellant did "wrongfully have sexual intercourse with [IS2 K] a woman not his wife and that under the circumstances the conduct of the accused was prejudicial to good order and discipline, or of a nature to bring discredit upon the armed forces." Charge Sheet. The appellant now alleges this charge is fatally defective due to the disjunctive terminal element. We disagree.

While charging in the disjunctive is generally disfavored, we rejected the appellant's argument in *United States v. Miles,* 71 M.J. 671 (N.M.Ct.Crim.App. 2012), *rev. denied*, 72 M.J. 257 (C.A.A.F. 2013). After examining the charge sheet and the record of trial, we find "the appellant was properly on notice of the charge, that he was not misled or confused as to what he was to defend against, and that he was not left vulnerable to double jeopardy." *Id.* at 674.

Inconsistency in Convictions

The appellant contends that there is insufficient evidence to support a conviction for fraternization, and that such a conviction is inconsistent with a conviction for sexual assault. We disagree.

In his brief, the appellant argues that "aside from their sexual activities that form the basis of [sexual assault charges], there is absolutely no evidence to indicate that Appellant and [IS2 K] had any personal relationship." Appellant's Brief at 54. The appellant further argues that those non-consensual activities "do[] not support a finding of a 'relationship' as envisioned by the [instruction prohibiting fraternization]." *Id*. The appellant cites to no legal authority in support of this position.

Our own research revealed but one opinion in support of the appellant's argument. In *United States v. Myer*, 1999 CCA LEXIS 455, unpublished op. (Army Ct.Crim.App. 21 Dec 1999), the Army Court of Criminal Appeals held that one could not providently plead to fraternization wherein the factual basis for the plea was a sexual assault committed upon a sleeping victim. This case, however, is distinguishable from *Myers*. In this case,

there were a series of interactions between the appellant and IS2 K, all of which happened in public or in front of a third party, that helped form the basis of their relationship, separate and apart from the digital penetration and sexual intercourse that supported the sexual assault charges. As HMC D testified, IS2 K was kissing the appellant in the XO's hotel room and in the hallways as they were walking to the front desk to find her room. The appellant made no effort to prevent this kissing and allowed the situation to further devolve by repeatedly trying to engage in a conversation with her about what happened in the XO's room. Later, the appellant returned to IS2 K's room, disrobed, and spent the night naked in her bed. When the victim called the appellant the following day to discuss what happened that night, he continued to deal with her as an equal, as opposed to maintaining the decorum expected of their different ranks. All of these facts show an unduly familiar relationship that was related to, but occurred separate and apart from, the charged sexual misconduct.

As for IS2 K having been intoxicated to the point that she was no longer able to consent to the sexual acts that occurred that night, we do not find that fact dispositive as to whether or not she and the appellant had an unduly familiar relationship. Again, while we might agree with our Army brethren that sleeping victims cannot engage in a relationship, we are unwilling to extend that holding to victims who lack capacity due to intoxication. To do so would ignore the danger that such relationships hold to good order and discipline within the armed forces. The negative impact on a fighting unit caused by an officer showing favoritism to, or sexual interest in, an enlisted subordinate is the same regardless of whether that subordinate is sober or not. As long as the legally incapacitated party is capable of engaging in what reasonably appears to others as an unduly familiar relationship, the dangers that the fraternization policy seeks to address are present, and those who violate the policy may be subject to punishment under the UCMJ for their actions.

Sentence Severity

Lastly, the appellant contends his sentence, in particular the dismissal, is unjustifiably severe. Specifically, the appellant cites to his Bronze Star with Valor Device, four combat deployments, and his delaying retirement in order to serve on a final combat tour with his unit as reasons for the inappropriateness of his dismissal. Appellant's Brief at 49-51.

Article 66(c), UCMJ, requires us to independently review the sentence of each case within our jurisdiction and only approve that part of the sentence which we find should be approved. *United States v. Baier*, 60 M.J. 382 383-84 (C.A.A.F. 2005). We are required to analyze the record as a whole to ensure that justice is done and that the appellant receives the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). In making this important assessment, we consider the nature and seriousness of the offenses, as well as the character of the offender, keeping in mind that courts of criminal appeals are tasked with determining sentence appropriateness, as opposed to bestowing clemency, which is the prerogative of the convening authority. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

We note that the appellant received far less than the maximum punishment of 63 years confinement, total forfeitures, a fine, and dismissal that he faced. The appellant was the third ranking member of his unit and sexually assaulted a junior Sailor who was severely intoxicated. The appellant committed this crime despite the intervention of the senior enlisted female of the unit, and in fact responded to this intervention with both verbal abuse and physical assault. After carefully considering the entire record, we are convinced that justice was done and the appellant received the punishment he deserved.

Conclusion

The findings and the sentence as approved by the convening authority are affirmed.

Senior Judge WARD and Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court