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

BEFORE

C.L. CARVER **R.W. REDCLIFF** **J.D. HARTY**

UNITED STATES

v.

Ronald H. BARNETT, Jr.
Sergeant (E-5), U.S. Marine Corps

NMCCA 9901313 Decided 30 December 2004

Sentence adjudged 12 June 1998. Military Judge: R.L. Rodgers. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Quantico, VA.

LT REBECCA SNYDER, JAGC, USNR, Appellate Defense Counsel
LT LORI MCCURDY, JAGC, USNR, Appellate Government Counsel

HARTY, Judge:

A general court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of violating a general order (2 specifications), maltreatment of a subordinate (3 specifications), giving a false official statement, indecent assault (4 specifications), and indecent acts, in violation of Articles 92, 93, 107, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 893, 907, and 934. The members sentenced the appellant to two years of confinement, total forfeiture of pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered the sentence executed.

We have carefully reviewed the record of trial, the appellant's six assignments of error, the Government's answer, and the appellant's reply. We find that the appellant's assignment of error concerning unreasonable multiplication of charges has merit. Otherwise, we conclude that the findings and 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.

Admission of Evidence under Military Rule of Evidence 404(b)

For his first assignment of error, the appellant contends the military judge erred by admitting evidence of uncharged misconduct over defense objection. Specifically, the appellant claims the testimony of RB concerning the appellant's prior acts of sexually-related comments and one instance of touching should not have been allowed as rebuttal evidence. We disagree.

A military judge's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)(citing *United States v. Tanksley*, 54 M.J. 169, 175 (C.A.A.F. 2000)). We will not overturn a military judge's evidentiary decision unless that decision was arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)(citing United *States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)). A military judge "abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *United States v. Humpherys*, 57 M.J. 83, 90 (C.A.A.F. 2002)(quoting *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)).

The three-part analysis established in *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989), is the analytical model for determining whether prior acts or wrongs should be admitted under MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.). The first prong addresses the logical relevance of the evidence. That is, can the finder of fact reasonably conclude that the act occurred and that the accused is the person who committed the act? The second prong also addresses logical relevance. That is, whether the accused's commission of the prior act is probative of a material issue in the present case. The third prong provides the military judge discretion to exclude otherwise relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. *Reynolds*, 29 M.J. at 109; *see Huddleston v. United States*, 485 U.S. 681, 689 (1988); *McDonald*, 59 M.J. at 429.

Here, RB testified she had been subjected to the appellant's unwanted and sexually-oriented comments both over the telephone and in person. These comments included statements that RB was sexy, her voice was sexy, that she should be married to someone like the appellant, and that the appellant wondered

what it would be like to have sex with a pregnant white woman.[1] She asked the appellant to stop these comments but he acted as if she had never expressed her displeasure with his comments. When the appellant would not stop his comments after RB requested, she would hang up the phone.

RB eventually requested mast with her commanding general, and prepared a written statement containing a full description of the appellant's offending actions. She took her written statement to the meeting with her sergeant major. She believes she gave the written statement to the sergeant major, however, her sergeant major testified that she did not. The sergeant major asked RB a few questions and she only complained of the appellant calling her on the telephone and sounding sweet. During that meeting, the sergeant major noticed that RB was upset and did not want to discuss the details with him. Eventually, a Sexual Harassment Incident Report was generated by the command. (Appellate Exhibit XXXVI). As a result of RB's allegations, the appellant was issued a page 11 counseling concerning improper behavior toward subordinate female Marines. (Prosecution Exhibit 5). RB's company commander testified that he became aware of RB's complaints about the appellant, recalled the appellant's statement that RB should have married the appellant, and was also aware of one instance of unwanted touching. RB's company commander believed she was a truthful person.

During trial, the victims in this case described multiple acts of unwanted sexually-oriented statements from and multiple unwanted instances of touching by the appellant. The appellant's defense was mistake of fact as to the victims' consent to his actions. It is within this context that we must determine if the military judge abused his discretion by allowing RB to testify before the members.

First, the finder of fact could reasonably conclude that the acts RB complained of did occur and that the appellant is the person who committed those acts. The members heard from RB and her sergeant major. Their testimony was contradictory on some points; however, it is clear RB did not tell her sergeant major everything. Second, the appellant's commission of the prior acts is probative of whether he believed the victims consented to his physical contact. Consent was a material issue

[1] RB was pregnant at the time.

raised by the appellant in his own defense.[2] Third, while the relevant evidence was prejudicial to the appellant, the danger of unfair prejudice did not substantially outweigh its probative value. The military judge gave a cautionary instruction immediately before and after RB's testimony and again before deliberations on findings. Under these circumstances, we find the military judge did not abuse his discretion. This assignment of error is without merit.

Witness Request

For his second assignment of error, the appellant contends the military judge erred by denying the appellant's witness request for Brigadier General (BGen) Mashburn.[3] Specifically, the appellant claims that BGen Mashburn would have testified that had RB made him aware of all of the allegations she is now making against the appellant he would have taken the appellant to court-martial, thus destroying RB's credibility before the members. His testimony, therefore, was both relevant and necessary. Appellant's Brief and Assignments of Error of 28 Jun 2002 at 19. We disagree.

Every party to a court-martial has an "equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Art. 46, UCMJ. "Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary." RULE FOR COURTS-MARTIAL 703(b)(1), MANUAL FOR COURT-MARTIAL, UNITED STATES (1995 ed.); *see also* MIL. R. EVID. 401. Our higher court has held that "[a] military judge's ruling on a request for a witness is reviewed for abuse of discretion. *United States v. Rockwood*, 52 M.J. 98, 104 (1999). The decision on a request for a witness should only be reversed if, "on the whole, denial of the defense witness was improper." *United States v. Ruth*, 46 M.J. 1, 3 (C.A.A.F. 1997). "We will not set aside a judicial denial of a witness request 'unless (we have) a definite and firm conviction that the (trial court) committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.' *United States v. Houser*, 36 M.J. 392, 397 (C.M.A.

[2] Mistake of fact as to consent is a defense to maltreatment of subordinates, *United States v. Fuller*, 54 M.J. 107, 111 (C.A.A.F. 2000)(overturning maltreatment conviction based on consensual sex), and indecent assault, *United States v. Ayers*, 54 M.J. 85, 90 (C.A.A.F. 2000)(finding the Government failed to prove lack of consent beyond a reasonable doubt in indecent assault case).

[3] BGen Mashburn held the rank of colonel at the time of the incident involving RB and the appellant; he was not RB's commanding general at the time.

1993) quoting Judge Magruder in The New York Law Journal at 4, col. 2 (March 1, 1962)." *United States v. McElhaney*, 54 M.J. 120, 126 (C.A.A.F. 2000).

A military judge must determine whether personal production of a witness is necessary by weighing certain recognized factors. These factors include: the issues involved in the case and the importance of the requested witness to those issues; whether the witness is desired on the merits or the sentencing portion of the case; whether the witness's testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness, such as depositions, interrogatories, or previous testimony. *Id*. at 127 (citing *United States v. Tangpuz*, 5 M.J. 426, 429 (C.M.A. 1978)).

The appellant requested the presence of BGen Harold Mashburn, Jr., USMC, claiming the witness would "directly contradict the testimony of government witness RB, and prove her to be incredible" and because he "counseled the accused on the behaviour (sic) which the government is attempting to introduce pursuant to MRE 404b." AE V. During trial, trial defense counsel provided further support for his request stating:

> [T]here was a request mast up to the CG that never made it past Colonel Mashburn. And when I talked to (Col Mashburn), . . . he said because (RB's complaint) was handled at a page 11, that means it was unsubstantiated. It would have been at a bare minimum an NJP if there was anything to it.

Record at 23. Trial counsel, however, had also spoken with the requested witness and came away with a different sense of what the witness would say, proffering:

> [BGen Mashburn] doesn't remember the details of the case, other than the names and that something happened. He'll say that if it wasn't legitimate there wouldn't have been a page 11. He felt that was the appropriate resolution at that time, and nothing further. He doesn't have an independent recollection of statements made . . . .
>
> [H]e would not make any judgment about (RB) . . . about her credibility. He wouldn't make any judgment at all, other than the fact that they felt it was substantiated enough that they gave him a page 11 for it in which it references sexual harassment.

Record at 21.

The military judge denied the witness request on the grounds that the witness was not requested for what he personally heard or saw, but for attacking RB's credibility based on how the witness would have handled the situation based on a certain set of circumstances, and because that testimony would be cumulative with SgtMaj Garr. *Id*. at 33. At a subsequent Article 39(a), UCMJ, session, the trial defense counsel renewed his request for BGen Mashburn under the same theory but conceded the witness would be cumulative with SgtMaj Garr. *Id*. at 453.

The military judge did not abuse his discretion by denying the request to produce BGen Mashburn. The appellant wanted to use the witness as a surrebuttal witness to the Government's rebuttal use of RB. Although the witness may have handled RB's allegations at a higher forum if he had known everything alleged, that does not equate to recent fabrication by RB.

RB put all the information about the appellant in a written statement. SgtMaj Garr acknowledges that RB was holding an envelope addressed to the commanding general when he met with her. There is no indication that an envelope or statement ever made it to the commanding general or to the requested witness. The real issue is whether the requested witness would have handled RB's allegations differently if he had received her detailed written statement. Given the fact that SgtMaj Garr testified to everything BGen Mashburn could have testified about, BGEN Mashburn’s inability to recall statements made by RB, and the tangential nature of the requested witness' testimony, we find no abuse of discretion.

Unreasonable Multiplication of Charges

The appellant's third assignment of error contends that charging the appellant with sexual harassment, maltreatment of subordinates, and indecent assault of the same victims by alleging the same facts is an unreasonable multiplication of charges. We agree.

We resolve unreasonable multiplication of charges claims by looking at whether the specifications are aimed at distinctly separate criminal acts, whether they misrepresent or exaggerate the appellant's criminality, whether they unfairly increase his exposure to punishment, and whether they suggest prosecutorial abuse of discretion in the drafting of the specifications.

United States v. Quiroz, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition). In weighing all of these factors together, we are able to determine whether charges are unreasonably multiplied.

Here, the charges of sexual harassment (as an orders violation), maltreatment of subordinates, and indecent assault referred not to discrete criminal acts, but the same factual conduct.[4] By charging the appellant's acts under three separate punitive articles, the Government increased the appellant's punitive exposure from 30 years of confinement (for indecent assault only) to 44 years of confinement (indecent assault, sexual harassment, and maltreatment).[5] Our review of the charge sheet suggests some prosecutorial overreaching with respect to charging the appellant.[6]

The *actus reus* for the offenses of violating Secretary of the Navy Instruction 5300.26b (30 Sep 1994) and maltreatment of subordinates can be defined in terms that include assaultive and sexual misconduct. Logic would suggest that the status of the victim, as an element under the SECNAVINST[7] and the maltreatment article, is important largely because of the crime's adverse effect upon good order and discipline, an element under the general article offense of indecent assault. It follows that the indecent assault was more than just the means by which the sexual harassment and maltreatment was accomplished; it reasonably encompassed the very conduct that constituted sexual harassment and maltreatment in this case.[8]

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[4] While the described comments and physical contact with a particular victim does not mirror image itself from charge to charge and specification to specification, it is substantially the same and compelling enough to convince this court the same behavior is the basis for each charge involving that particular victim.

[5] It was ameliorated to some extent when the military judge merged two specifications of sexual harassment and dismissed one specification of indecent assault thereby reducing the appellant's total punitive exposure to 37 years. (Record at 140).

[6] The appellant was also charged with two specifications of false official statement under Article 107, UCMJ. The maximum punishment for these offenses is not relevant to the unreasonable multiplication of charges claim.

[7] Sexual harassment may constitute maltreatment. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.), Part IV, ¶ 17c(2).

[8] Sexually related comments cannot constitute indecent assault. MCM, Part IV, ¶ 63b. Under the circumstances of this case, we find that any attempt to charge the appellant with sexual harassment (as an orders violation) and/or maltreat based solely on the appellant's sexually related comments while separating out the acts of indecent assault would also be an unreasonable multiplication of charges.

Accordingly, to convict the appellant of all three statutes exaggerates the criminality of his misconduct.

Applying the factors set forth in *Quiroz,* we find on balance that charging the appellant with sexual harassment (as a violation of SECNAVINST 5300.26b), maltreatment of a subordinate and indecent assault under the facts of this case constitutes an unreasonable multiplication of the charges. We also find that the unreasonable "piling on" of charges has resulted in prejudice to the accused. *Cf. United States v. Savage*, 50 M.J. 244, 245 (C.A.A.F. 1999)(holding in a multiplicity case that an unauthorized conviction alone constitutes punishment and carries with it potential adverse collateral consequences). We will, therefore, provide relief by setting aside the guilty findings under Charge I (sexual harassment as a violation of SECNAVINST 5300.26b) and the guilty findings under Charge II (maltreatment of subordinates). We will reassess the appellant's sentence in our decretal paragraph.

Military Judge Usurped the Fact-Finders' Role

For his fourth assignment of error the appellant alleges the military judge usurped the fact-finders role by (1) incorrectly instructing the members as to the content of a Government witness' testimony, and (2) by overruling the trial defense counsel's objection to the trial counsel's summary of a defense witness' testimony during closing argument. We disagree.

Improper Instruction

The appellant's alleged error is more appropriately addressed as an objection to the court's instruction to the members. Instructional error is reviewed *de novo*. *United States v. Grier*, 53 M.J. 30, 34 (C.A.A.F. 2000)(citing *United States v. Maxwell*, 45 M.J. 406, 425 (C.A.A.F. 1996)). Failure to object to an instruction before the members begin deliberation is waiver of the objection in the absence of plain error. *United States v. Cooper*, 51 M.J. 247, 252 (C.A.A.F. 1999); RULES FOR COURTS-MARTIAL 920(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.). To be plain error: (1) there must be an error; (2) the error must be plain (clear or obvious); and (3) the error must affect the substantial rights of the defendant. *United States v. Grier*, 53 M.J. at 34(citing *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998)).

The military judge gave a cautionary instruction to the members before and after RB testified and again prior to deliberations. Record at 456, 467, 539. The trial defense counsel not only did not object to the instruction, he affirmatively requested the instruction be given both before and after RB testified. *Id*. at 456. The appellant now asserts the error occurred when the military judge referred to RB's testimony as including evidence that the appellant "may have touched [RB] in a purportedly provocative manner." Appellant's Brief and Assignments of Error of 28 Jun 2002 at 26. We find that the military judge correctly summarized the evidence. While RB did not refer to the touching as "provocative" it is clear she did not consent to the touching and was offended by the touching. It was left to the members to decide if the touching occurred and if it did, whether it was "provocative", and to apply that decision within the limitations given by the military judge.

We hold that there was no error and no prejudice to appellant's substantial rights. This assignment of error is without merit.

Erroneous Ruling on Defense Objection

The appellant asserts the military judge erred by overruling the trial defense counsel's objection to trial counsel's closing argument. We disagree.

The trial counsel argued in closing that SgtMaj Garr testified that "when [RB] came in, she was upset. She handed him the envelope, and she didn't want to talk about it." Record at 506. Trial defense counsel timely objected on the grounds the trial counsel was arguing facts not in evidence. The military judge overruled the objection, and the trial counsel continued, stating: "So as you hear, Sergeant Major Garr did receive an envelope. He received the envelope from [RB]." *Id*. at 507.

The appellant is correct in stating that SgtMaj Garr never testified before the members that he received an envelope from RB. While SgtMaj Garr testified that RB was upset and did not want to discuss the situation with him, *Id*. at 471, there was no testimony concerning an envelope. The issue of an envelope was raised during an earlier Article 39(a), UCMJ, session to decide whether RB's testimony should be allowed. During that hearing, RB testified that she wrote a statement containing everything that happened and that she gave the statement to SgtMaj Garr.

Id. at 175. SgtMaj Garr then testified at a later Article 39(a), UCMJ, session that RB did have an envelope with her during their meeting, it was addressed to the commanding general, and that RB did not give the envelope to him. *Id.* at 435. The parties assumed RB's written statement was in the envelope, however, the members did not hear any of this testimony.

When RB and SgtMaj Garr testified before the members, the issue of RB's written statement was raised during trial defense counsel's cross examination of RB. Without reference to an envelope, RB testified that she wrote out a statement and handed the statement to SgtMaj Garr. *Id*. at 465-66. In surrebuttal, SgtMaj Garr testified, without reference to an envelope, that RB did not hand him a statement. *Id*. at 469. While the trial counsel did argue that RB handed an envelope to SgtMaj Garr, there was never any association between an envelope and a written statement in front of the members. The reference to an envelope would not have had any meaning for the members. The envelope was only significant to parties present at the Article 39(a), UCMJ, sessions.

Under these circumstances we cannot see how trial counsel's argument could have had any prejudicial impact on the outcome of the court-martial. This assignment of error does not warrant relief.

Motion to Suppress

For his fifth assignment of error, the appellant contends the military judge erred by denying the appellant's motion to suppress his oral and written statements to an agent of the Naval Criminal Investigative Service (NCIS) provided on 21 November 1997. The appellant claims his statements were involuntary because his will was overcome by coercive NCIS tactics in the form of promises made to him by Government agents. Appellant's Brief and Summary Assignments of Error of 28 Jun 2002 at 31. We disagree.

Voluntariness of a confession is a question of law which we review *de novo*. Whether the confession is voluntary requires the examination of the "'totality of all the surrounding circumstances -- both the characteristics of the accused and the details of the interrogation . . . In (a) family context, we can imagine circumstances involving threats, promises, or other inducements that would raise questions of the voluntariness of an accused's statements....'" *United States v. Ellis*, 57 M.J.

375, 378-79 (C.A.A.F. 2002)(citations omitted). In describing the "totality of circumstance" test, our higher court, in *Ellis*, stated:

> we do not look at 'cold and sterile lists of isolated facts; rather, (we) anticipate() a holistic assessment of human interaction.' [Citation omitted]. The totality of the circumstances include the condition of the accused, his health, age, education, and intelligence; the character of the detention, including the conditions of the questioning and rights warning; and the manner of the interrogation, including the length of the interrogation and the use of force, threats, promises, or deceptions.

Id. at 379.

Here, the appellant agreed to take an NCIS polygraph and drove himself to the test site, arriving at 0800. He was aware the polygraph concerned "various acts of indecent assault", and he was fully advised of his rights and waived those rights prior to the polygraph. PE 2. After the appellant showed deceptive on the polygraph, the NCIS agents conducted an interview with the appellant beginning some time after 1400. That interview concluded at approximately 1515 and resulted in a lengthy, detailed statement being completed at approximately 1635.

The appellant was a 28-year-old sergeant (E-5) with 10 years of active duty service and had successfully completed numerous military courses. He was selected for promotion to staff sergeant and recommended for the Enlisted to Warrant Officer Program. Prior to entering the service, the appellant graduated from high school, was a scholarship finalist based on academic achievement, and had completed several computer courses. *See* PE 5 and Defense Exhibits G-I. There was no evidence the appellant suffered from any psychological handicaps that affected his decision-making ability.

The appellant testified the NCIS agents told him that giving a written statement would be to his benefit and that a written statement would result in the matter being sent back to the command where the commanding officer would impose whatever punishment he felt appropriate. Record at 83. If the NCIS agent made these statements to the appellant, they may have may have contributed to the appellant's confession. The mere existence of a causal connection between the agents' statements and the appellant giving a statement, however, does not transform the appellant's otherwise voluntary confession into an

involuntary one. *Ellis*, 57 M.J. at 379 (citing *Colorado v. Connelly*, 479 U.S. 157, 164 (1986)). The NCIS agents' advice would have been a reasonable estimate of what would ordinarily happen in such cases. The information ordinarily would be provided to the appellant's commanding officer for a military justice decision. *See* R.C.M. 401-405.

"Not only must we examine the circumstances surrounding the taking of the statement regarding what was done or said, but we must also examine what was not done or not said. There were no threats or physical abuse. See, e.g., *Payne v. Arkansas*, 356 U.S. 560, 566 (1958))." *Ellis*, 57 M.J. at 379. Here, as in *Ellis*, the questioning "did not continue for days; there was no incommunicado detention, and no isolation for a prolonged period of time." *Id*. Viewing all the facts taken together, we are convinced that the NCIS agents did not overcome the appellant's will with their statements and that the statements were voluntary. Thus, we find the military judge did not abuse his discretion by denying the appellant's motion to suppress his statements to the NCIS. This assignment of error has no merit.

Motion for Jury View

For his final assignment of error, the appellant contends the military judge erred by denying his motion to allow the members to visit the Aberdeen Proving Grounds to personally observe the instructional areas and get into the M1A1 tanks where the alleged acts occurred. The appellant contends that had the motion been granted, the members would have "understood that allegations of sexual (sic) assault inside and around the tanks as described by the complaining witnesses were not credible . . . [and] would have likely acquitted Sgt Barnett of all charges." Appellant's Brief and Assignment of Errors of 28 Jun 2002 at 32-33. We disagree.

The appellant made a timely motion for an inspection of the crime scene pursuant to R.C.M. 913(c)(3). Appellate Exhibit XVIII; Record at 128-31. After considering the written motion and hearing argument, the military judge denied the motion. Record at 140. In his Findings of Fact, Appellate Exhibit LXII, the military judge ruled that the defense had not made a request for the Government to produce detailed information concerning the inside dimensions of the M1A1, and that "traditional means - testimonial description, photographs and other visual depictions - were more than adequate" to provide members the information they needed. Thus, there were no extraordinary circumstances to warrant a 200-mile round trip

to personally observe the M1A1 tanks or the bay in which they sit. *Id*.

The relevant rule provides as follows: "The military judge may, as a matter of discretion, permit the court-martial to view or inspect premises . . . ." R.C.M. 913(c)(3). The Discussion immediately following states: "A view or inspection should be permitted only in extraordinary circumstances." *Id.*, Discussion. In *United States v. Marvin*, 24 M.J. 365 (C.M.A. 1987)(per curiam) our higher court affirmed this court on the same issue stating:

> In exceptional circumstances, the military judge ". . . may as a matter of sound discretion authorize the court to view or inspect the premises or place or an article or object if the view or inspection is necessary to enable the members better to understand and apply the evidence in the case. The proceeding is authorized only if conducted in the presence of counsel, the accused, and, in a court-martial with a military judge, the military judge. The view should not be undertaken if the members of the court are already familiar with the premises involved or if photographs, diagrams, or maps adequately present the situation."

Id. at 366 n.4 (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES 1969 (Revised edition), ¶ 54e.

We are unwilling to set aside the military judge's reasoned decision on this issue. The rule enounced in R.C.M. 913(c)(3), its Discussion, and *Marvin* strongly imply that the preferred way in which the trier-of-fact is educated about necessary crime scene details is through "photographs, diagrams, or maps . . ." *Id*. at 366. We are confident that each counsel was successful in painting the picture they felt in their client's best interests. There is no indication that the members were confused or that justice was not done. We also note that the appellant took the position his actions were consented to rather than that they did not happen at all. This assignment of error is without merit.

Conclusion

We conclude that the findings, as modified by this decision, 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. Accordingly, the findings, as modified, are affirmed.

As a result of our action on the findings, we have reassessed the sentence in accordance with the principles of *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998), *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). Based on the nature and circumstances of the appellant's remaining offenses, and taking into consideration the appellant's 10 years of credible service, we find that the sentence approved by the convening authority remains appropriate to the findings of guilty. We direct that the supplemental court-martial order reflect our findings above.

Senior Judge Carver and Judge Redcliff concur.

For the court

R.H. TROIDL
Clerk of the Court