UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JOSHUA D. HALL
United States Air Force

ACM 37700

04 January 2013

Sentence adjudged 26 February 2010 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: David S. Castro.

Approved sentence: Dishonorable discharge, confinement for 8 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Major Michael S. Kerr; and Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Scott C. Jansen; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

STONE, GREGORY, and HARNEY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HARNEY, Judge:

Contrary to his pleas, a general court-martial composed of officer members convicted the appellant of one charge and one specification of rape, in violation of Article 120, UCMJ, 10 U.S.C. § 920. The members sentenced the appellant to a dishonorable discharge, confinement for eight years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the findings and sentence as adjudged.

Before this Court, the appellant raises the following assignments of error:[1] (1) the military judge erred by allowing "human lie detector" testimony, (2) the military judge erred by failing to instruct the members on lesser included offenses, (3) the military judge erred by instructing the members that voluntary intoxication was not a defense to rape by force, (4) the appellant received ineffective assistance of counsel during the findings and sentencing portion of his court-martial, (5) the appellant's conviction is legally and factually insufficient, and (6) the appellant was deprived of a fair trial because the members could not hear the military judge during the court-martial.[2] Having found no error that materially prejudices a substantial right of the appellant, we affirm.

Factual Background

The appellant and Senior Airman AB were deployed together at Al Dhafra Air Base, United Arab Emirates. During the deployment, the appellant and AB occasionally socialized as part of a group. The appellant and AB returned from the deployment on the same flight, which landed in Baltimore, Maryland, for a layover on 21 September 2008. After checking into her hotel, AB had a late dinner with her brother and niece at a nearby restaurant called Champions. After her brother and niece left her back at her hotel, AB decided to return to Champions to meet up with a group from her deployment because it was her birthday. The appellant was part of the group. For the next several hours, AB, the appellant, and other members of the group ate and drank alcohol together. Eventually, most of the group left Champions, leaving only AB and the appellant. They agreed to be each other's "wingman" as they continued to drink alcohol.

At about 0030 on 22 September 2008, the appellant and AB left Champions together. AB testified that she next remembered lying on the wet grass with the appellant on top of her trying to pull off her jeans. She told him "don't, stop" and later screamed "stop, rape" as the appellant pinned her down and told her to "shut up." AB also testified that, as she struggled, the appellant punched her in the face, at which point she "just wished it would get over" as she felt him penetrating her. When the appellant leaned back, AB said she grabbed her pants and ran to a nearby hotel. AB recalled that an unidentified woman accompanied her to the hotel and spoke to the clerk at the desk. The

[1] Issues (4), (5), and (6) are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[2] Although not raised as an issue by the appellant, we will also address the delay in appellate processing. In this case, the overall delay between the date this case was docketed with the Court and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to timely review and appeal, and (4) prejudice. *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. The post-trial record shows no evidence that the delay has had any negative impact on the appellant. Having considered the totality of the circumstances and entire record, we conclude that any denial of the appellant's right to speedy post-trial review and his appeal was harmless beyond a reasonable doubt and that no relief is warranted.

police and paramedics were dispatched to AB's location, where she was interviewed and eventually transported to a local hospital. AB told the officers that she had been raped. At the hospital, AB received a sexual assault forensic examination (SAFE), which included a physical examination and an interview with a SAFE nurse. As part of the examination, the SAFE nurse took vaginal swabs from AB.

At the time of the incident, WP, a resident in a nearby hotel, testified that he heard a woman screaming that she was raped. Shortly thereafter, WP noticed an individual he later identified as the appellant coming down the hill and jumping a fence into the pool area below his window. The hotel clerk, JG, testified that, in the early morning hours, she received a phone call about a person passed out in the third floor hallway. When the hotel clerk followed up about 30 minutes later, she found the appellant passed out there. She testified that she tried unsuccessfully to rouse him. The police also had difficulty waking the appellant, but eventually did so after a couple of minutes. A civilian detective interviewed the appellant after rights advisement. When told that he was suspected of raping AB, the appellant stated "it couldn't have been me." He also denied having sex with AB. The investigators took saliva and penile swabs, fingernail scrapings, and blood from the appellant. The majority of the DNA from the penile swab matched the DNA from AB. The appellant's blood alcohol content was .17. AB's blood alcohol content was .21.

At trial, AB testified and identified the appellant as the person who hit and raped her. The Government also presented testimony from WP, the responding police officers, lead detective, and crime scene technicians. The Government presented expert testimony from the SAFE nurse, from the forensic DNA analyst who conducted the DNA testing, and from a forensic toxicologist. The defense presented testimony from the hotel clerk, JG, to support the appellant's alibi; from a hotel resident who heard the screaming the night of the incident but could not identify AB; and from the appellant's father. The defense also presented expert testimony from a forensic psychologist, and from an expert in the psychology of eyewitness evidence.

Human Lie Detector Testimony

In his first assignment of error, the appellant asserts that the military judge committed plain error in allowing "human lie detector" testimony, abused his discretion by allowing further "human lie detector" testimony over defense objection, and failed to provide a curative instruction. We disagree.

Ms. LM, the SAFE nurse who examined AB within a few hours after the sexual assault, testified for the prosecution as an expert qualified in sexual assault examinations. LM testified that she interviewed AB and gave her a "head to toe" physical examination looking for trauma, any injuries requiring medical attention, and areas from which to collect evidence for law enforcement. LM described AB as upset, tearful, and

cooperative. LM noted that AB's gait was off and that she lost her balance when walking from one room to another. AB complained to LM of pain in her face, jaw, and nose area. She also stated her crotch was hurting but said there was "no way anything could have happened." When asked to describe AB's acceptance of what had happened to her, LM testified "I believe she was in denial at that point." The defense did not object and proceeded to cross-examine LM on the "denial" issue by focusing on areas the defense believed undermined her previous testimony.

As trial counsel began his redirect of LM, defense counsel lodged an objection, asserting that LM was not qualified to give an opinion about AB being in a state of denial. The military judge overruled the objection, noting that the defense failed to initially object to the testimony and then cross-examined LM on the "denial" issue. The military judge ruled that LM's testimony was admissible and went to the weight rather than the admissibility of the evidence. The judge also found that LM was qualified to provide an opinion for why she thought AB was in denial and allowed the defense to re-cross LM on this subject. The military judge then asked the defense team if it wanted an immediate curative instruction; the defense declined. At the close of evidence, the military judge gave an instruction addressing this issue.[3]

On redirect examination, the following colloquy took place between the trial counsel and LM:

> Q: Ma'am, in your twenty-two years experience as an ER nurse, how much exposure have you had to people who have undergone a traumatic event?
>
> A: Much.
>
> Q: Defense counsel pointed out that you are not licensed in psychology or psychiatry, so what is the basis of your opinion about Senior Airman [AB] being in denial about this?
>
> A: During the interview she kept saying that there is no way anything could have happened, there's no way anything could have happened, there's no way anything could have happened. And then I did the exam and I found trauma. I found penetration, signs of penetration. When I told her that there were signs of penetration, she became visibly, extremely

[3] The military judge gave the following instruction to the members prior to deliberation:

> Only you, the members of the court, determine the credibility of the witnesses and what the facts of this case are. No expert witness or other witness can testify that the alleged victim's or witness' account of what occurred is true, or credible, that the expert witness believes the alleged victim or another witness, or that a sexual encounter occurred. To the extent that you believed that any of the expert witnesses for either side testified or implied that he or she believes the alleged victim or a witness, that a crime occurred, or that the alleged victim or a witness is credible, you may not consider this as evidence that a crime occurred or that the alleged victim or witness is credible.

> upset, crying more. I've had experience with this in the past with other patients, there have been some, and most, I find nothing and they are relieved when nothing has been found. I have had other patients find that yes, there was signs of trauma. So that's why I feel like she was in denial when she kept saying "nothing happened, nothing happened", and then when there was something there showing that something did happen, that she was so upset.

When "an appellant has not preserved an objection to evidence by making a timely objection, that error will be forfeited in the absence of plain error." *United States v. Mullins*, 69 M.J. 113, 116 (C.A.A.F. 2010) (internal quotation mark and citation omitted). To establish plain error, the appellant must show "(1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Id*. (internal quotation marks and citations omitted).

Our superior court has held that it is error for a military judge to allow a witness to state an opinion "as to whether [a] person was truthful in making a specific statement regarding a fact at issue in the case." *United States v. Kasper*, 58 M.J. 314, 316 (C.A.A.F. 2003). An expert or any other witness may not testify "regarding the credibility or believability of a victim, or 'opine as to the guilt or innocence of an accused.'" *United States v. Cacy*, 43 M.J. 214, 217 (C.A.A.F. 1995) (quoting *United States v. Suarez*, 35 M.J. 374, 376 (C.M.A. 1992)). *See also United States v. Brooks*, 64 M.J. 325 (C.A.A.F. 2007).

In this case, we find that, when LM testified about AB being in a state of denial on direct and redirect examination, she was not offering human lie detector testimony. LM did not testify as to the guilt or innocence of the appellant. Nor did she testify about the believability or credibility of AB. Instead, we find that LM simply explained the inconsistency between the physical findings of trauma to AB and AB's description to her. In fact, on re-cross examination, trial defense counsel clarified with LM that AB's "denial" related to trauma to the vaginal area:

> Q: Okay, so just to be clear, your observations of the fact that she was in denial was just because she said she didn't believe sexual contact could have occurred?
>
> A: And then her reaction when she found out that it did.
>
> Q: *We can all agree that sexual -- some type of blunt force trauma did occur to the vaginal area?*
>
> A: Yes.

(Emphasis added). LM testified about AB's reaction in light of other sexual abuse victims and compared her response to the other victims LM has encountered as a SAFE nurse. *See Mullins*, 69 M.J. at 116 ("[A]n expert may testify as to what symptoms are found among [victims] . . . and whether the [victim] has exhibited these symptoms." (quoting *United States v. Birdsall*, 47 M.J. 404, 409 (C.A.A.F. 1998) (internal quotation marks and citations omitted)); *see also Cacy*, 43 M.J. at 217 (holding that testimony from a sexual abuse counselor that the victim's behavior was consistent with other sexual abuse victims was permissible). Thus, we do not find that LM's testimony invaded the province of the court members to determine AB's credibility. As such, we find that the military judge did not err when he initially admitted LM's testimony on direct examination or redirect examination over defense objection.

Even if the military judge erred, we do not find that the error prejudiced a substantial right of the appellant. Our superior court has held that no prejudice exists in human lie detector cases if the record contains "other evidence" upon which the members could rely. *Mullins*, 69 M.J. at 118; *Brooks*, 64 M.J. at 330. The case sub judice contains sufficient "other evidence." AB testified that the appellant raped her. The physical evidence corroborating AB's testimony included the DNA evidence and related testimony, as well as the vaginal injuries to AB consistent with penile sexual assault. The record also contains testimony from various forensic specialists and ample circumstantial evidence. Moreover, the military judge instructed the members that only they could make credibility determinations. Sufficient "other evidence" was before the members, who could evaluate and weigh without relying only upon LM's testimony.

We also find the military judge did not abuse his discretion when he allowed LM to testify about why AB exhibited signs of denial. *See United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010). In overruling the defense objection, the military judge noted that LM "certainly has a lot more experience than the majority of the [sexual assault nurse examiner] and SAFE nurses I've seen . . . ." The record shows that LM had conducted more than 500 SAFE examinations, served on the State of Maryland standards, testified as a witness 10 times, and taught SAFE nursing techniques to various organizations.

Instructions on Lesser Included Offenses

In his second assignment of error, the appellant asserts that the military judge erred in not instructing the members on the lesser included offenses of aggravated sexual assault and assault consummated by a battery. We again disagree.

Whether the members were properly instructed is a question of law we review de novo. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002). The military judge has a sua sponte duty to instruct the members on lesser included offenses reasonably raised by the evidence. *Id.*; *see also United States v. Smith*, 50 M.J. 451, 455 (C.A.A.F. 1999).

When reviewing instructions with counsel, the military judge specifically asked if either side desired instructions on any lesser included offense. Both sides answered "no." Later, the military judge and counsel engaged in an additional colloquy about possible instructions:

> MJ: . . . Before we call the members back, I previously asked counsel whether they believed consent from [sic] a mistake of fact as to consent was raised by the evidence in this case. My understanding of the answer was no from both sides. But again, I just wanted to get that on the record. Trial counsel?
>
> TC: That's correct, Your Honor. I do not see it raised by the evidence in this case.
>
> MJ: Defense counsel?
>
> DC: Yes, Your Honor. In the 802 we said that we would not bring out consent as a defense. We might say that we don't know what happened in that thirty-four minute period and how evidence can be placed. Alternative theories of evidence placement, but not consent.
>
> MJ: Including alibi for example?
>
> DC: Yes, Your Honor.
>
> MJ: Okay. So again, you don't believe consent or mistake of fact has been raised by the evidence. Correct?
>
> DC: Correct.
>
> MJ: Okay. And now just, previously, if Airman Hall is acquitted, we will be done with these proceedings. If he is not acquitted, depending upon what happens, there may be review of the case. Assuming that consent is somehow raised or someone else thinks it is raised, are you basically waiving, specifically waiving that issue at this point, waiving consent?
>
> DC: Your Honor, I'm not specifically waiving that. I don't intend to argue that somehow to the members, so.
>
> MJ: I don't need to know what your strategy is but I do know that you've obviously made certain strategic choices – actual decisions – at the trial level. So for trial level purposes –
>
> DC: Yes, sir. At the trial level purpose it is --

MJ: You've made strategic decisions?

DC: Yes, sir.

MJ: -- not to ask for those instructions?

DC: Yes, sir.

MJ: Very well. And does either side oppose me giving the alibi instruction before going on with procedural instructions? I plan on doing that after both sides have finished arguing.

TC: No objection, Your Honor.

DC: No objection, Your Honor.

Based on the posture of this case, we find that the military judge did not err. The record shows that the appellant took an "all or nothing" approach at trial and presented an alibi defense, as reflected in the above dialogue between the military judge and the appellant's counsel. In support thereof, the appellant called memory and eyewitness identification experts; the hotel clerk, JG, to verify his whereabouts at the time of the sexual assault; presented evidence of good military character; and vigorously cross-examined the Government's DNA witness on possible cross-contamination of the DNA samples. The appellant's alibi defense and other evidence presented did not reasonably raise the lesser included offenses of aggravated sexual assault or assault consummated by a battery. Moreover, we find that the appellant knew about, but affirmatively waived, the instructions on lesser included offenses to pursue the "all or nothing" defense. Our superior court has held that "instructions on lesser-included offenses are required unless affirmatively waived by the defense." *United States v. Strachan*, 35 M.J. 362, 364 (C.M.A. 1992). "An accused may seek to waive an instruction on lesser included offenses and present an 'all or nothing' defense as a matter of trial tactics." *United States v. Upham*, 66 M.J. 83, 87 (C.A.A.F. 2008) (citations omitted); *see also Smith*, 50 M.J. at 455. The appellant pursued this course of action. Having reviewed the record of trial, we find the military judge did not commit error, plain or otherwise. *Strachan*, 35 M.J. at 364.

Voluntary Intoxication Instruction

In his third assignment of error, the appellant argues that the military judge erred by instructing the members that voluntary intoxication was not a defense to rape by force. The appellant asserts that the prosecution evidence presented a factual scenario of digital penetration, not penile penetration. The appellant argues that the sexual act of digital penetration is a specific intent crime to which voluntary intoxication is a defense. We disagree.

The appellant was charged with rape by force under Article 120, UCMJ. This is a general intent crime requiring the Government to prove that the appellant "deliberately or purposefully committed an act of sexual intercourse by force and without the victim's consent." *United States v. Hibbard*, 58 M.J. 71, 72 (C.A.A.F. 2003). *See Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 45.a.(a)(1) (2008 ed). Voluntary intoxication is not a defense to a general intent crime. *United States v. Peterson*, 47 M.J. 231, 233 (C.A.A.F. 1997). The military judge asked both sides if they had objections to his proposed instructions, which included the instruction on voluntary intoxication. Trial counsel concurred with the proposed instructions. The defense objected to one instruction,[4] but not to the instruction on voluntary intoxication. The military judge instructed the members on the elements of rape, as well as the relevant definitions, which included "sexual act" and "force." The military judge then instructed the members as follows:

> There is evidence that the accused was intoxicated at the time of the alleged offense. Voluntary intoxication, whether caused by alcohol or drugs, is not a defense to the offense of forcible rape. The inability to remember because of intoxication, sometimes called "alcoholic amnesia" or "blackouts," is not in itself a defense.

Because rape was charged as a general intent crime, we find that the military judge did not err when he instructed the members that the appellant's voluntary intoxication was not a defense.[5]

Ineffective Assistance of Counsel

In his fourth assignment of error, the appellant argues that he received ineffective assistance of counsel during the findings and sentencing portions of his court-martial. After reviewing the record of trial, we find that trial defense counsel effectively represented the appellant throughout his court-martial. In the present case, the appellant's assertions are matters of opinion on trial strategy and tactics that can be resolved by reference to the record without the need for a post-trial evidentiary fact-finding hearing. *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997).

Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000)). This Court reviews claims of ineffective assistance of counsel de novo. *United States v. Mazza*, 67 M.J. 470, 474

[4] The defense objected to the false exculpatory statement instruction. The military judge overruled the objection.

[5] We also find that the evidence presented at trial does not support digital penetration. In addition to AB's testimony that the appellant's penis penetrated her vagina, LM testified that AB's vaginal injuries were consistent with penile, not digital penetration. Moreover, the DNA analyst testified that AB's DNA was found on the appellant's penis. As discussed later in the opinion, we also find the evidence legally and factually sufficient to support the appellant's conviction for rape.

(C.A.A.F. 2009); *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (citing *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006)). When reviewing such claims, we follow the two-part test outlined by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See Mazza*, 67 M.J. at 474. Under *Strickland*, the appellant has the burden of demonstrating: (1) a deficiency in counsel's performance that is "so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment;" and (2) that the deficient performance prejudiced the defense through errors "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

The deficiency prong requires the appellant to show his defense counsel's performance fell below an objective standard of reasonableness, according to the prevailing standards of the profession. *Id*. at 688. The prejudice prong requires the appellant to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. In doing so, the appellant "must surmount a very high hurdle." *Perez*, 64 M.J. at 243 (citations omitted); *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998) (citation omitted). This is because counsel are presumed competent in the performance of their representational duties. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001). Thus, judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000) (citing *Strickland*, 466 U.S. at 689). The "defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). *See Mazza*, 67 M.J. at 475 (citation omitted).

To determine whether the presumption of competence has been overcome, our superior court has set forth a three-part test:

> 1. Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> 2. If the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers"?
>
> 3. If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing *United States* v. *Polk*, 32 M.J. 150, 153 (C.M.A. 1991)). Moreover, "we need not determine whether any of the alleged errors [in counsel's performance] establish[] constitutional deficiencies under the first prong of *Strickland* [if] any such errors would not have been prejudicial under the

high hurdle established by the second prong of *Strickland*." *United States v. Saintaude*, 61 M.J. 175, 183 (C.A.A.F. 2005).

The appellant alleges that his defense counsel were ineffective because they (1) failed to use mitigating pictures of AB to rebut the prosecution's victim impact evidence during the sentencing phase; (2) failed to investigate or present any evidence of AB's character for dishonesty; (3) failed to investigate or present any evidence of the appellant's good character, even though the appellant presented his defense counsel with the names of willing witnesses; (4) were not as involved in appellant's case as they should have been; (5) did not comment on the altered nature of AB's pants that were offered into evidence; (6) did not introduce evidence that AB was infected with herpes, although the appellant was not; and (7) did not prepare the defense witnesses properly. In assessing each of his allegations of error, we find that the appellant has failed to establish any prejudice under the second prong of the *Strickland* test.

1. Mitigating Victim Impact. Trial defense counsels' affidavit shows that they were aware of photographs depicting AB's post-sexual assault activities that might have mitigated the Government's victim impact evidence. Trial defense counsel opted not to use this evidence during sentencing, concluding it would be unwise to attack AB after the members had already believed her to be the victim of a serious offense. We find this was a strategic decision that did not prejudice the appellant.

2. Victim's Character for Honesty and/or Truthfulness. The appellant's defense team investigated AB's character for honesty and/or truthfulness but could not find any useful evidence. We find no prejudice to the appellant.

3. Good Military Character. The trial defense team did raise good military character on behalf of the appellant. They introduced over 20 affidavits attesting to the appellant's character for peacefulness, good military character, law abidingness, and truthfulness. The defense called the appellant's father to testify in support of these topics. However, trial defense counsel chose not to call any other live witnesses to avoid them being cross-examined on areas that would mitigate the effectiveness of the defense. We find this was a strategic decision that did not prejudice the appellant.

4. Trial Defense Counsel Preparation. The appellant asserts that his trial defense team was not fully engaged in his case and was unprepared. He specifically asserts that he did not have adequate access to counsel, his counsel did not seek additional DNA testing, and they switched trial strategies in the days leading up to trial. The appellant was represented by three defense counsel, one of whom traveled to Maryland to visit the crime scene and consult with the appellant's former civilian defense counsel. They secured the services of a forensic serologist who reviewed the results of the state of Maryland's DNA testing. Their expert found no error in the testing. The defense team decided that requesting additional DNA testing would have further developed the

Government's case against the appellant. Additionally, the trial defense counsel recommended that the appellant not testify at trial, but advised him that the decision was his alone. We find all these to be strategic decisions that did not prejudice the appellant.

5. Condition of Victim's Jeans. The appellant's trial defense counsel did allow the admission of AB's jeans into evidence without objection in support of its alibi defense, using them in closing argument to direct the members' attention to the difference between the condition of her jeans (wet and muddy) and the appellant's jeans (dry and clean). We find this was a strategic decision that did not prejudice the appellant.

6. Victim's Herpes. When trial defense counsel learned that AB had herpes, they directed the appellant to get tested. Despite his negative test results, the defense opted not to introduce the herpes evidence. A forensic toxicologist and medical doctor advised the defense team that AB would not have transmitted the herpes during sexual intercourse unless AB experienced an outbreak during the encounter. The defense assessed the available evidence, to include the SAFE nurse's test results, and concluded that AB was not experiencing an outbreak. The defense made a strategic decision that this information had little evidentiary value. We find this was a strategic decision that did not prejudice the appellant.

7. Witness Preparation. The appellant asserts that his trial defense counsel did not adequately prepare his alibi witness, JG, to testify and generally asserts that she was mistreated. The record shows that JG gave contradictory statements to trial counsel that impeached her testimony during trial. The record also shows that JG directed her frustration about the trial process at the prosecution, not the appellant or his counsel. We find no prejudice to the appellant.

Legal and Factual Sufficiency

In his fifth assignment of error, the appellant argues that the evidence was legally and factually insufficient to support his conviction for rape. We disagree.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual 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 factfinder 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) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In resolving legal-sufficiency questions, we are "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993) (quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991) (internal quotation mark omitted)); *United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007). Our assessment of legal sufficiency is limited to the evidence

produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). 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 [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

To establish the offense of rape under Article 120, UCMJ, the Government was required to prove the following elements, as instructed by the military judge:

1. The appellant caused AB to engage in a sexual act, to wit: the appellant penetrated AB's vagina with his penis, and

2. The appellant did so by using force against AB, to wit: by using physical violence sufficient that AB could not avoid or escape the sexual conduct.

MCM, Part IV, ¶¶ 45.a(a)(1), 45a.(t)(1)(A), (t)(5)(C).

We find the evidence legally and factually sufficient to support the first element – that the appellant penetrated AB's vagina with his penis. AB identified the appellant as the person who sexually assaulted her, she testified that she felt his penis inside of her, and she testified that she told him "don't, stop" in a conversational tone and "stop, rape" while screaming. Testimony from the SAFE nurse and the DNA analyst confirmed that the physical act occurred. The analyst testified that she identified AB's DNA on the appellant's penis and underneath his fingernails. She also estimated that a "99.99% of the population . . . the huge majority of the population could not possibly have contributed that major component of DNA, that component that matches [AB]." She further amplified that the likelihood of the DNA showing up as it did on the appellant's penis was "approximately 1 in 39 billion." Moreover, the amount of DNA found on the appellant's penis was consistent with direct contact. Finally, the DNA analyst stated that it was several quadrillion times more likely that the DNA on the appellant's fingernails belonged to the appellant and AB rather than the appellant and someone else. The level of AB's DNA under the appellant's fingernails suggested contact from more than a handshake, such as from a forceful grip where the appellant's fingernails contacted AB's skin.

We also find the evidence legally and factually sufficient to support the second element – that the appellant used physical violence sufficient that AB could not avoid or escape the sexual conduct. AB testified about how she struggled to fend off the appellant, felt him trying to pull down her pants, put one of his legs onto her thigh, and punched her in the face. Additionally, the SAFE nurse testified about the multiple scratches on AB's arm, breast, and leg around the buttocks area; the bruise on her thigh; and the swelling across her nose, which she described as an injury not consistent with

falling down. The SAFE nurse also described vaginal tearing and other injuries inside AB's vagina consistent with a sexual assault by penile penetration.

We have carefully weighed and considered the evidence in the light most favorable to the prosecution, and have made allowances for not having personally observed the witnesses. We have paid particular attention to the matters raised by the appellant and are convinced beyond a reasonable doubt that the appellant is guilty of the charge and specification of which he was convicted.

Fair Trial

In his sixth and final assignment of error, the appellant argues that he was deprived of a fair trial, asserting that the panel members repeatedly could not hear the military judge over the sound of the air conditioning. We find that the appellant was not denied a fair trial. To the contrary, the record shows that the military judge asked the members to let him know if and when they had trouble hearing any portion of the trial. Once a member stated he or she could not hear, the military judge repeated what he was saying and ensured that all members heard him. We have considered the appellant's argument and find it to be without merit. *United States v. Matias*, 25 M.J. 356 (C.M.A. 1987).

Conclusion

We have reviewed the record in accordance with Article 66, UCMJ. The approved findings and the sentence are determined to be correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. *Id.*; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings of guilty and the sentence, as approved below, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court