United States Navy–Marine Corps Court of Criminal Appeals

Before
TANG, LAWRENCE, and STEPHENS,
Appellate Military Judges

UNITED STATES
Appellee

v.

Thomas E. MADER, III
Sergeant (E-5), U.S. Marine Corps
Appellant

No. 201800276

Decided: 27 February 2020.

Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Lieutenant Colonel Leon J. Francis. Sentence adjudged 4 May 2018 by a general court-martial convened at Marine Corps Base Hawaii, Kaneohe Bay, Hawaii, consisting of members with enlisted representation. Sentence approved by the convening authority: reduction to E-1, confinement for 190 days, and a bad-conduct discharge.

For Appellant: Lieutenant Commander Kevin R. Larson, JAGC, USN.

For Appellee: Lieutenant Commander Timothy C. Ceder, JAGC, USN; Captain Brian L. Farrell, USMC.

Judge STEPHENS delivered the opinion of the Court, in which Senior Judge TANG and Judge LAWRENCE joined.

PUBLISHED OPINION OF THE COURT

STEPHENS, Judge:

A general court-martial convicted Appellant, contrary to his pleas, of violating Articles 92 and 128, Uniform Code of Military Justice (UCMJ),[1] for violating the Marine Corps Order on hazing and for committing assaults consummated by a battery on four junior Marines. The charges arose from Appellant punching a junior Marine in the stomach and using a racial slur against him, forcing another junior Marine to drink alcohol, and burning three junior Marines with cigarettes as part of an initiation.

Appellant asserts six assignments of error (AOEs): (1) the military judge failed to give a mens rea instruction for violating the Marine Corps Order on hazing, (2) the military judge erred in allowing the Government to present rebuttal testimony to Appellant's own testimony, (3) the conviction for forcing a junior Marine to drink alcohol is legally and factually insufficient, (4) the convening authority did not consider clemency matters submitted by the trial defense counsel, (5) the military judge failed to give the members an instruction on consent, and (6) the convictions for burning junior Marines with a cigarette are factually insufficient.[2]

We agree that it appeared the convening authority did not consider Appellant's clemency matters and we ordered new post-trial processing, rendering AOE 4 moot. We find Appellant waived any error when the military judge failed to provide members a mens rea instruction concerning the hazing specification. In addition, we find one specification of violating the Marine Corps Order on hazing to be factually insufficient. Finally, we find that though Appellant appeared to actually believe the three junior Marines consented to being burned with cigarettes, their consent was not legally valid. We reassess the sentence and take action in our decretal paragraph.

I. BACKGROUND

A. Saturday Evening at the Barracks

Appellant was a data Marine in the communications platoon of Third Battalion, Third Marine Regiment (3/3) at Marine Corps Base (MCB) Hawaii, Kaneohe Bay, Hawaii. He had been at 3/3 for about three years and was days away from executing permanent change of station orders to recruiting duty back in the continental United States. On the Saturday before he left, Appel-

---

[1] 10 U.S.C. §§ 892, 928 (2012).

[2] AOEs 5 and 6 were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

lant went to one of the barracks where some of the 3/3 data Marines lived. The day before, most of them had returned to MCB Hawaii from a lengthy, large-scale training exercise on the big island of Hawaii at the Pohakuloa Training Area (PTA).

Appellant went to see Sergeant (Sgt) Alpha[3] from the data section, who lived on the third deck of this barracks. Private First Class (PFC) Bravo and PFC Charlie were roommates on the second deck. Lance Corporal (LCpl) Delta and LCpl Echo were also outside the barracks at a smoke pit. Except for LCpl Delta, these 3/3 data Marines had just returned from PTA. The data section had its "ups and downs"[4] at the exercise, and some Marines had been relieved for poor performance. That night, the mood shifted between drinking and having fun and more serious conversations about morale and life in the Marine Corps. Appellant had a bottle of whiskey with him. He drank that mixed with soda. Sergeant Alpha was also drinking, as was PFC Bravo, who eventually became drunk.

When Appellant was on the third deck talking and drinking with Sgt Alpha, he decided to go down to the second deck to PFC Charlie and PFC Bravo's room. Seeing LCpls Delta and Echo down in the smoke pit, Appellant called down to them. When Appellant got to PFC Charlie's room, he walked up to him, made a "knife hand," traced it down his chest, and punched him in the stomach. Appellant then called PFC Charlie, who is Puerto-Rican, a "beaner version of his [Appellant's] cousin."[5] PFCs Delta and Echo witnessed this.

A few minutes afterwards, the group ended up on the catwalk outside of Sgt Alpha's room. Most of them went inside, but Appellant and PFC Bravo stayed outside. Appellant handed PFC Bravo the bottle of whiskey and said, "Here, take a swig"[6] or "take a shot."[7] PFC Bravo took the bottle and started drinking very quickly, causing Appellant to tell him to "calm down"[8] and try

---

[3] To balance the privacy of witnesses and victims with ease of reading, we have given the following pseudonyms: Sergeant (Sgt) GS as "Sgt Alpha"; Private First Class (PFC) AG as "PFC Bravo"; PFC AP as "PFC Charlie"; Lance Corporal (LCpl) TF as "LCpl Delta"; and LCpl JM as "LCpl Echo."

[4] Record at 590.

[5] *Id*. at 372, 513, 564. The record indicated the word "beaner" is a derogatory epithet referring to persons of Mexican or Hispanic descent.

[6] *Id*. at 408.

[7] *Id*. at 761.

[8] *Id*. at 762.

to pull the bottle away. The junior Marine continued to drink that night, including sharing a glass of whiskey and soda with Appellant.

At some point, the conversation turned to Appellant and another sergeant's plans the next day to hike up Kansas Tower Hill (KT) aboard MCB Hawaii. Appellant said he noticed PFC Bravo appeared to be in better shape and called him a "savage,"[9] and asked if he wanted to join the KT hike. Appellant then jabbed him a few times in the stomach and pressed his head forcefully up against his. Appellant also asked if PFC Bravo wanted to go to the gym with him the next day, which, according to Appellant, he expressed interest in doing.

Sometime afterwards, Appellant was with PFC Bravo and LCpls Delta and Echo on the catwalk outside Sgt Alpha's room. PFC Charlie was inside Sgt Alpha's room with the door closed. The conversation turned to the problems with the PTA exercise and morale in the communications platoon. Appellant brought up that he and others were "burned" with a cigarette when he joined the platoon as a way of bonding. With this, Appellant took his cigarette and burned the chest of both PFC Bravo and LCpl Echo and LCpl Delta's shoulder. None of the junior Marines manifested any physical or verbal signs of lack of consent. The socializing continued for some time into the evening without incident.

The following morning, Appellant exchanged text messages with PFC Bravo about going to the gym. Due to his hangover, he declined, but Appellant still came to his room. He brought the junior Marine a dress cover that did not fit him. Appellant also stopped by LCpl Echo's room to inspect the cigarette burn. When Appellant asked LCpl Echo about his burn, he responded, "I wouldn't worry about it."[10] None of the junior Marines reported the incident. Two days later, Appellant left Hawaii. When some of the platoon's other lance corporals found out about the incident, they reported it, prompting a criminal investigation.

B. Appellant's General Court-Martial

Appellant's trial lasted four days. During the merits phase, the Government presented eight different witnesses and submitted several exhibits—including photos of the junior Marines' burns. Appellant testified on his own behalf, part of which was rebutted by testimony from LCpl Delta. Appellant denied calling PFC Charlie a "beaner," and he denied punching him. He

---

[9] *Id*. at 764.

[10] *Id*. at 616.

denied forcing or ordering PFC Bravo to drink alcohol and also stated he believed the junior Marines consented to being burned. He admitted he struck PFC Bravo in the stomach but testified he did so in jest and to congratulate PFC Bravo on his increased fitness level.

1. Testimony concerning whether Appellant ordered Private First Class Bravo to drink alcohol

PFC Bravo and LCpls Delta and Echo all testified about PFC Bravo's drinking, as did Appellant. Unsurprisingly, accounts differed. PFC Bravo testified that when he and Appellant were on the third deck outside of Sgt Alpha's room, Appellant offered him the bottle of whiskey saying, "Here, take a swig."[11] After drinking several ounces, Appellant tried to pull the bottle away, saying "Whoa, calm down. . . . [T]ake a shot,"[12] or similar words. The junior Marine attributed his motivation to drink to feeling peer pressure because of the rest of the group's drinking and "a little bit"[13] because of Appellant's rank. But he also maintained he had a duty to obey Appellant and he was "just being a PFC."[14]

PFC Bravo also testified about when he later drank from Appellant's glass of whiskey and soda. He testified that, though he did not want any of that alcohol, Appellant asked him to drink it and then instructed him to refill it. He did admit that despite his stated preference for not drinking alcohol, he did so at a friend's party before the PTA exercise. During his testimony, PFC Bravo could not recall several events—including those he previously described to trial counsel—on account of his intoxication that evening. For example, he could not recall telling the trial counsel in a prior interview that he drank because he wanted to "prove something to the Sergeant."[15] He was unable to recall this statement even after his recollection was refreshed with the trial counsel's notes indicating his prior statement.

PFC Delta testified that when Appellant later had the glass of whiskey and soda, he offered it to PFC Bravo and said, "Here, drink some of this."[16]

---

[11] *Id*. at 408.

[12] *Id*. at 762.

[13] *Id*. at 478.

[14] *Id*.

[15] *Id*. at 487.

[16] *Id*. at 515.

PFC Bravo said, "No" and "I don't like drinking."[17] In response, Appellant said, "Come on, we all drink."[18] However, when LCpl Echo testified, he was asked if PFC Bravo ever said anything to Appellant that evening about his preference for alcohol. He responded, "No, sir."[19] When asked again if "[PFC Bravo] did not say anything to [Appellant]," he again responded, "No, sir."[20]

Appellant testified he never had any knowledge of PFC Bravo's preference concerning alcohol until after the junior Marine started drinking. When the two were alone outside of Sgt Alpha's room, he offered PFC Bravo the whiskey bottle, saying, "Here, take a shot."[21] When he saw how much and how quickly PFC Bravo drank from the bottle, he tried to grab it back and said, "Whoa, calm down. . . . [T]ake a shot, . . . but that was pretty savage."[22] At some point, PFC Bravo spilled alcohol on his shirt, and was also feeling intoxicated. Appellant carried him "piggyback" down to his room and suggested he go to sleep. PFC Bravo declined, telling him "Nah, I want to go back upstairs and hangout."[23]

After Appellant and PFC Bravo went down to the latter's room, they joined LCpls Echo and Delta. According to Appellant, it was after PFC Bravo started drinking when the junior Marine told him, "I don't really drink that much."[24] When Appellant responded, "Why not? We all drink,"[25] PFC Bravo told him it was just a personal preference. Appellant testified that at that point, he did not offer PFC Bravo any more alcohol, but did offer it to the two other junior Marines, giving LCpl Delta his glass.

---

[17] *Id*.

[18] *Id*. at 518

[19] *Id*. at 573.

[20] *Id*.

[21] *Id*. at 761.

[22] *Id*. at 762.

[23] *Id*. at 469, 791.

[24] *Id*. at 763.

[25] *Id*.

2. Evidence of Appellant burning the junior Marines with a cigarette

a. Private First Class Bravo

Of the three junior Marines, PFC Bravo was the most intoxicated that evening and admits to not being able to remember much detail. He testified that he did not "remember consenting to anything."[26] He could not recall pulling down his own shirt, though in an earlier interview with the trial counsel, it appears he said just that.[27] He acknowledged there were no burn marks on the shirt he wore that night and maintained that either he or Appellant pulled down his shirt to inflict the burn mark. When he was burned, PFC Bravo was standing at parade rest, but he described that as a voluntary decision because he was trying to look and feel more sober.

PFC Delta testified that Appellant held up his cigarette and said to PFC Bravo, "Okay, where do you want it?"[28] Appellant then approached him, pulled his shirt collar down, placed the cigarette up against his skin, and took a drag on the cigarette for about three to five seconds. PFC Echo testified that Appellant placed the cigarette on PFC Bravo's chest and took "two or three" puffs.[29] He also could not remember whether PFC Bravo pulled down his own shirt or not.

b. Lance Corporal Echo

PFC Echo admitted he pulled down his own shirt for Appellant after he burned PFC Bravo. He also admitted it was after Appellant said to him, "You get one too."[30] But, he maintained he only pulled his shirt down because he was told to do something by a superior. However, LCpl Delta contradicted

---

[26] *Id*. at 477.

[27] The trial counsel's "proover notes" were not admitted. Because this was an appellate exhibit used for cross-examination, rather than admitted evidence, we do not consider this document for factual sufficiency review. *United States v. Beatty*, 64 M.J. 456 (C.A.A.F. 2007). However, when shown the notes, PFC Bravo indicated they were the notes taken during his conversation with the trial counsel and that he recognized some of the notes as accurately recounting his prior statements. We consider this line of questioning solely for its impeachment value relating to PFC Bravo's ability to accurately recall these events and its tendency to show PFC Bravo had a better recall of facts that tended to inculpate vice exonerate Appellant.

[28] Record at 522.

[29] *Id*. at 568.

[30] *Id*. at 607.

LCpl Echo's testimony about his own actions. He testified that LCpl Echo did not pull down his own shirt.

c. Lance Corporal Delta

PFC Delta testified that after Appellant burned the other two junior Marines, he turned to him. Appellant had only said, "Where do you want it" to the group once.[31] Both PFC Bravo and LCpl Echo had just been burned on their chest area beneath their collar. PFC Delta maintained that after watching Appellant burn both of the other Marines in the same place, Appellant came up to him, pulled up his shirt sleeve, and burned him on the shoulder. In addition, LCpl Delta denied he ever previously told the trial defense counsel that he moved his shirt or told Appellant he wanted to be burned on his chest.

d. Appellant's testimony

Appellant testified to a different order of the burnings. According to the junior Marines, it was PFC Bravo, LCpl Echo, and then LCpl Delta. Appellant's testimony was generally similar, but diverged in certain aspects. He testified that as he told the junior Marines about getting "burned" when he joined the communications platoon, he showed them his burn mark. Then, according to Appellant, the following exchange occurred:

[Appellant]: Here, I'll give you one.

[LCpl Delta]: Okay.

[Appellant]: No, I am just kidding. I wouldn't do that.

[LCpl Delta]: No. Do it. I want one![32]

Appellant testified that LCpl Delta wanted it on his forearm, but he chose not to burn him there because it would be easily visible. PFC Delta then said, "You could just move it up on my arm," and pushed his own shirtsleeve up.[33] Appellant then burned him. After that, Appellant burned LCpl Echo and then PFC Bravo. However, these two junior Marines were both burned on the chest and below the collarbone as to avoid detection by medical personnel when getting required vaccines. PFC Echo told Appellant he could burn him on his chest and pulled down his own shirt collar, as did PFC Bravo.

---

[31] *Id*. at 539.

[32] *Id*. at 777.

[33] *Id*. at 783.

After this, the group continued socializing for another few minutes. Then Appellant gave PFC Bravo a "piggyback" ride down to the second deck to his room so he could change his shirt. At this point, Appellant suggested he go to sleep due to his intoxication, but PFC Bravo said he wanted to go back upstairs.[34] The Marines continued drinking and socializing for some time.

Appellant testified he sent text messages to PFC Bravo the next morning, asking about him and inviting him to the gym. Appellant also came to the barracks and saw PFCs Bravo and Charlie, and LCpl Echo, and gave them a dress cover that did not fit him. None of the junior Marines reported the incidents of the previous night, nor appeared inclined to do so.

3. The military judge's instructions

a. The mens rea instruction for the Marine Corps Order on hazing

Defense did not ask for a mens rea instruction from the military judge for the Article 92 violation. The military judge did however modify the standard Benchbook instruction on the elements and definitions of violating a general order to indicate that the members could only convict Appellant if they found his conduct was "wrongful."[35]

b. The Defense proposed instruction on consent

The parties disagreed on the scope of the instruction the military judge should give to the members concerning assault consummated by a battery. Specifically, the Government urged the military judge to not include "mistake of fact" as to consent in the standard instructions or allow defense to even argue it.[36] The Government argued the rank disparity between Appellant and the junior Marines made it per se unreasonable for him to mistakenly believe they consented. The Defense requested language from Hawaii's pattern jury instructions that placed mistake of fact closer to the elements of assault consummated by a battery.[37] The military judge was not persuaded by either party's arguments and gave the standard Benchbook instruction on a reasonable mistake of fact.[38]

---

[34] *Id*. at 791.

[35] *Id*. at 929-30; App. Ex. XXX. *See* Dep't of Army, Pam. 27-9, Legal Services: Military Judge's Benchbook (Benchbook), para. 3-16-1 (10 Sept. 2014).

[36] App. Ex. XXXI.

[37] Record at 921.

[38] *See* Benchbook, para. 5-11-2.

4. The Government's rebuttal to Appellant's testimony

During Appellant's testimony, he described how he conducted physical training (PT) for the data Marines during down-time at work. He had the Marines do pull-ups and other exercises. Over Defense objection, the military judge asked a panel member's three-part question.[39] The questions were whether Appellant was the only non-commissioned officer (NCO) present with junior Marines during these PT sessions, how long they lasted, and whether Appellant "PT'd" alongside the Marines or merely instructed them. When asked, Appellant responded there were other NCOs present, the sessions would last approximately 10 to 15 minutes, and he would PT with the junior Marines.

In rebuttal, the military judge, over Defense objection, allowed the Government to present additional testimony from LCpl Delta. The Government proffered LCpl Delta's testimony would directly rebut Appellant's testimony by describing how Appellant entered his barracks room at 0100—on the first night LCpl Delta joined 3/3—and made him conduct physical training while Appellant watched.

Defense objected to this testimony as improper under Military Rule of Evidence (M.R.E.) 403 and 404(b) and as a discovery violation. The Government demonstrated that it had in fact disclosed this statement to the Defense (but for some reason did not charge this conduct as a separate hazing offense). The military judge found that because the testimony was offered to specifically rebut Appellant's response to a member's question, and witness credibility was paramount, the danger of unfair prejudice did not substantially outweigh its probative value.

PFC Delta testified that on the day he arrived at 3/3, Appellant entered his barracks room (the door did not lock properly) at approximately 0100. Most of the battalion was at the PTA training exercise. PFC Delta had only met Appellant earlier in the day. Appellant told him, "Hey, wake up. The duty says there's too many cigarette butts downstairs. Let's go police call it."[40] PFC Delta interpreted that as an order and followed Appellant outside. Once outside, Appellant told him, "Skull drag and pick up all the cigarette butts."[41] A "skull drag" is a term for low-crawling using only one arm, causing one's head to drag along the ground. Appellant forced LCpl Delta to pick up

---

[39] App. Ex. XXIII.

[40] Record at 876.

[41] *Id*. at 877.

cigarette butts for about fifty feet on a grassy field. Then he ran with LCpl Delta around the barracks building "a couple of times."[42] Appellant then smoked a cigarette while he ordered LCpl Delta to perform various exercises. This episode left LCpl Delta "confused" but not "angry."[43]

II. DISCUSSION

A. The Military Judge's Instructions to the Members

1. Appellant waived any error when the military judge failed to give a mens rea instruction

We review the "adequacy of a military judge's instructions" de novo.[44] "The military judge bears the primary responsibility for ensuring that mandatory instructions . . . are given and given accurately."[45]

Appellant argued the military judge committed error by not providing the proper mens rea instruction under *United States v. Haverty*.[46] The Government conceded this point. Both parties agreed Appellant forfeited the issue by failing to object at trial, and that we should review for plain error – though they disagreed on what the result of that plain error analysis would be. However, in the pendency of this appeal, our superior court decided *United States v. Davis*,[47] which held that when a military judge asks for any final objections or requests for changes on proposed instructions, a simple "No changes, Sir"[48] constitutes a waiver. "Consequently, while we review forfeited issues for plain error, we cannot review waived issues at all because a valid waiver leaves no error for us to correct on appeal."[49]

---

[42] *Id*. at 878.

[43] *Id*. at 882.

[44] *United States v. McDonald*, 73 M.J. 426, 434 (C.A.A.F. 2014) (citing *United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006)).

[45] *Id.* (alteration in original) (quoting *United States v. Miller*, 58 M.J. 266, 270 (C.A.A.F. 2003)).

[46] 76 M.J. 199, 207 (C.A.A.F. 2017).

[47] No. 19-0104, 2020 CAAF LEXIS 76 (C.A.A.F. Feb. 12, 2020).

[48] *Id*. at *5.

[49] *Id*. at *6 (internal quotation marks omitted) (citing *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009)).

The military judge discussed the various instructions at length with both parties, including the objections Appellant had concerning consent. Prior to reading the instructions to the members, the military judge asked both parties, "But other than those objections that both sides have made previously, any additional objections from either side?"[50] Appellant's civilian trial defense counsel answered, "No, sir."[51] This constituted a waiver under *United States v. Davis*, leaving this court with no error to review.

Even if this was not somehow waived, it would still fail under a plain error review as there was no "unfair prejudicial impact on the members' deliberations."[52] Moreover, we would only review Specification 2 of Charge I (calling PFC Charlie a "beaner") because we find Specification 1 of Charge I (forcing PFC Bravo to drink alcohol) factually insufficient. The difference between strict liability and recklessness was minimal, if non-existent, for Appellant's defense. First, he denied he ever called PFC Charlie a "beaner," rather than contesting his intent. Second, we are persuaded that if the military judge had instructed the members they could only find Appellant guilty if they believed he "knew that there was a substantial and unjustifiable risk that the social harm the law was designed to prevent would occur and ignored this risk"[53] when he called PFC Charlie a "beaner," they still would have convicted him.

The Marine Corps Order lists "verbally berating another for the sole purpose of belittling or humiliating"[54] as an example of hazing. We need not dwell on the obvious problems that using such epithets can cause in a military environment. Despite PFC Charlie's confusion or belief the term did not apply to him, as he is not of Mexican descent, it is clear from the record Appellant's sole intent in making such a statement was to belittle or humiliate him. Even under a plain error analysis, we would still find no material prejudice to Appellant.

---

[50] Record at 926.

[51] *Id*.

[52] *Haverty*, 76 M.J. at 207. at 208 (citing *United States v. Knapp*, 73 M.J. 33, 37 (C.A.A.F. 2014)).

[53] *Id.* at 204-05 (quoting *Recklessly*, BLACK'S LAW DICTIONARY 1462 (10th ed. 2014)).

[54] Marine Corps Order (MCO) 1700.28B, para. 2b (20 May 2013). This MCO was Prosecution Exhibit 1.

2. The military judge did not err in not giving a Defense-drafted instruction on consent

"While counsel may request specific instructions from the military judge, the judge has substantial discretionary power in deciding on the instructions to give."[55] We review a military judge's decision not to give a proposed instruction for an abuse of discretion.[56] We test whether "(1) the [proposed instruction] is correct; (2) 'it is not substantially covered in the main [instruction]'; and (3) 'it is on such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation.' "[57] There is no error unless all three prongs are satisfied.[58]

Appellant's requested instruction to the members was based off a local, civilian pattern jury instruction. In pertinent part, the proposed instruction read:

> The defense has raised the issue of consent as part of [PFC Bravo, LCpl Delta, and LCpl Echo] to the alleged touching in Specifications [1, 2, and 4 of Charge II]. In any prosecution, the complaining witnesses['] consent to the conduct alleged or to the result thereof is a defense if the consent negatives an element of the offense.[59]

The military judge declined to give it because the proposed language was already generally covered by the standard Benchbook instruction.

The salient point Appellant wanted impressed upon the members was that the Government was required to prove beyond a reasonable doubt that his mistake of fact to the consent of some of the junior Marines was not reasonable. The standard Benchbook instruction surely conveyed this. It read, in part:

> The evidence has raised the issue of mistake of fact on the part of the accused concerning whether [PFC Bravo, LCpl Delta, and LCpl Echo] lawfully consented to the touching alleged

---

[55] *United States v. Zamberlan*, 45 M.J. 491, 492 (C.A.A.F. 1997) (quoting *United States v. Eby*, 44 M.J. 425, 428 (C.A.A.F. 1996)).

[56] *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993) (citing *United States v. Dennis*, 625 F.2d 782 (8th Cir. 1980)).

[57] *Id.* at 478 (quoting *United States v. Winborn*, 34 C.M.R. 57, 62 (C.M.A. 1963)).

[58] *United States v. Bailey*, 77 M.J. 11, 14 (C.A.A.F. 2017) (citations omitted).

[59] Record at 921.

> in Specifications 1, 2, and 4 of Charge II, or whether the touching alleged in these Specifications of Charge II was offensive.
>
> The accused is not guilty of the offense of assault consummated by a battery for these offenses if:
>
> (1) He mistakenly believed that [PFC Bravo, LCpl Delta, and LCpl Echo] lawfully consented to the touching related to themselves or mistakenly believed that the touching alleged as bodily harm would not be offensive to [PFC Bravo, LCpl Delta, and LCpl Echo]; and
>
> (2) If such belief on the accused's part was reasonable. To be reasonable the belief must have been based on information, or lack of it, which would indicate to a reasonable person that the alleged victim's [sic] consented to the touching or that the touching alleged as bodily harm would not be offensive to the alleged victims.[60]

The military judge did not tailor the Benchbook instruction to address whether PFC Bravo, LCpl Delta, and LCpl Echo could *lawfully* consent to being burned by a cigarette or to address the impact of the public policy concerns on the reasonableness of Appellant's mistake of fact as to consent. We address these matters below. However, the instruction requested by the Defense similarly failed to address these concerns and it further failed to indicate in any fashion that a mistake of fact, in order to be a valid defense to assault consummated by a battery, had to be reasonable. Nevertheless, the requested instruction, even if had been an accurate statement of the law, and unique from the standard Benchbook language, was not on "such a vital point in the case that the failure to give it deprived [Appellant] of a defense or seriously impaired its effective presentation."[61] We find the military judge did not abuse his discretion in rejecting the requested instruction, in favor of the standard Benchbook instruction on mistake of fact.

---

[60] App. Ex. XXX at 4. *See* Benchbook, para. 5-11-2.

[61] *Zamberlan*, 45 M.J. at 493; *see also United States v. Miller*, 58 M.J. 266, 270 (C.A.A.F. 2003) (requested pretrial confinement credit instruction not "vital").

B. The Member's Questions and the Government's Rebuttal to Appellant's Testimony

Appellant challenges both the military judge's ruling allowing a member's questions to be asked and the ensuing Government rebuttal testimony. We review both of these decisions to admit evidence for an abuse of discretion.[62]

The choice of an accused to testify is a momentous one.[63] Appellant chose to face cross-examination and the possibility of member questioning. He introduced the topic of his informal physical training sessions with the junior Marines. His own testimony invited the member's question.

The impact of LCpl Delta's rebuttal testimony appeared devastating to the Defense. Though uncharged, it was a clear act of hazing. Having received discovery materials describing the incident, Appellant was on notice the Government knew about the "skull drag" incident, yet he still introduced the topic of his informal physical training sessions with the junior Marines. The member's question was a relevant and fair one, which the military judge allowed after properly applying the M.R.E. 403 balancing test.

The questions, and their answers, appeared to provide more detail to Appellant's testimony concerning the nature of his physical training sessions with the Marines. Just because the answers *may* have opened the door to rebuttal testimony of uncharged misconduct is not relevant to our analysis of the military judge's decision to allow the questions to be asked.

"Rebuttal evidence, like all other evidence, may be excluded pursuant to M.R.E. 403 if its probative value is substantially outweighed by the danger of unfair prejudice."[64] "When the military judge conducts a proper balancing test [under M.R.E. 403], we will not overturn the ruling to admit the evidence unless there is a 'clear abuse of discretion.' "[65]

The rebuttal testimony was clearly prejudicial to Appellant, but the question before us is whether it was *unfairly* prejudicial. It went directly to his credibility, which is "an omnipresent issue,"[66] so we find its probative value

---

[62] *United States v. Hills*, 75 M.J. 350, 354 (C.A.A.F. 2016).

[63] *United States v. Murray*, 52 M.J. 671, 674 (N-M. Ct. Crim. App. 2000) (citing *United States v. Pennycooke*, 65 F.3d 9, 11 (3d Cir. 1995)).

[64] *United States v. Saferite*, 59 M.J. 270, 274 (C.A.A.F. 2004) (citing *United States v. Hursey*, 55 M.J. 34, 36 (C.A.A.F. 2001)).

[65] *Id.* (quoting *United States v. Ruppel*, 49 M.J. 247, 250 (C.A.A.F. 1998)).

[66] *Id.* at 273.

was substantial. "Unfairly prejudicial" evidence often appeals to members' sympathies, arouses intense human reactions, or triggers an instinct to punish.[67]

It is fair to say the testimony of LCpl Delta's "skull drag" at the hands of Appellant was likely to arouse in the members a certain amount of justified indignation that a sergeant of Marines would treat a junior Marine who just checked in to the unit in such fashion. While we acknowledge this is a close call, we find the military judge did not abuse his discretion because the evidence was highly probative of Appellant's credibility.

C. Legal and Factual Sufficiency of Appellant's Conviction for Forcing Private First Class Bravo to Drink Alcohol

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 Appellant's guilt beyond a reasonable doubt."[68] In conducting this unique appellate function, we take "a fresh, impartial look at 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."[69] When conducting this review, we are "limited to the evidence presented at trial."[70] Proof beyond a reasonable doubt does not mean, however, that the evidence must be free from conflict.[71]

---

[67] *See Carter v. Hewitt*, 617 F.2d 961, 972 (3d Cir. 1980) ("[Evidence] is unfairly prejudicial if it 'appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish,' or otherwise 'may cause a jury to base its decision on something other than the established propositions in the case.' ") (quoting 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE P 403(03), at 403-15 to 403-17 (1978)); *see also Ballou v. Henri Studios*, 656 F.2d 1147, 1155 (5th Cir. 1981) (" '[U]nfair prejudice' . . . is not to be equated with testimony simply adverse to the opposing party. . . . [It] 'means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.' ") (quoting Notes of the Advisory Committee on Proposed Federal Rules of Evidence, 28 U.S.C.A. Rule 403, at 102).

[68] *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (emphasis omitted) (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011).

[69] *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

[70] *United States v. Pease*, 75 M.J. 180, 184 (C.A.A.F. 2016) (quoting *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007)).

[71] *United States v. Goode*, 54 M.J. 836, 841 (N-M. Ct. Crim. App. 2001).

When testing for legal sufficiency, we look at "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."[72]

To sustain a conviction for violating the Marine Corps Order on hazing under Article 92, the Government must prove beyond a reasonable doubt that (1) the Order was in effect, (2) Appellant had a duty to obey it, and (3) he recklessly violated it.[73] While we find the conviction to be legally sufficient, we do not find beyond a reasonable doubt that Appellant forced PFC Bravo to drink alcohol, and therefore did not violate the Order.

The testimony of PFC Bravo is mixed, at best. During trial he maintained he drank alcohol because Appellant ordered him to do so. But we weigh his credibility in light of the fact that he could not recall previously telling the trial counsel he drank to "prove something to the Sergeant." He described the events of that evening as "informal," "calm," and a "social gathering."[74] He also admitted he drank because he was feeling peer pressure from the *group* and only "a little bit" because of Appellant's rank. The belief PFC Bravo was solely acting from "instant, willing obedience to orders" in all of his interactions with Appellant is undercut by the junior Marine's own actions. When Appellant later suggested the intoxicated PFC Bravo remain in his room, he felt free to say, "Nah, I want to go back upstairs and hangout."[75]

As PFC Bravo continued to drink alcohol, this time two of the other junior Marines were present. PFC Delta depicted Appellant as essentially forcing PFC Bravo to drink, but his testimony was directly contradicted by LCpl Echo. We also note LCpl Delta was the junior Marine subjected to Appellant's "skull drag," meaning that if any witness had a significant bias motive to make Appellant's actions seem worse than they were, it would be LCpl Delta. PFC Delta's testimony is also contradicted by LCpl Echo elsewhere.

It is clear a noncommissioned officer could use his rank to "force" a junior Marine to drink alcohol, such as by instructing junior Marines to sit in a

---

[72] *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)).

[73] MANUAL FOR COURTS-MARTIAL (MCM) pt. IV, para. 16.b.(1) (2016 ed.); *Haverty*, 76 M.J. at 207-08.

[74] Record at 499.

[75] *Id*. at 469, 791.

chair and have alcohol poured into their open mouths.[76] In the aforementioned *United States v. Haverty*, our superior court found the appellant's material rights were prejudiced when the military judge failed to give the proper mens rea instruction. In that case, an Army sergeant—who was also a squad leader—used a "serious" and "commanding" voice to order a newly arrived specialist to take shots of alcohol as a condition of helping with her gear.[77] Here, the evidence shows even less coercion, if any at all, and simply does not establish beyond a reasonable doubt that Appellant forced PFC Bravo to drink alcohol.

D. The Factual Sufficiency of "Burning" the Junior Marines

To sustain a conviction for assault consummated by a battery under Article 128, the Government must prove beyond a reasonable doubt that (1) Appellant did bodily harm to another, and (2) that he did so with unlawful force or violence.[78] "An 'assault' is an attempt or offer with unlawful force or violence to do bodily harm to another . . . . It must be done without legal justification or excuse and without the lawful consent of the person affected. 'Bodily harm' means any offensive touching of another, however slight."[79] "A 'battery' is an assault in which the attempt or offer to do bodily harm is consummated by the infliction of that harm."[80] If the victim lawfully consented, the act is neither an assault nor a battery, because lawful consent "convert[s] what might otherwise be offensive touching into nonoffensive touching . . . ."[81] Even if a victim did not actually consent, an accused cannot be convicted of assault consummated by a battery if he was reasonably mistaken that the victim lawfully consented:

> Except as otherwise provided in this subsection, it is a defense to an offense that the accused held, as a result of ignorance or

---

[76] *United States v. Simmons*, 63 M.J. 89, 95 (C.A.A.F. 2006) (Crawford, J., dissenting) ("We had younger Marines . . . come in and sit in the chair and they would hold their heads back and we poured alcohol down their mouth for a couple of seconds and then get them up and bring another one in.") (quoting the appellant in that case).

[77] *Id*. at 202.

[78] MCM pt. IV, para. 54.b.(2).

[79] *Id.*, para. 54.c.(1)(a).

[80] *Id.*, para. 54.c.(2)(a).

[81] *United States v. Johnson*, 54 M.J. 67, 69 (C.A.A.F. 2000) (quoting *United States v. Greaves*, 40 M.J. 432, 633 (C.M.A. 1994)).

> mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.[82]

Because assault consummated by a battery requires only a general intent, the mistake as to consent must not only have existed in the mind of the accused—that is, he must have *actually believed* at the time of his actions that the victim consented—but his mistaken belief must *also have been reasonable* under all the circumstances.[83]

1. The evidence indicates Appellant actually believed the junior Marines consented to the burning

As stated above, 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 Appellant's guilt beyond a reasonable doubt."[84] After careful review of the evidence at trial and the parties' pleadings, we find Appellant had an honest, though mistaken, belief the junior Marines consented to being burned by the cigarette.

We note the witnesses provided conflicting and impeached testimony on the question of whether they pulled their own shirts down to allow Appellant to burn their chests. PFC Bravo testified Appellant pulled his shirt down, but then could not recall if he had previously told the trial counsel that he pulled his own shirt down, before finally settling on an answer that either he or Appellant pulled his shirt down. PFC Echo testified he pulled his own shirt down, which oddly enough, was contradicted by LCpl Delta, who testified

---

[82] Rule for Courts-Martial (R.C.M.) 916(j)(1) (2016). The same language is also contained in R.C.M. 916(j)(1) (2019).

[83] *Johnson*, 54 M.J. at 69.

[84] *Rosario*, 76 M.J. at 117.

Appellant pulled LCpl Echo's shirt down. We also note none of the junior Marines testified to any physical or verbal resistance while this was happening, they continued socializing for some time afterwards, and they did not initiate reporting of these events to anyone. We cannot conclude beyond a reasonable doubt that Appellant did not honestly, though apparently mistakenly, believe that under these circumstances the junior Marines consented to being burned.

2. Appellant's mistaken belief the junior Marines consented is contrary to public policy and was therefore not reasonable

Consent is sometimes, but not always, a defense to a battery.[85] In order for consent—or a reasonable mistake of fact as to consent—to be a defense, the consent must be lawful. For example, consent induced by fraud in the factum is not lawful consent.[86] Likewise, consent is lawfully irrelevant to certain crimes involving another, such as engaging in a mutual affray,[87] dueling,[88] aggravated assault,[89] carnal knowledge or rape of a child under age 12,[90] or bigamy.[91] Here, the junior Marines could have unambiguously consented to being burned by Appellant with a cigarette and the conduct would

---

[85] *See* LAFAVE, CRIMINAL LAW 473 (6th ed. 2017).

[86] *United States v. Carr*, 65 M.J. 39, 41-42 (C.A.A.F 2007) (discussing recognized distinction between agreement to engage in certain activities induced by *fraud in the factum*, in which perpetrator deceives victim as to his identity, for example, convincing victim he is actually victim's spouse, or as to nature of agreed upon act, such as claiming as bona fide medical procedure and not sexual encounter—and *fraud in the inducement*, in which deception is limited to persuasive collateral statements, such as "no, I'm not married" or "of course I'll respect you in the morning") (citations omitted).

[87] *United States v. Wilhelm*, 36 M.J. 891, 893 (A.F.C.M.R. 1993) (holding "any consent implied in mutual combat is void as a matter of law"); R.C.M. 916(e)(4) (engaging in mutual combat results in loss of right to self-defense).

[88] *United States v. Bygrave*, 46 M.J. 491, 493 n.4 (C.A.A.F. 1997).

[89] *See*, *e.g.*, *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016) ("An individual cannot consent to aggravated assault.") (citing *Bygrave*, 46 M.J. at 493); *United States v. Outhier*, 45 M.J. 326, 330 (C.A.A.F. 1996) ("[O]ne cannot consent to an act which is likely to produce grievous bodily harm or death.") (citing R. PERKINS & R. BOYCE, CRIMINAL LAW 155 (3d ed. 1982)); *United States v. Brantner*, 28 M.J. 941, 944 (N.M.C.M.R. 1989)).

[90] *Bygrave*, 46 M.J. at 493 n.4. (carnal knowledge).

[91] *Id.*

still have been illegal. Often overlooked is the harm to the general public when crimes occur. Victims' personal desires may not outweigh the need to curb such harm. "[A] criminal offense is a wrong affecting the general public, at least indirectly, and consequently cannot be licensed by the individual directly harmed."[92] Certain circumstances cannot evade criminal prosecution merely because one or both parties consented to the touching.

However, for many non-aggravated assaults consummated by a battery, consent or a reasonable mistake of fact as to consent would provide a valid defense. For example, mistake of fact can apply to certain touchings that are not generally objectively offensive, such as touching buttons on a blouse[93] or backrubs.[94] "Other things being equal, consent applies more to offensive touchings and insignificant bodily injuries than for hard blows or more serious injuries."[95] Here, we are considering cigarette burns, which were not charged and—under these facts—might not have qualified as aggravated assaults under Article 128,[96] but they simply cannot be equated to an unwelcome backrub or other minor "offensive touchings."

During trial, the military judge heard argument from both parties on whether the "mistake of fact" to consent instruction should be given to the members. The Government argued that an Army Court of Criminal Appeals case, *United States v. Arab*,[97] should prohibit the military judge from provid-

---

[92] *People v. Ford*, 43 N.E.3d 193, 198 (Ill. App. 3d 2015) (alteration in original) (quoting 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.5(a), at 504 (2d ed. 2014).

[93] *United States v. Bonano-Torres*, 31 M.J. 175, 180 (C.M.A. 1990) (finding legal error by lower court in holding unbuttoning of blouse did not legally constitute assault consummated by a battery).

[94] *Johnson*, 54 M.J. 67 (junior Airman can consent to public, workplace backrubs by senior noncommissioned officer).

[95] *Ford*, 43 N.E.3d at 198 (quoting LAFAVE § 16.2(e), at 564 (2d ed. 2014)).

[96] MCM, pt. IV, para. 54.b.(4)(b). "Grievous bodily harm" is defined as serious bodily injury. It does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of th4e body, serious damage to internal organs, and other serious bodily injuries." MCM pt. IV, para. 54.c.(4)(a)(iii). *See also*, Benchbook, para. 3-54-9.b…("Grievous bodily harm means fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious injuries. . . . Light pain, minor wounds, and temporary impairment of some organ of the body do not ordinarily individually or collectively establish grievous bodily harm.").

[97] 55 M.J. 508 (A. Ct. Crim. App. 2001).

ing a mistake of fact instruction. The military judge disagreed stating, "If they all agree to be burned as some sort of rite of passage in being comm[unications] Marines and he is being charged with assault, and [sic] consent is a defense."[98]

The junior Marines were all subject to a painful burn that left noticeable, and possibly permanent, scars on them.[99] Appellant knew his conduct was wrongful, regardless of the junior Marines' apparent consent, as he took measures to reduce the likelihood of detection. This is a clear instance of hazing and could have been charged as such. The Government has a clear and unequivocal right to criminalize this type of behavior, regardless of the consent of the victims. We draw parallels from the laws applicable to hazing; hazing is criminalized in the military and in almost every state, and consent is not a defense.[100]

But our analysis does not turn on the rank disparity between Appellant and his victims. Even if an offense took place between two Marines of equal rank, with no attendant hazing implications,[101] who agreed to burn each other with cigarettes, we find the analysis in *Arab* persuasive for considering such conduct criminal—regardless of consent—based on society's need to protect victims from this type of harm. The operative term is *lawful* consent.

In *Arab*, the appellant had a "decidedly peculiar marital relationship."[102] During intercourse, he tied his wife with flex-cuffs, dragged her by her hair, made small cuts with a knife in his wife's abdomen, burned her with ciga-

---

[98] Record at 770.

[99] The Government entered Prosecution Exhibits 2, 3, and 4, which were pictures of the junior Marines and their scars.

[100] Almost all states have criminalized hazing. *See*, *e.g.*, North Carolina (N.C. GEN STAT. ANN. § 14-35); California (CAL. PENAL CODE § 245.6); South Carolina (S.C. CODE ANN. § 16-3-510); and Virginia (VA. CODE ANN. § 18.2-56). Hawaii, the venue of this court-martial, has not. South Carolina legislatively barred consent as a defense to hazing (S.C. CODE ANN. § 16-3-540). *See also*, MCO 1700.28B, para. 2a, 3f (20 May 2013) ("Actual or implied consent to acts of hazing are not a defense to violating this Order.").

[101] We do not imply that hazing cannot be committed against someone of the same, or even senior, rank as an accused. *See* MCO 1700.28B, para. 2a, 2d (20 May 2013). For example, a "Senior Drill Instructor" (SDI) may be junior in rank to his or her "Green Belt" drill instructors who assist the SDI in training Marine recruits. If the junior-in-rank SDI is "hat hazing" the senior-in-rank Green Belt drill instructors, then that is still hazing and consent is not a defense.

[102] *Arab*, 55 M.J. at 513.

rettes on her nipple and abdomen, and then cut his name in large letters on her buttocks. The court was "unwilling . . . to recognize consent as a defense"[103] to such injuries and further stated, "We need not decide today exactly where the line is drawn on 'lawful consent' or 'unlawful force or violence.' We are satisfied that the appellant's conduct was well beyond it."[104]

Similarly, we find Appellant's conduct was well beyond the sort of "offensive touching," such as a backrub, the type of which would be subject to the defense of consent and mistake of fact at trial. We affirm his convictions for assault consummated by a battery because the apparent consent was not lawful and hence not reasonable. As a matter of law, we hold that under these circumstances a victim cannot consent to this type of injury.

E. Sentence Reassessment

Having disapproved Specification 1 of Charge I, we must now consider whether we can reassess the sentence pursuant to *United States v. Winckelmann*.[105] We consider the following factors:

> (1) [Whether there have been] [d]ramatic changes in the penalty landscape and exposure[;]
>
> (2) Whether an appellant chose sentencing by members or a military judge alone[;] . . .
>
> (3) Whether the nature of the remaining offenses capture[s] the gravamen of criminal conduct included within the original offenses and, in related manner, whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses[; and]
>
> (4) Whether the remaining offenses are of the type that judges of the courts of criminal appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial.[106]

After analyzing the *Winckelmann* factors, we can confidently and reliably determine that Appellant's sentence would be unchanged. Appellant was convicted of committing assault consummated by a battery on three junior

---

[103] *Id*. at 518.

[104] *Id*. at 519.

[105] 73 M.J. 11 (C.A.A.F. 2013).

[106] *Id*. at 15-16 (citations omitted).

Marines by burning them with a cigarette, another assault consummated by a battery by punching another junior Marine in the stomach, and two violations of the Marine Corps Order on hazing by directing a racial slur at the junior Marine he punched in the stomach and by forcing one of the junior Marines he burned with a cigarette to drink alcohol. The members sentenced Appellant to be reduced to pay-grade E-1, confinement for 190 days, and a bad-conduct discharge. They were aware he had spent 178 days in pretrial confinement when they sentenced him.

While not unimportant, the specification for forcing one of the junior Marines to drink alcohol is only a small part of the overall convictions for Appellant. We do not see a dramatic change in the sentencing landscape with the dismissal of this one specification. We also see that the nature of the remaining offenses—primarily the burning of the junior Marines with a cigarette—"captures the gravamen of criminal conduct included within the original offenses."[107] This sort of hazing is also the type of misconduct that is readily familiar to military appellate judges. For these reasons we are satisfied that the members would have awarded the same sentence to Appellant and that a rehearing for sentencing would "merely substitute one group of nonparticipants in the original trial for another."[108]

III. CONCLUSION

After careful consideration of Appellant's assigned errors, the record of trial, and the parties' submissions, we conclude the findings for Specification 2 of Charge I and for Charge II are correct in law and fact. We find the conviction for Specification 1 under Charge I to be factually insufficient and it is hereby **DISMISSED WITH PREJUDICE.** Following this action, we find no error materially prejudiced Appellant's substantial rights. Arts. 59, 66, UCMJ. We find the reassessed sentence is correct in law and fact. Accordingly, the findings as modified and sentence as reassessed are **AFFIRMED**.

The supplemental CMO shall reflect an accurate summary of Appellant's pleas and findings.[109] The CMO shall reflect that Appellant was charged with and pleaded not guilty to part (a) of Specification 2 under Charge II,

---

[107] *Id*. at 16.

[108] *Id*. at 15.

[109] *United States v. Crumpley*, 49 M.J. 538, 539 (N-M. Ct. Crim. App. 1998).

"(a) unlawfully strike PFC [JM] in the stomach with his fist." This sub-part was withdrawn by the Government after arraignment.[110]

Senior Judge TANG and Judge LAWRENCE concur.

FOR THE COURT:

RODGER A. DREW, JR.
Clerk of Court

[110] Record at 22-23.