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

Before Panel No. 2

UNITED STATES Appellee v. Nicholas A. HOWARD Gunnery Sergeant (E-7) U.S. Marine Corps Appellant	**APPELLANT'S BRIEF AND ASSIGNMENTS OF ERROR** Case No. 201300346 Tried at Marine Corps Recruiting Depot, San Diego, California, on 20 March and 30 April through 3 May 2013, before a General Court-Martial convened by Commanding General, 12th Marine Corps District, Western Recruiting Region, Marine Corps Depot San Diego.

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

PHILIP D. CAVE
Law Office
1318 Princess St.
Alexandria, VA 22314
(703) 298-9562
mljucmj@court-martial.com

DAVID C. DZIENGOWSKI
Lieutenant, JAG Corps, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
BLDG 58, Suite 100
Washington Navy Yard, DC 20374
P:(202) 685-7292
F:(202) 685-7426
david.dziengowski@navy.mil

Index of Brief

Table of Authorities

State Court Cases

Statutes

Rules

Secondary Sources

Assignments of Error

I.

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, Gunnery Sergeant (GySgt) Nicholas A. Howard, U.S. Marine Corps, received a dishonorable discharge. Accordingly, this Court has jurisdiction under Article 66(b), Uniform Code of Military Justice (UCMJ). *See* 10 U.S.C. § 866(b).

Statement of the Case

GySgt Howard was tried by a panel of enlisted and officer members sitting as a general court-martial from 30 April through 3 May 2013. The Government charged him with one violation of Article 120, UCMJ (aggravated sexual assault by causing bodily harm), and one violation of Article 134, UCMJ

(adultery). *See* 10 U.S.C. §§ 920, 934. The members convicted GySgt Howard of all charges and specifications. The members then sentenced GySgt Howard to reduction in rank to pay-grade E-1, total forfeitures of pay and allowances, and a dishonorable discharge.

On 28 August 2013, the Convening Authority (CA) approved the sentence as adjudged and, except for the punitive discharge, ordered it executed. (General Court-Martial Order No. 01-2013.) This appeal follows.

Statement of Facts

In 2012, GySgt Howard and Staff Sergeant (SSgt) Christopher L. Cooley, USMC, served together as Marine Corps recruiters in Alaska. (R. at 425.) They had known each other for quite some time; GySgt Howard recruited SSgt Cooley in February 2005. (*Id.*) After coming onto active duty, SSgt Cooley considered GySgt Howard a mentor. (R. at 426.) They were good friends. (*Id.*)

KK--the alleged victim--worked as a barista in a coffee shop. (R. at 427.) The coffee shop was located in the Diamond Center in Anchorage, Alaska, the same shopping center where SSgt Cooley and GySgt Howard served as recruiters at the Marine Corps Recruit Depot. (R. at 344.) GySgt Howard and SSgt Cooley often purchased coffee at KK's coffee shop. They

both met KK there. (R. at 344, 427.) Around September 2011, SSgt Cooley and KK started to date. (R. at 428.)

KK eventually stopped returning SSgt Cooley's phone calls. (R. at 457.) So SSgt Cooley moved on, and started seeing another girl. (R. at 457-58.) Eventually, he received a phone call from KK. She claimed to be six week's pregnant. (R. at 422.) SSgt Cooley went back to her so they could figure things out. (R. at 457.) But KK claimed to have miscarried the baby.[1] (R. at 347, 422, 459-60.)

In any case, the reunion rekindled the relationship between KK and SSgt Cooley. (R. at 374.) They began to socialize together again. And on 30 December 2012, KK, SSgt Cooley, GySgt Howard, April Howard (Howard's wife), and Rhianna Reuppel (April's sister), all set out for an evening of food and drinks. (R. at 348.) The occasion: celebrating April and KK's birthdays. (*Id.*) Together, they drove in the Howard's Chevrolet Tahoe to the Grape Tap in Wasilla, where they had a dinner reservation. (R. at 350.) After dinner, they headed to another location called the Hot Quarter Grill. (R. at 352, 431.) All told, KK estimates that she consumed two mimosas at the first restaurant, and one or two more

[1] Notably, while undergoing a SANE exam, KK told Forensic Nurse Tara Henry that she had *not* been pregnant before. (R. at 618.) And Master Sergeant (MSgt) Jeremey Shorten, USMC, testified that SSgt Cooley told him, "I think she was lying [about being pregnant] just to keep me around." (R. at 668.)

drinks at the second restaurant. (R. at 353.) Though she called herself drunk at that point, (*id.*), SSgt Cooley testified that she did not seem drunk to him.[2] (R. at 431.)

After dinner and some drinks, they made their way back to the Howards' house to play Nintendo Wii. (R. at 353.) But SSgt Cooley had an idea; he suggested they all go into the Howards' hot tub. (R. at 434.) Consistent with SSgt Cooley's idea, KK entered the hot tub. (R. at 357.) The record is unclear as to whether KK got out of the hot tub herself or had some help, (R. at 390), but there is no question that GySgt Howard carried KK to his camper--approximately twenty to forty yards--once she was out of the hot tub. (R. at 362, 436.)

KK testified that being carried over the shoulder by GySgt Howard did not concern her at all. (*Id.*) She trusted GySgt Howard. (R. at 377, 416.) And she felt safe around him. (*Id.*) Once they got to the camper, KK walked in herself. (R. at 297, 392.) The camper was already warm, even though it was negative 5 degrees outside. (R. at 392, 434.) KK climbed into the bunk and lay down. (R. at 298, 399.)

By this point, SSgt Cooley entered the camper. He had left the hot tub early to change out of his bathing suit. (R. at 436.) He intended to sleep in the camper with KK to avoid

[2] Though not admitted into evidence, KK's blood-alcohol content at the time of her sexual assault examination measured at .018. (R. at 83; I.O. Report at 5.)

driving home. (R. at 431-32.) SSgt Cooley became concerned, however, about the smoke detector.[3] (R. at 362.) So he went inside the Howard's house to retrieve a nine-volt battery. (R. at 298.) KK remembered hearing this conversation. (R. at 362.)

After SSgt Cooley left, GySgt Howard climbed into the bunk and lay beside KK. (R. at 362.) Still in her bathing suit, she felt her bikini bottoms move down her thigh. (R. at 363.) As KK was menstruating, she had a tampon inside her vagina. (*Id.*) According to her, she put her hand on GySgt Howard's thigh, attempting to push him away. Significantly, she also testified that she tried to remove her tampon. (R. at 397.) She said she tried to remove her tampon because she believed she was going to engage in intercourse. (R. at 416.) She never said "no," and she never said "stop." (R. at 399.) In fact, she gave no verbal communication whatsoever to say no to GySgt Howard. (R. at 399-400.)

KK did not testify to penetration. For example, the Government asked, "Did you feel any penetration; did you feel anything inside you?" (R. at 363.) KK answered, "*Right now I don't remember.*" (*Id.* (emphasis added).) In fact, the only testimony of penetration came from Forensic Nurse Tara Henry.

[3] The camper was heated by a propane heater. (R. at 438.)

Following a contested ruling allowing her to testify to hearsay under Military Rule of Evidence 803(4), she testified: "She reported that the suspect put his penis in her vagina." (R. at 584.) This statement is the subject of Assignment of Error I, *infra*.

Although KK did not remember penetration, she did remember that GySgt Howard did not force her or hold her down. (R. at 400.) His arm merely lay across her body. (*Id.*) And she acknowledged that she could have flirted with him unintentionally. (R. at 416.) KK asked SSgt Cooley, for example, if she had been flirting with GySgt Howard because she was unsure. (R. at 404.)

After five or six minutes of alone time, SSgt Cooley rejoined KK and GySgt Howard in the camper. (R. at 438.) GySgt Howard had to open the door because it was either jammed or locked. (*Id.*) KK was aware the door is old and sometimes sticks. (R. at 393.) When he entered the camper, SSgt Cooley "started messing with the smoke detector immediately." (R. at 439.) He eventually turned and looked at KK, who lain in the bunk with "her side facing the door." (*Id.*) Contrary to KK's testimony, he did not observe her in the fetal position. (R. at 398, 453.) But her eyes appeared red, and he could tell "something was going on." (*Id.*) SSgt Cooley asked GySgt

Howard if he knew what was going on; GySgt Howard said he did not know. (R. at 439-40.)

SSgt Cooley later testified that if KK had cheated on him, she would be very upset at herself. (R. at 460.)

The two ultimately left the Howard residence. Before they did, KK hugged GySgt Howard goodbye. (R. at 402.)

Additional relevant facts are included in the argument section below.

Summary of the Argument

I.

The military judge erred when he admitted, over defense objection, hearsay testimony from Forensic Nurse Tara Henry. Providing the only testimony of penetration, she testified that KK told her that GySgt Howard penetrated her vagina with his penis. This hearsay should have been excluded because it does not qualify as an exception under M.R.E. 803(4). It was made to a forensic nurse during the course of a sexual assault examination. Underscoring its importance--and harm to GySgt Howard, the Government emphasized this hearsay testimony during its closing argument. This error prejudiced GySgt Howard, and this Court should set aside the findings and sentence.

II.

The convictions under Articles 120 and 134, UCMJ, are factually and legally insufficient. No reasonable factfinder could have found all the essential elements of aggravated sexual assault by causing bodily harm and adultery beyond a reasonable doubt. Further, viewing the entirety of the evidence, this Court cannot be convinced beyond a reasonable doubt that GySgt Howard is guilty of these offenses. The complainant, KK, did not testify to penetration. And GySgt Howard contained none of KK's DNA despite being tested the morning after the incident. For these reasons, among others, this Court should set aside the findings and sentence.

III.

The military judge erred when he denied GySgt Howard's request for the mistake of fact as to consent instruction. This error materially prejudiced GySgt Howard's substantial right to a fair trial. Accordingly, this Court should set aside the findings and sentence.

Argument

I.

THE MILITARY JUDGE ERRED WHEN HE ADMITTED THE HEARSAY STATEMENT OF KK. BECAUSE THAT STATEMENT WAS MADE TO A FORENSIC NURSE DURING THE COURSE OF A SEXUAL ASSAULT EXAM, IT DOES NOT QUALIFY UNDER M.R.E. 803(4) AS A STATEMENT FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT. MOREOVER,

BECAUSE THIS HEARSAY IS THE ONLY TESTIMONY OF PENETRATION--WHICH THE GOVERNMENT EMPHASIZED DURING ITS CLOSING--IT PREJUDICED GYSGT HOWARD.

Facts

When KK went to the emergency room at Alaska Regional Hospital, she was turned away. (R. at 566.) Alaska Regional Hospital does "not do sexual assault evaluations." (R. at 567.) So Alaska Regional Hospital immediately called the police. (*Id.*) Hospital staff then escorted her to a waiting room for police arrival and transport to a forensic-ready facility. (R. at 571.) Nothing in the record suggests KK was given a choice to stay at Alaska Regional or go to the forensic-ready Providence Alaska Medical Center. (R. at 367-68, 446-47, 567, 571.)

Enter Providence Alaska Medical Center. Staff at Alaska Regional Hospital filled out a release form, stating KK should be released to "*Forensic* Nursing Services of Providence[.]" (Appellate Ex. XIV, at 7 (emphasis added).) The police complied; they picked up KK and transported her to Providence. There, she met with Ms. Tara Henry--a Forensic Nurse/Nurse Practitioner. (R. at 557, 564-66.)

Though Forensic Nurse Henry provides medical treatment, she also collects samples to be preserved for evidence during the course of her sexual assault exams. For example, she

collects DNA samples. (R. at 569.) These samples are "for the collection of evidence." (*Id.*) She takes photographs, copies of which are turned over to the police. (R. at 406, 509.) Indeed, KK signed a disclosure form that authorized the release of her medical information to the police. (Appellate Ex. XIV, at 4.) According to the Chain of Custody form, the State of Alaska Evidence Collection Kit and Medical-Forensic Record were released to law enforcement. (*Id.* at 5.) The "State of Alaska Sexual Assault Kit" is twenty-six pages long. (Appellate Ex. XIV, at 9-35.)

Notably, Forensic Nurse Henry testified that her sexual assault program exists due to grant funding. (R. at 573.) She specifically recalled that "the Office of [*sic*] Violence Against Women" is one source of the grant funding. (R. at 574.)

Defense Counsel elicited the above, relevant information during *voir dire* of Forensic Nurse Henry. (R. at 564-74.) That *voir dire* followed a hearsay objection by Defense Counsel. Specifically, Defense Counsel objected to Trial Counsel's question of Forensic Nurse Henry regarding what KK told her during the sexual assault exam. (R. at 562.)

> Q. Now, ma'am. I want to focus you to December 31st with Ms. [KK]. When she arrived do you remember what kind of history you obtained from her?

A. Yes.

Q. And can you explain the [*sic*] to the members, please?

A. She reported that.

CC: Objection, hearsay.

MJ: Response?

TC: Sir, statements made for purposes of medical treatment and diagnosis.

MJ: Response to that?

CC: This is not medical treatment. The good nurse is a member of the law enforcement team. . . . [T]hough there might . . . be some tangential medical treatment provided after the exam is done, this exam is for law enforcement purposes.

(R. at 562.)

Having placed his objection on the record, the Government made clear its intentions: it sought hearsay testimony that GySgt Howard penetrated KK with his penis. (R. at 576-77.) The Government sought that testimony because, as the military judge noted, KK "said she doesn't remember the penetration." (R. at 577.) Additionally, penetration is required to prove the offense. (R. at 708.) The military judge rightfully observed that Forensic Nurse Henry's examination is "intertwined" with law enforcement, and that "she was conducting the exam on [KK] because of a report of sexual assault." (*Id.*) But he did not make a ruling.

MJ: Are you going to ask her the question, 'Did [KK]

tell you that she was penetrated?'

TC: Certainly, sir.

MJ: Okay. So is that purpose of the medical diagnosis?

TC: Absolutely, sir, medical treatment.

MJ: Okay. Which seems to be partly inconsistent with her testimony during direct. Although it was scattered about throughout on cross and redirect, *she said she doesn't remember the penetration.* So now you're -- what you're doing is being able to provide a previous statement of this witness closer in time to the event that supports the allegation of sex assault.

TC: Through a hearsay exception, yes, sir.

MJ: And you think it fits underneath the medical diagnosis?

TC: Based on what's been elicited from Ms. Henry, absolutely, sir.

MJ: Well, absolutely doesn't answer the mail for me in that regard.

(R. at 577 (emphasis added).) The Government reiterated its focus to the military judge: "All we're interested in is how the impacted tampon came to be." (R. at 579.) In other words, all the Government was interested in was getting the members to hear GySgt Howard penetrated KK's vagina with his penis.

The military judge stated, "Okay. All right. We're going to *play it by ear* as we go along. Okay." (R. at 579 (emphasis added).) Defense Counsel reiterated his objection,

focusing on the history and purpose of the hearsay rule. (R. at 580.) After considering additional remarks from the Government, the military judge hedged, "Okay. *We'll see how it goes.*" (R. at 582 (emphasis added).)

Forensic Nurse Henry's critical testimony resumed:

> Q. Mrs. Henry, can you tell us what physical acts [KK] described which helped you in making your further assessments in treatment?
>
> A. Are you asking for -- to further assess for nongenital findings or her genital findings?
>
> Q. Genital findings.
>
> A. Okay. *She reported that the suspect put his penis in her vagina.*
>
> Q. And did she have any --
>
> CC: *Objection.*
>
> MJ: I'm sorry?
>
> CC: I have an objection as to hearsay.
>
> MJ: *That objection is overruled.* Please continue.

(R. at 584-85 (emphasis added).) The Government did just that.

During closing argument, the Government emphasized this hearsay testimony. Trial Counsel detailed:

> But we don't just need her word, we have the impacted tampon. The tampon that, as we heard, *as she described it when she went to see Tara Henry* as a [*sic*] *resulting from penetration of the penis that night. He put his penis in her vagina and that's what caused the tampon to be where it was.*

(R. at 720 (emphasis added).) The members returned a verdict of guilty as to all charges and specifications. (R. at 759.)

Standard of Review

This Court reviews a military judge's ruling to admit evidence for an abuse of discretion. *See United States v. Czachorowski*, 66 M.J. 432, 434 (C.A.A.F. 2008) (citing *United States v, Dewrell*, 55 M.J. 131, 137 (C.A.A.F. 2001)). Findings of fact are reversed if clearly erroneous, and conclusions of law are reviewed *de novo*. *Czachorowski*, 66 M.J. at 434 (citing *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007)).

Principles of Law

Hearsay is inadmissible except as provided by the Military Rules of Evidence or acts of Congress. Mil. R. Evid. 802. Statements that are "made for 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" constitute one such exception. Mil. R. Evid. 803(4). This medical treatment/diagnosis exception exists because, ordinarily, a patient has every incentive to be honest to a diagnosing or treating physician to promote her own well-being. *See United States v. Welch*, 25 M.J. 23, 25 (C.M.A.

1987). Put differently, a patient lies to a doctor at her own medical peril. It is this premise that undergirds the rule.

The U.S. Court of Appeals for the Armed Forces requires courts "to look beyond the statement itself to determine if this premise is well-founded in context." *United States v. Cucuzzella*, 66 M.J. 57, 59 (C.A.A.F. 2008) (citing *United States v. Donaldson*, 58 M.J. 477, 485-87 (C.A.A.F. 2003)). Then, to determine whether a statement qualifies for the M.R.E. 803(4) exception, courts must employ a two-prong test: first, "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 diagnosis or treatment that is being sought." *Cucuzzella*, 66 M.J. at 59 (quoting *United States v. Edens*, 31 M.J. 267, 269 (C.M.A. 1990)) (internal quotations and additional citations omitted). Both prongs must be met for hearsay to be admitted under M.R.E. 803(4). *Edens*, 31 M.J. at 269 (citing *United States v. Williamson*, 26 M.J. 115, 116 (C.M.A. 1988)).

Discussion

A. The military judge abused his discretion in admitting this harmful, hearsay testimony.

The military judge abused his discretion when he admitted the hearsay statement of KK through Forensic Nurse Henry.

This testimony fails the two-prong *Edens* test, and it should have been excluded. The military judge did not perform this test, or any test, when he erroneously admitted this evidence. For these reasons, among others, this Court should set aside the findings and sentence.

The predominant use of forensic nurse examinations is the gathering and preservation of evidence for use by police and prosecutors. "[A] SANE nurse examination is not typically 'designed primarily to establish or prove some past fact, but to describe current conditions describing *police assistance*.'" *State v. Romero*, 156 P.3d 694, 698 (N.M. 2007) (quoting *Davis v. Washington*, 547 U.S. 813, 822 n.1 (2006)) (emphasis added). The context of this particular examination demonstrates that forensic purpose. Because KK's statement was not made for purposes of medical diagnosis or treatment, its admission fails the first prong of *Edens*.

The setting of the exam demonstrates as much. KK initially went to Alaska Regional Hospital to report the alleged incident. As soon as she did, however, that hospital ordered her to be transported to Providence Alaska Medical Center. (R. at 564-66; Appellate Ex. XIV.) The sole reason: to undergo a forensic sexual assault examination. (*Id.*) The record is devoid of any indication that KK had a choice in the matter. To safeguard the evidence, the police transported her

to Providence. The police then served as the authorized recipient of her records generated during that exam, again to safeguard them. (Appellate Ex. XIV.)

If more is needed, Ms. Henry served as a *forensic* nurse. She took DNA samples, samples that have no other purpose aside from preserving evidence. (R. at 569.) The form she filled out was titled the "State of Alaska Sexual Assault Kit." (Appellate Ex. XIV, at 9-35.) And the program itself was funded, in part, from the Office on Violence Against Women.[4] (R. at 574.)

As noted above, the Supreme Court of New Mexico has found an inextricable link of a SANE nurse examination to law enforcement. *Romero*, 156 P.3d at 698. And other states are in accord. The Supreme Court of Nevada, for example, found at least one SANE nurse to be "a police operative." *Medina v. State*, 143 P.3d 471, 476 (Nev. 2006) ("She testified that she is a 'forensics nurse' and that she gathers evidence for the prosecution for possible use in later prosecutions."). So did Kentucky. *See Hartsfield v. Commonwealth*, 277 S.W.3d 239, 244-45 (Ky. 2009). In *Hartsfield*, the Supreme Court of Kentucky, much like Nurse Henry, observed the dual nature of SANE Examiners: "A SANE nurse serves two roles: providing

[4] A quick Internet search demonstrates the Office on Violence Against Women is part of the U.S. Department of Justice. *See* www.ovw.usdoj.gov.

medical treatment and gathering evidence." *Id.* at 244. Notwithstanding their dual nature, the court still found "their function of evidence gathering, combined with their close relationships with law enforcement, renders SANE nurses' interviews the functional equivalent of police questioning." *Id.* *Finally,* the Supreme Court of Kansas took a similar approach in *State v. Bennington*, 264 P.3d 440, 454 (Kan. 2011). That court found that a SANE nurse acted as a law enforcement agent. *Id.* at 454.

To be sure, the Supreme Court of Wyoming takes a different approach. *See McLaury v. State*, 305 P.3d 1144, 1150 (Wyo. 2013) (holding the appellant's "argument that the victim's statements to the SANE nurse were made specifically for use in [his] prosecution falls short."). But that case is readily distinguishable from this one. In *McLaury*, the appellant was given *a choice* to get a forensic exam. *Id.* at 1145 ("The police officer then asked the victim if she would like to go to the hospital, and she stated that she would."). Here, KK was turned away from Alaska Regional Hospital because that hospital did not have a forensic nurse. There is no evidence in the record to suggest that Alaska Regional Hospital could not have extracted the impacted tampon--the medical treatment she sought. And importantly, there is no evidence to suggest she was given a choice to stay at Alaska

Regional Hospital to get that immediate treatment or to wait for police and go to Providence Alaska Medical Center, the evidence collection site.

In light of this persuasive precedent, and given the unique facts of *this* case, the principal purpose of Forensic Nurse Henry's examination was without question the collection and preservation of evidence. She served as a law enforcement agent, undermining the premise that undergirds M.R.E. 803(4). Accordingly, the Government cannot meet its burden under the first prong of the *Edens* test.[5] That failure is fatal. As a result, the military judge erred in allowing the hearsay evidence from Forensic Nurse Henry.

Before moving to prejudice, an additional point must be noted. In making his "play it by ear" non-ruling, (R. at 579), the military judge did not rely upon--or cite--the well-established, leading case on point: *United States v. Edens*. *See Cucuzella*, 66 M.J. at 59 ("In *United States v. Edens*, 31 M.J. 267 (C.M.A. 1990), this Court established a two-part test for evaluating statements offered as exceptions to the hearsay rule under M.R.E. 803(4)."). Indeed, the military judge cited *no case* to support his clipped, four-word ruling: "That objection is overruled." (R. at 585.) No findings of fact or

[5] Significantly, the party that offers the hearsay evidence bears the burden of showing its admissibility. *Cf. Donaldson*, 58 M.J. at 485.

conclusions of law accompanied this ruling. Given his utter lack of findings on such a critical issue at trial, this Court should give the military judge less deference on appeal. *See United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) ("This Court gives military judges less deference if they fail to articulate their balancing analysis on the record[.]").

B. The military judge's erroneous ruling prejudiced GySgt Howard.

This Court employs a four-pong test to determine whether the erroneous admission of evidence harmed an accused. *See United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004). Specifically, this Court weighs "(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." *Id.* (quoting *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)). Because each factor weighs in favor of a finding of prejudice here, this Court should set aside the findings and sentence.

The first and third prongs are addressed in tandem. Until Forensic Nurse Henry testified, the Government failed to offer testimony of penetration. KK, the alleged victim, could not say it on the stand. The military judge recognized as much: KK "said she doesn't remember the penetration." (R. at 577.) So the Government needed to elicit hearsay testimony

from Forensic Nurse Henry to introduce this critical testimony. As the military judge instructed the members, the element of "sexual act"--contained in the Article 120 offense alleged here--requires proof of "*penetration*, however slight, of the vulva *by the penis*." (R. at 708 (emphasis added).)

The Government's repeated efforts to introduce the testimony showcased its importance.[6] (R. at 562, 577, 579, 584-85.) As did the use of the testimony during the Government's closing argument. There, Trial Counsel underscored Forensic Nurse Henry's testimony:

> But we don't just need her word, we have the impacted tampon. The tampon that, as we heard, *as she described it when she went to see Tara Henry* as a [*sic*] *resulting from penetration of the penis that night. He put his penis in her vagina and that's what caused the tampon to be where it was.*

(R. at 720 (emphasis added).)

To be sure, the Government had DNA evidence placing GySgt Howard's semen inside KK's vagina. But that semen was located at the front of KK's vagina, where it could have been introduced from an outside source, such as masturbation. (R. at 737.) Ms. Kitey did not test the semen near the cervix or

[6] Interestingly, Chapman observes SANE nurses may be called to testify when the alleged victim herself is unavailable. Julia Chapman, Note: *Nursing the Truth: Developing a Framework for Admission of SANE Testimony under the Medical Treatment Hearsay Exception and the Confrontation Clause*, 50 Am. Crim. L. Rev. 277, 292 (2013). Here, the alleged victim *did* testify--just not to the Government's liking.

on the tampon, which could have belonged to SSgt Cooley--her boyfriend. (R. at 500-01, 737.) KK acknowledged having had sex with SSgt Cooley just three or four days before her encounter with GySgt Howard, and Ms. Kitey testified that semen can be collected from inside a vagina seven days after sexual activity. (R. at 528.)

Additionally, none of KK's DNA was found on GySgt Howard. No blood or other trace evidence was found on the sheets, despite KK being on the first day of her period. (R. at 732.) And no injuries, to include minor lacerations consistent with consensual sex, were found inside KK's vagina. (R. at 585, 600, 623.) That finding is consistent with a conclusion that no sex occurred. (R. at 604.)

Thus, the Government knew its case was far from strong, which is why it fought so hard to introduce the hearsay evidence from Forensic Nurse Henry.

Of course, the lack of Government evidence translates to a relatively strong defense case, the second prong under *Kerr*. But there is more than the absence of evidence. The defense introduced four character witnesses, each of whom testified to GySgt Howard's strong military character. (R. at 635, 643, 653, 662.) The defense also introduced the testimony of April Howard's sister, Rhianna Reuppel, who impeached KK's testimony by contradiction. (R. at 679-80.)

Regarding the fourth and final prong, the military judge hinted at the potent quality of the hearsay evidence at issue: "So now you're -- what you're doing is being able to provide a previous statement of this witness closer in time to the event that supports the allegation of sex assault." (R. at 577.) The Government agreed: "Through a *hearsay* exception, yes, sir." (*Id.* (emphasis added).) Thus, this impermissible hearsay evidence strengthened the Government's case. It lifted the Government over the hurdle constructed by KK's incomplete testimony. And ultimately, it prejudiced GySgt Howard.

Conclusion

The military judge erred when he admitted, over defense objection, hearsay testimony from Forensic Nurse Tara Henry. Providing the only testimony of penetration, she testified that KK told her that GySgt Howard penetrated her vagina with his penis. This hearsay should have been excluded because it does not qualify as an exception under M.R.E. 803(4). Specifically, it fails the first prong of the *Edens* test for admissibility. Because this error prejudiced GySgt Howard, this Court should set aside the findings and sentence.

II.

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

Standard of Review

This Court reviews claims of legal and factual sufficiency *de novo*. *See United States v. McMurrin*, 72 M.J. 697, 706 (N-M. Ct. Crim. App. 2013) (citing *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)).

Principles of Law

This Court has an independent obligation to review each case *de novo* to ensure the factual and legal sufficiency of the findings. Article 66(c), UCMJ, 10 U.S.C. § 866 (2012); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). In doing so, this Court is empowered to substitute its judgment for that of the trial court. *Id.* When deciding legal insufficiency, the test 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. Humphreys*, 57 M.J. 83, 94 (C.A.A.F. 2004). A review of legal sufficiency is limited to the evidence introduced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). As for factual insufficiency, "the test is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," this Court is unconvinced

of the accused's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also McMurrin*, 72 M.J. at 706.

Discussion

A. The charge of aggravated sexual assault by causing bodily harm was neither factually nor legally proven beyond a reasonable doubt. This Court should set aside the finding.

KK's DNA did not appear on any of the samples taken from GySgt Howard. (R. at 476.) Her DNA was not on the penile swab. It was not on his pubic hair. And it was not on his fingernail scrapings. (R. at 476.) Despite KK being on the first day of her period, no blood was found on the sheets or on GySgt Howard. (R. at 478, 619.) Detective Jade Baker, Anchorage Police Department, testified that, in light of the lab results, it is possible that no sexual intercourse occurred. (R. at 478-79.)

Forensic DNA Examiner, Meredith Kitey, U.S. Army Criminal Investigation Laboratory, Fort Gillem, Georgia, also testified. She noted that she found semen on KK's vaginal swabs that belonged to GySgt Howard. (R. at 492, 499-500.) But these samples came from the front of KK's vagina. (R. at 499, 720-21, 736.) She did not test the semen on the cervical swabs or tampon swabs, which could have belonged to SSgt Cooley. (R. at 500-01, 737.) Thus, there is no basis to reject the defense theory that GySgt Howard produced semen or

pre-ejaculate--without penetration--during their time in the bunk together, which then contaminated the front of KK's vagina as she attempted to maneuver her tampon. (R. at 737.)

When Forensic Nurse Henry examined KK, she found no injuries. (R. at 585, 623.) Specifically, KK's genitalia were injury free. (R. at 600.) She testified that it is common to discover injuries resulting from even consensual sex. (R. at 600-01.) Critically, she admitted a reasonable conclusion that can be drawn from a finding of no injuries is that no sexual intercourse occurred. (R. at 604.) These facts all weigh in favor of a finding of factual and legal insufficiency. Yet there is more.

The Government's complaining witness did not testify to penetration. (R. at 363, 368.) That silence is deafening, especially in a case where substantial incapacitation is not at issue.

Even if this Court finds sexual intercourse occurred, which it should not, KK's testimony that she did not consent to the sex is simply not credible. For example, she admitted that she tried to take her tampon out after GySgt Howard climbed in bed with her. (R. at 364.) And she was impeached on two occasions by contradiction. Forensic Nurse Henry, for example, testified that KK told her she was never pregnant, which directly contradicts her story of pregnancy and

subsequent miscarriage to SSgt Cooley. (R. at 687.) And Rhianna Reuppel, April Howard's sister, testified that KK cried in the Howard house because she was jealous of the relationship April had with GySgt Howard, which directly contradicts her story that she cried because she missed her unborn baby. (R. at 680.)

As for the offensive touching, KK testified that she trusted GySgt Howard. She testified that she felt safe around him, and never felt threatened. (R. at 377, 416.) She further testified that GySgt Howard did not hold her down or force himself on her when they lay in the bunk together. (R. at 400.) In fact, when he got into the bunk with her, she never told him "no" or said, "stop." (R. at 399.) Then she gave GySgt Howard a hug, just moments after the alleged incident. (R. at 402.) Under these circumstances, any touching that may have occurred was not offensive. As the Government failed to satisfy this additional, critical element, this Court should set aside the findings and sentence.

In light of all this evidence, this Court cannot be convinced beyond a reasonable doubt that GySgt Howard is guilty of aggravated sexual assault by causing bodily harm. The Government failed to prove that sexual intercourse occurred. And even if this Court finds it did--which it did

not--the Government failed to disprove that the sex was consensual. Finally, the Government failed to prove the offensive touching required under the charged offense. For these reasons, the conviction under Article 120, UCMJ, is factually and legally insufficient.

B. The charge of adultery was neither factually nor legally proven beyond a reasonable doubt. This Court should set aside the finding.

Appellant incorporates the facts and argument regarding the sexual intercourse discussed above. *See* part A, *supra*.

The evidence on the prejudice to good order and discipline came only from testimony of SSgt Cooley, and reasonable inferences from that testimony. (R. at 425.) The military judge had dismissed the service discrediting allegation on a defense motion made under R.C.M. 917.

SSgt Cooley testified to the following relevant facts. He was an active-duty Marine assigned as Staff NCOIC at Recruiting Station Wasilla, who had been recruited into the Marine Corps by GySgt Howard. (R. at 425.)

The Government asked SSgt Cooley, "How did the knowledge of the incident amongst the two Marines that knew and yourself, how did it impact your work environment." (R. at 449-50.) The reply was, "*I don't think it really did.* We had a mission to make, so." (R. at 450 (emphasis added).) He further testified to how it affected his feelings toward the

Marine Corps, "I mean, it definitely, you take a second guess to it, you know, when you have a mentor and something like that happens you know. . . . I don't know, makes you second guess, you know, why you're in it." (*Id.*) Then the military judge specifically excluded testimony that GySgt Howard's actions caused staffing changes, and he instructed the members accordingly. (R. at 451.)

To establish that an offense prejudices good order and discipline, the prosecution must establish conduct that has a direct, palpable, and adverse impact on good order and discipline. *See Manual for Courts-Martial, United States* ¶60.c.(2) (2012) (MCM); *United States v. Snyder*, 4 C.M.R. 15, 18 (C.M.A. 1952) (noting "'prejudice' is used here in the sense of detriment, depreciation or as injuriously affecting."); *United States v. Priest*, 45 C.M.R. 338, 345-46 (C.M.A. 1972). The MCM further explains:

> Adulterous conduct that is directly prejudicial includes conduct that has an obvious, and measurably divisive effect on unit or organization discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect toward a servicemember.

MCM ¶62(c)(2). Further, the evidence cannot be remote or indirect. *Id.*

Snyder's strong--in quantum and severity--language is not satisfied with the weak, ambiguous testimony of SSgt Cooley.

There is no evidence that the alleged conduct "interfere[d] with the performance of military duties." *Snyder*, 4 C.M.R. at 18. During argument, the government once again confused the effects of the investigation process with the effects on SSgt Cooley at the time of the alleged offenses. It argued: "It affected teamwork. It affected teamwork because he no longer could speak, was willing to speak to" to Appellant. (R. at 725.) However, that is not the testimony, and it is not a clear inference from any testimony.

Additionally, this argument contradicts the evidence, and the military judge's express ruling: "He actually said there was no impact on his unit or his mission." (R. at 451.) There is also no clear evidence that "they never spoke again." (R. at 725.) There was testimony that two other Marines knew of the allegations, but there was no testimony of what impact, if any, it had on the two Marines and their performance or duty as Marines. Thus, any inference is not fair or beyond speculation. (R. at 726.) Put differently, any impact is remote, which fails to satisfy the MCM and the CAAF's latest guidance on Article 134. *See United States v. Caldwell*, 72 M.J. 137, 141 (C.A.A.F. 2013) ("Appellant's impression that members in the unit felt uneasy also does not provide a sufficient factual basis to establish a direct and palpable effect on good order and discipline.").

Conclusion

GySgt Howard's convictions for sexual assault causing bodily harm and adultery under Article 120 and 134, UCMJ, respectively, are legally and factually insufficient. Given these facts, no reasonable factfinder could have found that sexual intercourse occurred between KK and GySgt Howard. What is more, this Court cannot be convinced of GySgt Howard's guilt beyond a reasonable doubt. Accordingly, this Court should set aside the findings and sentence.

III.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE FAILED TO GIVE--OVER THE DEFENSE TEAM'S REQUEST--THE INSTRUCTION FOR MISTAKE OF FACT AS TO CONSENT.

Standard of Review

Whether a panel was properly instructed is a question of law reviewed *de novo*. *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996). And, "when an affirmative defense is raised by the evidence, an instruction is required." *United States v. Stanley*, 71 M.J. 60, 62 (C.A.A.F. 2012) (citing *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002)).

> Once it is determined that a specific instruction is required but not given, the test for determining whether this constitutional error was harmless is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' Stated differently, the test is: 'Is it clear beyond a reasonable doubt that a

> rational jury would have found the defendant guilty absent the error?'

McDonald, 57 M.J. at 20 (citations omitted).

Principles of Law & Discussion

There is an incomplete record of how the instructional issue was presented and decided. The military judge discussed his proposed findings instructions with counsel, and in particular discussed *United States v. Dipaola*, 67 M.J. 98 (C.A.A.F. 2008); unfortunately, much of this discussion appears to have occurred during an R.C.M. 802 session. (R. at 691.) Once back on the record, the military judge told counsel he would not instruct on the mistake of fact defense because, "I did not find evidence to support the instruction." (*Id.*) There is some record discussion of mistake, sufficient to indicate the defense was requesting the instruction, and therefore there is no waiver. (R. at 695-697.) *See, e.g.*, *United States v. Johnson*, 36 M.J. 862, 865 (A.C.M.R. 1993) ("This Court has recently and repeatedly cautioned against too liberal a use of R.C.M. 802 conferences."); *United States v. Washington*, 35 M.J. 774 (A.C.M.R. 1992).

Ultimately, the military judge agreed there was "some evidence" for a mistake of fact instruction, but was "not convinced" of "some evidence" of mistake of fact *as to consent*. (R. at 699-700.)

In *United States v. DiPaola*, a rape case, the CAAF applied *United States v. Taylor* in the context of a mixed message theme presented by the evidence and the defense theme. 67 M.J. at 102-03. The CAAF found that failure to give the instruction was not harmless. *Id.* at 103. In *United States v. Hibbard*, 58 M.J. 71 (C.A.A.F. 2003), also a rape case, the CAAF made an important point--"An affirmative defense 'may be raised by evidence presented by the defense, the prosecution, or the court-martial.'" *Id.* at 73 (quoting R.C.M. 916(b) discussion). Thus, an accused need not testify to put the affirmative defense in issue. And any doubt as to the need for an instruction is resolved in favor of the accused. *Id.* at 73.

"Most often, it is clear whether a lesser-included offense or an affirmative defense or some theory or question of law has been raised by the evidence. Occasionally, though, it may not be at all clear[.]" *United States v. Westmoreland*, 31 M.J. 160 (C.M.A. 1990) (citing *United States v. Graves*, 1 M.J. 50, 53 (C.M.A. 1975)).

What then happens when the evidence is less clear, or what amount of evidence is required? In *Westmoreland*, the U.S. Court of Military Appeals (C.M.A.) relevantly opined:

> The Court again emphasizes to all participants in the trial that it is absolutely essential that all factual issues and offenses raised at all in the

> evidence be the subject of instructions--requested or not--by the trial judge. This is demanded not out of an abundance of caution, but from the desire that the fact-finding function be exercised to the fullest by the jury--the essence of a fair trial.

31 M.J. at 164. While not explicitly stated, the language of *Westmoreland* counsels the giving of an instruction in the event of doubt or ambiguity. *See United States v. Steinruck*, 11 M.J. 322, 324 (C.M.A. 1981) ("Any doubt whether the evidence is sufficient to require an instruction should be resolved in favor of the accused.").

The standard to give an instruction is low: only "some evidence" need be shown, which reasonably places the lesser included offenses in issue." *United States v. Staten*, 6 M.J. 275, 277 (C.M.A. 1979). The evidence need not be un-contradicted. *Id.* ("As the United States Supreme Court teaches, 'so long as there was some evidence [raising the lesser included offense], the credibility and force of such evidence must be for the jury, and cannot be a matter of law for the decision of the court.'") (alteration in original). *See also United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000).

The issue now before the Court was before the C.M.A. in *United States v. Taylor*, 26 M.J. 127, 130 (C.M.A. 1988), where an allegation of rape and the possibility of an affirmative

defense of mistake was raised. There, the C.M.A. determined that,

> It is not necessary that the evidence which raises an issue be compelling or convincing beyond a reasonable doubt. Instead, the instructional duty arises whenever 'some evidence' is presented to which the fact finders might 'attach credit if' they so desire.

26 M.J. at 129-30. As such, this Court should find the military judge erred when he failed to instruct the members on the mistake of fact as to consent. There was some evidence of mistake of fact as to consent, as noted in the factual summaries above.

Conclusion

WHEREFORE, this court should find that the members were not properly instructed and that the error was not harmless beyond reasonable doubt, in which case this court must set aside the findings of guilty to the Additional Charge.

PHILIP D. CAVE
Law Office
1318 Princess St.
Alexandria, VA 22314
(703) 298-9562
mljucmj@court-martial.com

DAVID C. DZIENGOWSKI
Lieutenant, JAG Corps, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington, D.C. 20374
P: (202) 685-7292
F: (202) 685-7426
david.dziengowski@navy.mil

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court and to Director, Appellate Government Division, and electronically uploaded onto CMTIS, on 6 February 2014.

DAVID C. DZIENGOWSKI
Lieutenant, JAG Corps, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington, D.C. 20374
P: (202) 685-7292
F: (202) 685-7426
david.dziengowski@navy.mil