IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 2

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
	)	Case No. 201300346
v.	)	Tried at Marine Corps Air Station Miramar, California, on January 24 and April 19, 2013 and at Marine Corps Recruit Depot San Diego, California on March 20 and April 30 – May 3, 2013, by a general court-martial convened by Commanding General, 12th Marine Corps District, Western Recruiting Region, Marine Corps Recruit Depot San Diego.
Nicholas A. HOWARD, Gunnery Sergeant (E-7) U.S. Marine Corps Appellant	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

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Errors Assigned

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WHETHER THE MILITARY JUDGE ERRED IN ADMITTING, OVER DEFENSE OBJECTION, A HEARSAY STATEMENT REGARDING PENETRATION UNDER M.R.E. 803(4), WHEN THE STATEMENT WAS MADE TO A FORENSIC NURSE DURING THE COURSE OF A SEXUAL ASSAULT EXAMINATION?

II.

WHETHER THE CONVICTIONS UNDER ARTICLES 120 AND 134, UCMJ, ARE FACTUALLY AND LEGALLY INSUFFICIENT?

III.

WHETHER THE MILITARY JUDGE ERRED WHEN HE FAILED TO GIVE THE REQUESTED MISTAKE OF FACT AS TO CONSENT INSTRUCTION?

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a dishonorable discharge. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A panel of members with enlisted representation, sitting as a general court-martial, convicted Appellant, contrary to his pleas, of one specification of aggravated sexual assault by causing bodily harm and one specification of adultery, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920 and 934 (2012). The Members sentenced Appellant to reduction to pay

grade E-1, total forfeiture of all pay and allowances, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged, and except for the dishonorable discharge, ordered the sentence executed.

Statement of Facts

A. Appellant's sexual assault of KK.

Staff Sergeant (SSgt) Cooley worked for Appellant at the recruiting station in Anchorage, Alaska. (R. 344-45, 426.) KK met them both through her work in a coffee shop and restaurant near the recruiting station. (R. 344, 427.) KK began a romantic relationship with SSgt Cooley. (R. 344-45.) Over the course of that dating relationship KK was at Appellant's home on two or three occasions. (R. 348-49, 432.) Appellant was married. (Pros Ex. 1; Pros. Ex. 9 at 20.) KK knew Appellant's wife and his two children. (R. 345, 430.)

On December 30, 2011, KK and SSgt Cooley went to dinner with Appellant and his wife to celebrate her birthday. (R. 349-50, 430-31.) After dinner and drinks they returned to Appellant's residence where more alcohol was consumed. (R. 353-54, 431.) After consuming alcohol at Appellant's residence, SSgt Cooley and KK made a plan to spend the night there rather than drive back to either KK's or SSgt Cooley's residence. (R. 358, 432.) The plan was to sleep in the camper parked next to Appellant's residence. (R. 358; Prosecution Ex. 2 at 1.) KK

borrowed a swimming suit from Appellant's wife and went to the hot tub off the back deck with SSgt Cooley and Appellant. (R. 356, 435.) KK soon began to doze off in the hot tub. (R. 358, 435.)

SSgt Cooley went back into the house to change out of the borrowed swimming suit. (R. 436.) Appellant carried KK over his shoulder from the hot tub to the trailer. (R. 358; Prosecution Ex. 2 at 5.) Once inside the trailer KK laid down on the bed in the fetal position. (R. 360, 394, 398; Pros. Ex. 2 at 4.) KK was laying on top of the covers facing away from the living area still wearing only the bikini she was wearing in the hot tub. (R. 360-61, 437.) SSgt Cooley entered the trailer experiencing no problems or difficulties with the door to the trailer. (R. 437.)

The camper was heated by an indoor/outdoor propane heater. (R. 438.) The smoke detector in the trailer was missing batteries. (R. 438.) SSgt Cooley left the trailer to obtain batteries for the smoke detector from the residence. (R. 395, 438.) When he left the trailer Appellant climbed onto the bed behind KK and pulled her bikini bottoms down. (R. 363, 369, 415.) Appellant wrapped his arm around her spooning her as she lay on her side facing away from him. (R. 363.) KK reached back with her left hand and pushed against his legs trying to roll away from him. (R. 363.) KK felt unable to escape the

situation. (R. 414.) When unable to escape KK tried unsuccessfully to remove her tampon using her right hand because she "didn't want it to get stuck inside me." (R. 363, 397, 412-13, 415-16.) KK never gave Appellant any indication that she wanted to have sexual intercourse with him. (R. 369, 371, 414.)

After approximately five minutes, SSgt Cooley returned to the trailer with batteries. (R. 363, 438.) When SSgt Cooley returned he was unable to get the camper door open. (R. 365, 438.) SSgt Cooley had to knock and Appellant got up and let him into the camper. (R. 364, 438.) KK was upset and crying. (R. 364, 369, 439.) Appellant left the camper and returned to the house. (R. 364.)

SSgt Cooley was unable to elicit any information from KK about what happened in the camper while he was gone looking for batteries for the smoke detector. (R. 440.) SSgt Cooley decided to take KK home rather than stay in the camper for the night. (R. 440.) After going back into the house to change, SSgt Cooley drove KK from Appellant's house back to his house with her crying the whole way and not answering his questions about what happened. (R. 366, 443.) SSgt Cooley had never seen KK as upset as she was that night, not even when she previously had a miscarriage. (R. 443, 449, 460.)

Upon reaching the house KK immediately went to the bathroom and tried unsuccessfully to locate the string to her tampon. (R.

366.) KK asked for his assistance and SSgt Cooley was unable to locate the string either. (R. 367, 445.) In the bathroom KK informed SSgt Cooley that Appellant forced himself upon her. (R. 444, 454.) Removal of the impacted tampon was KK's "first" priority. (R. 367.) KK contacted her mother, a registered nurse, for advice about what to do about the impacted tampon. (R. 367.) KK's mother then came to SSgt Cooley's residence along with KK's sister. (R. 367.) KK's mother drove SSgt Cooley and KK to the emergency department at Alaska Regional. (R. 367.)

B. KK's statements during the sexual assault examination and her medical treatment.

After reporting the rape at Alaska Regional Hospital local law enforcement transferred her to a second facility, Providence Alaska Medical Center (Providence). (R. 566, 570, 564.) In Anchorage, Alaska, regardless of whether law enforcement is involved or not, all patients reporting sexual assault are transferred to Providence. (R. 567-68.) Providence contains a small clinic, set aside within the larger hospital that is used to treat persons that have reported sexual assaults. (R. 559.) Many medical treatments can be handled entirely within the clinic. (R. 560.) When a patient has a treatment need beyond the capability in the clinic they are brought to the emergency department. (R. 561.)

Ms. Henry was the nurse on call when KK was brought to Providence. (R. 559.) Ms. Henry is a forensic nurse and a nurse practitioner. (R. 557.) Forensic nurses specialize in providing medical care for patients who are affected by crime. (R. 558.) Nurse practitioner is an advanced credential of a registered nurse that requires training and education beyond that of a registered nurse. (R. 568.) A nurse practitioner is authorized to place sutures (stitches), write prescriptions, order laboratory work, and order x-rays. (R. 568.)

An encounter with a patient in the Providence clinic is considered "an episode of care by a medical provider." (R. 570.) The primary purpose of the appointment with KK was to perform a medical examination and provide needed treatment. (R. 566.) Any evidence collection was a secondary purpose. (R. 566.)

At the outset of their appointment, Nurse Practitioner Henry introduced herself and informed KK that her job is to make sure she is medically okay. (R. 561.) Nurse Practitioner Henry also explained that while she can collect samples for evidence in an investigation, her priority was taking care of KK's medical needs. (R. 561.)

Nurse Practitioner Henry completed a seven part process with KK. (R. 559.) The first step was a screening examination to ensure there were no injuries requiring emergent care such as an actively bleeding wound or a bone fracture. (R. 559.) After

determining she was medically stable, Nurse Practitioner Henry moved on to taking a medical history. (R. 559.) Following the medical history came consent forms, then a medical forensic history, then a medical forensic examination, then treatment, and finally discharge. (R. 559.) If a patient does not consent to evidence collection they still do the entire medical work up. (R. 566.)

All of the forms used in this specialized clinic during this episode of care are part of the patient's medical record. (R. 565.) As stated by Nurse Practitioner Henry, the primary purpose is medical evaluation and treatment, not evidence collection. (R. 566.) The Military Judge found as fact that there was a medical purpose. (R. 575.)

During the second step of the process, taking a medical history, Nurse Practitioner Henry's role is that of a medical provider, acting as a nurse. (R. 560.) The medical history covers the current event that brought the patient to the hospital. (R. 560.) While taking a medical history, Nurse Practitioner Henry asks a variety of questions to determine what happened, to evaluate any injuries the patient may have sustained, and determine any treatment the patient might need. (R. 560.) When presenting as a victim of a sexual assault the medical providers need to know details of how it happened to

know what tests may need to be done and what course of treatment to offer. (R. 560.)

Here, during the medical history component, KK reported that she had an impacted tampon and that it was caused when Appellant "put his penis in her vagina." (R. 562, 584.) KK was also concerned about sexually transmitted diseases. (R. 585.) Following completion of the medical history Nurse Practitioner Henry performed a full medical examination. (R. 585-86.) During the medical examination Nurse Practitioner Henry observed the impacted tampon turned horizontal. (R. 586-87; Pros. Ex. 3.) Nurse Practitioner Henry removed the impacted tampon in the Providence clinic. (R. 368, 405, 588-89.) During the process of removing the tampon it did not touch KK's external genitalia. (R. 589.) Nurse Practitioner Henry indicated the only impacted tampons turned horizontal that she has seen have occurred when sexual intercourse occurred while the female had a tampon in. (R. 590.)

Following removal of the tampon, Nurse Practitioner Henry collected a series of swabs from KK. (R. 591.) She swabbed near the cervix and the cervix itself for both forensic purposes and to test for sexually transmitted diseases. (R. 591.) Nurse Practitioner Henry collected swabs from the vaginal walls for forensic purposes and to test for different sexually transmitted

diseases. (R. 591.) Prior to discharge, KK was treated with antibiotics, emergency contraception, and ibuprofen. (R. 593.)

C. Appellant's DNA was found on the vaginal swabs taken from KK.

Some of the swabs taken during KK's sexual assault examination were sent to the United States Army Criminal Investigation Laboratory (USACIL) for testing including DNA testing. (R. 492.) Vaginal swabs, cervical swabs, labia major swabs, labia minora swabs, perineum swabs, the tampon itself, and her underwear were all sent to USACIL. (R. 499.) Semen was found on all of the swabs taken from CK as well as the tampon and the underwear. (R. 499, 525; Pros. Ex. 5.) The semen on the vaginal swabs from the vaginal cavity was tested for DNA. (R. 499.) The DNA profile from the semen matched Appellant. (R. 499-500, 504; Pros. Ex. 5.)

D. Trial Defense Counsel's objections to statements made by KK to Nurse Practitioner Henry at trial.

Trial Defense Counsel objected to a question asking Nurse Practitioner Henry to explain KK's statements during her medical history questioning. (R. 562.) Trial Counsel responded that the statements qualified for the hearsay exception for medical diagnosis or treatment. (R. 562.) Neither the Trial Defense Counsel nor the Trial Counsel cited any case law or other source of authority in raising the objection or in responding to it.

During an Article 39(a) session, Trial Defense Counsel took the witness on an extended voir dire. (R. 564-74.) The Military Judge found as fact, that KK did "have a medical concern, an impacted tampon." (R. 580.) The Military Judge also found there was medical purpose in the visit to the Providence clinic and recognized that a statement having a dual purpose does not negate its ability to qualify for the medical diagnosis or treatment hearsay exception. (R. 575, 607.)

After hearing arguments from counsel, the Military Judge sustained the objection in part and overruled the objection in part. (R. 583-84.) The Military Judge did not cite any case law he was relying on reaching his ruling. Trial Counsel then asked the Nurse Practitioner to state what physical acts KK described that helped her in "further assessments in treatment?" (R. 584.) Nurse Practitioner Henry responded "[s]he reported that the suspect put his penis in her vagina." (R. 584.) Trial Defense Counsel again objected on hearsay grounds and was overruled. (R. 585.)

E. The Military Judge's denial of a mistake of fact as to consent instruction due to lack of evidence adduced at trial to support giving such an instruction.

Trial Defense Counsel sought an instruction on mistake of fact as to consent. (R. 691, 695.) The discussion between the parties regarding instructions occurred in part in a Rule for Courts-Martial (R.C.M.) 802 conference. (R. 691.) The Military

Judge summarized the R.C.M. 802 conference, including Civilian Defense Counsel's argument as to why there was some evidence to support the instruction. (R. 691, 695.) The Military Judge also provided Civilian Defense Counsel an opportunity to put his full basis for seeking the instruction on the Record. (R. 695.)

Civilian Defense Counsel's basis for seeking the mistake of fact as to consent was: (1) KK asking SSgt Cooley if she had been flirting with Appellant over the course of the evening during the drive home from Appellant's residence after the assault; (2) characterizing KK's testimony as her not recalling if she had been flirting with Appellant; (3) that Appellant did not use physical force to overpower KK to accomplish the sexual assault; (4) KK's purported "lack of action" as Appellant pulled down her bikini bottoms; and (5) KK not saying the word "no" during the assault itself. (R. 695.) After continued discussion of the issue Civilian Defense Counsel added a sixth basis, the attempted removal of the tampon. (R. 697.)

The Military Judge cited the case of *United States v. DiPaola*, 67 M.J. 98 (C.A.A.F. 2008), and denied the request for a mistake of fact instruction. (R. 691, 699.) The Military Judge stated the some evidence standard and that doubt on the issue of the instruction should be resolved in favor of Appellant on the Record. (R. 699.) The Military

Judge did find the instruction for the affirmative defense of consent applicable. (R. 700.)

Argument

I.

THE VICTIM'S STATEMENT TO THE NURSE PRACTITIONER MADE DURING THE SEXUAL ASSAULT EXAMINATION ABOUT THE SOURCE AND CAUSE OF HER IMPACTED TAMPON WAS ADMISSIBLE BECAUSE IT WAS MADE FOR THE PURPOSE OF MEDICAL DAIGNOSIS AND WITH THE EXPECTATION OF RECEIVING MEDICAL TREATMENT.

A. The applicable standard of review for evidentiary rulings requires significantly more than merely disagreeing with the Military Judge's ultimate ruling.

Evidentiary rulings are reviewed for an abuse of discretion. *E.g.*, *United States v. Rodriguez-Rivera*, 63 M.J. 372, 381 (C.A.A.F. 2006). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion." *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (internal quotations omitted). An ultimate conclusion that is "arbitrary, fanciful, clearly unreasonable or clearly erroneous" is an abuse of discretion.

E.g., *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (internal quotations omitted).

B. KK's statement to the nurse practitioner examining her about the source of her medical concern and its cause was properly admitted by the Military Judge.

In conducting review of evidentiary rulings the evidence is considered in the light most favorable to the prevailing party. *E.g.*, *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996). Hearsay statements are generally inadmissible. Mil. R. Evid. 802. An exception to the general prohibition on hearsay exists for statements "made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Mil. R. Evid. 803(4). To qualify for the exception the statement must satisfy a two part test: "[f]irst the statements must be made for the purposes of medical diagnosis or treatment; and second, the patient must make the statement with some expectation of receiving medical benefit for the medical diagnosis or treatment that is being sought." *United States v. Cucuzzella*, 66 M.J. 57, 59 (C.A.A.F. 2008) (internal quotations omitted).

Here the statement in question, "[s]he reported that the suspect in question put his penis in her vagina" was a statement

made for purposes of medical diagnosis and treatment. (R. 584.) There are two components to the challenged statement, first that Appellant was the perpetrator. Second, that his penis penetrated her vagina. Both components of the statement fall squarely within the express language of the rule. The victim, KK, was describing the "inception or general character of the cause or external source" of her medical issue. Mil. R. Evid. 803(4). Appellant's penetration of her vagina with his penis is the external source, or the general character of the cause of her medical issue, the impacted tampon. Mil. R. Evid. 803(4).

The statement in question also satisfies both prerequisite prongs for the medical diagnosis and treatment exception. *See United States v. Edens*, 31 M.J. 267, 269 (C.M.A. 1990) (establishing two prong test for medical diagnosis or treatment exception to hearsay). KK made the statement to explain her current medical condition and she did so for the purpose of receiving medical treatment, including removal of the impacted tampon.

1. KK's statements to Nurse Practitioner Henry during the medical history component of the examination were made for the purpose of medical diagnosis or treatment.

A Military Judge's finding that a statement was made with an expectation of receiving medical treatment is a finding of fact that shall not be overturned unless clearly erroneous.

United States v. Ureta, 44 M.J. 290, 297 (C.A.A.F. 1996). Findings of fact are clearly erroneous when they are entirely unsupported by the record, *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004), or where despite support in the record "the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985); *United States v. Martin*, 56 M.J. 97, 106 (C.A.A.F. 2001).

Here, the Military Judge found both that KK had a legitimate medical concern in the impacted tampon and that there was a medical purpose for her appointment at the Providence clinic with Nurse Practitioner Henry. (R. 575, 580.) Those factual findings are not clearly erroneous as they are amply supported in the Record.

KK reported the rape and the impacted tampon at Alaska Regional Hospital and was transferred to Providence without receiving medical treatment. (R. 546, 566, 570.) KK's first actual medical appointment occurred at the Providence clinic for victims of sexual assault with Nurse Practitioner Henry. (R. 559.) At the outset of the appointment, Nurse Practitioner Henry informed KK that her job is to make sure she is medically alright. (R. 561.) Therefore, KK was aware this appointment was for the purpose of medical treatment. *See*, *e.g.*, *United States v. Cox*, 45 M.J. 153, 157 (C.A.A.F. 1996) (noting

prerequisites for statement to qualify as for purposes of medical diagnosis or treatment may be established by caregiver's testimony).

The first step in this episode of care was a screening examination to ensure KK had no injuries requiring immediate emergent care such as a fracture or an actively bleeding wound. (R. 559.) Following the screening examination the nurse practitioner took a medical history from KK. (R. 559.) Nurse Practitioner Henry considers herself as acting as a medical care provider during the medical history portion of the episode of care. (R. 560.) Medical history questioning covers the current event that brought the patient to the hospital. (R. 560.) Accordingly, Nurse Practitioner Henry asked KK what happened to cause her to come in for treatment. (R. 560.)

In *Cucuzzella*, statements made to a Family Advocacy Nurse were found to satisfy the medical diagnosis and treatment exception. *Cucuzzella*, 66 M.J. at 60. There a married couple was referred to a Family Advocacy Nurse out of concerns about neglect of a newborn. *Id.* at 58. Sometime after that initial referral the wife came back to see the Family Advocacy Nurse alone. *Id*. The wife began by reporting she was writing bad checks and then eventually reported that her husband had been physically and sexually abusing her for years. *Id*. Despite the Family Advocacy Nurse's inability to provide any actual

treatment as she was not a licensed counselor, the statements, including identifying the abuser were found within the hearsay exception for medical diagnosis and treatment. *Id*. at 60.

Here, KK's statements are even more clearly for the purposes of medical diagnosis and treatment than seen in *Cucuzzella*. *Cucuzzella*, 66 M.J. at 58. In *Cucuzzella*, the medical care provider was not capable of diagnosing or of providing actual treatment, she was only capable of providing a referral. *Id*. at 59. Here, Nurse Practitioner Henry, to which KK made the statements, was not only capable of but did provide specific treatments as a direct result of the statements made.

Nurse Practitioner Henry needed to know the details of what occurred because the tests required and treatment rendered could differ based on how the sexual assault occurred. (R. 560.) Here, KK reported that she had an impacted tampon and that it was caused when Appellant "put his penis in her vagina." (R. 562, 584.) Accordingly, as a direct result of that statement Nurse Practitioner Henry knew that she had to locate and extract the impacted tampon, that she needed to test for sexually transmitted diseases, that she needed to offer preventative measures against sexually transmitted diseases and emergency contraceptive options due to the penile penetration. (R. 586-89; Pros. Ex. 3.) Nurse Practitioner Henry also provided antibiotics as a preventative measure against some sexually

transmitted diseases and provided ibuprofen for general discomfort. (R. 591, 593.)

2. KK made the statements to Nurse Practitioner Henry with the expectation of receiving medical treatment to remove the impacted tampon.

"The critical question is whether she had some expectation of treatment when she spoke to the caregivers." *United States v. Rodriguez-Rivera*, 63 M.J. 372, 381 (C.A.A.F. 2006) (citing *United States v. Haner*, 49 M.J. 72, 76 (C.A.A.F. 1998)). "The key factor in determining whether a particular statement is embraced by the medical-treatment exception is the state of mind or motive of the patient in giving the information to the physician and the expectation or perception of the patient that if he or she gives truthful information, it will help him or her to be healed." *United States v. Donaldson*, 58 M.J. 477, 485 (C.A.A.F. 2003).

Here, as the Military Judge found, the Record demonstrates the impacted tampon was a significant concern to KK. (R. 580, 584.) KK testified that she was concerned about it as the sexual assault was occurring. (R. 364.) When she knew she could not escape the sexually assault, she tried to remove the tampon because she "didn't want it to get stuck inside me." (R. 364, 397, 412-13, 415-16.) The first thing she did upon reaching home after the sexual assault was try to locate the impacted tampon. (R. 366.) She then solicited assistance from

SSgt Cooley who could not locate the tampon either. (R. 367, 445.) KK then contacted her mother, a registered nurse, for advice and assistance about the impacted tampon. (R. 367.) KK then went to the emergency department and reported two things, that she was raped and that she had an impacted tampon. (R. 367.) Based on her consistent concern about the impacted tampon and that she immediately reported it to the first medical care provider she came in contact with demonstrate she was seeking medical treatment to remove the tampon.

The initial hospital referred her to a second facility. (R. 564, 566, 570.) Her first substantive meeting with a medical care provider was with Nurse Practitioner Henry. She again reported her medical condition to that care provider. (R. 652, 584.) As a result, KK obtained what she was seeking, treatment to remove the impacted tampon.

3. Identifying Appellant as the source of her medical concern did not take the statement outside the scope of the hearsay exception for diagnosis and treatment.

Identifying the cause or source of injuries, including who caused them, can be part of a statement for the purpose of medical diagnosis or treatment. *Haner*, 49 M.J. at 74-75; *see also United States v. Brimeyer*, No. 201100141, 2012 CCA LEXIS 235, *37-38 (N-M. Ct. Crim. App. Jun. 28, 2102) (noting identity of a perpetrator can fall within the medical diagnosis and

treatment exception); *see also United States v. Hollis*, 54 M.J. 809, 812 (N-M. Ct. Crim. App. 2000) (citing *United States v. Deland*, 22 M.J. 70, 74 (C.M.A. 1986)(same)). In *Haner*, the victim was both physically and sexually assaulted for hours. *Haner*, 49 M.J. at 74-75. After escaping from her tormentor she was referred to a hospital by a District Attorney to have her injuries documented. *Id*. at 76. During her medical examination which revealed significant bruising she told the doctor the source of her injuries and how they occurred. *Id*. at 77. Among other things she explained that her husband duct taped her hands and ankles and repeatedly struck her with a belt. *Id*. at 77. Those statements, including the cause or source of the injuries, were within the hearsay exception for medical diagnosis and treatment. *Id*. at 77.

Here, as in *Haner*, KK explained the cause or source of the injury. In *Haner*, the source of the injury was her husband tying her up and repeatedly striking her with a belt. *Haner*, 49 M.J. at 77. Here, the injury was an impacted tampon, and KK explained that it occurred when Appellant drove it inside of her with his penis. (R. 662, 584.) Just as in *Haner* where explaining the source of the injury, both the who and the how, was within the scope of the hearsay exception, here explaining the source of the injury was within the scope of the hearsay exception.

C. Neither being referred to a medical facility by law enforcement nor that a statement made may also be usable for a dual purpose of law enforcement does not negate its ability to qualify for a hearsay exception.

Appellant's argument that Nurse Practitioner Henry's primary purpose was law enforcement which prevents statements to her from qualifying for the hearsay exception for medical diagnosis is both factually inaccurate and legally incorrect. (Appellant's Br. at 16, 17.) Nurse Practitioner Henry testified repeatedly that her primary purpose was as a health care provider and that any evidence collection was secondary. (R. 560, 561, 566, 570.) The Military Judge made no finding to the contrary. *See Reister*, 44 M.J. at 413 (noting evidence considered in light most favorable to prevailing party below). Nurse Practitioner Henry testified that even if KK had not consented to any forensic evidence collection she still would have completed all the other portions, including the medical history, the examination, and provided the treatment. (R. 566.) Further, the Military Judge found there was a legitimate medical purpose for KK's appointment at the Providence clinic. (R. 575.) Being referred to hospital by law enforcement does not negate the ability of statements to qualify for hearsay exception for medical diagnosis or treatment. *Haner*, 49 M.J. at 76. Similarly, that a statement has a dual investigative purpose does not negate its ability to qualify for hearsay exception for

medical diagnosis or treatment. *United States v. Hollis*, 54 M.J. at 809, 814 (N-M. Ct. Crim. App. 2000), *aff'd*, 57 M.J. 74 (C.A.A.F. 2002), *cert. denied*, 2002 U.S. LEXIS 8746 (U.S. Dec. 2, 2002); *see also Haner*, 49 M.J. at 77 (finding statements still qualify for hearsay exception where doctor's testimony explained that he had dual purpose of documenting injuries when referred by law enforcement as well as treating). Here, the Military Judge correctly noted that dual purpose does not negate applicability of hearsay exception. (R. 607.) Appellant's arguments lack merit.

D. The Military Judge did not abuse his discretion by not citing *United States v. Edens* in explaining the ruling.

Appellant's argument that the Military Judge abused his discretion by not citing *United States v. Edens*, 31 M.J. 267 (C.M.A. 1990) in reaching his ruling was an abuse of discretion is incorrect. (Appellant's Br. at 19-20.) The *Edens* test consists of two prongs, that the statement was explaining a current medical condition and that the statement was made for the purpose of receiving treatment for that medical condition. *Edens*, 31 M.J. at 269. Here, while the Military Judge did not articulate he was applying *Edens*, he did make factual findings relevant to the two prongs of the *Edens* test. (R. 575, 580, 607.) The Military Judge found KK was explaining a legitimate medical concern to her health care provider. (R. 580.) The

Military Judge also found KK's statement was for the purpose of receiving treatment for the medical condition. (R. 575, 607.) As the Military Judge's factual findings were pertinent to the two prongs of the applicable *Edens* test, it is clear he was applying that test in his analysis of the issue. *See United States v. Mott*, 72 M.J. 319, 329 (C.A.A.F. 2013) (noting factual findings failing to address relevant considerations constitutes abuse of discretion).

E. Assuming arguendo it was error to admit KK's statement to her medical provider, no prejudice resulted because it was completely inconsequential in light of the DNA evidence.

Erroneous admission of evidence only warrants relief where it resulted in material prejudice to a substantial right. 10 U.S.C. § 859; *United States v. Goodin*, 67 M.J. 158, 160 (C.A.A.F. 2009). This Court evaluates "prejudice from an erroneous evidentiary ruling by weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999) (citation omitted). Here, the overwhelming strength of the evidence of Appellant's guilt establishes that there was no prejudice.

1. Strength of the case against Appellant.

The strength of the case against Appellant was strong. KK reported Appellant raped her to SSgt Cooley as soon as he got her safely home. (R. 444, 454.) Semen was found on all of the swabs collected from KK, including from her labia majora, her labia minora, inside of her vagina, near her cervix, from her impacted tampon, and from her underwear. (R. 499, 525.) Appellant's DNA was found in semen inside KK's vagina. (R. 499-500, 504; Pros. Ex. 5.) Further, large portions of KK's testimony about the events preceding the rape and about the aftermath of the rape were corroborated by other witnesses.

SSgt Cooley corroborated all of the victim's testimony regarding Appellant's opportunity to commit the sexual assault. SSgt Cooley corroborated KK's testimony that Appellant was in the camper while KK was laying on the bed. (R. 360-61, 437.) SSgt Cooley then corroborated that he left Appellant alone in camper with KK when he went to locate batteries. (R. 395, 438.) SSgt Cooley corroborated that when he returned to the camper, the door was locked and Appellant had to unlock the door and let him into the camper. (R. 363, 365, 438.) SSgt Cooley also corroborated that KK was crying when he got back into the camper. (R. 364, 369, 439.)

SSgt Cooley corroborated the events after the sexual assault as well. SSgt Cooley corroborated KK was so upset that

he decided to drive her home despite their prior plans to spend the night due to their alcohol consumption. (R. 440, 449, 460.) SSgt Cooley corroborated that KK sought his assistance in finding the string to the impacted tampon. (R. 367, 445.)

When KK first presented herself to the hospital she reported she was raped and that her tampon was impacted. (R. 367.) The evidence collected at Providence corroborated KK's report. All of the swabs collected at Providence by Nurse Practitioner Henry were found to contain semen, corroborating KK's allegation that sexual intercourse occurred. Further, the impacted tampon had turned horizontal. (R. 586-87; Pros. Ex. 3.) Nurse Practitioner Henry testified that the only impacted tampons turned horizontal she has seen in her nineteen year career were as a result of sexual intercourse while the female had the tampon in. (R. 590.)

2. Strength of the Defense's case.

Appellant's case was weak. Appellant acknowledged some sexual contact occurred and put forward alternate theories that any touching that occurred was consensual and that actual intercourse never occurred. (R. 299, 485, 730, 732, 734.) However, Appellant offered no actual evidence of any of his theories, only conjecture and argument from counsel. The victim was adamant that there was no consensual contact. (R. 369, 371, 414.) Further, the evidence demonstrated sexual intercourse did

occur. The theory that Appellant never actually penetrated her vulva lacked merit as KK's tampon was impacted up against her cervix, turned sideways, consistent with sexual intercourse, with semen found on it, and Appellant's DNA was found inside her vagina. *See United States v. Hall*, 66 M.J. 53, 55-56 (C.A.A.F. 2008) (finding defense case that consisted of relatively unsupported alternative theories weak).

3. The materiality of the evidence in question.

Admittedly, the evidence in question did pertain to the penetration element of the charged offense. In the statement to her medical care provider, KK did both identify Appellant and indicate that he inserted his penis into her vagina. (R. 562, 584.) However in light of the other evidence the statement was insignificant as it was cumulative of other evidence establishing penetration. Trial Defense Counsel found this evidence so insignificant that he never mentioned it in his closing argument spanning sixteen pages of transcript instead focusing on challenging the forensic evidence. (R. 728-44.) Further demonstrating the relative insignificance of this statement as evidence, it was mentioned once in passing in the prosecution's closing argument spanning eleven pages of transcript and never mentioned in the rebuttal argument. (R. 720, 744-47); *see United States v. Durbin*, 68 M.J. 271, 276 (C.A.A.F. 2010) (finding brief references in closing and

rebuttal arguments demonstrate limited materiality of the evidence in question).

4. The quality of the evidence in question.

The statement made to Nurse Practitioner Henry identifying Appellant was qualitatively insignificant in light of the other evidence. *See Hall*, 66 M.J. at 56 (noting challenged evidence not qualitatively significant where duplicative of other stronger evidence). First, it was cumulative of SSgt Cooley's testimony that KK informed him Appellant had forced himself upon her. (R. 444, 454.) Second, the testimony of both KK, and SSgt Cooley established Appellant's opportunity to commit the offense during the period he was alone with KK in the camper. (R. 395, 438.)

KK reported to SSgt Cooley that Appellant raped her as soon as she was safely at her residence. (R. 444, 454.) The impacted tampon was found inside her near her cervix. (R. 586-87; Pros. Ex. 3.) The tampon was found to have semen on it. (R. 525.) And the most significant evidence of all, the semen found inside KK's vagina contained Appellant's DNA. (R. 499-500; Pros. Ex. 5.) The significance of the DNA evidence overwhelms the statement made that Appellant inserted his penis in her vagina and renders the statement qualitatively insignificant.

As all four factors of the prejudice analysis favor the prosecution, Appellant suffered no material prejudice to a substantial right.

II.

APPELLANT'S CONVICTIONS WERE LEGALLY AND FACTUALLY SUFFICIENT BECAUSE THE TESTIMONY ESTABLISHED ALL ELEMENTS OF THE OFFENSES AND WAS CORROBORATED BY THE FORENSIC EVIDENCE INCLUDING APPELLANT'S DNA.

A. Standard of Review.

This Court reviews claims of legal and factual sufficiency de novo. 10 U.S.C. § 866(c); *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007).

B. Appellant's convictions are legally sufficient because the victim's testimony was corroborated by both SSgt Cooley and her medical care provider as well as compelling forensic evidence in that semen found in KK's vagina matched Appellant's DNA profile.

The test for legal sufficiency is whether, considering the evidence admitted at trial in a light most favorable to the prosecution, a reasonable fact-finder could have found all the elements beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The Court's 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). In resolving questions of legal sufficiency, the Court is "bound to draw every reasonable inference from the evidence of record in

favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001).

Testing for factual sufficiency, this Court asks whether, after weighing the evidence in the record of trial, it is independently convinced of Appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In testing for factual sufficiency, this Court is required to "recogniz[e] that the trial court saw and heard the witnesses." *Id*. This is not a *pro forma* legal requirement. Rather, it takes into account the legal rule that the trier of fact is best situated to assess a witness's credibility while testifying. *See, e.g., United States v. Madey*, 14 M.J. 651, 653 (A.C.M.R. 1982), *rev. denied*, 15 M.J. 183 (C.M.A. 1983); *United States v. Ferguson*, 35 F.3d 327, 333 (7th Cir. 1994), *cert. denied*, 514 U.S. 1100 (1995) (trial court's evaluation of witness credibility "will not be disturbed unless it is completely without foundation."). It also takes into account that, where the court members are properly instructed to consider a witness' credibility, this Court should presume that the members followed the Military Judge's instructions to do so. *See United States v. Collier*, 67 M.J. 347 (C.A.A.F. 2009); (R. 711-12.)

Appellant's argument that neither the aggravated sexual assault nor the adultery convictions are legally sufficient is fatally flawed as it essentially reduces to challenging the

credibility of the victim, alleging she was impeached twice during cross examination. (Appellant's Br. at 26-27.) Even assuming *arguendo* KK's credibility was damaged on cross examination, that is completely irrelevant to legal sufficiency, where evidence is considered in the light most favorable to the prosecution. (Appellant's Br. at 26-27); *e.g.*, *Reed*, 54 M.J. at 41.

1. The aggravated sexual assault conviction was legally and factually sufficient.

The elements here of aggravated sexual assault by causing bodily harm are: (1) causing another person to engage in a sexual act; (2) by causing bodily harm to another person. Manual for Courts-Martial, United States (2012 ed.), App. 28, at A28-3, ¶ 45(b)(3)(b). Here, those elements were alleged as (1) sexual intercourse with KK; (2) by placing his arm across her upper body. (R. 708; Charge sheet.) These elements were both satisfied from testimony alone without even consideration of the forensic evidence.

KK testified that Appellant got on the bed behind her in the camper. (R. 363, 364.) KK testified that she felt her bikini bottoms being pulled down. (R. 369.) KK testified that Appellant's arm was wrapped around her and that she could not get away from him when she pushed on his legs. (R. 363.) KK testified that she was unable to find her tampon to remove it

and that it was impacted, or pushed completely inside of her. (R. 363, 397, 412-13, 415-16.) The door to the camper was locked when SSgt Cooley returned with the batteries.

SSgt Cooley testified that KK informed him that Appellant had forced himself upon her. (R. 444, 454.) KK testified that she informed the intake nurse at Alaska Regional, the first hospital she went to that she was raped. (R. 564, 566, 570.) Nurse Practitioner Henry, from the medical facility KK was transferred to, testified that KK informed her that Appellant inserted his penis into her vagina. (R. 562, 584.) Even without any of the forensic evidence, including the DNA evidence of Appellant's semen inside KK's vagina, this conviction is legally sufficient. (R. 499-500.) When the forensic evidence is considered this Court should be convinced of the factual sufficiency of the conviction as well. Nurse Practitioner Henry has only seen impacted tampons turned horizontal, as seen here, when it was caused by sexual intercourse. Semen was found on all of the swabs, including on the tampon itself. And Appellant's DNA was found in the semen insider KK's vagina.

2. <u>The adultery conviction was legally and factually sufficient</u>.

The elements of adultery here are: (1) that the accused wrongfully had sexual intercourse with KK; (2) that the accused was married to another person at the time; and (3) that the

conduct was prejudicial to good order and discipline. (R. 706); Manual for Courts-Martial, United States (2012 ed.), pt. IV, ¶ 62(b). That sexual intercourse occurred was established through the testimony of KK, SSgt Cooley, and Nurse Practitioner Henry, as discussed *supra* at 24-25 and 29-30, without even having to consider the forensic evidence which provides further support for the fact that sexual intercourse occurred. That Appellant was married to another was established through the testimony of KK, SSgt Cooley, and Appellant's own service record documents. (R. 345, 430; Pros Ex. 1; Pros. Ex. 9 at 20.) That Appellant's conduct was prejudicial to good order and discipline was established through SSgt Cooley's testimony. (R. 449-51.) Appellant's conduct made SSgt Cooley reconsider his commitment to the Marine Corps. (R. 450.) As a result of Appellant's conduct, SSgt Cooley now questions the legitimacy of mentor-mentee relationships, that a mentor may have very different interests in mind than the best interests of the mentee. (R. 451.) SSgt Cooley has lost trust in the Marine Corps as a result of Appellant's actions. (R. 450.)

III.

THE MILITARY JUDGE DID NOT ERR IN DECLINING TO GIVE THE MISTAKE OF FACT INSTRUCTION BECAUSE THERE WAS NO EVIDENCE TO WARRANT IT.

A. Standard of Review.

Mistake of fact as to consent does potentially apply to a charge of aggravated sexual contact. Manual for Courts-Martial, United States (2012 ed.), App. 28, at A28-3, ¶ 45(r). Military judges are required to instruct members on affirmative defenses "in issue." *E.g.*, *United States v. Lewis*, 65 M.J. 85 (C.A.A.F. 2007) (*citing* R.C.M. 920(e)(3)). An allegation of error in regard to a failure to give a mandatory instruction is reviewed *de novo*. *United States v. Schumacher*, 70 M.J. 387 (C.A.A.F. 2011) (*citing United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007)).

B. The Military Judge correctly concluded that mistake of fact as to consent was not raised by the evidence.

A matter is considered "in issue" when "some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose." *United States v. Neal*, 68 M.J. 289, 297-98 (C.A.A.F. 2010). "In other words, 'some evidence,' entitling an accused to an instruction, has not been presented until 'there exists evidence sufficient for a reasonable jury to find in [the accused's] favor.'" *Schumacher*, 70 M.J. at 389 (*quoting Mathews v. United States*, 485 U.S. 58,

63 (1988)). The evidence can be raised by the prosecution, the defense, or by the court-martial itself. *United States v. Hibbard*, 58 M.J. 71, 73 (C.A.A.F. 2003). A military judge's duty to instruct is not determined by a defense theory of the case, rather by the actual evidence presented during trial. *United States v. Brown*, 43 M.J. 187, 189 (C.A.A.F. 1995); *but see Hibbard*, 58 M.J. at 73 (noting theory can be considered but is not dispositive).

Mistake of fact as to consent in a general intent offense, such as aggravated sexual assault, requires both a subjective and objective showing. *United States v. Peterson*, 47 M.J. 231, 234-35 (C.A.A.F. 1997). Appellant must have had a subjective belief his victim was consenting and that belief must have been objectively reasonable. Manual for Courts-Martial, United States (2012 ed.), App. 28, at A28-5, ¶ 45(t)(15); *Peterson*, 47 M.J. at 235. To warrant the instruction, there must be some evidence from which members could find both the subjective and the objective components.

In *Peterson*, the instruction was not due because there was no affirmative evidence on the merits that appellant had a subjective belief the victim consented. *Peterson*, 47 M.J. at 235. Here, as in *Peterson*, Appellant points to no evidence of his subjective belief KK consented. Appellant neither took the stand and testified as to his belief nor was there any statement

offered indicating his subjective belief she was consenting. *See United States v. Thomas*, No. 200900367, 2009 CCA LEXIS 463, *9 (N-M. Ct. Crim. App. Dec. 29, 2009) (finding instruction due where there was affirmative evidence that accused believed sexual activity was consensual). Accordingly, exactly as in *Peterson*, no mistake of fact as to consent instruction was due.

Assuming *arguendo* there was some evidence of Appellant's subjective belief KK was consenting there is no evidence upon which members could find that mistaken belief was reasonable. Appellant provides no assistance in explaining where some evidence might be found as he points to no specific evidence in the argument in his brief. (Appellant's Br. at 35.) Instead Appellant simply claims some evidence existed "as noted in the factual summaries above." (Appellant's Br. at 35.) Accordingly the United States will address the seminal case that the Military Judge cited and relied upon as well as each of the six possibilities Civilian Trial Defense Counsel argued provided some evidence. (R. 695, 697.)

The Military Judge properly relied upon *United States v. DiPaola*, 67 M.J. 98 (C.A.A.F. 2008), in concluding the instruction was not warranted here. (R. 691.) The facts of *DiPaola*, where the instruction was warranted, are significantly beyond the facts seen here. In *DiPaola*, the victim willingly participated in some sexual activity. *Dipaola*, 67 M.J. at 101.

Specifically she kissed the appellant, allowed him to remove her shirt, to kiss her bare breasts, and allowed him to rub her "crotch area" with his hand. *Id*. Further, the victim and appellant had a prior sexual relationship that had lasted several months. *Id*. at 99. Under those circumstances some evidence existed upon which reasonable members could have found a "mixed message" and therefore a mistake of fact as to consent. *Id*. at 102. Here, completely unlike *DiPaola*, KK had no prior sexual relationship with Appellant. Also unlike *DiPaola*, KK never kissed Appellant allowed him to kiss her bare breasts, or to rub her crotch area. The facts that provided "some evidence" in *DiPaola* are completely absent here.

None of the things Civilian Trial Defense Counsel mentioned in seeking the instruction actually establish some evidence justifying the instruction. (R. 695, 697.)

1. Neither KK's lack of memory of flirting with Appellant nor her asking SSgt Cooley if she had flirted with Appellant over the course of the evening provide any evidence of mistake of fact as to consent.

Consent requires words or overt acts. Manual for Courts-Martial, United States (2012 ed.), App. 28, at A28-5, ¶ 45(t)(14). Mistake of fact as to consent requires a reasonable belief that certain words or overt acts were consent when in fact they were not. Manual for Courts-Martial, United States (2012 ed.), App. 28, at A28-5, ¶ 45(t)(15). Accordingly, there

must be at least one actual word or overt act for the accused to misinterpret to constitute his mistake of fact as to consent. *See United States v. Rozmus*, No. 200900052, 2009 CCA LEXIS 320, *8 (N-M. Ct. Crim. App. Sep. 10, 2009) (noting mistake of fact instruction not due where there was no overt act on part of victim that could have been misconstrued). Trial Defense Counsel's first two rationales for the instruction point to no actual word or overt act that Appellant misinterpreted, therefore they cannot form the basis of some evidence to justify the instruction.

KK did not recall touching Appellant, flirting with him, or giving him any indication she wanted to engage in sexual intercourse with him. (R. 369, 371, 414.) Trial Defense Counsel argued that lack of memory means it either "could have happened or could not have happened" implying the mere possibility provides some evidence to warrant the instruction. (R. 695.) Trial Defense Counsel's argument fails for two reasons. First, KK never answered affirmatively, therefore the only substance in the Record are the questions from counsel which are not evidence. *Williams v. Illinois*, 132 S.Ct. 2221, 2234 (2012). Secondly, the only actual evidence in the Record is KK denying she did anything to indicate to Appellant she wanted to engage in sexual intercourse. (R. 369, 371, 414.)

After the sexual assault occurred while SSgt Cooley was driving KK to his residence KK asked him if it appeared to him that she was flirting with Appellant over the course of the evening. (R. 372.) This event provides no evidence to support a mistake of fact instruction for three reasons. First, as this question occurred after the sexual assault it could play no role in whether Appellant's purported mistake of fact as to consent was reasonable at the time of the sexual assault. *Hibbard*, 58 M.J. at 75 (explaining applicability of mistake of fact instruction evaluated from the circumstances at the time of the offense). Second, there is no evidence Appellant was aware KK asked this question so it can play no role in evaluating the reasonableness of his purported mistake. If Appellant was not aware of a fact, he can't have relied on that fact in reaching his conclusion that KK was consenting. Finally, the actual evidence adduced indicates KK never flirted with Appellant, which is the underlying implication on which he relies here.

As is often seen in victims of sexual assault, KK was struggling with what happened to her and wondering if she brought it on herself somehow. Her question demonstrates she was exploring whether she did something to bring about the assault. KK provided no testimony about SSgt Cooley's response to her inquiry. (R. 372.) SSgt Cooley never testified to observing any flirtatious behavior on the part of KK towards

Appellant. The only testimony in the Record is KK denying she did anything to indicate to Appellant she wanted to engage in sexual intercourse. (R. 369, 371, 414.) Asking another person who was physically present their opinion of what they saw prior to the sexual assault, which is all the evidence shows happened here, does not provide actual evidence of mistake of fact as to consent.

2. The absence of words or overt acts by KK cannot form the basis of a mistake of fact as to consent.

Civilian Trial Defense Counsel's argument that KK's failure to say the word "no" or purported lack of resistance as Appellant pulled down her bikini bottoms cannot form the basis of a mistake of fact as to consent. (R. 695.) Appellant's claim reduces to the absence of words or acts on the part of KK is evidence of consent, or restated, the basis on which Appellant mistakenly believed KK was consenting. That argument is fatally flawed. Consent is statutorily defined as "words or overt acts indicating a freely given agreement to the sexual conduct at issue[.]" Manual for Courts-Martial, United States (2012 ed.), App. 28, A28-5, ¶ 45(t)(14). Consent is only manifested through an actual word or act on the part of the participant. Mistake of fact as to consent means the word or act was misinterpreted to mean consent when in truth it was not

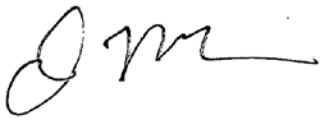
manifesting consent. Here, Appellant points to no actual word or overt act that he misinterpreted.

3. KK's unsuccessful attempt to remove her tampon does not provide any evidence of mistake of fact as to consent.

KK tried to remove her tampon when it became obvious to her that she could not escape the event. (R. 363, 393.) This fact alone provides no evidence to justify a mistake of fact as to consent instruction for two reasons. First, there is no evidence in the Record that Appellant was aware she tried to remove her tampon. KK lay on her side facing away from Appellant at the time of the assault. (R. 363.) Appellant assaulted her from behind. KK used her left hand to try and push away from him. (R. 363.) Then with her right hand, while laying on her right side, she reached for the string to her tampon. There is no evidence in the Record that Appellant, from his position behind her, was even aware she tried to remove her tampon. Second, as evidenced by the fact that she was unable to find the string, the tampon was already impacted when she tried to remove it. Meaning Appellant had already penetrated her with his penis and pushed it completely inside of her. Accordingly, as her action occurred after the intercourse had begun it cannot be used to provide some evidence that she was consenting to something that had already happened.

Conclusion

WHEREFORE, the United States respectfully requests that this Court affirm the findings and sentence adjudged and approved below.



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Certificate of Filing and Service

I certify the foregoing was delivered to the Court and a copy was served upon opposing counsel and electronically filed on May 19, 2014.

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