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

Before
R.E. VINCENT, R.G. KELLY, E.C. PRICE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ANTHONY E. BROWN
AIR TRAFFIC CONTROLLER SECOND CLASS (E-5), U.S. NAVY

NMCCA 200800149
GENERAL COURT-MARTIAL

Sentence Adjudged: 08 November 2007.
Military Judge: Col Steven Folsom, USMC.
Convening Authority: Commander, Navy Region Northwest, Silverdale, WA.
Staff Judge Advocate's Recommendation: CDR S.L. Hladon, JAGC, USN.
For Appellant: Patrick M. Flynn; LT Heather Cassidy, JAGC, USN.
For Appellee: LT T.H. Delgado, JAGC, USN; Capt Mark Balfantz, USMC.

30 April 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRICE, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of two specifications of violating a lawful general order, dereliction of duty, making a false official statement, rape, assault consummated by a battery, and two specifications of committing indecent acts, in violation of Articles 92, 107, 120, 128, and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, 920, 928, and 934. The appellant was sentenced to nine

years confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant raises three assignments of error. First, he asserts that the evidence is factually insufficient to support a finding a guilty to Charge III, rape. Second, he alleges that his trial defense counsel provided ineffective assistance of counsel by improperly advising him as to the maximum punishment for the offenses he faced. Third, he claims that the sentence adjudged and approved by the CA is inappropriately severe.[1]

We have carefully examined the briefs of the parties, the record of trial, and the affidavits submitted by the appellant and trial defense counsel. We conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Sufficiency of the Evidence as to Rape

In his first assignment of error, the appellant contends that the evidence is factually insufficient to support his conviction for Charge III, rape. We disagree.

A. Background

The appellant was a 38-year-old, experienced Air Traffic Controller Second Class assigned to Naval Air Station (NAS), Whidbey Island, Washington. Airman (AN) M, the victim, was a 20-year-old E-3 who had been assigned to NAS Whidbey Island, her first duty station, for approximately 10 months at the time of this incident. Both the appellant and AN M were assigned to the Air Traffic Control Operations Division.

On the evening of December 2nd and the morning of 3 December 2006, the appellant and AN M were assigned to stand the mid-watch from 2330 to 0730 in the "cab" atop the Air Traffic Control tower onboard NAS Whidbey Island. Prior to December 2nd, AN M had stood mid-watch with the appellant in April 2006 and her only other interaction had been conversations regarding another Sailor in their division.

After assuming the watch on December 2nd, the appellant informed AN M that she had three options: (1) she could go to the BEQ and sleep if she returned prior to morning turnover, (2) she could sleep in the break room two floors below the cab in the tower, or (3) she could stay in the tower cab with him. AN M believed she could get in trouble if she slept in her BEQ room

[1] Assignments of error II and III were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

during assigned watch hours, so she decided to stand her watch in the tower cab. It was a cold, rainy night and the only functioning heater in the tower was a small portable unit.

During the course of the watch, the appellant repeatedly made sexual comments, engaged AN M in sexual conversations and made repeated sexual advances including rubbing AN M's stomach and breast, which she rebuked. Record at 220-35. At one point during the watch, the appellant and AN M both fell asleep. *Id.* at 235, 238. At approximately 0630, the appellant woke up and told AN M to get up.

The appellant then straddled AN M while she lay on the floor. He placed his hands on either side of her, preventing her from being able to move. He tried to kiss her, but she turned her face and he kissed her cheek. The appellant then asked AN M if he could kiss her. AN M didn't move, but decided to kiss the appellant believing it would end the interaction. The appellant kissed her again and despite her clinched teeth tried to stick his tongue in her mouth. The appellant then got up and AN M covered her head with a blanket. Shortly thereafter, she heard a loud noise caused by the appellant's throwing of a chair across the tower cab as he exclaimed "God, what is it with you people?" *Id.* at 240-41. She then felt scared after hearing the appellant "clinking around in the kitchen area" which housed a variety of items, including knives. *Id.*

As AN M gathered her belongings in anticipation of turning over the watch, the appellant "came up from behind" and pushed her forward. *Id.* at 241-42. She caught herself on the supervisor's desk and the appellant proceeded to "grind" on her from behind. *Id.* at 242. He asked her, "So you mean to tell me you would like it like this?" She replied, "No, that's how my ex-boyfriend cheated on me when I was in boot camp." *Id.*

The appellant then grabbed AN M by the arm, turned her around, and pushed her onto a desk on her back with her feet off the floor. Then standing between AN M's legs, the appellant proceeded to unzip her coat and asked if he could ejaculate on her stomach. She told him "no" and he asked "why not?" AN M did not reply believing "'no' would be enough." *Id.* at 244.

The appellant then tried to put his hand down AN M's pants. AN M pulled away and grabbed his hand, but then he quickly moved and slid his hand underneath her underwear. He began rubbing her genitals and unbuckling his belt with the other hand. The appellant then pulled her shirt up and began rubbing his penis against her side. The appellant asked AN M if he could do this and she told him "no". *Id.* at 245. He then asked "why not?" *Id.* Again, AN M did not respond. When asked at trial what she did when the appellant was performing these acts, AN M testified she just laid there and didn't do anything because the appellant was three times her size and she was afraid that if she fought him off she would get hurt.

The appellant asked again if he could rub himself on her. She said "no." *Id.* at 246. The appellant then began to rub himself on her stomach. He next asked if he could take her pants off. She told him "no." *Id.* He asked "why not?" and AN M did not respond. *Id.* The appellant then tried to pull her pants down. In an attempt to make it harder for the appellant to pull her pants down, AN M sat down harder on the desk. However, the appellant grabbed her lower back and lifted her lower back off of the desk, pulling her pants down to about mid-thigh. He then asked if he could rub himself on her vagina. She told him "no," but he proceeded to rub his penis on her vagina. *Id.* at 246.

The appellant then asked AN M if he could take her left leg out of her pants. She said "no" and, in an attempt to prevent him from taking her leg out of her pants, she spread her legs apart to keep her pants tighter around her legs so it was harder to pull them down. *Id.* She also flexed her foot in an attempt to prevent the appellant from removing her shoe. Nonetheless, the appellant pushed AN M's legs together and took her pant leg off along with her underwear. He also removed her left shoe.

The appellant then rubbed his penis on AN M's vagina. While he rubbed his penis on her vagina, he asked her if he could "stick it in" her. *Id.* at 247. She said "no." *Id.* The appellant proceeded to insert his penis in AN M's vagina. The appellant then asked if he could ejaculate inside AN M, and she said "no." *Id.* at 249. The appellant then indicated he had ejaculated, AN M asked him where, and he touched the right side of her pubic area and said "right here." *Id.*

AN M testified that during the events leading up to and including the act of sexual intercourse the appellant never held her down, verbally threatened her, used his rank to encourage her to have sex with him, or tried to hurt her. However, she testified that she did not fight back because she was afraid he would hurt her.

After the watch was relieved, AN M returned to her BEQ room and tried to call two friends, but was unable to reach them. She then called her mother and told her that she thought she had been raped and then reported the rape to Government authorities.

Within a few hours of the incident, the appellant called Mr. B, a former shipmate of the appellant and AN M's ex-boyfriend. The appellant told Mr. B that he had engaged in sex with AN M and that she had said "no" prior to their encounter, but that she did not say "no" during intercourse. *Id.* at 357-58.

B. Principles of Law

Article 66(c), UCMJ, requires this court to conduct a *de novo* review of the legal and factual sufficiency of each approved finding of guilty. *United States v. Washington*, 57 M.J. 394, 399

(C.A.A.F. 2002)(citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). 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 appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The test for legal sufficiency is whether, "considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *Id.* at 324 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

To prove rape, the Government was required to prove: (1) that the accused committed an act of sexual intercourse; and (2) that the act of sexual intercourse was done by force and without consent. MANUAL FOR COURTS-MARTIAL, UNITED STATES, Part IV, ¶45b(1) (2005 ed.). Although listed within the same element, force and lack of consent are related, yet distinct, elements of the offense of rape. *United States v. Simpson*, 58 M.J. 368, 377 (C.A.A.F. 2003). However, "our case law recognizes that there may be circumstances in which [force and lack of consent] are so closely intertwined that both elements may be proven by the same evidence." *Id.* (citing *United States v. Palmer*, 33 M.J. 7, 9-10 (C.M.A. 1991)). We look at the totality of the circumstances to determine whether the elements of force and lack of consent are established. *United States v. Bright*, 66 M.J. 359, 363 (C.A.A.F. 2008)(citing *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996)).

Lack of consent can be manifested verbally, physically, or by a combination of the two. *United States v. Leak*, 61 M.J. 234, 245-46 (C.A.A.F. 2005). Therefore, a verbal "no" can manifest the necessary lack of consent for the offense of rape under certain circumstances. *Id.* at 246. In such a situation, physical resistance is not required. *Cauley*, 45 M.J. at 356.

"[F]orce can be actual or constructive." *Bright*, 66 M.J. at 363. Actual force is physical force used to overcome the victim's lack of consent. *Leak*, 61 M.J. at 246 (citing *United States v.* Palmer, 33 M.J. 7, 9 (C.M.A. 1991)). Constructive force can be shown by proof of a coercive atmosphere that includes, for example, threats or statements that resistance would be futile. *Simpson*, 58 M.J. at 377.

C. Discussion

The appellant asserts that the evidence is factually insufficient "to conclude beyond a reasonable doubt that force was used and that lack of consent existed." Appellant's Brief of 6 Jun 2008 at 5. We disagree.

1. Consent

The appellant argues that AN M's actions did not amount to "more than a mere lack of acquiescence" and that the evidence reflects that "although [AN M] initially may have been reluctant to engage in sexual intercourse . . . she ultimately consented." Appellant's Brief at 7. The issue is whether AN M reasonably manifested lack of consent by "taking such measures of resistance as were called for by the circumstances." MCM, Part IV, ¶45c(1)(b).

The record reflects that AN M repeatedly told the appellant "no" when he made sexual advances toward her and asked her if he could perform specific sexual acts. The appellant's admission to Mr. B corroborates AN M's testimony on this point. In addition to telling the appellant "no," AN M took measures to prevent the appellant from removing her pants and one of her shoes prior to the act of sexual intercourse. AN M testified she was afraid to physically resist the appellant. Instead, her efforts of resistance included sitting down harder on the desk and spreading her legs apart to keep her jeans tight on her body to prevent the appellant from pulling her pants down, and flexing her foot to prevent the appellant from removing her shoe. We conclude that AN M did reasonably manifest a lack of consent and that her words and actions did not amount to mere lack of acquiescence.

2. Force

We next assess the element of force and consider whether the appellant used more than the incidental force involved in penetration. The appellant argues that even if he used force to place AN M on the desk or to remove her pants, that force was not the means by which the act of sexual intercourse occurred. He contends that any force ceased prior to the appellant asking AN M if she would engage in sexual intercourse and prior to actually engaging in intercourse. We disagree.

The appellant invites us to consider facts in isolation without taking into account the circumstances leading up to and including the act of intercourse. AN M testified that the appellant used actual physical force to engage in the act of sexual intercourse with her by: pushing her up against a desk, grabbing her arm, turning her around, pushing her back onto the supervisor's desk so that she was lying across the desk with her feet dangling above the floor. Meanwhile, the appellant was standing between her legs and moved to the side and put his hand down her pants. She pulled away and grabbed his hand, but he moved his hand underneath her underwear, and then tried to pull her pants down, which she resisted, yet he still removed her shoe and one pant leg. After pushing her legs together and taking her pant leg off, he then began rubbing his penis on her vagina, ultimately inserting his penis into her vagina. The appellant's actions convince us beyond a reasonable doubt that the appellant used force when engaging in sexual intercourse with AN M.

In addition, force and lack of consent are so closely intertwined in this case that the same evidence is relevant to proof of both elements. *See Simpson*, 58 M.J. at 377. The following factors weigh heavily in our review of the assigned error: (1) the appellant was an experienced, 38-year-old E-5; (2) AN M was a 20-year-old E-3; (3) the appellant exercised actual and apparent authority over AN M during this two-person watch; (4) the location and timing of the rape, including that the incident occurred in an isolated space approximately 10 stories above the ground, at approximately 0630 near the end of mid-watch; (5) the appellant's repeated sexual advances throughout the watch and particularly his repeated refusal to accept verbal and physical indications that AN M was not a willing participant; (6) the appellant's throwing of a chair and loud expression of frustration just before his final sexual advances culminating in the rape; and (7) that the appellant was physically larger than AN M.

After considering the evidence in the light most favorable to the Government, we are convinced that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. After taking into consideration that we did not have to opportunity to see and hear the witnesses, we are also convinced beyond a reasonable doubt of the appellant's guilt.

Ineffective Assistance of Counsel

"This Court analyzes claims of ineffective assistance of counsel under the test outlined by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984), and considers (1) whether counsel's performance fell below an objective standard of reasonableness, and (2) if so, whether, but for the deficiency, the result would have been different." *United States v. Gutierrez*, 66 M.J. 329, 331 (C.A.A.F. 2008)(citations omitted). The appellant has the burden of demonstrating both deficient performance and prejudice. *Id.*

To demonstrate prejudice, the appellant must show that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id. (*quoting *Strickland*, 466 U.S. at 694). The United States Court of Appeals for the Armed Forces developed the following three-pronged test to determine whether an appellant has overcome the presumption of competence:

> (1) Are the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsel's actions in the defense of the case?
>
> (2) If they are true, did the level of advocacy "fall[] measurably below the performance . . . [ordinarily expected] of fallible lawyers"?
>
> (3) If ineffective assistance of counsel is found to

> exist, "is . . . there . . . a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt?"

United States v. Christian, 63 M.J. 205, 209 (C.A.A.F. 2006) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). We have for consideration the record of trial, the appellant's affidavit, and the affidavits of the trial defense counsel and assistant trial defense counsel. Since this is a post-trial claim based on conflicting affidavits, we will apply the principles enunciated in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

In his post-trial affidavit, the appellant asserts a number of perceived deficiencies in his trial defense counsel's performance including: (1) "[d]efense counsel also alleged the most [severe] consequences would be punishable with a maximum of 3 to 8 months confinement," and (2) that trial defense counsel failed to present the results of the DNA kit which revealed "no sexual contact between the appellant and AN M," and failed to call the "medical examiner" who would testify there was no evidence of sexual intercourse. Appellant's affidavit of 29 May 2008. The appellant asserts that with a maximum potential punishment including confinement for life, "there is no reasonable explanation for failing to advise [him] of the maximum punishment he could receive." Appellant's Brief at 9, 10.

The trial defense counsel states: (1) that he met with the appellant in his office and advised him of the charges and maximum punishment for each of those charges and subsequently discussed an offer from the Government with the appellant that limited potential confinement to five years, (2) that the appellant informed him he had "rubbed the head of his penis on [AN M's] vagina and ejaculated on her pubic area," and (3) that the "DCFL report" verified the presence of the appellant's DNA on AN M's breasts and pubic area and that the "sexual assault examiner" would testify her findings were "consistent with intercourse." Affidavit of Trial Defense Counsel of 11 Aug 2008.

The assistant trial defense counsel states that, prior to his first meeting with the appellant, (1) the trial defense counsel indicated he had previously reviewed the charge sheet, elements of the offenses and maximum punishment for each offense with the appellant, and (2) that both the trial and assistant trial defense counsel subsequently made it clear to the appellant that he could be sentenced to many years of confinement if convicted. The assistant trial defense counsel also acknowledged participation in discussions with the appellant and trial defense counsel regarding the Government's pretrial offer that would limit potential confinement to five years. Affidavit of Assistant Trial Defense Counsel of 16 Sep 2008.

A. Improper advice on maximum authorized sentence

First, the appellant's affidavit is ambiguous and inconsistent. The appellant asserts that counsel advised him "3 to 8 months confinement" was the most severe punishment he would face, yet he acknowledges there was an offer from the Government that he would have considered had he been properly advised by counsel on the maximum possible punishment. His affidavit and citation to a range of punishments suggest "3 to 8 months" confinement was a predictive range of likely punishment vice the maximum possible punishment. Similarly, the appellant's acknowledgement that he would have considered the Government's offer had he been properly advised suggests that offer included a limitation on confinement that exceeded "3 to 8 months" confinement. Applying the first *Ginn* factor, the facts alleged in the appellant's affidavit appear to allege an error that would not result in relief even if any factual dispute were resolved in the appellant's favor, and the appellant's claim could be rejected on that basis alone. *Ginn*, 47 M.J. at 248.

However, assuming without deciding that the appellant's affidavit is factually adequate on its face, under the fourth *Ginn* factor, we next consider whether the appellate filings and the record as a whole "compellingly demonstrate" the improbability of those facts. *Id.* Both trial defense counsel indicate they discussed with the appellant the potential for lengthy confinement in this rape and multiple additional offense case, as well as the Government's pretrial offer which would have limited maximum confinement to five years.[2]

Their assertions are supported by the record and the appellant's affidavit. During preliminary instructions and in the appellant's presence, the military judge informed the members that the maximum authorized punishment "could include . . . confinement for life." Record at 84. Prior to sentencing, the military judge again informed the members the maximum authorized punishment included possible confinement for life. *Id.* at 655; AE XXVII. Yet, at no point during the trial did the appellant bring the alleged discrepancy between "3 to 8 months" and confinement for life without the possibility of parole to the military judge's attention, nor does he claim to have discussed this significant discrepancy with his counsel. Additionally, in the clemency request submitted on behalf of the appellant, trial defense counsel requested the CA disapprove confinement greater than four years, consistent with the terms of the Government's "pre-trial agreement" offer. Appellant's Clemency Request of 19 Dec 2007 at 2.

[2] A discrepancy exists between the post-trial affidavits of counsel and the appellant's clemency request as to whether the Government's pretrial offer would have limited confinement to four years or five years. Affidavit of Trial Defense Counsel of 11 Aug 2008 at 2; Affidavit of Assistant Trial Defense Counsel of 16 Sep 2008 at 1; Appellant's Clemency Request of 19 Dec 2007 at 2. Resolution of this discrepancy is not necessary to resolve this assignment of error.

The appellant's acknowledgment that he "would have considered" the Government's pretrial agreement offer "had he been properly advised" provides further evidence that "3 to 8 months" confinement, if discussed at all, was a predictive range of probable confinement and that the Government's offer exceeded that period of confinement. In addition, the appellant was an experienced, 38-year-old second class petty officer charged with multiple serious offenses referred to a general court-martial including rape, who had previously been charged with rape – thus rendering any assertion that his counsel indicated, and he believed, the maximum authorized punishment to be "3 to 8 months" confinement incredible. Charge Sheet; Record at 39-49, 158-59, 168, 219; Appellate Exhibits III, V.[3]

We conclude that further fact-finding is not required and reject this claim of ineffective assistance of counsel for two reasons, (1) the appellant's affidavit appears to allege an erroneous prediction of a range of probable confinement, if convicted, which if an error would not result in relief even if any factual dispute were resolved in his favor, and (2) assuming without deciding that the appellant's affidavit is factually adequate on its face, under the fourth *Ginn* factor, we conclude the record as a whole "compellingly demonstrates" the improbability that the trial defense counsel informed the appellant that the maximum authorized punishment for the charged offenses was "3 to 8 months" confinement.

B. Failure to present lab results reflecting "no sexual contact" or testimony of no evidence of intercourse

The appellant alleges that trial defense counsel failed to present the results of the DNA kit which revealed "no sexual contact between" the appellant and AN M, and failed to call the "medical examiner" who would testify there was no evidence of sexual intercourse. Appellant's Affidavit of 29 May 2008. We will analyze this allegation under the first *Ginn* factor. *Ginn*, 47 M.J. at 248.

[3] The appellant had previously been charged with the rape of another Sailor in violation of Article 120, UCMJ. Following investigation in accordance Article 32, UCMJ, and consistent with the investigating officer's recommendation, that charge was dismissed without prejudice, and on 05 September 2006, punishment was imposed under Article 15, UCMJ, for adultery in violation of Article 134, UCMJ. Prosecution Exhibits 12, 13.

The evidence adduced at trial supports a finding that sexual intercourse occurred. Specifically, AN M testified intercourse occurred and Mr. B testified that the appellant had called him and admitted to sexual intercourse with AN M hours after the alleged incident. At trial, in both opening statements and closing arguments, the defense conceded that intercourse had occurred. The defense theory focused upon the elements of force and lack of consent, and argument that the Government's failure to present physical evidence from the rape kit and failure to present the testimony of medical professionals supported a finding that the Government had not carried its burden of proof on the rape charge. Record at 144-45, 418-26. Additionally, the defense attempted to bolster their theory of the case through cross examination of Mr. B. Record at 358-64.

Applying the first *Ginn* factor and assuming the facts alleged in the appellant's affidavit to be true, presentation of evidence inconsistent with intercourse would have been, at best, inconsistent with the defense's reasonable theory of the case based upon the available evidence. Given the appellant's pretrial admission and AN M's testimony, the defense theory provides both a reasonable explanation for counsel's actions, and clearly does not fall below the performance level expected of trial defense counsel. *See Christian*, 63 M.J. at 209. On the contrary, introduction of evidence that no sexual intercourse occurred would have placed evidence supporting alternate theories before the members. Specifically, that there was no intercourse, but if there was, it was either consensual or the proof of force or lack of consent was insufficient. We conclude the appellant's affidavit alleges an error that would not result in relief even if any factual dispute were resolved in the appellant's favor, and the appellant's claim is rejected on this basis. *Ginn*, 47 M.J. at 248.

After carefully reviewing the entire record and the affidavits, we are satisfied there is no merit in these or the appellant's remaining perceived deficiencies in his trial defense counsel's performance or in the appellant's claim of ineffective assistance of counsel.

Sentence Appropriateness

The appellant asserts that a sentence including a dishonorable discharge, confinement for nine years, forfeiture of all pay and allowances for nine years, and reduction in pay grade to E-1 is inappropriately severe for these offenses and this offender. The appellant asserts that "[a]lthough the crimes for which [he] was convicted are very serious, his case is devoid of the type of aggravating factors that would generally warrant confinement for nine years." Appellant's Brief at 11-12.

A court-martial is free to impose any lawful sentence that it determines appropriate. *United States v. Turner,* 34 C.M.R. 215, 217 (C.M.A. 1964). Our determination of sentence

appropriateness under Article 66(c), UCMJ, requires us to analyze the record as a whole to ensure that justice is done and that the accused 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. *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982). In determining sentence appropriateness, we are mindful that it is distinguishable from clemency, which is a bestowing of mercy on the accused and is the prerogative of the CA. *Healy,* 26 M.J. at 395.

The appellant was convicted of sexual harassment and indecent acts with two subordinate female Sailors, and the rape of one of those Sailors. Each sexual offense involved much younger, junior, subordinate personnel during an isolated two-person watch, and following extensive unprofessional, sexually aggressive behavior by the appellant. He was also convicted of dereliction of duty, false official statement and assault consummated by a battery.

At trial, the appellant presented a comprehensive case in extenuation and mitigation, including multiple letters reflecting his performance, good military character and parental responsibilities, his performance evaluations, awards, commendations, qualifications, certifications, education and the testimony of several witnesses including: one active duty and one retired first class petty officer, and two chief petty officers. The crux of the defense sentencing evidence was the appellant's parental responsibilities, remorse, significant achievements, performance, rehabilitative potential, and impact of lengthy confinement on his daughter. The appellant also provided an unsworn statement.

After carefully considering the entire record of trial, the nature and seriousness of these offenses, the matters presented by the appellant in extenuation and mitigation, and the appellant's military service, we find the sentence to be appropriate for this offender and his offenses. *United States v. Baier,* 60 M.J. 382, 384-85 (C.A.A.F. 2005); *Healy,* 26 M.J. at 395; *Snelling* 14 M.J. at 268. Granting additional sentence relief at this point would be to engage in clemency, a prerogative reserved for the convening authority, and we decline to do so. *Healy*, 26 M.J. at 395-96.

Conclusion

Accordingly, we affirm the findings and sentence, as approved by the convening authority.

Senior Judge VINCENT and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court