UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ANDREW C. CERTA
United States Air Force

ACM 38037

05 September 2013

Sentence adjudged 22 July 2011 by GCM convened at Ellsworth Air Force Base, South Dakota. Military Judge: William C. Muldoon.

Approved Sentence: Bad-conduct discharge, confinement for 3 years and 3 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Ja Rai A. Williams; Captain Travis K. Ausland; and David P. Sheldon (civilian counsel).

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Martin J. Hindel; and Gerald R. Bruce, Esquire.

Before

ORR, HELGET, and WEBER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Senior Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of one specification of aggravated sexual assault, two specifications of wrongful sexual contact, two specifications of forcible sodomy, one specification of the lesser included offense of sodomy without consent,[1] one specification of obstruction of justice, one specification of dereliction of duty, one specification of

[1] The appellant was charged with the greater offense of forcible sodomy, in violation of Article 125, UCMJ, 10 U.S.C. § 925.

false official statement, and one specification of malingering, in violation of Articles 120, 125, 134, 92, 107, and 115, UCMJ, 10 U.S.C. §§ 920, 925, 934, 892, 907, 915.[2] The members sentenced the appellant to a bad-conduct discharge, confinement for 3 years and 3 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the adjudged sentence.

Before this Court, the appellant assigned six errors: (1) Military Rule of Evidence 413 unconstitutionally lessens the Government's burden of proof when the members are instructed that, if they find that it was more likely than not that one charged offense occurred, they could use it as propensity evidence against the other charged offenses; (2) The military judge erred in allowing admission of the DSM-IV diagnostic criteria for the medical condition of malingering as evidence that the appellant committed the offense of malingering; (3) The military judge violated the appellant's Sixth Amendment[3] right to confront the complaining witnesses about how and why they first reported the alleged offenses to the Air Force Office of Special Investigations (AFOSI); (4) The Government failed to state the offense in Charge IV of obstruction of justice, in violation of Article 134, UCMJ, when it failed to allege a terminal element; (5) The evidence is factually and legally insufficient to show that the appellant forcibly sodomized ME, in violation of Article 125, UCMJ; and (6) The evidence is factually and legally insufficient to show that the appellant sexually assaulted RM, in violation of Articles 120 and 125, UCMJ. We agree in part. For the reasons stated below, the finding of guilty to Charge IV and its Specification is set aside and dismissed. However, the remaining findings and the sentence, as reassessed, are affirmed as they are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.

Background

The offenses charged under Article 120 and 125, UCMJ, involve three alleged victims. The first alleged victim, RM, was a 24-year-old civilian who had lived in Rapid City, South Dakota (SD) most of her life. She met the appellant in the fall of 2009 at her friends' house. At some point during her first encounter with the appellant, they engaged in consensual oral, anal, and vaginal sex. RM saw the appellant at one point after that first night, but did not talk to him again until the night of 20 February 2010.

Before heading to the bars with her friends, RM drank two beers at a friend's house around 2100. About an hour later, RM and her friends went to Dublin Square, a

[2] Consistent with his pleas, the appellant was found not guilty of one specification of aggravated sexual assault, one specification of aggravated sexual contact, and one specification of assault consummated by battery, in violation of Articles 120 and 128, 10 U.S.C. §§ 920, 928. Additionally, one specification of wrongful sexual contact, in violation of Article 120, UCMJ, was dismissed without prejudice by the military judge. The three specifications of wrongful sexual contact were charged as lesser included offenses of the two specifications of aggravated sexual assault and the specification of aggravated sexual contact.

[3] U.S. CONST. amend. VI.

local Rapid City bar, where she drank two beers and a shot known as a "Miami." As she and her friends departed Dublin Square and were walking towards Budd Ugly's, another local establishment, RM heard the appellant call her name. They engaged in a brief conversation which ended with RM telling the appellant that she and her friends were headed to Budd Ugly's. RM testified that, at this point, she was beginning to feel intoxicated.

While at Budd Ugly's, RM drank at least two beers and three shots. Although she could still walk and was aware of her surroundings, she felt the effects of the alcohol were intensifying. RM and her friends then returned to Dublin Square where RM consumed a couple more beers. RM testified that she was dancing that night which usually occured only when she was drunk. While at Dublin Square, RM ran into the appellant again while smoking a cigarette outside. The appellant suggested that they become regular sexual partners with no strings attached because he felt they were into the same things. RM agreed to go home with the appellant to have sex. They left the bar at approximately 0130 on 21 February 2010.

RM began to have memory problems at this point and did not remember the drive to the appellant's apartment. She also did not know where he lived. She was not wearing a jacket even though the temperature was 15 degrees Fahrenheit with a wind chill of six degrees Fahrenheit. She testified that it usually took about six or seven beers for her to become intoxicated and that she tended to experience blackouts if she also drank shots.

The next thing RM remembered was sitting on the appellant's living room floor with the appellant and his roommate. She was exhausted and felt extremely drunk. She next remembered the appellant suggesting that they take a shower and then engaging in sexual intercourse with him in the shower. While in the shower, RM started feeling ill, so she exited the shower and went to the toilet to vomit. Sometime after she vomited, the appellant gave RM some mouthwash so she went to the sink to rinse her mouth out. While rinsing her mouth out, the appellant came up behind her, grabbed her hands and pinned them behind her back, and proceeded to have vaginal sex with her. RM could feel the bathroom counter pressing up against her body. Her head was spinning and she felt like the situation was beyond her control.

RM's memory then went blank and the next thing she recalled was having vaginal sex on the appellant's bed. The appellant had bonded her hands behind her back. She remembered being on her knees with her chest and the side of her face lying on the bed. The appellant pushed her head into the bed, making it difficult to breathe. RM did not fight back as she was exhausted and felt helpless. She testified, "I just wanted it to be over." Eventually, the appellant started having anal sex with RM, to which she firmly told him, "no." The appellant asked, "Why, you let me do it last time?" RM responded, "I don't care. No." The appellant engaged in anal sex four more times. RM said "no" each time. The appellant continued until he ejaculated all over her back.

RM did not remember how she got cleaned up, but she did remember putting her clothes on and going outside to call a male friend to come and pick her up because she was scared and wanted to leave. After hanging up with her friend, she turned around and saw the appellant standing at the door. He then told her in a firm voice, "You're not going anywhere." Sometime later, still feeling exhausted, she went back to the appellant's bedroom to lay on his bed. The next thing she remembered was waking up with the appellant engaging in vaginal sex. She also recalled being aware, while drifting in and out of consciousness, that her vagina was completely dry and intercourse was painful. RM told the appellant he was hurting her, so he spit on her vagina and resumed vaginal intercourse.

The following morning, after waking up and getting dressed, the appellant informed RM that there was urine on her side of the bed, he found it to be disgusting, and instructed RM to clean it up. RM testified that the entire night she felt the appellant was overpowering her and would not listen to her when she told him no.

The second alleged victim, Airman First Class (A1C) AG, met the appellant through a friend in October 2009. They would go out drinking together on weekends and, in November 2009, they started a consensual sexual relationship which continued until February 2010. On one specific occasion in early November 2009, A1C AG and the appellant went out drinking in Rapid City, and then returned to the appellant's dorm room. A1C AG testified that she had "a good amount" to drink that night, did not remember everything that had occurred while they were out at the bars, and did not recall how she was transported to the appellant's dorm room.

A1C AG remembered the appellant opening the door to his room but did not remember what occurred until her next memory of being in the shower with him. A1C AG testified that she found herself up against the wall under the showerhead with the appellant's finger in her anus. She started crying loudly and told him, "no." She testified that she said "no" at least five times before the appellant removed his finger. Although he removed his finger, the appellant proceeded to insert his penis into her anus. A1C AG again cried loudly and said "no" after which the appellant finally stopped. A1C AG testified that during this ordeal she was terrified and too scared to leave. Afterwards, A1C AG and the appellant left the shower and went to his bed. The appellant held A1C AG and apologized. Based on this, she engaged in consensual sex with the appellant.

Sometime shortly before 9 March 2010, the appellant called A1C AG and indicated that he had been called into AFOSI as someone had pressed charges against him. The appellant requested A1C AG to delete his text messages, phone calls, and phone number. He also didn't want her to mention the "one" incident and to sugarcoat

everything. However, A1C AG went to AFOSI and instead told them what actually happened.

The third alleged victim, ME, was a former A1C assigned to Ellsworth Air Force Base (AFB), SD. ME testified that she first met the appellant at a friend's birthday party around February 2010. The next time she saw the appellant was on 5 March 2010 when she went over to his apartment for dinner and to watch a movie. They eventually engaged in kissing and at one point the appellant tried to put his hand under ME's shirt but she rebuffed him. ME felt the appellant was "a little too persistent" so she decided to be "kind of on [her] guard with him."

Sometime later in March 2010, ME returned to the appellant's apartment to play some video games with a group of friends. Upon seeing ME, the appellant attempted to kiss her, but she turned her cheek to avoid him. The appellant appeared to be upset by her reaction. ME testified that several people at the party informed her that the appellant had indicated she was his girlfriend, but ME did not want to be his girlfriend. Later in the evening, a group of people decided to go downtown and asked ME to join them. ME initially wanted to go, but she observed that the appellant was upset with the idea so she elected to stay for about half an hour to calm him down and then leave to catch up with them. Everyone left except ME, the appellant, and the appellant's friend who was sleeping on the couch.

ME does not recall everything that happened next, but she does recall being in the kitchen sitting on the kitchen counter. At some point they started kissing. ME acquiesced to the kissing, but she kept her hands on the counter and did not embrace the appellant. The appellant then removed ME from the counter and they ended up on the floor. The appellant removed his pants and placed his penis near ME's face as he wanted her to perform oral sex. However, ME kept her mouth closed. She testified that the appellant placed one hand on his penis with his other hand behind her head and tried to force his penis into her mouth. ME resisted by moving her mouth from side to side. She tried pushing him on his thighs and hips but that just made the appellant try even harder. ME said she felt scared and helpless so she decided to perform oral sex on the appellant because she thought the sooner it was over, the safer she would be. She testified that the appellant was pretty built and strong. ME thought about screaming because there was a guy on the couch, but she didn't know who he was and whether or not he would help her. When the appellant finished, ME got up and spit the ejaculate out in the sink. She then went into the bathroom and texted a couple of friends for assistance.

The remaining three charges of malingering, dereliction in duty, and false official statement all pertain to the appellant faking an injury to avoid duty.

Beginning on 30 September 2010, the appellant went to the emergency room complaining of severe leg pain. He was initially diagnosed with rhabdomyolysis, which

is the breakdown of muscle tissue. Within six days, lab results showed that his condition had resolved itself, yet the appellant continued to complain of severe leg pain (a 10 out of 10 on the pain scale) and indicated he couldn't walk. He was initially placed on quarters until 8 December 2010. During his treatment, the appellant was sent to Denver, Colorado, where he was seen and evaluated by a rheumatologist and a neurologist. They performed an "EMG," which is a nerve conduction study which looks at how the muscles contract. No abnormalities were found; however, because the appellant did not assist in contracting his muscles during the study, the doctors did not consider it a good test. Consequently, a muscle biopsy was done to check for any disease in the muscle. The biopsy results were normal. On 9 December 2010, the appellant was referred to physical therapy at Ellsworth AFB. From December 2010 to February 2011, his physical therapy employed several pain control modalities such as electrical stimulation and joint mobilization, but nothing worked. On the appellant's last visit on 18 February 2011, it took the appellant much longer than 10 minutes to climb 10 stairs. The physical therapist testified that the appellant would not have been able to walk without the aid of crutches or a wheelchair on 18 February 2011.

On 1 March 2011, the appellant requested that his treating physician place him on quarters due to severe pain and stress at work. He was on crutches and said that he couldn't walk. The Government called several witnesses who saw the appellant drive from his house to a place called "The Weight Room" on 3 March 2011. The appellant was able to drive, walk normally in the parking lot, and use a series of weightlifting equipment, including a calf machine and a leg extension machine. The appellant's provider testified that the appellant should not have been able to perform these exercises considering the leg pain he had complained of and that these exercises violated the terms of his no-exercise profile. Having seen a video of the appellant using the machines at "The Weight Room," his physical therapist testified that it was a "remarkable turnaround" from 18 February 2011. The Government also called a few other witnesses who testified they saw the appellant walk normally in January 2011.

Military Rule of Evidence 413

In his first assignment of error, the appellant alleges that Mil. R. Evid. 413 is unconstitutional by impermissibly lessening the Government's burden of proof when the members are instructed that, if they find it was more likely than not that one charged offense occurred, they could use it as propensity evidence against the other charged offenses.

The constitutionality of a statute is a question of law which we review de novo. *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000) (citing *United States v. Brown*, 25 F.3d 307, 308 (6th Cir. 1994)). A rule of evidence is presumed constitutional unless lack of constitutionality is clearly and unmistakably shown. *Id*. at 481 (citing *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998)).

An appellant overcomes the presumption of constitutionality by showing that the challenged rule of evidence "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id*. (quoting *Montana v. Egelhoff*, 518 U.S. 37, 43-45 (1996)). Whether a jury was properly instructed is a question of law reviewed de novo. *United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F. 2007) (citation omitted). When an appellant first challenges the constitutionality of a statute as applied on appeal, the matter is generally considered to be forfeited and reviewed under a plain error standard. *United States v. Goings*, 72 M.J. 202, 205 (C.A.A.F. 2013) (citations omitted). Upon plain error review, to prove that Mil. R. Evid. 413 is unconstitutional as applied to him, the appellant "must point to particular facts in the record that plainly demonstrate why his interests should overcome Congress' and the President's determinations that his conduct be proscribed." *Id.* (citing *United States v. Vazquez*, 72 M.J. 13, 16-21 (C.A.A.F. 2013); *United States v. Ali*, 71 M.J. 256, 266 (C.A.A.F. 2012)).

The appellant argues that Mil. R. Evid. 413 is unconstitutional as applied to this case because the military judge improperly instructed the court members on the use of propensity evidence and thereby "sanctioned the bootstrapping of verdicts." At trial, the military judge followed the Department of the Army Pamphlet 27-9, *Military Judge's Benchbook* [hereinafter "*Benchbook*"], model instruction regarding Mil. R. Evid. 413 to instruct that:

> In Charges I and II, there are eight specifications alleging some form of sexual assault. Evidence that the accused committed any of the sexual assaults alleged in any specification may have no bearing on your deliberations in relation to any other specification alleging a sexual assault, unless you first determine by a preponderance of the evidence, that is more likely than not, the offense or offenses alleged in the other specification or specifications occurred. If you determine by a preponderance of the evidence the offense or offenses alleged in other specifications occurred, even if you are not convinced beyond a reasonable doubt that the accused is guilty of that offense or those offenses, you may nonetheless then consider the evidence of that offense for its bearing on any matter to which it is relevant in relation to the other specifications in Charges I and II. You may also consider the evidence of such other act or acts of sexual assault for its tendency, if any, to show the accused's propensity or predisposition to engage in sexual assault.
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> You may not, however, convict the accused solely because you believe he committed these other offenses or solely because you believe the accused has a propensity or predisposition to engage in sexual assault. In other words, you cannot use this evidence to overcome a failure of proof in the Government's case, if you perceive any to exist. The accused may be

> convicted of an alleged offense only if the prosecution has proven each element beyond a reasonable doubt.
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> Each offense must stand on its own and proof of one offense carries no inference that the accused is guilty of any other offense. In other words, proof of one sexual assault creates no inference that the accused is guilty of any other sexual assault. However, it may demonstrate that the accused has a propensity to commit that type of offense. The prosecution's burden of proof to establish the accused's guilt beyond a reasonable doubt remains as to each and every element of each offense charged. Proof of one charged offense carries with it no inference that the accused is guilty of any other charged offense.[4]

In *Wright*, our superior court held Mil. R. Evid. 413 to be constitutional under both the Due Process and Equal Protection Clauses. The Court found that admission of such evidence is not so extremely unfair as to violate fundamental conceptions of justice. *Wright*, 53 M.J. at 48. In *Schroder*, a case addressing a military judge's instruction regarding the use of propensity evidence of child molestation under Mil. R. Evid. 414, which is similar in substance to Mil. R. Evid. 413, our superior court prescribed that, "Although the law does not mandate a formulaic instruction, it is essential that where, as here, the members are instructed that [Mil. R. Evid.] 414 evidence may be considered for its bearing on an accused's propensity to commit the charged crime, the members must also be instructed that the introduction of such propensity evidence does not relieve the [G]overnment of its burden of proving every element of every offense charged. Moreover, the factfinder may not convict on the basis of propensity evidence alone." *Schroder*, 65 M.J. at 56.

We find Mil. R. Evid. 413, as applied in this case, to be constitutional. In following the *Benchbook's* model instruction, the members were appropriately advised on the proper use of propensity evidence and that such evidence does not relieve the Government of its burden to prove each and every element of every charged offense. The appellant has failed to show "why his interests should overcome Congress' and the President's determinations that his conduct be proscribed." *See Goings*, 72 M.J. at 205. Accordingly, this assigned error is without merit.

Medical Malingering Evidence

The appellant asserts the military judge erred in allowing admission of the DSM-IV diagnostic criteria for the medical condition of malingering as evidence that the appellant committed the offense of malingering under Article 115, UCMJ.

[4] The appellant did not object to this instruction at trial.

This Court reviews a military judge's decision to admit evidence for an abuse of discretion and will not overturn the military judge's ruling unless it is "'arbitrary, fanciful, clearly unreasonable, or clearly erroneous,' or influenced by an erroneous view of the law." *United States v. Thompson*, 63 M.J. 228, 230 (C.A.A.F. 2006) (quoting *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)). Objections not raised at trial are reviewed for plain error. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). To establish plain error, the appellant bears the burden of demonstrating the following: (1) there was error; (2) such error was plain, clear, or obvious; and (3) the error materially affects substantial rights resulting in prejudice. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005).

During its case-in-chief, the Government called Dr. (Major) Cecilia Ficek, a family physician who was also the Chief of the Medical staff at Ellsworth AFB. She had also been the appellant's treating physician since 8 December 2010. She was recognized as an expert in the "field of medicine." During her testimony, Dr. Ficek informed the members that, since she could not identify a cause for the appellant's pain, there were three potential differential diagnoses for the appellant's lower extremity pain, consisting of unknown etiology, chronic pain syndrome, and medical malingering. She stated that the medical diagnosis of malingering is found under DSM-IV, V65.2, which read as follows:

> The essential feature of Malingering is the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution, or obtaining drugs. Under some circumstances, Malingering may represent adaptive behavior, for example, feigning illness while a captive of an enemy during wartime.
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> Malingering should be strongly suspected if any combination of the following is noted: (1) Medico legal context of presentation. Example, the person is referred by an attorney to the clinician for exam; (2) Marked discrepancy between the person's claimed stress or disability and the objective findings; (3) Lack of cooperation during the diagnostic evaluation and complying with prescribed treatment regimen; and (4) The presence of Antisocial Personality Disorder.

Dr. Ficek concluded her testimony by stating that she did find two or more of the above-listed factors for medical malingering, but that she ultimately could not conclude with any degree of medical certainty as to a diagnosis for the appellant. Further, on cross-examination, Dr. Ficek distinguished medical malingering from legal malingering, but was only willing to provide an opinion as to medical malingering. There was no objection to Dr. Ficek's testimony on this issue.

Prior to the parties' arguments on findings, the military judge instructed the court members on the elements of malingering under Article 115, UCMJ, using the model instruction from the *Benchbook*. There was no objection to this instruction.

The appellant alleges that by allowing the introduction of the DSM-IV criteria for medical diagnosis of malingering, it created a substantial risk that the members would be confused and find the appellant guilty of malingering under Article 115, UCMJ, based on the much broader medical criteria. The appellant also cites to the Government's findings argument, wherein the trial counsel argued, "[T]he only medical diagnosis based on any objective finding is malingering. He's guilty of those offenses as well." The appellant argues that the military judge should have given a limiting instruction to ensure the members evaluated the Government's evidence in terms of statutory elements of malingering under Article 115, UCMJ, rather than based on the medical criteria for malingering.

The appellant has failed to show any error occurred in this case. Considering the overwhelming evidence from the numerous witnesses, the two videos showing the appellant using weightlifting machines with his legs, the military judge's instructions on the offense of malingering, which were directly from the *Benchbook*, and Dr. Ficek's testimony distinguishing medical from legal malingering, the admission of the DSM-IV criteria on medical malingering was not error, plain or otherwise.

Sixth Amendment Right to Confrontation

The appellant alleges that his Sixth Amendment right to confrontation was violated when the military judge did not permit his trial defense counsel to cross-examine the alleged victims about how and why they first reported the alleged offenses to the AFOSI.

A military judge's evidentiary ruling that allegedly violates the appellant's confrontation rights is reviewed for an abuse of discretion. *United States v. Moss*, 63 M.J. 233, 236 (C.A.A.F. 2006); *United States v. Israel*, 60 M.J. 485, 488 (C.A.A.F. 2005). Should we find the military judge abused his discretion, the case will be reversed unless the error is harmless beyond a reasonable doubt. *Id.* "Trial judges have broad discretion to impose reasonable limitations on cross-examination, 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *United States v. McElhaney*, 54 M.J. 120, 129 (C.A.A.F. 2000) (quoting *Delaware v. Van Arsdall*, 475 U .S. 673, 679 (1986)). That discretion, however, is not unfettered. An accused's "right under the Sixth Amendment to cross-examine witnesses is violated if the military judge precludes [him] from exploring an entire relevant area of cross-examination." *Israel*, 60 M.J. at 486 (citing *United States v. Gray*, 40 M.J.

77, 81 (C.M.A. 1994)). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mil. R. Evid. 401.

At trial, while cross-examining AG, the trial defense counsel asked, "At the time you were interviewing with [AF]OSI, you didn't consider yourself a victim?" The military judge sustained the trial counsel's objection based on relevance. Later, the trial defense counsel asked AG, "You didn't want to be involved in this when [AF]OSI called you in" and the trial counsel again objected based on relevance. This led to an Article 39(a), UCMJ, 10 U.S.C. § 839(a), hearing wherein the trial counsel elaborated that whether or not the witness feels she was a victim is irrelevant. The military judge ultimately sustained the objection.

During cross-examination of ME, the trial defense counsel similarly asked, "You didn't want to come forward today, did you?" The trial counsel objected for relevance and requested a session under Article 39(a), UCMJ, at which the trial defense counsel articulated that they wanted to pursue this line of questioning to call into question ME's credibility. The trial defense counsel also informed the military judge he intended to ask a question directed at AFOSI calling ME a victim. The military judge again sustained the objection to this line of questioning. Finally, concerning RM, during an Art 39(a), UCMJ, hearing, the trial defense counsel indicated he wanted to establish whether RM considered herself a victim prior to speaking with the Rapid City Police Department. The Government responded with a motion in limine precluding that line of questioning which the military judge granted.

On appeal, the appellant's counsel claims that the defense theory was that RM was ashamed for having another night of drunken sex with a relative stranger but did not report the incident until encouraged by her uncle, an AFOSI agent. AG entered as a character witness and exited as a victim. ME was identified through her friend, AG. The appellant claims that due to the military judge's rulings, the defense had no way of showing that the alleged victims had a motive to misrepresent their testimony due to the influence of AFOSI.

We find that the military judge did not err in this case. The information sought by the trial defense counsel was irrelevant. Additionally, the military judge allowed the trial defense counsel, through extensive cross-examination, to question each alleged victim on their memory of what occurred, their level of intoxication, their willingness to participate, whether or not the appellant was under a reasonable mistake of fact, and various inconsistencies in their testimony. Accordingly, the trial defense counsel was afforded the opportunity for an effective cross-examination and the appellant's Sixth Amendment right to confrontation was not violated.

Failure to State an Offense

The appellant argues that his conviction for obstruction of justice, as alleged in the Specification of Charge IV, should be set aside and dismissed because the Specification failed to allege the Article 134, UCMJ, terminal element of being either prejudicial to good order and discipline (Clause 1) or service discrediting (Clause 2). We agree.

Whether a charge and specification state an offense and the remedy for their failure to do so are questions of law that we review de novo. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012). "A specification states an offense if it alleges, either expressly or by [necessary] implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)); Rule for Courts-Martial 307(c)(3).

Because the appellant did not complain about the missing element at trial, we analyze this case for plain error and, in doing so, find that the failure to allege the terminal element was "plain and obvious error that was forfeited rather than waived." *United States v. Humphries*, 71 M.J. 209, 215 (C.A.A.F. 2012); *see also United States v. Gaskins*, 72 M.J. 225, 232 (C.A.A.F. 2013). In analyzing defective indictments for plain error, the appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right. *Humphries*, 71 M.J. at 214 (citing *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)). "[T]he defective specification alone is insufficient to constitute substantial prejudice to a material right." *Id*. at 215 (citing *Puckett v. United States*, 556 U.S. 129, 142 (2009); *United States v. Cotton*, 535 U.S. 625, 631-32 (2002)). Therefore, reviewing courts "look to the record to determine whether notice of the missing element is somewhere extant in the trial record or whether the element is 'essentially uncontroverted.'" *Id*. at 215-16 (quoting *Cotton*, 535 U.S. at 633; *Johnson v. United States*, 520 U.S. 461, 470 (1997)). If so, the charging error is considered cured and material prejudice is not demonstrated. *Id*. at 217.

On appeal, the Government argues that the appellant had fair notice of the terminal element and of the Government's theory of proof based upon the Article 32, UCMJ, 10 U.S.C. § 832, report of investigation (ROI) which specifically addressed the terminal element. The Government's position is that the ROI is part of the "record" for purposes of resolving the question of whether the appellant received fair notice of the charges against him. The Government also points to the trial defense counsel's closing argument where he argued that the Government failed to show any direct injury to good order and discipline and therefore, failed to prove the terminal element. Considering these two factors, the Government argues that the appellant was sufficiently on notice to mount a proper defense against the obstruction charge.

After a close review of the trial record, we find no such notice "somewhere extant in the trial record," nor is there any indication that the evidence was uncontroverted as to the terminal elements. Concerning the Government's contention that the appellant was provided notice of the terminal element in the ROI, our superior court, in upholding this Court's decision in *United States v. Carter*, ACM 37715 (A.F. Ct. Crim. App. 4 January 2013) (unpub. op.), held that an appellant satisfies his burden to demonstrate that the defective specification under Article 134, UCMJ, materially prejudiced his substantial rights even though he was provided actual notice through an ROI received prior to trial. *United States v. Carter*, __M.J.__No. 13-5005/AF (Daily Journal 6 August 2013). *See also United States v. Tunstall*, 72 M.J. 191, 197 (C.A.A.F. 2013) (holding that courts are limited to considering evidence contained in the trial record. Accordingly, "somewhere extant in the trial record" does not include the Article 32, UCMJ, report).

We are also mindful that in *Humphries*, our superior court allowed the Government to cure any error by demonstrating that the missing element was "essentially uncontroverted." *Humphries*, 71 M.J. at 215-16. However, as the *Gaskins* Court noted, cases such as this are "simply inapposite" compared to the Supreme Court cases in which the Government put on evidence that went directly to the omitted aggravating factor or element. *Gaskins*, 72 M.J. at 234. Since the Government never introduced evidence in this case concerning the missing element, we may not find that the missing element was "essentially uncontroverted."

In sum, we can find nothing in the record that reasonably placed the appellant on notice of the Government's theory as to which clause of the terminal element of Article 134, UCMJ, he violated. Given the mandate set out by our superior court in *Humphries* and *Gaskins*, we are compelled to set aside and dismiss Charge IV and its Specification.

Factual and Legal Sufficiency

The appellant contends the evidence is not factually and legally sufficient to sustain his convictions for forcibly sodomizing ME and for sexually assaulting and forcibly sodomizing RM, in violation of Articles 120 and 125, UCMJ.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of factual and legal sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence 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) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)). "[I]n resolving questions of legal sufficiency, we are 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). Our assessment of factual and legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

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, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325, *as quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, 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." *Washington*, 57 M.J. at 399.

The appellant contends the Government failed to prove that he forcibly sodomized ME. In support of this position, the appellant argues that ME's testimony is simply not credible due to logistical concerns with the chain of events, ME's failure to immediately leave the appellant's apartment after the assault, her failure to remember the events of what occurred despite not being intoxicated, and her receipt of disciplinary actions while on active duty.

The appellant likewise contends that the evidence is insufficient to prove that he sexually assaulted and forcibly sodomized RM. He claims that RM was unable to recall significant portions of the night in question, rendering her testimony unreliable. He additionally asserts that RM's actions demonstrate that she had the ability to manifest her lack of consent and chose not to do so. Finally, under the circumstances of this case, the appellant alleges that he had a reasonable belief that RM consented to the sexual acts.

We disagree. Based upon our review of the record of trial, the convictions are factually and legally sufficient. The issues addressed by the appellant on appeal were all presented to the members through significant cross-examination of the alleged victims and during closing arguments. Although the appellant did show some inconsistencies in the testimony of both RM and ME, and that they at times had engaged in consensual sexual activity with the appellant, the Government nevertheless provided sufficient evidence showing that RM and ME were overpowered by the appellant and did not consent to the sexual activity charged in the respective specifications.

We have considered the evidence in the light most favorable to the prosecution. We have also made allowances for not having personally observed the witnesses. Having paid particular attention to the matters raised by the appellant, we find the evidence factually and legally sufficient to support his convictions for aggravated sexual assault, wrongful sexual contact, and forcible sodomy. We are convinced beyond a reasonable doubt that the appellant is guilty of the charges and specifications of which he was convicted.

Sentence Reassessment

Having found error regarding the obstruction of justice specification, we must consider whether we can appropriately reassess the sentence or whether we must return the case for a rehearing on sentence. After dismissing a charge, this Court may reassess the sentence if we can determine to our satisfaction that, absent the error, the sentence adjudged would have been at least a certain severity, as a sentence of that severity or less will be free of the prejudicial effects of that error. *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). Even within this limit, the Court must determine that a sentence it proposes to affirm is "appropriate," as required by Article 66(c), UCMJ, 10 U.S.C. § 866(c). "In short, a reassessed sentence must be purged of prejudicial error and also must be 'appropriate' for the offense involved." *Sales*, 22 M.J. at 307-08. Under this standard, we have determined that we can discern the effect of the errors and will reassess the sentence on the basis of the errors noted, the entire record, and in accordance with the principles of *Sales* and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), to include the factors identified by Judge Baker in his concurring opinion in *Moffeit.*

Considering the sexual assault and forcible sodomy charges, the obstruction of justice charge was not one of the more serious charged offenses in this case. In fact, there was very limited evidence presented to prove the charge and, since AG essentially disregarded the appellant's attempt to influence her testimony, there was minimal impact caused by the appellant's actions. Accordingly, having considered the entire record of trial and the principles of *Sales* and *Moffeit*, we are confident the appellant would have received no less than the sentence he was adjudged at his trial. Furthermore, we find the sentence is appropriate, correct in law and fact, and, based on the entire record, should be approved.

Conclusion

The findings of guilty to Charge IV and its Specification are set aside and dismissed. The remaining findings and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[5] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

[5] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

Accordingly, the approved findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court