UNITED STATES NAVY–MARINE CORPS
COURT OF CRIMINAL APPEALS

No. 201600014

UNITED STATES OF AMERICA
Appellee

v.

DEVIN G. ANGIOLINI
Lance Corporal (E-3), U.S. Marine Corps
Appellant

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge: Lieutenant Colonel Brian E. Kasprzyk, USMCR.
For Appellant: Lieutenant Ryan W. Aikin, JAGC, USN; Lieutenant Jacqueline M. Leonard, JAGC, USN.
For Appellee: Lieutenant Commander Jeremy R. Brooks, JAGC, USN; Lieutenant Robert J. Miller, JAGC, USN.

Decided 30 December 2016

Before CAMPBELL, RUGH, and HUTCHISON, *Appellate Military Judges*

This opinion does not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Practice and Procedure 18.2.

CAMPBELL, Senior Judge:

At a contested general court-martial, officer and enlisted members convicted the appellant of two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920. The military judged then merged the specifications for sentencing purposes, and the members sentenced the appellant to reduction to pay grade E-1, forfeiture of all pay and allowances for 84 months, seven years of confinement, and a dishonorable discharge. The convening authority approved the findings and sentence as adjudged.

The appellant asserts as assignments of error (AOEs) that the convictions for both sexual assault specifications are legally and factually insufficient, that the specifications constitute an unreasonable multiplication of charges, and that the military judge abused his discretion by admitting the appellant's statements to law enforcement.[1] We find the appellant's convictions factually insufficient, thereby mooting the unreasonable multiplication of charges AOE. However, we affirm a conviction of a lesser included offense and a reassessed sentence, as reflected in the decretal paragraph. With that corrective action, no error materially prejudicial to the appellant's substantial rights remains. Arts. 59(a) and 66(c), UCMJ.

I. BACKGROUND

The appellant and Lance Corporal (LCpl) E.R.G. met on Facebook during May 2013, and they frequently communicated through various electronic media during the summer. Some of their conversations were romantic in nature, but they all ceased for several months based upon LCpl E.R.G.'s brief engagement to another man. Their communications resumed sometime in November or early December 2013, after LCpl E.R.G.'s engagement ended.

The two discussed possibly meeting for the first time while they were both home for the holidays. LCpl E.R.G. initially invited the appellant to dinner with some of her friends on 23 December 2014 near her hotel in the appellant's home town. When the appellant responded that he was not not sure if he was free for dinner, LCpl E.R.G. asked if he "wanted to hang out" later instead.[2]

At 2317 that evening, LCpl E.R.G. again messaged the appellant to "come over" to her room and that "[her] friends left."[3] Before agreeing to come over, the appellant asked if they could cuddle, to which LCpl E.R.G. responded in the affirmative. He then asked if they could kiss, to which LCpl E.R.G. responded, "Ha maybe."[4] She repeatedly asked whether the appellant would have a ride back home from the hotel, and later testified that she did so because she did not want him to stay overnight. When the appellant had still not arrived by 2337, LCpl E.R.G. began "tr[ying] to make stuff up to try to get him to not want to come over."[5] She told the appellant, among other things, that she had a fight with her brother, she did not think coming over was "a

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[1] The fourth AOE is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[2] Prosecution Exhibit (PE) 3 at 5.

[3] *Id*. at 6.

[4] *Id*. at 9.

[5] Record at 378.

good idea" because there was "so much drama right now,"and that it was "not a good time up here" because "everyone [wa]s drunk and fighting."[6]

The appellant persisted and finally said he was at the hotel and his ride had already left. LCpl E.R.G. informed him that she was "really tired" and "not in a cuddlinh [sic] mood" before he made his way to the room sometime around 0100 on 24 December.[7] When he arrived, LCpl E.R.G. was laying in bed, and two other people were also in her room. The four of them briefly socialized before the others departed, leaving the appellant and LCpl E.R.G. alone in the room.

The appellant quickly joined LCpl E.R.G. in the bed. He was on his back, and she was on her side facing him. She wore spandex yoga pants, underwear, and a tank top. The two began to kiss. Here LCpl E.R.G.'s and the appellant's versions of events diverge.

According to LCpl E.R.G., when the appellant touched her buttocks, she moved his hand away and told him not to touch her there. He later reached his hand inside her pants and inserted his fingers into her vagina. She reacted by asking when his ride would arrive, and telling him she did not want to do anything sexual that night. The appellant begged her to do "sexual things" because they would not see each other for some time after the holidays.[8] She explained that she "didn't sleep with people [she] didn't know and [they] didn't know each other."[9]

After this conversation, the appellant got on his knees and exposed his penis through the fly of his underwear. He told LCpl E.R.G., "look at this, it won't fit in you," then grabbed her wrist and pulled her hand towards his penis.[10] LCpl E.R.G. pulled her hand away. The appellant then spread her legs with his knees while reaching for his phone on the night stand, rubbing his penis over the top of her pants. She pushed him away and told him to call his ride. Having arranged for transportation, the appellant asked to cuddle until his ride arrived. LCpl E.R.G. agreed.

The two lay together on the bed on their right sides. LCpl E.R.G. had her arms crossed against her chest and her legs bent in a "comfortable sleeping

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[6] LCpl E.R.G. testified that she fabricated this story to try to get the appellant to change his mind about coming to her hotel room. Record at 376.

[7] PE 3 at 22; Record at 376-77.

[8] Record at 352.

[9] *Id.*

[10] *Id.*

position."[11] The appellant lay directly behind her, with his right arm underneath her neck, over the pillow. LCpl E.R.G. fell asleep in that position.

Her next recollection was waking to the appellant pulling down her pants. He then inserted his penis into her vagina. LCpl E.R.G. said, "Ouch," from the pain caused by the penetration.[12] The appellant's right arm was still underneath her and pressed against her arms. She lay frozen in place while the appellant continued penetrating her vagina.[13]

On the other hand, the appellant testified that when left alone in the hotel room, he and LCpl E.R.G. lay side-by-side kissing for three to five minutes. Then he inserted his fingers into her vagina. Her "breathing picked up" and she started "moaning."[14] After a couple of minutes, she pulled back and said, "I don't really know if we should do this tonight." He stopped and, after a brief back and forth, asked to cuddle until his ride arrived. LCpl E.R.G. agreed, and they lay next to each other on the bed.

The appellant gave conflicting accounts about what happened next. When first confronted in text messages from LCpl E.R.G. about the incident, he stated, "I feel stupid. Like. I let horomones [sic] get the best of me."[15] When told that LCpl E.R.G. believed they "weren't going to do anything" that night,

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[11] *Id.* at 354.

[12] *Id.* at 355.

[13] LCpl E.R.G. testified about her response during cross-examination:

> Q. So at the moment from when Lance Corporal Angiolini in your account puts his penis in onward, you make no effort to move any part of your body?
>
> A. Correct, sir.
>
> Q. From this point forward you had testified earlier you kind of just wanted it to be over; right?
>
> A. Yes, sir.
>
> Q. And because you wanted it to be over, you just didn't – I was in shock, nothing happened; right?
>
> A. Correct, sir.
>
> Q. Lance Corporal Angiolini does all the physical things that are going to happen from this point till the end of the sexual encounter; right?
>
> A. Yes, sir.

Id. at 454.

[14] *Id.* at 550.

[15] PE 4 at 4.

the appellant responded, "Hormones. :/ i honestly started falling asleep then bam horomones."[16] He also texted clarification that he remembered passing out and waking up with his penis already inside of LCpl E.R.G.'s vagina.[17]

He provided a similar account when interviewed by Naval Criminal Investigative Service (NCIS) officials on two occasions.[18] Pressed throughout the interviews, he insisted that he did not know how his penis ended up inside of LCpl E.R.G.'s vagina and repeatedly explained that he was asleep when it happened. Near the end of the second interview, he admitted to consciously pulling down her pants, but said he did so before falling asleep.[19]

The appellant's court-martial testimony differed. There, he explained that LCpl E.R.G. initiated sex by moving her hips against him as they were cuddling while lying side-by-side. After a few minutes, he pulled her pants down and inserted his fingers into her vagina. He then took his penis out of his boxers, spit on it, and inserted it into her vagina. She responded by breathing heavily and moaning, thereby signifying her consent.

Both the appellant and LCpl E.R.G. testified that the sexual intercourse lasted approximately five minutes, during which LCpl E.R.G. did not move or say anything. The appellant continued thrusting his penis inside of LCpl E.R.G.'s vagina until he ejaculated on her leg. He then went to the bathroom

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[16] *Id.* at 5.

[17] *Id.* at 7.

[18] The appellant recounted falling asleep and awaking to the two of them "going at it" with his penis already inside of LCpl E.R.G.'s vagina. PE 8 at 18, 41. During the second interview, he clarified that he awoke to his penis not entirely in her vagina, but that he "pushed it in" after realizing "she was wet." PE 9 at 22.

[19] The appellant told the Special Agent near the end of the second interview:

> On Wednesday. I told you everything I remembered. I thought more on the prior days, and I remembered more detail . . . It's two things. . . . I thought I remembered waking up in her. And I thought about it in more detail because I was, like, did that – because you guys said that doesn't make sense in my story. And I thought about it. It doesn't make sense. So that's when I thought. I remembered back, and I just let it come to me. And that's when I remembered that I wasn't all the way in her, which was wrong. And I had made poor judgment. The second thing. . . . I remember before we had fully fallen asleep, my hand moved from here to here and I remember my thumb playing with the yoga pants line, just kind of test the waters to see if she was okay with it. And then I was moving too slow. Like, I was tired, I was moving too slow. I fell asleep. . . . And I had woken up and her pants were down[.]

PE 9 at 37-38.

and returned with a piece of toilet paper that he placed on the bed next to her. He remarked how they were "going steady" now and informed LCpl E.R.G. that he reserved a hotel room for a night later that week.[20] She agreed that she would stay with him again on that night before the appellant left the hotel room. According to LCpl E.R.G., the appellant remarked on his way out, "By the way, you tease me while you sleep."[21]

After the appellant left, LCpl E.R.G. showered. She walked down the hall to her friend's hotel room, banged on the door until her friend emerged, and then reported that she was raped by the appellant.[22] Before checking out of the hotel, she put her clothing into a bag to preserve potential evidence.

Later that day, the appellant sent LCpl E.R.G. a Facebook message: "sorry i pissed you off i can guess what i did.. i'll leave you alone i guess, say something if i'm wrong."[23] LCpl E.R.G. did not respond until after reporting the sexual assault allegation to NCIS.

II. DISCUSSION

A. Legal and factual sufficiency

We review questions of legal and factual sufficiency *de novo*. Art. 66(c), UCMJ; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt." *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (citations and internal quotation marks omitted). In weighing questions of legal sufficiency, the court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted).

The test for factual sufficiency is whether, "after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt." *United States v. Rankin*, 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006) (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987) and Art. 66(c), UCMJ), *aff'd on other grounds*, 64 M.J. 348 (C.A.A.F. 2007). In conducting this appellate role, we take "a fresh, impartial look at

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[20] Record at 357.

[21] *Id*. The appellant told NCIS in his initial interview that he "probably would've said something like that." PE 8, p. 38.

[22] LCpl E.R.G. did notreport the incident to the military until February 2014.

[23] PE 2 at 5.

the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399. The phrase "beyond a reasonable doubt" does not imply the evidence must be free from conflict. *Rankin*, 63 M.J. at 557. "[F]actfinders may believe one part of a witness' testimony and disbelieve another. . . . So, too, may we." *United States v. Lepresti*, 52 M.J. 644, 648 (N-M. Ct. Crim. App. 1999) (citation and internal quotation marks omitted).

The appellant argues both sexual assault specifications for which he was convicted are legally and factually insufficient. We address each in turn.

1. Bodily harm

The elements for the sexual assault alleged in Specification 1 are: (1) that the appellant committed a sexual act upon LCpl E.R.G., to wit: penetrating her vulva with his penis; and (2) that the appellant did so "by causing bodily harm to [her], to wit: holding [her] arms against her body with [his] arm[.]"

The term "bodily harm" means "any offensive touching of another, however slight[.]" Arts. 120(g)(3) and 128(c)(1)(a), UCMJ. Holding LCpl E.R.G.'s arms against her body could constitute an offensive touching. *See, e.g. United States v. Johnson*, 54 M.J. 67, 69 (C.A.A.F. 2000) (noting that "a backrub could, under some circumstaces, constitute an offensive touching"); *United States v. Sever*, 39 M.J. 1, 4 (C.M.A. 1994) (finding that a kiss on the cheek constituted offensive touching). However, after careful deliberation, we are not ourselves convinced the Government proved this element beyond reasonable doubt.

LCpl E.R.G. testified that she fell asleep with her arms against her chest and the appellant's right arm underneath her, over the pillow. When she awoke, the appellant was pulling down her pants with his left arm and inserting his penis into her vagina. At the same time, the appellant's right arm was "still underneath [her]."[24] In direct examination, when asked, "[w]as [the appellant's] hand or his right arm touching you?" she responded, "[h]e had it wrapped around on my hand, sir."[25] During cross-examination, she further explained what the appellant did with his right arm during the sexual act:

> Q. One of his hands is touching your arms; correct?
>
> A. Yes, sir.

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[24] Record at 355.

[25] *Id*.

. . . .

Q. Is it coming from underneath you or over top of you?

A. Underneath me, sir.

. . . .

Q. As it comes under can you demonstrate again the hand position that you fell asleep in?

A. It's against my chest, sir.

Defense Counsel: For the record, [LCpl E.R.G.] has created a fist with her right hand, cupped her left hand over the top, put her elbows in -- put her elbows in near her body, and put her hands against her chest.

Q. Have I accurately described the manner in which your arms fell asleep?

A. Yes, sir. They were in this area. I'm not sure what hand was over which.

Q. So not necessarily the cupped fist, but hands up against your lower neck?

A. Yes, sir.

Q. And that's the position that you wake up in as well; right?

A. Correct, sir.

Q. And somehow one of [the appellant's] hands goes underneath you and comes around the front; right?

A. Yes, sir.

. . . .

Q. As the hand comes up, you can feel it touching -- if you feel [the appellant's] hand come up, you feel it touch your hands right?

A. Yes, sir.

Q. But he didn't punch your hands in any way; correct?

A. No, sir.

Q. Leaves no bruises?

A. No, sir.

Q. In fact you just feel it there; correct?

A. Yes, sir.

Q. You are frozen; right?

A. Yes, sir.

Q. And you make no effort to rotate your shoulders to get your hands free; correct?

A. No, sir.

Q. You make no effort to push out and get your hands out; correct?

A. Correct, sir.

Q. Nor do you make an effort to use an elbow to strike Lance Corporal Angiolini; correct?

A. Correct, sir.

Q. It's because you don't move your hands at all in any way once you feel [the appellant's] penis; correct?

A. Correct, sir.[26]

During LCpl E.R.G.'s testimony about how the appellant wrapped his hand around hers, she never contended that he held her arms against her body with his arm, as the specification alleges. There was no other evidence regarding the appellant's arm position during the sexual intercourse. As a result, we are not convinced that the appellant held her arms against her body in the course of wrapping his hand around hers.

We therefore find insufficient evidence to prove that the appellant committed the sexual act by "holding [LCpl E.R.G.'s] arms against her body with [his] arm[.]" To the contrary, based on LCpl E.R.G.'s testimony, throughout the sexual encounter the appellant's arm remained in the same position as it had been when she fell asleep.

2. Asleep

The elements for the sexual assault alleged in Specification 2 are: (1) that the appellant committed a sexual act upon LCpl E.R.G., to wit: penetrating her vulva with his penis; and (2) that the appellant did so "when he knew or reasonably should have known that [LCpl E.R.G.] was asleep."

The Manual for Courts-Martial (MCM)[27] provides no definition of "asleep" for purposes of Article 120, UCMJ. "In construing the language of a statute or rule, it is generally understood that the words should be given their common and approved usage." *United States v. Matthews*, 68 M.J. 29, 36 (C.A.A.F.

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[26] *Id.* at 449-52.

[27] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.).

2009) (citation and internal quotation marks omitted). *The American Heritage Dictionary of the English Language* defines asleep as "[i]n a state of sleep,"[28] and sleep as a "natural periodic state of rest for the mind and body, in which the eyes usually close and consciousness is completely or partially lost, so that there is a decrease in bodily movement and responsiveness to external stimuli."[29]

We are not convinced the Government proved beyond a reasonable doubt that LCpl E.R.G. was asleep when the appellant inserted his penis into her vagina. LCpl E.R.G. testified that she fell asleep and awoke to the appellant "pulling [her] pants down and starting to have sex with [her]."[30] She reiterated during cross-examination that she could feel her pants being pulled down and was aware of the appellant behind her *prior to* sexual intercourse. Asked during direct examination whether she was fully awake when she felt her pants coming down, she responded, "I was waking up."[31] She testified that she became fully awake when the appellant started having sex with her.

These facts are analogous to those in *United States v. Welch* No. NMCCA 201500184, 2016 CCA LEXIS 253, unpublished op. (N-M. Ct. Crim. App. 21 Apr 2016), where we found the victim was not asleep for purposes of an abusive sexual contact charge when he awoke just prior to the sexual contact and "was aware of what was happening," even though the victim had kept his eyes closed throughout the encounter. *Id.* at *5, *9-10. Welch had previously initiated sexual activities with the victim during periods of diminished capacity. *Id.* at *2-3. However, because the complainant was able to recall Welch standing in front of him with an exposed penis before the sexual contact,we set aside the conviction and affirmed only an attempted abusive sexual contact. *Id.* at *8-9, *12.

Similarly, LCpl E.R.G. was aware of what was happening before the sexual act. Despite still being in the process of waking up, she felt the appellant pulling her pants down while aware that he was lying behind her. Thus, she was not asleep for purposes of the second element of this specification. Despite the nature of the relationship between the perpetrator and victim in *Welch* differing significantly from that between the appellant

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[28] (5th ed. 2016), *available at* https://ahdictionary.com/word/search.html?q=asleep.

[29] *Id.*, *available at* https://ahdictionary.com/word/search.html?q=sleep.

[30] Record at 355.

[31] *Id.*

and LCpl E.R.G., we are nonetheless similarly convinced beyond reasonable doubt that this appellant attempted to commit a sexual act upon LCpl E.R.G. while she slept.

To constitute the lesser included offense of an attempted sexual assault of this variety, Article 80, UCMJ, requires that the act be done with the specific intent to commit a sexual act while the victim was asleep, amounting to more than mere preparation and tending, even though failing, to effect its commission. *See, e.g., United States v. Guin*, 75 M.J. 588, 594, unpublished op. (N-M. Ct. Crim. App. 2016). The specific intent to commit the offense must be accompanied by an overt act which directly tends to accomplish the unlawful purpose, goes beyond preparatory steps, and is a direct movement toward the commission of the offense. MCM, Part. IV, ¶¶ 4a(a) and 4c(1)-(2).

The appellant's overt act of inserting his penis into LCpl E.R.G.'s vulva after she fell asleep, facing away from him, constituted direct movement towards committing a sexual assault while he believed she was still asleep. LCpl E.R.G. testified, and the appellant did not dispute, that she clearly indicated, verbally and physically, that she did not want to have sex that night. We are convinced that but for LCpl E.R.G. waking as the appellant pulled down her pants, he would have penetrated her while she slept.

The appellant's testimony that the sexual act was consensual is not credible. He apologized to LCpl E.R.G. the next morning by stating, "[I] can guess what [I] did." This admission of culpability, coupled with his statement about how LCpl E.R.G. teased him while she slept, does not comport with the appellant's later testimony that he believed LCpl E.R.G. fully consented to sexual intercourse.

The appellant's various accounts of the incident not only erode his credibility, the initial versions also clearly reveal his belief that LCpl E.R.G. was asleep when he began penile penetration—an act he repeatedly described as apparently occurring while even he was asleep. After first blaming his actions on hormones, he told LCpl E.R.G. and then investigators, during two separate NCIS interviews, that he awoke to his penis already inside of LCpl E.R.G.'s vagina. Only at trial did he ultimately admit that he was fully awake when he inserted his penis.

Consequently, we affirm a conviction for the lesser included offense of attempted sexual assault while LCpl E.R.G. was asleep.

B. Sentence reassessment

Having found it appropriate to affirm only a lesser included offense of one of the two specifications, we must analyze whether to reassess the sentence. Courts of Criminal Appeals can often "modify sentences 'more expeditiously, more intelligently, and more fairly' than a new court-martial[.]" *United States*

v. Winckelmann, 73 M.J. 11, 15 (C.A.A.F. 2013) (quoting *Jackson v. Taylor*, 353 U.S. 569, 580 (1957)). In such cases, the courts "act with broad discretion[.]" *Id.*

Reassessing a sentence is appropriate if we are able to reliably determine that, absent the error, the sentence would have been at least of a certain magnitude. *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000). A reassessed sentence must not only "be purged of prejudicial error [but] also must be 'appropriate' for the offense involved." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986).

We base these determinations on the totality of the circumstances of each case, guided by the following "illustrative, but not dispositive, points of analysis":

(1) Whether there has been a dramatic change in the penalty landscape or exposure.

(2) Whether sentencing was by members or a military judge alone.

(3) Whether the nature of the remaining offenses captures the gravamen of criminal conduct included within the original offenses and, whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses.

(4) Whether the remaining offenses are of the type with which appellate judges should have the experience and familiarity to reliably determine what sentence would have been imposed at trial.

Winckelmann, 73 M.J. at 15-16.

Under the circumstances in this case, we find we are able to reassess the sentence and that it is appropriate for us to do so. Although the maximum punishment has decreased from 30 years' to 20 years' confinement and the appellant elected members for sentencing, all other factors favor our reassessment. *See* Art. 80(e), UCMJ. First, this court has extensive experience and familiarity with the remaining conviction, as none presents a novel issue in aggravation. Second, the gravamen of the sexual assault and attempted sexual assault are sufficiently equivalent, as the offenses involve the same underlying acts by the appellant. The appellant would be guilty of sexual assault but for the fact that, unbeknownst to him, LCpl E.R.G. awoke moments before he committed the sexual act. Third, all evidence in aggravation, extenuation, and mitigation remains, and no new forms or sources of sentencing evidence are apparently more relevant under the new offense vice the old. Consequently, the importance of the evidence adduced on the merits and at sentencing remains the same regardless of the specific attempted or completed offense being at issue.

Taking these factors as a whole, we can confidently and reliably determine that absent the error, the members would have sentenced the appellant to a similar period of confinement, reduction in rank, and punitive discharge. We conclude that seven years' confinement, reduction to pay grade E-1, forfeitures of all pay and allowances for 84 months, and a dishonorable discharge is appropriate punishment for the remaining offense and this offender—thus satisfying the *Sales* requirement that the reassessed sentence is not only purged of error, but also appropriate. *Sales*, 22 M.J. at 308; *see, e.g.*, *United States v. Parker*, 75 M.J. 603, 619-20 (N-M. Ct. Crim. App. 2016), *rev. denied*, __ M.J. __, No. 16-0461, 2016 CAAF LEXIS 372 (C.A.A.F. May 16, 2016).

C. Admission of appellant's statements to NCIS

The appellant next avers he invoked the right to counsel before making statements to NCIS, and the military judge erred by admitting the those statements. We disagree.

We review a military judge's ruling on a motion to suppress for abuse of discretion. *United States v. Cote*, 72 M.J. 41, 44 (C.A.A.F 2013). We review findings of fact under the clearly erroneous standard and conclusions of law *de novo*. *Id*. (citing *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004)).

The Fifth Amendment guarantees that no suspect "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The privilege against self-incrimination encompasses "the right to counsel specifically during pretrial questioning." *United States v. Seay*, 60 M.J. 73, 77 (C.A.A.F. 2004) (citing *Edwards v. Arizona*, 451 U.S. 477 (1981)) (additional citations omitted); *see also* MILITARY RULE OF EVIDENCE 305(c)(4), SUPPLEMENT TO MCM, UNITED STATES (2012 ed.) ("If a person subjected to interrogation . . . chooses to exercise the right to counsel, questioning must cease until counsel is present.").

To invoke the privilege, a suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459 (1994). "If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." *Id.* at 461-62. If a suspect's statement is ambiguous, law enforcement officials may attempt to clarify the issue of rights invocation, but they are not required to do so. *Id.* at 461. Law enforcement "may continue questioning unless the suspect unambiguously invokes his rights, regardless of whether law enforcement officials have endeavored to clarify any ambiguity." *United States v. Delarosa*, 67 M.J. 318, 320 (C.A.A.F. 2009) (citing *Davis*, 512 U.S. at 461-62).

In *Davis*, the suspect told Naval Investigative Service (NIS) agents, during an interrogation, "[m]aybe I should talk to a lawyer." *Davis*, 512 U.S. at 455. The agents then explained to the suspect that he could have a lawyer if he so desired, but the suspect responded that he did not in fact want a lawyer. The Supreme Court found the suspect's statement, "[m]aybe I should talk to a lawyer," was not a request for counsel, and thus the judge did not err in admitting the evidence. *Id*. at 462.[32]

Here, after the appellant was advised of his right to counsel, and before questioning, he engaged in the following exchange with the NCIS Special Agent:

> Appellant (A): I have a question.
>
> Special Agent (SA): Sure.
>
> A: -- pertaining to having a lawyer come.
>
> SA: Mhm.
>
> A: Is that a timely event, like, I don't want to, like, do something stupid.
>
> SA: I can't give you any legal advice, number one. And I'm not sure -- to be honest with you, I have no idea. Like, what do you mean timely? Like, if you could –
>
> A: Like, is there some military lawyer somewhere that can just come in and --
>
> SA: That I don't know. There is a legal shop here on base. I know that and you can go there. I don't know though. I don't know the timeliness if, you know, I have no idea. But like I said, you have the rights right here. It's up to you whether or not you want to talk without a lawyer or you want to come here and talk with us right now. So it's totally up to you.
>
> A: Okay. I'm going to talk now, but -- sign here?
>
> SA: Okay. Well, real quick. So you don't want -- you don't have a lawyer right now?
>
> A: I do not have a lawyer at this time.

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[32] *See also United States v. Lux*, 905 F.2d 1379, 1381-82 (10th Cir. 1990) (upholding a trial judge's determination that a suspect did not request an attorney when she asked how long it would take if she wanted a lawyer and if she would have to stay in jail while she waited for one, and the police officer responded that he did not know how long getting a lawyer would take and that she would remain in jail.)

SA: And you don't want to have a lawyer? You're going to talk right now; correct?

A: Yes.[33]

The military judge did not err in determining that the appellant did not invoke his right to counsel. The appellant never unequivocally requested counsel. Instead of unambiguously invoking the right to counsel after the interrogator again clarified that he could have counsel present if he so desired, the appellant proceeded to unambiguously waive that right and participate in the interrogation.

III. CONCLUSION

The guilty finding as to Specification 1 of the Charge is set aside. The guilty findings as to Specification 2 and the Charge are affirmed only in so far as they include the lesser included offense under Article 80, UCMJ, of attempted sexual assault of LCpl E.R.G. while she was asleep. The sentence as reassessed is affirmed.

Judge RUGH and Judge HUTCHISON concur.

For the Court

R.H. TROIDL
Clerk of Court

[33] PE 8 at 4-5.