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

BEFORE

C.L. CARVER **R.C. HARRIS** **W.L. RITTER**

UNITED STATES

v.

Reginold D. ALLISON
Mess Management Specialist Seaman (E-3), U.S. Navy

NMCCA 200000637 Decided 24 November 2004

Sentence adjudged 15 October 1999. Military Judge: P.J. Straub. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Training Center, Great Lakes, IL.

LT GLENN GERDING, JAGC, USNR, Appellate Defense Counsel
LT JASON GROVER, JAGC, USN, Appellate Defense Counsel
LT ROSS W. WEILAND, JAGC, USNR, Appellate Government Counsel

HARRIS, Judge:

A general court-martial composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of fleeing apprehension, rape, assault consummated by a battery (choking), assault consummated by a battery with a knife, and burglary (with intent to commit rape), in violation of Articles 95, 120, 128, and 129, Uniform Code of Military Justice, 10 U.S.C. §§ 895, 920, 928, and 929. The members sentenced the appellant to confinement for 8 years, reduction to pay grade E-1, total forfeiture of pay and allowances, and a bad-conduct discharge. The convening authority approved the adjudged sentence and, except for the bad-conduct discharge, ordered it executed.

We have carefully considered the record of trial, the appellant’s four assignments of error, and the Government’s response. We conclude that the findings and the sentence are correct in law and fact and there is no error materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c) UCMJ.

Assignments of Error

The appellant raised the following assignments of error (AOEs):

> I. THE MILITARY JUDGE ABUSED HIS DISCRETION BY ALLOWING MR. YATES AND MS. JOHNSON TO GIVE OPINIONS AND TESTIFY ABOUT THE STATISTICAL SIGNIFICANCE OF THE DNA[1] TEST RESULTS BECAUSE THEY LACKED THE PROPER QUALIFICATIONS TO OFFER THEIR OPINIONS AND BECAUSE THEY FAILED TO EXPLAIN THE STATISTICS AND POPULATION GENETICS UNDERLYING THEIR TESTIMONY.
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> II. THE EVIDENCE WAS FACTUALLY AND LEGALLY INSUFFICIENT TO ESTABLISH THAT APPELLANT COMMITTED BURGLARY AND RAPE.
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> III. THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE INSTRUCTED THE MEMBERS THEY COULD CONSIDER YN3 R'S UNCONSCIOUSNESS IN DETERMINING WHETHER SHE COULD MANIFEST LACK OF CONSENT.
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> IV. THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ALLOWED THE TRIAL COUNSEL TO ARGUE IN HIS PRE-SENTENCING ARGUMENT THAT THE APPELLANT WAS AN EVIL AND DEPRAVED SEXUAL PREDATOR, AND THAT YN3 R SUFFERED AS A VICTIM FROM BEING FORCED TO TESTIFY IN APPELLANT'S COURT-MARTIAL.

Expert Testimony

In the appellant’s first AOE, he asserts that the military judge abused his discretion by allowing Mr. Yates and Ms. Johnson to testify about the statistical significance of their analysis of DNA extracted from inside and outside of a condom, and on a bloody knife, both of which were found at the scene of an attack on Yeoman Third Class (YN3) R[2] in her barracks room. The appellant further asserts that these witnesses were unqualified to provide statistical analysis testimony and that they failed to explain the population genetics underlying that testimony. The appellant avers that this court should set aside the findings pertaining to the burglary and rape charges and the sentence. We disagree.

Before trial, the appellant filed a motion *in limine*, in which he requested a hearing under *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 *U.S*. 579 (1993), regarding the admissibility of the DNA evidence in this case. Record at 93-107. The military judge granted the motion, and a *Daubert* hearing was conducted during which Yates and Johnson testified.

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[1] Deoxyribonucleic Acid.

[2] The victim was a Yeoman Seaman at the time of the attack.

Id. at 119-237. Following the *Daubert* hearing, the military judge ruled that DNA profiling, "specifically PCR and RFLP testing[[3]], are sound and reliable scientific techniques." *Id.* at 242. He further held that the appellant's "argument that a statistician is needed in this determination is misspent" because the "statistical analysis required is based on data bases and formulas provided by statisticians." *Id.* At trial, the appellant renewed his objections to Yates' and Johnson's testimony and their DNA analysis reports. *Id.* at 1000, 1016, 1020, 1077, 1084-86, 1107, 1111.

This court reviews a military judge's evidentiary rulings on the admissibility of evidence, including DNA evidence, for an abuse of discretion. *United States v. Thomas*, 49 M.J. 200, 202 (C.A.A.F. 1998). To be reversed on appeal, an evidentiary ruling must have been "arbitrary," "clearly unreasonable," or "clearly erroneous." *United States v. Travers,* 25 M.J. 61, 62 (C.M.A. 1987)(*citing United States v. Yoakum*, 8 M.J. 763 (A.C.M.R. 1980)).

If scientific knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert may testify thereto in the form of an opinion or otherwise. MILITARY RULES OF EVIDENCE 702 and 703, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). It is well-established that DNA test results, including a statistical analysis, are admissible at courts-martial if a proper foundation is laid. *United States v. Youngberg*, 43 M.J. 379, 386 (C.A.A.F. 1995); *see also United States v. Mason,* 59 M.J. 416, 425 (C.A.A.F. 2004).

The military judge accepted Yates, an employee of the U.S. Army Criminal Investigation Laboratory (USACIL), as an expert in forensic serology and forensic DNA analysis.[4] Record at 1000. Yates testified that PCR is one of two DNA typing techniques that distinguish between people, because everyone, except identical twins, has different DNA profiles. He further testified that USACIL often uses PCR because it allows the profiling of small and/or degraded stains. Yates also testified that he had

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[3] Polymerized Chain Reaction and Restriction Fragment Length Polymorhphism, respectively. Record at 100.

[4] Yates testified he has a B.A. in biology and an M.Ed. He was trained in forensic serology in 1970 by the Army Crime Laboratory (ACL) in Frankfurt, Germany, and then helped establish DNA testing at ACL. He testified that he has studied DNA analysis at the Forensic Science Service in England, at Lifecodes Corporation (one of the first U.S. companies to perform forensic DNA testing), and at the FBI Academy. He also worked for the Armed Forces Institute of Pathology (AFIP) and the Ontario Province Laboratory. Yates also testified that he reviews literature on DNA analysis, and has published a paper on bloodstains. He has been recognized as a court expert about 50 times, 3 times in DNA analysis. Record at 994-99; Prosecution Exhibit 51 (Yates' Curriculum Vitae).

conducted well over 1000 PCR tests following the DNA Advisory Board guidelines, as established by the FBI. Finally, Yates testified that there are several quality control standards in place at USACIL, and that the American Society of Crime Laboratory Directors accredits USACIL. *Id.* at 1002-03, 1011-13.

The military judge also accepted Johnson, a USACIL employee, as an expert in forensic serology and forensic DNA analysis.[5] *Id.* at 1086. Johnson testified that at USACIL, she identifies body fluids on evidence, and performs DNA typing on those fluids. *Id.* at 1079-86.

Based on the evidence in this case, we find that although Yates and Johnson were not statisticians, they were required to necessarily determine occurrence frequencies of DNA types in order to be experts in Forensic DNA Analysis. They each relied on and explained the statistical method recommended by the National Research Council, a method that has been accepted in the scientific community as valid. As the *Youngberg* Court found, "statistical probabilities are basic to DNA analysis and their use has been widely researched and discussed." *Youngberg*, 43 M.J. at 387 n.9 (quoting *United States v. Davis*, 40 F.3d 1069, 1075 (10th Cir. 1994). Therefore, the *Youngberg* court found the military judge did not err by allowing a biologist with expertise in DNA typing to present statistical evidence. *Id.* at 387. For the same reason, we find no error here and decline to grant relief.[6]

Sufficiency of Evidence

In the appellant's second AOE, he asserts that the evidence is factually and legally insufficient to prove beyond a reasonable doubt that he raped YN3 R or that he committed burglary with the intent to commit rape. The appellant avers that this court should set aside the findings pertaining to the burglary and rape charges and the sentence. We disagree.

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[5] Johnson testified that she had a B.S. in biochemistry and had completed college coursework in statistics and recombinant DNA technology. She testified that in 1985 she was trained for one year at the Wisconsin State Crime Laboratory, and she attended the Serological Research Institute in California at their semen identification school, the FBI's DNA analysis methods course, and the FBI's advanced school for DNA analysis methods. The witness testified she also had attended Lifecodes Corporation's DNA analysis methods school and a number of other classes and seminars; reviewed the relevant literature in the field; and was a member of the Northwest Association of Forensic Scientists and the Midwestern Association of Forensic Scientists. She published three articles in serology and DNA, and had testified in court 19 times; four or five of those times were for the defense. Record at 1079-84; Prosecution Exhibit 53 (Johnson's Curriculum Vitae).

[6] We are thus not persuaded by the *dicta* cited by the appellant appearing in a concurring opinion in the unreported case of *United States v. Mason*, ARMY 9601811, slip op. at 2, n.2. (Army Ct. Crim. App. 30 June 1999), that a forensic chemist may not testify about the statistical significance of a DNA analysis unless the witness is also a qualified statistician.

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, UCMJ; *see 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 prosecution, a reasonable fact-finder could have found that all the essential elements were proven 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 test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41; *Turner*, 25 M.J. at 325; *see* Art. 66(c), UCMJ. Reasonable doubt, however, does not mean that the evidence must be free from conflict because the factfinders may believe one part of a witness' testimony and disbelieve another. *United States v. Allen,* 59 M.J. 515, 533 (N.M.Ct.Crim.App. 2003)(citations omitted), *aff'd*, 59 M.J. 478 (C.A.A.F. 2004), *cert. denied*, 2004 U.S. LEXIS 6660 (U.S. 4 October 2004). In exercising the duty imposed by this "awesome, plenary 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.

To support a conviction for rape in this case, the Government must establish the following elements beyond a reasonable doubt:

> (1) That the appellant committed an act of sexual intercourse with YN3 R; and
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> (2) That the act of sexual intercourse was done by force and without consent.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 45(b)(1). To prove burglary with intent to commit rape, the Government must prove the following elements beyond a reasonable doubt:

> (1) That the appellant unlawfully broke and entered the dwelling house of YN3 R;
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> (2) That both the breaking and entering were done in the nighttime; and
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> (3) That the breaking and entering were done with the intent to commit rape.

Id. at ¶ 55(b).

The appellant challenges the Government's proof in three areas: (1) the identity of the attacker in both charges; (2) the question of penetration in the rape charge; and, (3) the issue of breaking with regard to the burglary charge. We have carefully examined all of the evidence admitted on the merits. We conclude that the evidence is both legally and factually sufficient to support both of these charges.

A. The Attacker was the Appellant

The appellant lived in the Boorda Hall barracks aboard Naval Training Center (NTC) Great Lakes, Illinois. Record at 700. According to the testimony of an acquaintance of the appellant's, at about 1800 or 1900 hours on the evening before the attack, the appellant said, while looking out of his (appellant's) barracks room window, that he could see directly into the barracks room of YN3 R, and that he could "smack the guts" (have sexual intercourse) with her anytime he wanted to. *Id.* at 694.

YN3 R, whose roommate had left for the weekend, testified that she went to sleep around 2200 hours on 7 November 1998, wearing a sports bra and underwear. She left her barracks room door unlocked because she had invited a Sailor with whom she had a romantic relationship to come over. YN3 R testified that early the next morning, at about 0515, a man wearing a black ski mask and gloves, who was at the foot of her bed "grunting," awakened her in her room. *Id.* at 663-64. She testified that he then attacked her, but she fought back and tried to reach a "little pocket knife" she kept on her windowsill. *Id*. at 502. According to YN3 R's testimony, the attacker turned toward the window to see what she was reaching for, and thus she could see his "brownish-green" eyes "with a yellow tint" in the dim light coming through the window. *Id.* at 498-504. She testified that she immediately recognized the eyes as those of "Reggie," a Sailor whose recent invitations to go out on a date she had twice turned down. YN3 R testified that she did not know Reggie's last name, but she had seen him a few times when he visited her roommate, and she had seen him working as a Gate Guard. She testified that on these occasions she had noticed his unique eye color. *Id.* at 505-10. She identified "Reggie" at trial as MSSN Reginold Allison, the appellant. *Id.* at 511.

YN3 R testified that during a struggle on her bed, she and the attacker fell to the floor, and he was then able to remove her panties and insert his penis into her vagina. *Id.* at 512-15. However, he had "trouble" and lost his erection, and when he "reached for himself," she testified that she ran to her front door, which she unlocked and opened briefly, only to be pulled back inside and into the bathroom by the attacker. *Id.* at 516-17. YN3 R testified that he climbed on top of her again on the bathroom floor and she screamed, "Reggie, don't do this." *Id.* at 518. According to YN3 R, the attacker then pulled back from her and said, "I'm not Reggie. My name's not Reggie." *Id*. She testified that she recognized the voice as Reggie's. *Id.* at 524.

She also testified that during the attack, she had been able to see his thigh, which indicated to her that the attacker was African-American, as is the appellant. *Id.* at 523.

Yates testified that DNA from sperm found inside the condom worn by the attacker and left at the scene matched the appellant's blood DNA profile. He further testified: (1) that the frequency of that DNA profile in the U.S. Caucasian population is 1-in-3.9 billion, and in the U.S. African-American population, it is 1-in-17 million; (2) that the DNA profile from non-sperm cells on the outside of the condom matched YN3 R's blood DNA profile; (3) that the frequency of that DNA profile in the Caucasian population is 1-in-3 million, and in the African-American population, it is 1-in-1.6 million; (4) that DNA from blood on the knife was examined and it also matched YN3 R's DNA profile; and (5) that the reported frequencies are conservative estimates. *Id.* at 1021-22, 1066.

Johnson testified that she was provided with blood samples from the appellant and YN3 R, a "used" condom, and the bloody knife. Upon examination of the knife, she found blood and amylase, an enzyme found in very high concentrations in saliva. She testified that she found sperm cells on the inside of the condom and on the outside, she found epithelial cells, which are most commonly found in body cavity linings, such as the vagina or the mouth. Johnson further testified that she performed RFLP DNA testing on the sperm cells. She explained in her testimony that because RFLP uses one more loci than does PCR testing, it is a more discriminating test. The witness testified that she has conducted this type of testing more than 1000 times. *Id.* at 1086, 1090-93, 1094.

Johnson testified that USACIL uses the statistical method for determining frequency of occurrence numbers recommended by the National Research Council's 1996 report on DNA testing; a method that has been studied and researched, and accepted in the scientific community as valid. She testified: (1) that frequency of occurrence numbers are derived by her from an FBI database constructed to measure the allele frequency in various population groups; (2) that the sample racial group members were determined by self-reporting, and the number of people tested varies with allele group, from a low of around 300 to high of around 750; and, (3) that the final frequency of occurrence numbers are derived from the allele frequencies multiplied by the number of tested loci. *Id.* at 1142-45.

In closing, Johnson testified that the DNA profile from sperm cells found inside the condom in this case matched appellant's blood DNA profile at each loci. She based her conclusion on the fact that the frequency of occurrence for that DNA profile was about 1-in-3 quadrillion in the U.S. Caucasian population, 1-in-900 trillion for the U.S. African-American population, and 1-in-40 trillion in the U.S. Hispanic population.

She testified that these figures are conservative (rounded down) estimates. *Id.* at 1113.

According to the testimony of Great Lakes Police Department Officer Captain (CAPT) Smith, after he arrived in response to a report of a sexual assault and found that the attacker was gone, he also found that YN3 R's retractable bedroom window was broken. He further testified that he immediately saw on the carpet in the hallway area of YN3 R's room, a bent, bloody "steak" knife, and a "used" condom. *Id.* at 1210-1211. The condom was on the floor close to the front door, just around the corner from where YN3 R regained consciousness. Prosecution Exhibit 3(B).

CAPT Smith and Police Officer May testified that YN3 R immediately told them after she opened her door that the attacker was "Reggie," who worked "for them" at the Gate. *Id.* at 1209, 1408. CAPT Smith recalled that YN3 R told him about the attacker's green eyes. *Id.* at 1209. They then sent out a call to look for the appellant, to which Aviation Structural Mechanic Second Class (AMH2) Diller responded by setting up a checkpoint at Gate 1. *Id.* at 715, 1211.

AMH2 Diller testified that at about 0622, he stopped the appellant as he was attempting to drive out of Gate 1, and the appellant said, "How you doing, Diller?" *Id.* at 718, 792. AMH2 Diller testified that he asked for the appellant's ID card, and once that was in his hand, he told the appellant to shut off his car's engine and to step out. He testified that instead, the appellant tried unsuccessfully to retrieve his ID card and then said, "Fuck you," and drove speedily away. *Id.* at 718-20. AMH2 Diller testified that the appellant led him on a lengthy car chase through the streets of North Chicago, during which both vehicles were damaged. He testified that he was eventually able to block the appellant's car with his own, but the appellant got out and ran. The appellant lost a shoe, but was able to outrun AMH2 Diller. *Id.* at 720-28. The appellant's description was reported to the Naval Criminal Investigative Service (NCIS) and, later that morning, NCIS Special Agent (SA) Weimer arrested the appellant after spotting him wearing dark plaid drawstring flannel pants, a University of Michigan jacket, and one shoe, walking down a North Chicago Street. *Id.* at 858-59, 871.

That afternoon, at an NCIS office, NCIS SA Banks observed the appellant sign a search authorization form. *Id.* at 1247. When SA Banks emptied the appellant's jacket pocket, he found a 3-pack of Trojan brand condoms, with only one condom still in the box. SA Banks testified that when he pulled out the condom box, the appellant volunteered that he "forgot" that the condom box was in his pockets, and that it had "been there for a year or two." *Id.* at 1247-48. However, a representative of Carter Wallace Corporation, the company that manufactures Trojan brand condoms in Colonial Heights, Virginia, testified that markings on the wrapped condom in the box showed that it had been manufactured beginning on 21 June 1998, and was first available

for shipment to market on 31 July 1998, just a few months before the attack. *Id.* at 843-54.

Based on this record, with or without the DNA evidence discussed in the appellant's first AOE, there is evidence beyond a reasonable doubt that the appellant was YN3 R's attacker. The appellant was clearly interested in YN3 R, having twice unsuccessfully asked her out. Then, on the evening before the attack, while telling an acquaintance that he could easily look from his room into YN3 R's, he bragged that he could have sex with her whenever he wanted to. YN3 R, while still under the stress from the attack the next morning, immediately identified the attacker as a Gate Guard with green eyes named Reggie -- the appellant. During the attack, she was able to identify both his unique eye color (which the Members also viewed) and his voice. Record at 1201. Additionally, the attacker denied to YN3 R that he was "Reggie" when she said, "Reggie, don't do this." Only an attacker who had been correctly identified would have stopped to tell YN3 R that he was not who she thought he was. Additionally, the appellant's flight from authorities provides probative evidence of his consciousness of guilt. *United States v. Simmons,* 54 M.J. 883, 891 (N.M.Ct.Crim.App. 2001). His spontaneous attempted exculpatory statement to SA Banks that the relatively new box of condoms in his pocket had been there for a year or two further demonstrated appellant's consciousness of guilt.

B. The Appellant Penetrated YN3 R's Vagina with his Penis

As explained above, YN3 R testified that the appellant penetrated her while they were on the floor by her bed, but he lost his erection. She testified that she was unsure whether he had fully or partially penetrated her, and that she did not know if the appellant penetrated her after he rendered her unconscious. *Id.* at 513-16. YN3 R testified that she told NTC Great Lakes Hospital emergency room (ER) physician, Dr. Akintilo later that morning that she was unsure about penetration when she was unconscious. *Id.* at 617, 649. She did not recall ever having told him there had not been penetration while she was conscious. She was sure that she "felt it," but she "didn't know how far . . . it went in." *Id.* at 673. YN3 R also testified that she had trouble communicating with medical personnel that morning because she was disoriented, in shock, embarrassed," and "could hardly talk." *Id.* at 606, 665.

As explained above, the "used" condom was found on the hallway floor of YN3 R's barracks room near where she regained consciousness after having been strangled. The condom was found to have sperm cells on the inside that matched appellant's DNA profile, while cells commonly found in body cavity linings that were located on the outside of the condom, matched YN3 R's DNA profile.

In order to prove rape, the Government must establish penetration. MCM, Part IV, ¶ 456(1)(a). But, "[a]ny penetration, however slight, is sufficient to complete the offense." MCM, Part IV, ¶ 45c(1)(a).

CAPT Smith testified that when YN3 R first opened her door, she had a "black eye, scratch marks all over her neck, blood all over her mouth," and was "very traumatized. Her hair looked like it had been "put in a blender." *Id.* at 1207. He also testified that YN3 R told him that she did not know if she had been raped. *Id.* at 1209.

Lieutenant (LT) Dawson, an officer who knew the appellant and responded to the reported sexual assault, testified she was with YN3 R for about 2 to 2 1/2 hours in the ER on the morning of 8 November 1998. LT Dawson further testified that YN3 R told her that the attacker had attempted penetration. She also testified that on the forensic laboratory report from that morning, she (LT Dawson) checked a block indicating that penetration had been "attempted." *Id.* at 1277-80. However, she also testified that according to her notes from that morning, YN3 R told her that she believed there had been penetration while she was conscious, but she was unsure about what happened while she was unconscious. *Id. at* 1303.

Dr. Atkintilo testified that he gave YN3 R a pelvic exam that morning and noted no vaginal injuries. He also testified that YN3 R told him that she was sure there was no penetration while she was conscious, but she was unsure what happened while she was unconscious. He agreed that there was no report that corroborated this testimony, but he thought this was "implied" in the medical report. He also testified that YN3 R wanted a female doctor to examine her, but there was none available. *Id.* at 1315, 1320, 1326.

Considering YN3 R's hysterical and embarrassed state, the fact that she was both conscious and unconsciousness at different times during the attack, and the difficulty she had speaking that morning because she had been strangled, we are not surprised that there are some discrepancies among the witnesses concerning the question of penetration. Nevertheless, YN3 R's testimony that there had been at least some penetration while she was conscious is consistent with LT Dawson's notes, and is corroborated by the presence of sperm cells inside the condom that matched the appellant's DNA profile, and body cavity lining cells on the outside of the condom that matched YN3 R's DNA profile. We thus find no reason to doubt YN3 R's credibility on the question of penetration. And, as discussed below in connection with the appellant's third AOE, the location of the condom near to where YN3 R was choked into unconsciousness, coupled with the DNA evidence, also suggests that she was penetrated while she was unconscious.

C. The Appellant Broke into RN3 R's Barracks Room

The government can establish a breaking for purposes of burglary, if, among other things, the appellant opened a closed door to gain entry into a dwelling. MCM, Part IV, ¶ 55c(2). As explained above, YN3 R testified that the appellant was able to break into her barracks room because she had left her hallway door unlocked.

LT Dawson testified that YN3 R told her in the ER that she had been awakened in her room by the attacker. Record at 1290. A former military member who had been friends with YN3 R, also testified that YN3 R told her she had been awakened in her room by the attacker. Record at 1415.

Dr. (Psychologist) Weinrep testified that she met with YN3 R for counseling on 19 March 1999. According to her report of that session, YN3 R told her that she felt guilty about the rape because she "had opened the door" to the attacker. She testified that her typed report was based on her notes of the interview, but that the notes no longer exist. *Id*. at 1260-62, 1265. However, Dr. Weinrep acknowledged that when she first spoke with the trial counsel on 4 October 1999, her memory was that YN3 R told her she had left her door unlocked. *Id*. at 1268.

The only evidence to suggest that YN3 R, not the attacker, opened her door was the conflicting testimony of Dr. Weinrep about what YN3 R told her during a counseling session many months after the attack. We note that YN3 R's statement about feeling guilty because she "had opened the door" can be interpreted consistently with her other statements if "opening" the door referred to intentionally having left it unlocked. Based on all of the evidence of record, we find no reason to doubt YN3 R's credibility on this point. As such, we decline to grant relief.

Instruction on Consent

In the appellant's third AOE, he asserts that the military judge abused his discretion when he instructed the members they could consider YN3 R's unconsciousness in determining whether she could manifest consent. The appellant avers that this court should set aside the rape charge and the sentence. We disagree.

Consent may not be inferred where the victim is unable to resist because of the lack of mental or physical faculties. And, if to the accused's knowledge, the victim is unconscious to an extent rendering her incapable of giving consent, the act is rape. MCM, Part IV, ¶ 45c(1)(b). We find that there was at least some evidence that reasonably raised the possibility that YN3 R was penetrated while she was unconscious.

As explained above, YN3 R testified that the attacker first penetrated her in her bedroom, but he lost his erection. The "used" condom was later found on the hallway floor of YN3 R's

barracks room, just around the corner from where she regained consciousness after having been strangled. The condom was found to have sperm cells on the inside that matched appellant's DNA profile, while cells that typically are found in body cavity linings were found on the outside of the condom. These cells matched YN3 R's DNA profile.

The military judge, *sua sponte*, raised the issue of YN3 R's unconsciousness, stating that:

> It's the court's belief that their evidence, even though no—neither party argued one way or the other for that proposition, I think that it is fairly raised by the evidence and the—and would raise a question in the members' minds, and, therefore, I will give that particular instruction.

Record at 1548-49. Trial defense counsel objected, arguing that there was "very little evidence" to "suggest that the penetration took place while [YN3 R] was unconscious." *Id.* at 1549. The military judge overruled the objection and he gave the instruction. *Id.* at 1555-56.

The standard of review for most trial rulings on instructional issues is abuse of discretion. *United States v. Forbes*, 59 M.J. 934, 939 (N.M.Ct.Crim.App. 2004)(internal citations omitted), *rev. granted*, No. 04-5005 (C.A.A.F. 15 September 2004). Where an instruction is not requested by a party, the military judge may have a *sua sponte* duty to give it, if the issue is "reasonably raised" by "some" evidence. *United States v. Smith,* 50 M.J. 451, 455 (C.A.A.F. 1999).

We find that because the attack on YN3 R continued outside of her bedroom, and that the used condom was found near to where she was rendered unconscious, there was at least some evidence from which the members could conclude that YN3 R was penetrated while she was unconscious. Therefore, the military judge did not abuse his discretion by giving the instruction. Accordingly, we decline to grant relief.

Sentencing Argument

In the appellant's fourth AOE, he asserts that the military judge abused his discretion when he allowed trial counsel to make two particular arguments to the members regarding sentencing. The appellant avers that this court should set aside the sentence. We disagree.

The legal test for examining an alleged improper argument is whether it was erroneous and whether it materially prejudiced the substantial rights of the appellant. *United States v. Baer,* 53 M.J. 235, 237 (C.A.A.F. 2000). The focus is not on the words used in the argument in isolation, but rather, must be viewed in the context of the entire court-martial. *Id*. at 238. "When

arguing [on sentencing,] the trial counsel is at liberty to strike hard blows, but not foul, blows." *Id.* at 237. Trial counsel is charged with being a zealous advocate, and may argue the evidence of record as well as all reasonable inferences fairly derived therefrom. However, arguments aimed at inflaming the passions or prejudices of the members are improper. *Id.*

If an argument was improper and resulted in a constitutional error, the government must convince an appellate court beyond a reasonable doubt that the error was not prejudicial. *United States v. Powell,* 49 M.J. 460, 465 (C.A.A.F. 1998)(citing *United States v. Adams,* 44 M.J. 251, 252 (C.A.A.F. 1996)).

A. The "Evil and Depraved" and "Sexual Predator" Argument

In his argument, trial counsel referred to the appellant as a "sexual predator" five times, and as "evil and depraved," one time in his 12-minute sentencing argument. Record at 1669-74. Trial defense counsel objected and moved for a mistrial with regard to sentencing. *Id.* at 1677. The military judge denied the motion and did not give a curative instruction. *Id.* at 1679.

We find that the trial counsel's reference to appellant as "evil and depraved" and as a "sexual predator" struck hard blows, but were not aimed at improperly inflaming the passions of the members. When viewed within the context of the entire court-martial, these arguments were fair comment on the evidence. *See, e.g., United States v. McPhaul,* 22 M.J. 808, 814-15 (A.C.M.R. 1986).

Even if we were to find that the trial counsel's argument was improper, the appellant was not materially prejudiced by these remarks. We note that trial counsel asked the members to sentence the appellant, who was facing the possibility of confinement for life without the possibility of parole, to 45 years confinement and a dishonorable discharge, in addition to total forfeitures and reduction to E-1. The members sentenced the appellant to only 8 years of confinement and a bad conduct discharge, in addition to total forfeitures and reduction to E-1. Record at 1716. Therefore, in view of the relatively lenient sentence adjudged, we find that the substantial rights of the appellant were not materially prejudiced by trial counsel's argument. *Baer,* 53 M.J. at 238.

B. The Argument that YN3 R Suffered from Testifying at Court-Martial

It is well established that a military judge has broad discretion to determine whether matters will be admitted as aggravation evidence under R.C.M. 1001(b)(4). MCM, Part X, ¶ 1001(b)(4); *see United States v. Wilson,* 47 M.J. 152, 155 (C.A.A.F. 1997); *United States v. Rust,* 41 M.J. 472, 478 (C.A.A.F. 1995). Whether a circumstance is directly related to

or results from the offenses calls for considered judgment by the military judge, and appellate courts will not overturn that judgment lightly. *Wilson,* 47 M.J. at 155; *United States v. Jones,* 44 M.J. 103, 104-05 (C.A.A.F. 1996). Sentencing evidence, like all other evidence, is subject to the balancing test of MIL. R. EVID. 403. *United States v. Manns,* 54 M.J. 164, 166 (C.A.A.F. 2000); *Rust,* 41 M.J. at 478. "Ordinarily, appellate courts 'exercise great restraint' in reviewing a judge's decisions under Rule 403." *United States v. Harris,* 46 M.J. 221, 225 (C.A.A.F. 1997)(internal quotes omitted).

Evidence in aggravation properly may include evidence of the financial, social, psychological, and medical impact upon a crime victim. MCM, Part X, ¶ 1001(b)(3). During the presentation of aggravation evidence, YN3 R testified that "having to come in here [to court] to describe everything" "was one of the most horrifying events" of her life, and that no one should have to go through describing a crime to prosecutors over and over again. Record at 1637. In his sentencing argument, trial counsel asked the members to consider the impact of the appellant's actions on YN3 R's life. In one portion of that argument he stated:

> Imagine the horror of having to tell your story to the police, to NCIS, to [the] emergency room doctor, to an emergency room nurse, people in ... [her] chain of command, the prosecutors at the Article 32, at the court-martial. How difficult must that have been for her. How much trauma must that have caused her.

Record at 1672. Trial defense counsel objected, arguing that trial counsel was impermissibly commenting on the appellant's right to an Article 32 Investigation and his constitutional right to plead not guilty at court-martial. He also moved for a mistrial with regard to sentencing. *Id.* at 1676-77. The military judge denied the motion and did not give a curative instruction. He reasoned that trial counsel's argument was not a comment upon the appellant's exercise of his rights. *Id.* at 1678-79. We disagree.

Although we do not find that trial counsel's argument was "manifestly intended" as comment on the exercise of the appellant's right to plead not guilty and confront the witnesses against him, the members could "naturally and necessarily" take it as such. *Cf. United States v. Dennis*, 39 M.J. 623, 625 (N.M.Ct.Crim.App. 1993), *aff'd*, 40 M.J. 305 (C.M.A. 1994); *see also, United States v. Austin,* 25 M.J. 639, 638 (A.C.M.R. 1987).

Nevertheless, the improper comments were not extensive, and, as previously explained, the members sentenced the appellant to punishment far less severe than that argued for by the trial counsel. Therefore, we are convinced beyond a reasonable doubt that the error was not prejudicial, and decline to grant relief.

Conclusion

The findings and the sentence, as adjudged and approved by the convening authority, are affirmed.

Senior Judge CARVER and Senior Judge RITTER concur.

For the Court

R.H. TROIDL
Clerk of Court