United States Navy–Marine Corps Court of Criminal Appeals

Before
THE COURT EN BANC[1]

UNITED STATES
Appellee

v.

Sean M. SWISHER
Lance Corporal (E-3), U.S. Marine Corps
Appellant

No. 202100311

Decided: 16 August 2023

Appeal from the United States Navy-Marine Corps Trial Judiciary
upon reconsideration

Military Judge:
Eric A. Catto

Sentence adjudged 29 July 2021 by a general court-martial convened at Marine Corps Recruit Depot Parris Island, South Carolina, consisting of officer and enlisted members.[2] Sentence in the Entry of Judgment: reduction to E-1, confinement for 54 months, and a dishonorable discharge.[3]

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[1] Judges Blosser and Gross took no part in the consideration or decision of this case.

[2] Appellant elected members for findings and military judge for sentencing.

[3] Appellant was credited with having served eight days of pretrial confinement.

For Appellant:
Lieutenant Colonel Matthew Neely, USMC
Major Jasper W. Casey, USMC
Mr. Mike Hanzel

For Appellee:
Lieutenant Gregory A. Rustico, JAGC, USN
Lieutenant Ebenezer K. Gyasi, JAGC, USN
Lieutenant Colonel James A. Burkart, USMC
Major Candace G. White, USMC

Senior Judge KISOR delivered the opinion of the Court, in which Chief Judge HOLIFIELD, Senior Judge HACKEL, and Judges KIRKBY and DALY joined.

THE COURT EN BANC

This unpublished opinion does not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Appellate Procedure 30.2

KISOR, Senior Judge:

A general court-martial composed of members with enlisted representation convicted Appellant, contrary to his pleas, of penetrating Ms. Bravo's[4] mouth with his penis when she was incapable of consenting due to impairment; penetrating Ms. Bravo's vulva with his finger when she was incapable of consenting due to impairment [Article 120, Uniform Code of Military Justice [UCMJ]]; attempting penetration of Ms. Bravo's vulva with his penis when she was incapable of consenting due to impairment [Article 80, UCMJ]; and wrongfully using of cocaine [Article 112a, UCMJ].[5]

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[4] All names in this opinion, other than those of Appellant, the judges, and appellate counsel, are pseudonyms.

[5] Appellant was charged with other offenses as well, but was acquitted either by the members, or by the military judge in response to Appellant's Rule for Courts-Martial [R.C.M.] 917 motion for a finding of not guilty. After announcement of findings of

Appellant asserts nine assignments of error [AOEs], which we combine and reorder as follows: (1) the evidence is legally and factually insufficient to support the convictions to Charge I (sexual assault) and Charge II (attempted sexual assault); (2) the military judge erred when he denied Appellant's challenges to members for both actual and implied bias; (3) trial counsel committed prosecutorial misconduct; (4) Appellant's sentence is inappropriately severe and disparate; (5) cumulative error deprived Appellant of a fair trial; (6) the evidence is legally and factually insufficient to support Appellant's conviction for attempted sexual assault; (7) the evidence is legally and factually insufficient to support Appellant's conviction for cocaine use; (8) Appellant was denied his right to a unanimous verdict.[6] On 15 May 2023, a Panel of this Court issued an opinion in Appellant's case finding no factual or legal error materially prejudicial to Appellant's rights and affirming Appellant's convictions and sentence.

On 13 June 2023, Appellant's newly assigned appellate defense counsel filed a motion for en banc reconsideration.[7] In his motion, Appellant raised several bases underlying his request including, *inter alia*, that en banc reconsideration was necessary to consider a new argument under this Court's precedent in *United States v. Marin* regarding the existence of an invalid legal theory underlying the Specification of Charge II.[8] On 27 June 2023, we directed the United States to respond to Appellant's Motion. On 8 August 2023, after careful consideration, we granted Appellant's motion for en banc reconsideration and withdrew the Court's 15 April 2023 decision. We find merit in Appellant's new argument pertaining to the application of *Marin* but resolve Appellant's argument on different grounds. The Specification under Charge II fails

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guilty by the members, the military judge consolidated Specifications 1 and 2 of Charge I (penetrative sexual assault offenses) for the purpose of findings.

[6] We merged AOE 1 with the AOE originally numbered AOE 6 as they are both legal and factual sufficiency AOEs. The renumbered AOEs 6 through 8 are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We have reviewed these AOEs and again find them to be without merit. *United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987). Additionally, we note that the unanimous verdict issue was resolved in *United States v. Anderson*, _ M.J. _ (C.A.A.F. 2023).

[7] This issue was not raised with this Court either as an assignment of error, or as a supplemental assignment of error after this Court issued its opinion in *United States v. Marin*, 83 M.J. 626 (N-M. Ct. Crim. App. 2023).

[8] *United States v. Marin*, 83 M.J. 626 (N-M. Ct. Crim. App. 2023).

to state an offense and the conviction for Charge II is, therefore, legally insufficient. We find Appellant's other asserted bases for reconsideration to be without merit and take action in our decretal paragraph.

I. BACKGROUND

In the early morning hours of 1 December 2019, security guards at an outdoor mall and bar complex in South Carolina were approached by a patron who stated her friend, Ms. Bravo, was missing. The women had been together just a few minutes prior, but when several women left for the restroom, they left Ms. Bravo alone to wait for them. Upon their return from the restroom, Ms. Bravo was not where her friends had left her, and the security guards were notified. A few minutes later, the security guards found Ms. Bravo behind a free-standing coffee shop. She was non-responsive, covered in vomit, and two men -- Appellant and Mr. Sierra -- appeared to be sexually assaulting her. Mr. Sierra appeared to be engaging in penile/vaginal penetration, and Appellant appeared to be subjecting her to unwilling oral copulation. Mr. Sierra ultimately pleaded guilty in state court to criminal sexual conduct in the third degree, and testified against Appellant at his general court-martial.

Prior to the sexual assault, Mr. Sierra and Appellant had several "bumps" of cocaine (a bump is a small amount, placed on an item like a key, and then snorted).[9] The cocaine was purchased by Mr. Sierra shortly before the men sexually assaulted Ms. Bravo. Mr. Sierra knew it was cocaine because he had used cocaine in the past and the effects were similar; he was energized and enthused.

Mr. Sierra testified that he and Appellant spoke with Ms. Bravo when she was outside the restroom waiting for her friends. Mr. Sierra offered her cocaine in exchange for her performing oral sex on him, and she agreed. Mr. Sierra and Appellant shared the cocaine with Ms. Bravo, each taking a bump. They then walked in the direction of the free-standing coffee shop, whereupon the two men engaged in sexual activity upon Ms. Bravo. Mr. Sierra pulled down Ms. Bravo's pants and attempted to engage in sexual activity but was unable to do so because he could not get an erection. Mr. Sierra and Appellant simultaneously engaged in oral and attempted vaginal copulation with Ms. Bravo and switched back and forth several times.[10] Mr. Sierra testified that he observed

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[9] R. at 1290-1291.

[10] Mr. Sierra testified that he attempted to insert his penis in Ms. Bravo's vagina several times, but was unable to insert it "all the way" because he was unable to get an erection. R. at 1299-1300.

Appellant's penis enter Ms. Bravo's mouth and observed Appellant attempt to penetrate Ms. Bravo's vagina with his penis. She vomited, which Mr. Sierra wiped off her face with his shirt. Once he wiped the vomit from Ms. Bravo, he continued to engage in sexual activity upon Ms. Bravo until security guards found the trio. Mr. Sierra also testified that throughout the sexual assault, Ms. Bravo did not utter a word and she did not use her hands or otherwise participate in any manner.

One of the security guards, Mr. Shaw, testified that his first impression was that "two men [were] taking advantage of a woman."[11] Mr. Shaw approached the group, and observed Ms. Bravo lying on her back with her pants down and Appellant was lying on top of her with his penis exposed. Mr. Sierra was "hunched" near Ms. Bravo's head, also with his penis exposed.[12] When Mr. Shaw announced himself and shined his flashlight on Ms. Bravo's face, she put her hands up to cover her face while Appellant attempted to cover her up. Mr. Shaw testified that Appellant said, "I was trying to help her" or words to that effect.[13]

Mr. Shaw's observation of Ms. Bravo was that she was very intoxicated. When he told her to get up, "she was still out of it. I was like, do you need help getting up? She was – she didn't say anything. So I started to grab her and pulled her up and helped her up. And I pulled her pants up, and I buttoned her pants up. And I, then, carried her to the ledge…and sat her down."[14] As to her demeanor, Mr. Shaw testified that "...she was scared. She was out of it. She was drunk. She had vomit all over her shirt, all over the ground, all in her hair and she appeared confused and unaware of what was going on."[15]

Ms. Bravo's last memory prior to the assault was drinking at the bar with her friends.

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[11] R. at 1365.

[12] R. at 1369.

[13] R. at 1370.

[14] R. at 1371.

[15] R. at 1372.

II. DISCUSSION

A. The finding of guilty for sexual assault (Charge I) is Legally and Factually Sufficient.

Appellant contends that the evidence is legally and factually insufficient to support his conviction for sexual assault because Appellant's DNA was not found in Ms. Bravo's vulva and because Ms. Bravo was capable of consenting. We review such questions de novo.[16] To determine legal sufficiency, we ask "whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt."[17] In conducting this analysis, we must "draw every reasonable inference from the evidence of record in favor of the prosecution."[18]

In evaluating factual sufficiency (for cases where alleged misconduct occurred before 2021), we determine "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are . . . convinced of the [appellant's] guilt beyond a reasonable doubt." [19] In conducting this unique appellate function, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt."[20] Proof beyond a "[r]easonable doubt, however, does not mean the evidence must be free from conflict."[21]

To be found guilty of sexual assault under Charge I, Appellant must have committed a sexual act upon Ms. Bravo by penetrating her mouth with his penis, and by penetrating Ms. Bravo's vulva with his finger, when Ms. Bravo was incapable of consenting due to impairment by alcohol, and Appellant

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[16] Article 66(d)(1), UCMJ; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

[17] *United States v. Turner,* 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); see *United States v. Gutierrez,* 73 M.J. 172 (C.A.A.F. 2014).

[18] *Gutierrez*, 74 M.J. at 65 (citation and internal quotation omitted).

[19] *Turner*, 25 M.J. at 325.

[20] *Washington,* 57 M.J. at 399.

[21] *United States v. Rankin*, 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006).

knew, or reasonably should have known, Ms. Bravo was incapable of consenting to the sexual act due to impairment.[22] "Incapable of consenting" means the person is incapable of appraising the nature of the conduct at issue or physically incapable of declining participation in or communicating unwillingness to engage in the sexual act at issue.[23]

Mr. Sierra testified that he saw Appellant's penis in Ms. Bravo's mouth, facts which were corroborated by the security guards who first reported to the scene.[24] Mr. Sierra also testified that he observed Appellant put his fingers into Ms. Bravo's vulva and that Appellant attempted to engage in sexual intercourse with her. When interviewed by investigators, Appellant admitted that he "fingered" Ms. Bravo, and that she performed oral sex on him.[25]

Appellant now argues that because DNA evidence was not found in either Ms. Bravo's vulva or mouth, these sexual acts did not occur. Expert witness testimony sufficiently explained how transfer DNA may not be found in a case like this. The Defense's expert opined that, "[g]iven the sensitivity of the tests and recent research that has shown the likelihood of finding DNA with these types of tests, in my opinion, that means contact, physical contact did not take place."[26] Appellant's assertion is undermined significantly by the testimony of Mr. Sierra, who stated that he directly observed Appellant digitally penetrate Ms. Bravo, and he observed Appellant put his penis in Ms. Bravo's mouth. He also observed Appellant attempt to insert his penis in Ms. Bravo's vagina, but "[i]t didn't go in though."[27] Additionally, Appellant also provided statements to law enforcement in which he admitted to penetrating Ms. Bravo's mouth with his penis, and her vulva with his fingers.[28]

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[22] Art. 120(b)(3)(A), UCMJ.

[23] Art. 120(g)(8), UCMJ.

[24] One of the two security guards saw Appellant's penis as Appellant inserted his penis into Ms. Bravo's mouth, and the other security guard saw Appellant at Ms. Bravo's head, apparently sodomizing her, testifying that "it appeared – [Appellant's] hunching over, like, he was trying to put his penis in her mouth or something like that nature." R. at 1435.

[25] Pros. Ex. 5.

[26] R. at 1983.

[27] R. at 1301.

[28] Pros. Ex. 5; R at 1245-1246.

Eyewitness testimony also showed that Ms. Bravo consumed marijuana, ecstasy, and cocaine prior to the sexual assault. Ms. Bravo's drug use was confirmed by a blood test.[29] Her intoxication was apparent from the video evidence of Ms. Bravo walking around the bar area, and from the testimony of eyewitnesses who observed that she consumed a great deal of alcohol that night, that she vomited in the bathroom prior to the assault, and then vomited again while lying down while being assaulted. Vomiting, by itself, does not indicate that she was incapable of consenting, but lying in her vomit without attempting to clean herself up certainly indicates that she was unaware of her circumstances. She made no effort to clean herself or cover herself up (though she did cover her eyes from the security guard's flashlight) and was lying in a pool of her own vomit when security came upon Ms. Bravo, Appellant and Mr. Sierra. Responding security officers testified she was unable to stand unassisted,[30] and the smell of alcohol emanated from her breath.[31] Even Mr. Sierra admitted that she was exhibiting indicators of intoxication (slurred words and stumbling),[32] and that when security arrived, Ms. Bravo needed help standing up.[33] One responding police officer stated, "[it] just seemed like [Ms. Bravo] didn't realize [the vomit] was there. She's kind of just disheveled, state, disoriented. She doesn't realize she's missing a shoe. It seemed like she knew something had happened, but she didn't know quite what was going on."[34] The victim's level of intoxication was clear to the members. We, too, are convinced that Ms. Bravo was so impaired as to be incapable of consenting, and that Appellant knew of her condition.

We find the evidence legally sufficient to support Appellant's conviction for sexual assault as charged in Charge I. Additionally, after taking a fresh, impartial look at the evidence, and after weighing the evidence in the record of trial and making allowances for not having observed the witnesses, we, too, are convinced of Appellant's guilt beyond a reasonable doubt and find the evidence factually sufficient to support Appellant's conviction.

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[29] Ms. Bravo's blood was not tested for ecstasy because there was not enough blood drawn to conduct the testing for ecstasy, but her blood did test positive for marijuana and cocaine.

[30] R. at 1064.

[31] R. at 1093.

[32] R. at 1306.

[33] R. at 1309.

[34] R. at 1130.

B. Charge II fails to state an offense, and the finding of guilty is therefore legally insufficient.

The Specification of Charge II, as drafted, does not state an offense. Appellant was charged as follows:

> In that [Appellant] on active duty, did, at or near Myrtle Beach, South Carolina, on or about 1 December 2019, attempt to commit a sexual act upon K.B., by penetrating K.B.'s vulva with his penis when K.B. was incapable of consenting to the sexual act because she was impaired by an intoxicant, to wit: alcohol, and [Appellant] *reasonably should have known of that condition*.[35]

Whether a specification states an offense is a purely legal issue.[36] And it is axiomatic that appellate courts review questions of law de novo. A specification states an offense if it alleges, either expressly or by necessary implication, every element of the offense, so as to give the accused notice and protection against double jeopardy.[37]

Recently, in a published opinion, this Court explained that attempt offenses, like all inchoate offenses, requires the Government to prove beyond a reasonable doubt that an accused had the requisite *mens rea* – specific intent.[38] "In cases where an appellant is charged with attempted sexual assault and the theory is that the victim could not consent, the Government is required to prove that the appellant actually *knew* that the victim could not consent."[39] In this case, it was error for the Specification of Charge II to fail to state the proper *mens rea*. Thus, Appellant's conviction for Charge II must be reversed.

Further, applying the factors laid out by the CAAF in *United States v Winckelmann*, we are confident that sentence reassessment, rather than remand, is appropriate.[40] We also note that the military judge merged the Specification of Charge II with the consolidated Specification under Charge I for sentencing purposes and awarded Appellant 54 months of confinement. We take action in our decretal paragraph.

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[35] The charge sheet (emphasis added).

[36] *See United States v. Raucher*, 71 M.J. 225, 226 (C.A.A.F. 2012).

[37] *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006).

[38] *Marin*, 83 M.J. at 632.

[39] *Id*.

[40] *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013).

C. The military judge did not err by denying Defense challenges to five members for actual and implied bias.

Appellant contends that the military judge abused his discretion in denying Appellant's challenges for cause based on actual and implied bias. We review challenges for actual bias for an abuse of discretion.[41] For allegations of implied bias, we review using a standard "less deferential than abuse of discretion, but more deferential than de novo."[42]

An accused has "the right to an impartial and unbiased panel."[43] Rule for Courts-Martial 912 provides the framework by which we evaluate potential panel members. A member should be removed for cause from the panel whenever it appears that a member "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[44]

"[T]he text of R.C.M. 912 is not framed in the absolutes of actual bias, but rather addresses the appearance of fairness as well, dictating the avoidance of situations where there will be substantial doubt as to fairness or impartiality. Thus, implied bias picks up where actual bias drops off because the facts are unknown, unreachable, or principles of fairness nonetheless warrant excusal."[45] Rule 912 gives the military judge "great deference when deciding whether actual bias exists because it is a question of fact, and the judge has observed the demeanor of the challenged member."[46] Implied bias is a bit more nuanced:

> Implied bias exists when most people in the same position as the court member would be prejudiced. To test whether there is substantial doubt about the fairness of the trial, we evaluate implied bias objectively, through the eyes of the public, reviewing the perception or appearance of fairness of the military justice system. This review is based on the 'totality of the circumstances.' Although we review issues of implied bias for an abuse of discretion, because we apply an objective test, we apply a less

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[41] *United States v. Napolitano*, 53 M.J. 162, 166 (C.A.A.F. 2000).

[42] *United States v. Woods*, 74 M.J. 238, 243 (C.A.A.F. 2015).

[43] *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012).

[44] R.C.M. 912 (f)(1)(N).

[45] *United States v. Bragg*, 66 M.J. 325 at 327 (C.A.A.F. 2008).

[46] *Napolitano,* 53 M.J. at 166 .

> deferential standard than we would when reviewing a claim of actual bias.[47]

A military judge is afforded less deference in regard to a challenge for cause based on implied bias because the issue is viewed through the eyes of the public, and the focus is on the appearance of fairness.[48] Where a military judge declares on the record that he or she has considered the liberal grant mandate, appellate courts will afford the military judge greater deference.[49]

In the present case, trial defense counsel challenged 16 of the 18 appointed members, and the military judge excused eight of the 16 challenged members. Appellant now argues that five of the eight unsuccessfully challenged members should have been excused for actual or implied bias.[50] Of the five, Appellant argues three members harbored an erroneous view of the law regarding intoxication and incapacity. The remaining two members were challenged for unique reasons outlined below.

How voir dire was conducted is helpful to understanding the context of the members' answers. Here, after the military judge swore in the prospective members, he provided preliminary instructions. These instructions did not provide details on the case or hint at any legal theories that counsel might present, nor did the preliminary instructions elucidate the law. After the military judge provided all prospective members his preliminary instructions, he allowed counsel to individually question the prospective members, starting with trial counsel. To be clear, at the point of individual voir dire, the members knew nothing about the case except for the general nature of the charges, and they had not yet been instructed on the law. In answering questions from the military judge and counsel, the members relied on their general military training, common sense, education, and experience. The issue, therefore, is not whether they walked through the door with proper and accurate legal knowledge, but rather whether they met the criteria found in R.C.M. 912 to serve as impartial panel members. In the event questioning from counsel elicits views contrary to

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[47] *United States v. Elfayoumi*, 66 M.J. 354 (C.A.A.F. 2008).

[48] *Bragg*, 66 M.J. at 326 (quoting *United States v. Rome,* 47 M.J. 467, 469 (C.A.A.F. 1998)).

[49] *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007).

[50] At trial, although defense counsel did not challenge all of the challenged members on actual and implied bias grounds, the military judge considered whether the members had displayed actual or implied bias in his rulings.

counsel's legal theories of the case, or that perhaps even demonstrates potential bias, it is permissible to attempt to rehabilitate the members, querying them on whether they can abide by the military judge's instructions on the law.[51]

Appellant argues that Captain [Capt] Delta, Master Sergeant [MSgt] Peters, MSgt Conway, Gunnery Sergeant [GySgt] Stewart, and Staff Sergeant [SSgt] Carter should have been removed from the panel for actual or implied bias due to their incorrect views of the law. We disagree. Appellant's foundational argument that members whose initial understanding of the law cannot be rehabilitated is incorrect. What the system demands is impartial members who will obey the military judge's instructions.

1. MSgt Conway, GySgt Stewart, and SSgt Carter

Appellant argues that MSgt Conway harbored an incorrect view of the law because he stated, "[w]hen someone's intoxicated, they don't have that ability to consent" which he admits was based on his Sexual Assault Prevention and Response (SAPR) training. While some people are unable to correctly articulate the legal standard of consent, that does not prohibit them from sitting as members of a court-martial. In any event, the military judge asked MSgt Conway if he could follow the military judge's instructions on the law of consent and capacity, and MSgt Conway agreed that he could. Defense counsel challenged MSgt Conway for cause, and the military judge denied the request, stating, "while Master Sergeant [Conway] initially indicated that intoxication means one cannot consent, he – that appeared to be an uninformed view. And he said that he could set all previous notions aside and follow the Military Judge's instructions."[52] At trial, the challenge to MSgt Conway was limited to defense counsel's belief that MSgt Conway held an inelastic belief, which was overruled by the military judge. Although Appellant now argues that the military judge's ruling should be given less deference because he did not articulate his analysis under the implied bias standard, we disagree. The military judge considered the liberal grant mandate, and had properly articulated the actual and implied bias tests (albeit at an earlier point[53]) and expressly found that

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[51] *See United States v. Napolitano*, 53 M.J. 162 (C.A.A.F. 2000) (Once a member gives a response that shows a potential grounds for challenge, counsel or the military judge may ask questions of that member to rehabilitate the member.).

[52] R. at 899-900.

[53] R. at 897.

MSgt had no actual or implied bias.[54] The Military Judge declined to excuse MSgt Conway.[55] We find that the military judge did not abuse his discretion when he overruled trial defense counsel's actual bias objection to MSgt Conway. Applying the heightened standard for implied bias challenges and reviewing the totality of the circumstances, we do not believe that MSgt Conway's inclusion on the panel would cause the public to perceive unfairness in the military justice system.[56] We find that the military judge also did not err when he declined to excuse MSgt Conway on the basis of implied bias.

During individual voir dire, GySgt Stewart agreed that "someone who is experiencing an alcohol-induced blackout cannot consent to sex."[57] Appellant argues that this "clear misunderstanding on the law on capacity to consent" constitutes actual bias.[58] Like MSgt Conway, it appears that GySgt Stewart did not have prior training as to the precise legal definition of consent. In his ruling, the military judge noted that "it was surprisingly clear …that [GySgt Stewart's strong response to alcohol] really was contained to offenses involving alcohol and cars and drunk driving…he seemed to be very clear that that was his issue, was drunk driving, not drinking alcohol itself…he appeared to be – to not hold an [in]elastic position on the issues related to this case. The Court found [sic] no actual bias or implied bias…"[59] We agree and find that the military judge did not abuse his discretion when he overruled defense counsel's actual bias objection to GySgt Stewart. Applying the heightened standard for implied bias challenges and reviewing the totality of the circumstances, we also do not believe that GySgt Stewart's inclusion on the panel would cause the public to perceive unfairness in the military justice system. We therefore find that the military judge did not err when he declined to excuse GySgt Stewart on the basis of implied bias.

Like GySgt Stewart, SSgt Carter also stated in individual voir dire that he did not believe that people in an alcohol-induced blackout state can consent. Trial defense counsel objected to this on the grounds of actual bias, and Appellant renews that objection now. The military judge asked SSgt Carter, "...if you

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[54] R. at 897-900.

[55] R. 900.

[56] *See United States v. Dockery*, 76 M.J. 91, 96-7 (C.A.A.F. 2017) (articulating the appellate standard for reviewing claims of implied bias).

[57] R. at 759.

[58] Appellant's Br. at 69.

[59] R. at 901-02.

[hear] legal definitions that I provide, you're going to follow those definitions and those are going to trump any other perception that you came in with before this court-martial?"[60] SSgt Carter responded, "Yes, sir."[61] We find that the military judge sufficiently rehabilitated SSgt Carter, and sought affirmation from SSgt Carter that he could and would "apply the facts that [were] in front of [him] to the law and facts" that the military judge provided him.[62] We agree, and hold that the military judge did not abuse his discretion when he overruled trial defense counsel's actual bias objection to SSgt Carter. Applying the heightened standard for implied bias challenges and reviewing the totality of the circumstances, we do not believe that SSgt Carter's inclusion on the panel would cause the public to perceive unfairness in the military justice system.[63] We further hold that the military judge did not err when he declined to excuse SSgt Carter on the basis of implied bias.

2. Captain Delta

Appellant challenges the military judge's retention of Capt Delta on the panel because Capt Delta's step-sister was the victim of a rape, and because Capt Delta had a firmly-held belief that people who are blacked-out cannot consent to sex. Appellant lists other grounds for challenging Capt Delta. The military judge addressed those grounds at trial, and after a thorough voir dire, tested for actual and implied bias, considered the liberal grant mandate, and found neither actual nor implied bias.[64] Later, Capt Delta asked several questions of witnesses during trial that caused defense counsel to again challenge him. Specifically, Capt Delta asked one of the witnesses, the forensic psychiatrist, "can the mind successfully suppress the memory of a traumatic event with the assistance of alcohol, can someone refuse to remember a traumatic memory or is it etched in the mind forever, and is it possible a dual personality emerged the night of the incident that went against any conservative upbringing?"[65] The military judge recalled Capt Delta for further voir dire after both trial and defense counsel rested but before deliberations. After a very thorough

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[60] R. at 832.

[61] *Id*.

[62] R. at 831.

[63] *See Dockery*, 76 M.J. at 97.

[64] R. at 898.

[65] R. at 2154.

voir dire, the military judge discovered that these questions were based exclusively on the testimony offered by the expert witness. After putting his legal analysis and reasoning on the record with thorough findings of fact, the military judge again ruled that Capt Delta displayed no actual or implied bias.[66] We do not believe that the military judge abused his discretion when he found no actual bias. Applying the standard outlined above for implied bias, we do not find that the military judge erred in declining to excuse Capt Delta on the basis of implied bias either.

3. MSgt Peters

Appellant challenges MSgt Peters' empanelment because MSgt Peters had some knowledge of the case. The military judge was aware of this and in his ruling, he stated:

> While the member had some prior knowledge of the case, the prior knowledge…was limited to hearing the accused's name and the fact that there was a sex assault allegation. There is no indication that he had any idea of any of the details and had no knowledge of really any of the allegation itself. Just the fact that there was a Marine accused of that offense he stated that the knowledge would not affect his decision making in this case. And he – his demeanor indicated that he could be fair and impartial.[67]

We do not believe that the military judge abused his discretion when he found no actual bias, and applying the standard outlined above for implied bias, we likewise do not find that the military judge erred in declining to excuse MSgt Peters on the basis of implied bias.

D. Trial counsel did not commit prosecutorial misconduct

Appellant argues that trial counsel opening statement and closing argument were improper:

> "As early as opening statement, the trial counsel argued '[Appellant] took advantage of a highly intoxicated and vulnerable young woman,' and 'they both sexually assaulted her when she was *too intoxicated to consent.'* Rather than focus on Ms. Bravo's capacity to consent, the government's closing argument reiter-

[66] R. at 898.

[67] R. at 899.

> ated this. The trial counsel stated, '[i]n this case, we have a Marine who took advantage of a highly intoxicated and vulnerable young woman,' and that 'two men sexually assaulted her when she was *too intoxicated to consent.*' And when discussing Ms. Bravo's state the government described that she was 'confused,' 'disoriented,' 'highly intoxicated,' and 'under the influence.' The government's argument capitalized on at least four of the members' biases and misconceptions of the law.[68]

Because Appellant did not object to trial counsel's comments during trial, we review for plain error. Plain error requires that Appellant show "(1) there was error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right."[69]

We note that Charge I alleges that Appellant sexually assaulted Ms. Bravo, who was incapable of consenting due to impairment by alcohol. The Government's reasonable inference that Appellant took advantage of an intoxicated woman for the purpose of sexually assaulting her is neither improper argument nor prosecutorial misconduct as it constitutes the charged offense. This argument is meritless.

Appellant also argues that trial counsel confused the issue of legal and medical consent, because Ms. Bravo was able to communicate during her sexual assault nurse examiner exam. So as to clarify any issues related to the issue of consent, the military judge issued a proper curative instruction, informing the members that they "must follow [his] legal instructions and definitions of consent and incapacity to consent to sexual activity when determining whether the accused is guilty of Charges I and II."[70]

We find no error in trial counsel's comments.

E. Was the sentence awarded by the military judge inappropriately severe and disparate?

Appellant next argues that his sentence was inappropriately severe for two reasons: (1) Appellant's sentence is disparate when compared to the sentence

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[68] Appellant's Br. at 91-92.

[69] *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011).

[70] R. at 2261.

awarded to Mr. Sierra by the State of South Carolina; and, (2) because Appellant presented ample mitigating evidence of a military career involving no prior offenses, and of a traumatic childhood.

We review sentence appropriateness de novo.[71] We may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as we find correct in law and fact and determine, on the basis of the entire record, should be approved.[72]

We decline to compare Mr. Sierra's case with Appellant's sentence for an analysis of appropriateness. His sentence was for different crimes and was adjudicated by a civilian jurisdiction. We are unaware of any precedent that requires us to find parity between a military court-martial sentence and a sentence awarded by a state or local jurisdiction.[73] We are also not moved by Appellant's argument that because he has no prior misconduct or because he had a traumatic childhood, the military judge's sentence is too harsh. Due to the egregious nature of Appellant's crimes, the military judge's awarding of 54 months' confinement, reduction to E-1, and a dishonorable discharge was appropriate. We find no error.

F. Did the cumulative effect of all error deprive Appellant of a fair trial?

Appellant asserts that "[e]rror was pervasive throughout the court-martial. Even if no particular error warrants relief, the cumulative effect of all the error deprived him of a fair trial."[74] Without question, the doctrine of cumulative error allows this Court to reverse a conviction even if the errors do not merit

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[71] *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005).

[72] 10 U.S.C. § 866(d)(1) (2018).

[73] In his motion for en banc reconsideration, Appellant takes issue with this conclusion and cites *United States v. Sothen*, 54 M.J. 294 (C.A.A.F. 2001) and *United States v. Behunin*, 83 M.J. 158 (C.A.A.F. 2023) for the proposition that we are required to compare a court-martial sentence with a sentence awarded by a state or local jurisdiction in closely related cases. Appellant's Motion for En Banc Reconsideration at 12. We disagree. While our Court in *Sothen* chose to compare appellant's court-martial conviction with his co-conspirator's state court conviction, there was no requirement to do so. Appellant's reliance on dicta in *Sothen* and a single footnote in *Behunin*, 83 M.J. at 158 n.2 (which in turn cites back to *Sothen*) does not support his argument.

[74] Appellant's Br. at 99.

reversal individually.[75] However, we do not find any aggregate prejudice. Appellant received a fair trial. This assignment of error is therefore without merit.

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, the finding of guilt as to the Specification under Charge II is **SET ASIDE** and Charge II and its Specification are **DISMISSED WITH PREJUDICE**.

The remaining findings are **AFFIRMED.**

Because the military judge had already merged the now-dismissed Specification under Charge II with the consolidated Charge I for purposes of sentencing, there is no change to Appellant's punitive exposure. Reassessing the sentence on the basis of the noted error, the remaining findings of guilty, and the entire record, we **AFFIRM** the sentence in the Entry of Judgment.

FOR THE COURT:

MARK K. JAMISON
Clerk of Court

[75] *United States v. Dominguez*, 81 M.J. 800, 822 (N-M. Ct. Crim. App. 2021) (citing *United States v. Banks* 36 M.J. 150 (C.A.A.F. 1992)).