IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

J.W. ROLPH **C.L. SCOVEL** **J.D. HARTY**

UNITED STATES

v.

Scott A. MCCOY
Captain (O-3), U. S. Marine Corps

NMCCA 200101209 Decided 20 April 2006

Sentence adjudged 28 August 2000. Military Judge: T.L. Miller. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Camp Smedley D. Butler, Okinawa, Japan.

LCDR E.J. MCDONALD, JAGC, USNR, Appellate Defense Counsel
LCDR ROBERT EVANS, JAGC, USNR, Appellate Defense Counsel
LT BRIAN L.MIZER, JAGC, USNR, Appellate Defense Counsel
LT FRANK GATTO, JAGC, USNR, Appellate Government Counsel

SCOVEL, Senior Judge:

A general court-martial composed of members convicted the appellant, contrary to his pleas, of failure to obey a lawful general regulation, consensual sodomy, and conduct unbecoming an officer and gentleman, in violation of Articles 92, 125, and 133, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 925, and 933. The appellant was sentenced to forfeiture of $3,525.00 pay per month for one month and a dismissal. The convening authority approved the sentence as adjudged.

We have considered the record of trial, the appellant's six assignments of error, and the Government's answer. The appellant asserts that he was prejudiced by the pretrial actions of the staff judge advocate (SJA); post-trial recommendations were prepared by an ineligible officer; the SJA's recommendation (SJAR) failed to comment on his character of service; the trial counsel's behavior before and during trial prejudiced the

appellant's right to a fair hearing on the merits; the evidence was legally and factually insufficient to support the findings of guilty; and the charged sexual conduct was constitutionally protected. We conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

These charges arise from several sexual encounters between the appellant, who was a married captain, and then-Lance Corporal (LCpl) (at trial, Private First Class) "H."

On the evening of 17 December 1999, the appellant attended "Bosses' Night" at an enlisted club aboard Marine Corps Air Station, Futenma, Okinawa. A lance corporal who worked for the appellant introduced the appellant to LCpl H in the club's lobby. He was not sure if he introduced LCpl H by her first name or by her grade and last name. He also testified that he did not remember if he introduced the appellant as "boss" or "captain." LCpl H testified that the appellant introduced himself using his first name and she noticed that he was not wearing a wedding ring. They spoke to each other briefly before LCpl H went to the head. She testified that as she left the head, the appellant approached her and told her to grab his wrist, saying that other parts of his body were also that large. They then went to different areas of the club.

The appellant and LCpl H met again about an hour later. She felt attracted to him and when he suggested that she join him in his car, she agreed. She noticed the officer sticker on the windshield and questioned the appellant about it. He stated that he was an officer. She testified that she was drunk and did not care about the disparity in their grades. They did not kiss or hug, but had a general conversation in which the appellant told her that he was not married. The appellant then asked her for oral sex. She agreed, and performed fellatio on him. Her estimate for the duration of this oral sex varied from 20-30 minutes to 35-40 minutes, but she was certain that the appellant did not ejaculate. After she stopped, they talked again for a few minutes before re-entering the club and going to different areas.

After an hour, LCpl H saw the appellant and motioned for him to wait for her. She accepted his invitation to return to his car, and they drove to a parking lot behind the base's gas

station. They talked for a few minutes and then she again performed fellatio on him. She believed the appellant was drunk. After about 40 minutes of oral sex, during which he maintained an erection and did not ejaculate, they decided to engage in sexual intercourse. The appellant moved to the passenger side of his car and reclined the front seat, and they engaged in intercourse for a lengthy period of time. The appellant did not ejaculate. When they became worried that they might be discovered, they drove to another parking lot off base where, after intercourse for about an hour, the appellant ejaculated. They talked for a few minutes before leaving for Futenma. En route to the air station, they stopped in another parking lot where LCpl H again performed fellatio on the appellant. They then returned to Futenma and the appellant dropped her at her barracks.

The second sexual encounter between the appellant and LCpl H occurred about one week later. She testified that he came to her barracks room around noon, attired in his camouflage utility uniform with grade insignia and nametape. After a short conversation, the appellant lowered his trousers, but did not remove them. LCpl H performed fellatio on him and then they engaged in sexual intercourse. The appellant ejaculated, then dressed and departed. He was in her room for about one hour.

The third rendezvous occurred much like the second. LCpl H testified that about one week after their meeting in her barracks, he returned to her room during the day. He was again attired in his camouflage utility uniform. They engaged in oral sex and sexual intercourse.

Pretrial Actions of the SJA

The appellant asserts that he was denied his right to a fair and impartial trial on the merits by actions of the convening authority's SJA. He points to a pretrial discussion between the SJA and a member, in which the SJA stated that he believed the allegations against the appellant and thought the Government had a strong case. The appellant argues that the SJA's statements "pollute[d] the jury pool" and disqualified the SJA from offering pretrial advice to the convening authority. Appellant's Brief of 13 Nov 2003 at 7. We disagree.

Before referring any charge to a general court-martial for trial, the convening authority must refer it to the SJA for "consideration and advice." Art. 34, UCMJ. The SJA's pretrial advice is "primarily [a] prosecutorial codal tool." *United*

States v. Hardin, 7 M.J. 399, 403 (C.M.A. 1979). Our superior court has long recognized that in performing this pretrial advisory role, the SJA acts like a prosecutor and not a judge. *See United States v. Lynch,* 13 M.J. 394, 396 (C.M.A. 1982); *United States v. Smith*, 33 C.M.R. 85, 91 (C.M.A. 1963); *United States v. Hayes*, 22 C.M.R. 267, 270 (C.M.A. 1957). The SJA is not elevated "to a state of absolute impartiality required in the strict sense for a trial judge, reviewing authority or appellate court." *Hardin*, 7 M.J. at 403. Moreover, strict impartiality of a judicial nature appears inconsistent with the statutory requirement that the SJA provide a recommendation to the convening authority on the disposition of the case, a discretionary conclusion that should entail consideration of the same factors to be weighed by the convening authority. *See* RULE FOR COURTS-MARTIAL 306(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Discussion; R.C.M. 601(d)(1).

Our review of the record indicates that before the Article 32, UCMJ, investigation (the report of which was dated 1 June 2000), the SJA discussed this case with Lieutenant Colonel (LtCol) "O," the convening authority's public affairs officer, because the case was likely to attract media attention. LtCol O recounted his discussion with the SJA in individual voir dire conducted by the appellant's civilian counsel (CC):

> CC: You indicated to the military judge when he asked you whether you had discussed the facts of the case at all that [the SJA] may have generally expressed [that a case involving media attention was likely], but that he also told you his beliefs on the case. Can you tell us about that?
>
> MBR: Well, as the Base SJA, I think he believed that the charges were true, that's why he's bringing it to – well, would have recommended it to go to a court.
>
> CC: Can you remember anything specifically that was said?
>
> MBR: I think that he hoped it wouldn't have to come to a court, that it could be settled before court.
>
> CC: Did he indicate how that might happen or why?
>
> MBR: He didn't indicate how, but because he thought he had the – the government had a strong case.

Record at 318.

At the time of this discussion, LtCol O had not been detailed as a member of the court-martial. The convening authority added him as a member after referring the charges to a general court-martial. After voir dire indicated not only that LtCol O had been informed of the SJA's assessment but also that he was the reporting senior for a key witness, the military judge granted the trial defense counsel's challenge for cause. The record does not indicate that the SJA had similar discussions with other members of the court-martial or other members of the command who might have been detailed to serve as court-martial members in this case. The record also does not indicate that LtCol O, acting either personally or in his capacity as the public affairs officer, relayed the SJA's statements to others. The SJA provided his pretrial advice to the general court-martial convening authority in a letter dated 14 June 2000.

We find no merit to this assignment of error. The SJA acted properly in alerting the public affairs officer, who at that time had not been assigned to the court-martial panel, to the case, which was likely to engender media interest. He acted properly like a prosecutor and not a judge when he assessed the strength of the case against the appellant and provided his recommendation to the convening authority for referral to a general court-martial. We find no evidence of "pollution" of either this court-martial panel or the broader "pool" of potential members in the command. We similarly find that the SJA was not disqualified from submitting pretrial advice to the general court-martial convening authority as required by Article 34, UCMJ.

Eligibility of SJA to Submit SJAR

The appellant asserts that LtCol "V," the SJA during the post-trial process, was disqualified from "involve[ment] in the post trial recommendations" because she was a witness, by affidavit, on a pretrial motion. Appellant's Brief at 8-9. Quoting *United States v. Zaptin*, 41 M.J. 877, 880 (C.M.A. 1995), he contends that her participation in the post-trial process was plain error because she was not "free from any connection with the controversy." *Id.* We disagree.

Among other pretrial motions, the appellant moved to dismiss the charges on the basis of unlawful command influence.

Appellate Exhibit I. In support of his motion, he offered LtCol V's affidavit, relating her recollection of her telephone conversation with the appellant in December 1999. The affidavit stated that LtCol V, then assigned as the Deputy SJA, recalled receiving a telephone call from an officer who she believed was the appellant. He related to her the substance of a discussion between himself and his squadron commander concerning a summary court-martial to which the commander had detailed the appellant. The appellant told her that his commander had expressed his displeasure with the appellant for reaching a result he considered "too lenient." The appellant asked if such a discussion between a convening authority and a summary court-martial officer were permissible. She informed him that it was not and that she would forward this information to the SJA. She did not speak to the appellant's commander about the incident. AE VI. The appellant did not assert that LtCol V had any other role in the events giving rise to the unlawful command influence issue. The military judge denied the motion to dismiss.

By the time the record of trial was authenticated and ready for submission to the convening authority, LtCol V had become the SJA. Her deputy, however, signed the SJAR because she was absent from the command on annual leave. LtCol V signed an addendum to the SJAR, which corrected the SJAR by noting the military judge's decision on a pretrial motion unrelated to the assertion of unlawful command influence and then concurred in the SJAR's recommendation that the appellant's clemency request be denied. Addendum to SJAR of 19 Jun 2001.

Before making the highly discretionary decision to approve, reduce, or set aside the findings and sentence, the convening authority must consider any matters submitted by the defense as well as a recommendation prepared by an SJA or legal officer. Art. 60, UCMJ; R.C.M. 1105 and 1106. Our superior court has emphasized the importance of ensuring that the convening authority and SJA be, and appear to be, objective in exercising these duties. *United States v. Taylor*, 60 M.J. 190, 193 (C.A.A.F. 2004). A recommendation prepared by a biased SJA could unfairly prejudice the convening authority's decision and endanger the integrity of the military justice system. *Id*.

Whether a staff judge advocate is disqualified from participating in the post-trial review process is a question of law that we review de novo. The defense "has the initial burden of making a prima facie case" for disqualification. *United States v. Wansley*, 46 M.J. 335, 337 (C.A.A.F. 1997).

In this instance, by pointing out that LtCol V was a witness on a pretrial motion, the appellant has made a prima facie case for disqualification. He asserts that the fact that she was a witness rendered her ineligible per se to submit post-trial recommendations and, therefore, her participation was plain error. We believe, however, that this analysis sweeps too broadly and fails to distinguish between various types and degrees of SJA involvement.

An SJA may be ineligible to serve as the SJA for the convening authority in a case in which he or she testified as a witness concerning a contested matter (unless the testimony is clearly uncontroverted). R.C.M. 1106(b), Discussion; *see United States v. Choice*, 49 C.M.R. 663 (C.M.A. 1975). In *Choice*, the SJA testified on a speedy trial motion regarding his office's policy and practice when an accused requested administrative discharge. Our superior court applied a test of "objective reasonableness" to determine whether the SJA had a personal or official interest, stating that disqualification depends on whether the SJA is put in the position of "weighing his testimony against or in light of other evidence which conflicts with or modifies his own." *Choice*, 49 C.M.R. at 665. In finding that the SJA was not disqualified, the court noted that "the unrebutted facts to which he testified, with only a single exception, were precisely those desired to be elicited by defense counsel." *Id*.

In this case, we find that LtCol V was not disqualified from participating in the post-trial review process. A fair reading of her affidavit indicates only an official interest in the unlawful command issue. Her testimony was objective and revealed no predisposition as to the issue's outcome. It was uncontroverted and the SJA was not put in the position of weighing her testimony against conflicting evidence. Finally, we note that her affidavit was offered as evidence on the motion by the appellant and appears to have aided the argument he sought to make.

Content of the SJAR

The appellant notes that the SJAR failed to include information from his service record as to his character of service. He asserts that this omission was plain error, and requests that we remand the case for a new SJAR and convening authority's action. We disagree.

The SJAR shall include concise information summarizing the appellant's service record, including length and character of service, awards and decorations received, and any records of nonjudicial punishment and previous convictions. R.C.M. 1106(d)(3)(C). Failure of the appellant to comment on any matter contained in the recommendation constitutes "waiver" (properly forfeiture, see *United States v. Olano*, 507 U.S. 725, 733 (1993)) of the issue on appeal in the absence of plain error. R.C.M. 1106(f)(6). "Plain error" requires that an error, in fact, exist; that it be plain or obvious; and that it materially prejudice the substantial rights of the accused. *United States v. Finster*, 51 M.J. 185, 187 (C.A.A.F. 1999) (citing *United States v. Powell*, 49 M.J. 460, 463, 465 (C.A.A.F. 1998); *see also United States v. Fuson*, 54 M.J. 523, 526 (N.M.Ct.Crim.App. 2000).

In this case, the SJAR listed "average pro/con [proficiency/conduct] marks" under "character of service" as a way to fulfill the requirement of R.C.M. 1106(d)(3)(C). While such performance marks are available for Marines in pay grades E-1 through E-4, fitness reports are used to report the performance of Marines in grades E-5 and above. The SJAR, therefore, was correct in noting that the proficiency/conduct marks were "N/A [not applicable]," but it did not attempt to describe by any other means the appellant's character of service.

We have previously encouraged SJAs to summarize the character of service in cases in which numerical marks are not available. *See United States v. Powell*, No. 9800344, 1999 CCA LEXIS 64, unpublished op. (N.M.Ct.Crim.App. 31 Mar 1999). We take this opportunity to do so again. We decline, however, to find that this omission was plain error entitling the appellant to relief.

Although he cited both R.C.M. 1105 and 1106 in his response to the SJAR, the trial defense counsel focused on clemency and did not assert the omission of character-of-service information as "erroneous, inadequate, or misleading" in fulfilling his responsibilities under R.C.M. 1106(f)(4). Request for Clemency of 12 May 2001. The appellant therefore forfeited this claim of error. R.C.M. 1106(f)(6). Even if we were not to find forfeiture of this issue, we find no material prejudice to the appellant's substantial rights.

We note that the convening authority stated in his action that he considered both the appellant's clemency request, in which the trial defense counsel highlighted the appellant's

character of service by referring to his "unblemished record as a Marine Officer," and the record of trial, which included Defense Exhibit U, the appellant's Official Military Personnel File, including fitness reports. We find that the appellant's character of service was fully communicated to the convening authority. This assignment of error has no merit.

Conduct of Trial Counsel

Pointing to the cumulative impact of specific acts of alleged misbehavior by the trial counsel, the appellant asserts that a "critical mass of improper conduct by the Government" denied him a fair trial. Appellant's Brief at 12-13. We disagree.

Our superior court has defined prosecutorial misconduct as "action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996). We will review the military judge's findings of fact regarding the Government's alleged actions under the "clearly erroneous" standard. Whether the facts found by the military judge constitute prosecutorial misconduct and whether such misconduct was prejudicial error are questions of law that we review de novo. *See id*. at 5-6; *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995). If we find prosecutorial misconduct, we review "the trial record as a whole to determine whether such a right's violation was harmless under all the facts of a particular case." *Meek*, 44 M.J. at 5.

In this case, the appellant moved before the trial to dismiss the charges on several grounds, including prosecutorial misconduct as follows: (1) the trial counsel's extra-judicial statements to the media; (2) the trial counsel's recommendation to the appellant's commanding officer that he not submit a letter of recommendation to the officer conducting the Article 32, UCMJ, investigation; (3) the trial counsel's group interviews of witnesses before the trial; and (4) the trial counsel's use of the commanding general's title to summon witnesses for a group meeting. On appeal, the appellant renews his claim of prosecutorial misconduct, citing, in addition to the above actions of the trial counsel, the following: (5) the SJA's discussion of the case with an officer later detailed as a member of the court-martial; (6) the trial counsel's proposal, in the presence of the members, for a site visit by the court-martial; and (7) the trial counsel's suggestion, in the presence

of the members, that the Government would offer evidence of the appellant's character for truthfulness when that issue was not properly before the court.

Except for the trial counsel's extra-judicial statements, the military judge entered findings of fact on the appellant's assertions of pretrial misconduct by the trial counsel (numbers 2-4, above). Appellate Exhibit LXX. The appellant does not now contend that those findings were erroneous, and our review of the record likewise convinces us that they were not clearly erroneous. We adopt them as our own.

Regarding the trial counsel's extra-judicial statements, the record indicates that he conceded making statements concerning the appellant's opportunity to take a polygraph examination to a reporter for the *Stars and Stripes* newspaper during the Article 32, UCMJ, investigation. Record at 102-03. The newspaper published accounts of the Article 32, UCMJ, investigation, but did not include reference to a polygraph examination. AE XVI.

As for the appellant's other assertions of prosecutorial misconduct (numbers 5-7, above), the Government and the appellant do not dispute the circumstances of these events. We have previously addressed the SJA's discussion with an officer of the command, later detailed as a member, in which he stated that he believed the allegations against the appellant and thought the Government had a strong case. In addition, the record clearly indicates that in the presence of the members the trial counsel both proposed a site visit, Record at 731-34, and attempted to cross-examine a defense witness who was testifying about the appellant's good military character by questioning him about the appellant's character for integrity, *id*. at 811-19.

The appellant offers no citation to a "legal norm or standard" in contending that the above actions constitute prosecutorial misconduct. Our evaluation of the trial counsel's actions leads us to conclude that only his extra-judicial statements might so qualify. Although offered "off the record," his comments to a newspaper reporter, concerning the appellant's opportunity to take a polygraph examination, were proscribed by Rule 3.6 of Judge Advocate General Instruction 5803.1B of 11 February 2000, "Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General." We have previously concluded that the SJA acted properly in discussing the case with the public affairs officer, who was later detailed as a member. We now find that the

actions of the SJA, and the remaining actions of the trial counsel (while not examples of "best practice"), do not constitute prosecutorial misconduct.

Assuming *arguendo* that the trial counsel's extra-judicial statement constituted prosecutorial misconduct, we turn to the question of its impact. We are required to review the trial record as a whole to determine whether this violation was harmless under the all the facts of the case. We note that the *Stars and Stripes* did not include the trial counsel's statement concerning a possible polygraph examination in its coverage of the case. AE XVI. The military judge issued an order to the members to avoid media accounts of the case. AE VIII. He questioned the members in voir dire concerning their knowledge of media accounts in general and specifically concerning a polygraph examination, and granted a challenge for cause based, in part, on what a member said he knew about the case from the newspaper. Record at 254-380. Two other members with knowledge of the case were challenged peremptorily. We find the trial counsel's statement harmless under all the facts of this case.

Finally, we consider whether the trial counsel's errors cumulatively rise to the level of prosecutorial misconduct of such severity as to constitute prejudicial error. We note specifically the military judge's favorable rulings on the appellant's objections to the trial counsel's references to a site visit and to evidence of his character for truthfulness, as well as his cautionary instructions on these points to the members. Record at 731-34, 811-19. We find that the sum of these actions by the trial counsel does not rise to the level of prosecutorial misconduct that constitutes prejudicial error.

Sufficiency of the Evidence

The appellant asserts that the Government's evidence of the appellant's guilt, provided primarily through the testimony of LCpl H, was insufficient both factually and legally.

This court has an independent statutory obligation to review each case *de novo* for legal and factual sufficiency, and may substitute its own judgment for that of the trial court. Art. 66(c), UCMJ; *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the essential elements of the crime 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, 318-19 (1979)).

The test for factual sufficiency is more favorable to an appellant. It requires the members of this court to be convinced themselves of the appellant's guilt beyond a reasonable doubt, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses. *Reed*, 54 M.J. at 41; *Turner*, 25 M.J. at 325; *see* Art. 66(c), UCMJ. Proof beyond a reasonable doubt, however, does not require that the evidence be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)(citing *United States v. Steward*, 18 M.J. 506 (A.F.C.M.R. 1984)). We may believe one part of a witness' testimony and yet disbelieve another. *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979); *see* Art. 66(c), UCMJ. In exercising the duty imposed by this "awesome, plenary, *de novo* power," *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990), this court may judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the military judge or court-martial members. Art. 66(c), UCMJ. In addressing the issue of factual sufficiency, we have carefully reviewed the record of trial, but have given no deference to the factual determinations made at the trial level. *See United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

The appellant contends that the only witness who testified that the charged sexual activity took place was LCpl H, and she is not to be believed. We have thoroughly reviewed the record of trial, noting the appellant's catalog of seemingly newfound memories, inconsistencies, and accounts of prolonged sexual relations in LCpl H's testimony; her motive to fabricate; and her admitted untruthfulness on other matters. We have also considered the circumstantial evidence that corroborated aspects of LCpl H's testimony, e.g., the barracks duty logbook that showed that the appellant was present in her barracks for about an hour at the time she testified he visited her in her room.

After considering the evidence in the record of trial and applying the tests for legal and factual sufficiency, we conclude that the record contains more than sufficient evidence upon which a reasonable factfinder could have found that all the elements of the charged crimes had been proven beyond a reasonable doubt. In addition, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. We therefore find the evidence legally and factually sufficient to support the appellant's conviction.

Constitutionality of Conviction for Consensual Sexual Conduct

In his last assignment of error, the appellant asserts that his conviction for consensual sexual conduct outside the presence of others is constitutionally protected and cannot be the subject of criminal prosecution. He relies on the U.S. Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down a Texas criminal statute prohibiting same-sex sodomy, as the basis for his contention that his conviction of violating Articles 92 and 133, UCMJ, by engaging in sexual intercourse, and Article 125, UCMJ, by engaging in sodomy, are constitutionally defective. Appellant's Brief at 19-21. We disagree and find that, under the facts of this case, the appellant's acts fall within the exceptions recognized by the Supreme Court. *Lawrence*, 539 U.S. at 578.

After the appellant filed his brief, our superior court considered and rejected a general constitutional attack on Article 125, UCMJ. *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004). Since the appellant also attacks the constitutionality of his convictions of violating Articles 92 and 133, UCMJ, we will address his constitutional challenges to all three convictions by considering "whether [these Articles are] constitutional as applied to [a]ppellant's conduct." *Id*. at 206. We focus on three questions:

> First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? 539 U.S. at 578. Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?

Id. at 206-07; *see also United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004).

In this case, the answer to the first question is not clear and, therefore, we will consider it in the appellant's favor. The first meeting between the appellant and LCpl H resulted in oral sex and sexual intercourse in the appellant's car, when it was parked at night in parking lots at locations both on and off base. Shielded by darkness, their actions were not readily visible to passers-by. Their later trysts took place in the

privacy of LCpl H's barracks room. All sexual contact between these two adults was consensual.

We answer the second question in the affirmative. We find that the relationship between the appellant and LCpl H encompassed factors identified by the Supreme Court in *Lawrence* as outside its analysis. Although both the appellant and LCpl H were adults, we find that she was in a relationship with the appellant in which consent might not have been easily refused, had she been so inclined. *Marcum*, 60 M.J. at 203 (citing *Lawrence*, 539 U.S. at 578). The appellant was a senior company-grade officer while LCpl H was a junior enlisted Marine. "[I]n relationships where consent might not easily be refused, the nuance of military life is significant." *Id*. at 207.

We answer the third question in the affirmative by finding the presence of additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest. We note that the appellant's conduct was the basis for his conviction of violating a lawful general regulation prohibiting personal relationships between service members that are unduly familiar and that fail to respect differences in grade or rank, when such relationships are prejudicial to good order or of a nature to bring discredit upon the Naval Service. U.S. Navy Regulations, Art. 1165 (1990). Our superior court has recognized that to avoid preferential treatment, undermining good order and discipline, or diminished unit morale, the military has consistently regulated relationships between service members. *See United States v. McCreight*, 43 M.J. 483, 485 (C.A.A.F. 1996).

In this case, the appellant and LCpl H committed adultery and sodomy in his car on base and in her barracks room. When LCpl H thought she was pregnant, she went to her superiors and lied about her relationship with the appellant, causing an investigation to focus on a sergeant. We find that the appellant's misconduct with LCpl H directly undermined good order and discipline, placing his adultery and sodomy with her outside the protected liberty interest recognized in *Lawrence*.

We find Articles 92, 125, and 133, UCMJ, constitutional as applied to the appellant. This assignment of error is without merit.

Conclusion

We affirm the findings and the sentence as approved by the convening authority.

Chief Judge ROLPH and Judge HARTY concur.

For the Court

R.H. TROIDL
Clerk of Court