UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant RAYMOND M. ALLEN
United States Air Force

ACM 34174

2 January 2003

Sentence adjudged 21 February 2000 by GCM convened at MacDill Air Force Base, Florida. Military Judge: Linda S. Murnane.

Approved sentence: Confinement for 1 year and reduction to E-4.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Jeffrey A. Vires, Major Marc A. Jones, and Major Karen L. Hecker.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Major Jennifer R. Rider, and Captain Christa S. Cothrel.

Before

SCHLEGEL, STONE, and ORR, W.E.
Appellate Military Judges

OPINION OF THE COURT

STONE, Judge:

The appellant was tried by general court-martial at MacDill Air Force Base, Florida, and found guilty, contrary to his pleas, of attempted forcible sodomy, violating lawful general regulations, dereliction of duty, sodomy, communicating threats, and indecent acts in violation of Articles 80, 92, 125, and 134, UCMJ, 10 U.S.C. §§ 880, 892, 925, 934. A court-martial panel of officers sentenced him to 1 year of confinement and reduction to the grade of E-4. The convening authority approved the sentence as adjudged. The appellant submitted 15 assignments of error, 5 of which are discussed below.[1] Finding no errors prejudicial to appellant's substantial rights, we affirm.

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[1] The remaining errors, raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), were carefully considered but found to be meritless.

I. Challenge of Court Member, Col G

A. Background

The appellant was a highly successful Air Force recruiter from 1995 to 1999. He won numerous recognitions for his recruiting efforts, ultimately progressing from a first line recruiter to a supervisory position. The charges and specifications he faced at trial alleged a variety of both consensual and nonconsensual sexual misconduct involving three female recruits and an active duty female who had just graduated from basic training. He was found guilty as charged, except for two specifications which resulted in findings of guilty to the lesser included offenses and one specification alleging he improperly forced a recruit to go to basic training in violation of a lawful general regulation governing recruiter conduct.

During voir dire, the military judge asked the court members general questions as a group. She directed the court members to review the charges and specifications and then asked them if "anyone or any member of your family or anyone close to you personally ever been the victim of an offense similar to any of those charged in this case?" The military judge noted that the members responded negatively except for Colonel (Col) G, "whose response is 'perhaps'."

Col G was subsequently questioned outside the presence of the other court members. The military judge conducted the following individual voir dire of Col G:

> MJ: Sir, in response to one of my questions you indicated that there may be a family member, friend or a close relative who's been the victim of a similar offense. And you seemed to be somewhat not sure about that. Can you tell us, in general, what that's about, sir?
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> MEM [COL G]: Yes[.] Both my wife and my sister were the victim of sexual assaults.
>
> MJ: And was that at the hands of a family member or a stranger?
>
> MEM [COL G]: Stranger in both cases.
>
> MJ: And were those--was any individual ever found or prosecuted for the offenses committed against your wife or her sister?
>
> MEM [COL G]: No.
>
> MJ: Sir, did that--did these events occur before you married your wife or after?

MEM [COL G]: Before I married my wife, yes.

MJ: Okay. And has there been any lasting impact in terms of a problem in your relationship that has surfaced as the result of your wife's status as a victim of such an offense?

MEM [COL G]: No.

MJ: And your wife's sister-- --

MEM [COL G]: No, it's my sister.

MJ: I'm sorry, your sister. How about with your sister? Have there been any lasting effects that have had some impact on your life regarding your sister's status as a victim?

MEM [COL G]: No.

MJ: Sir, is there anything about your wife or your sister's [sic] having been victimized as a victim of an assault that you believe would affect your ability to be fair and impartial in this case?

MEM [COL G]: No.

Trial counsel did not go into this area, but the issue did come up briefly during defense counsel's individual voir dire of Col G:

DC: Sir, I have just one brief area I wanted to cover with you, to a certain extent it may have been covered by the military judge. You stated that either a member of your family or a close friend had been a witness in a court case. Was that the same set of facts that was coming out of what we were just talking about? Or was it something different?

MEM [Col G]: I've got a pretty--I'm not sure--I lost the bubble on which one it was. When you originally brought it up I remembered somebody in my family testified, but I can't recall who it is right now, this second. But certainly I testified in a court case as well.

DC: Okay, sir. What was that regarding? Was it regarding the officer case you were talking about?

MEM [COL G]: Yes, that's correct.

DC: Any others, sir?

MEM [COL G]: Obviously, my wife has testified in the rape. Nothing besides that. That I can recall right now.

Based upon these inquiries, the defense challenged Col G for cause based upon actual and implied bias. In denying the challenges, the military judge, without making a specific determination of whether there was actual or implied bias, concluded that Col G could legally, fairly, and impartially serve as a court member. First, she reviewed the examples of disqualifying circumstances listed in the Discussion of Rule for Courts-Martial (R.C.M.) 912(f)(1)(N) and found that none of them applied. Second, she concluded there had been sufficient passage of time since the assaults. Third, she emphasized Col G's demeanor. In this regard, she elaborated by describing his demeanor as the "unemotional way in which he spoke of the status of his wife and his sister as victims." After the military judge denied the defense's challenge for cause, the defense peremptorily challenged Col G, preserving the issue by stating that they would have exercised their challenge on another member but for the military judge's ruling.

B. Discussion

In the interest of removing any substantial doubt about the legality, fairness, or impartiality of a court-martial, military judges must be liberal in granting challenges for cause against court members. *United States v. Daulton*, 45 M.J. 212, 217 (1996). Additionally, we must be concerned with the perception and appearance of fairness and impartiality. Thus, a military judge not only must grant a challenge against a court member who harbors an actual bias, but also when the public may perceive unfairness in the military justice system if a particular member is allowed to sit in judgment of the case. This latter circumstance is referred to as implied bias. *United States v. Downing*, 56 M.J. 419, 422 (2002).

The test for determining implied bias is an objective one and is framed in this case as whether an objective public observer would find it consonant with a fair and impartial system of justice if Col G sat in judgment of the appellant. *See United States v. Wiesen*, 56 M.J. 172, 174 (2001); *Daulton*, 45 M.J. 212. Our superior court has suggested that the test for implied bias also carries with it an element of actual bias. Thus, there is implied bias when "most people in the same position would be prejudiced." *Wiesen*, 56 M.J. at 174. However, when there is no actual bias, implied bias should be invoked rarely. *Id.* (citing *United States v. Rome*, 47 M.J. 467, 469 (1998)). The burden for establishing that grounds for a challenge exists is upon the party making the challenge. *Downing*, 56 M.J. at 422; R.C.M. 912(f)(3).

The trial judge's determination that actual bias does not exist is given a high degree of deference and is reviewed for an abuse of discretion because it is essentially a question of credibility that relies greatly on the military judge's observation of the court member's demeanor. *United States v. Armstrong*, 54 M.J. 51, 53 (2000), *aff'd*, 57 M.J. 321 (2002); *United States v. Napoleon* 46 M.J. 279, 283 (1997). In comparison, the standard for reviewing a trial judge's determination that implied bias does not exist is less deferential, although it is more deferential than de novo review. *Armstrong*, 54 M.J. at 54.

We hold that the appellant did not carry his burden of establishing facts that would warrant a determination of actual or implied bias. The appellant had the opportunity to elicit facts from Col G that might have established either actual or implied bias. Tellingly, he did not elicit any specific information about the assaults on Col G's wife and sister. We do not know the nature or seriousness of the sexual assaults, where or when they occurred, and most importantly, how these assaults affected each of them physically, emotionally, or financially. In essence, we are left with little more than an opportunity to speculate, which we will not do. Failure to inquire into potentially prejudicial information and then claim on appeal that the information was prejudicial—or appears to be prejudicial—makes any claim of bias, actual or implied, "ring hollow." *United States v. Lavender*, 46 M.J. 485, 488-89 (1997).

In essence, the appellant is asking that we apply a per se rule that would preclude a court member from sitting on any case whenever they or a close family member was a victim of a vaguely similar offense. We decline to do so. Our superior court has determined there is no per se disqualification when an individual, or a family member, has been the victim of a crime similar to the one charged against the appellant. *United States v. Brown*, 34 M.J. 105, 110 (C.M.A. 1992) (father of victim of homosexual assault not disqualified in consensual sodomy case); *United States v. Hughes*, 48 M.J. 700, 723 (A.F. Ct. Crim. App. 1998), *aff'd on other grounds*, 52 M.J. 278 (2000) (brother of victim of child sexual abuse not disqualified to sit on case involving similar charges). *But cf. Daulton*, 45 M.J. at 218 (abuse of discretion in child abuse case to not disqualify member whose sister and mother were child abuse victims); *United States v. Smart*, 21 M.J. 15 (C.M.A. 1985) (abuse of discretion in robbery case to deny challenge of victim of multiple robberies who indicated it would be hard to totally disregard past incidences).

Therefore, with regard to actual bias, we hold that the military judge did not abuse her discretion. Col G's responses during voir dire demonstrated he was not affected by the circumstances surrounding the assaults on his wife and sister. Indeed, at trial the defense counsel appeared to more or less acknowledge, without conceding, that Col G could act fairly and impartially.

Nor is this a case of implied bias. We hold that a reasonable, disinterested member of the public would not see unfairness in Col G's continued presence. We are

satisfied that an objective public observer would find Col G's presence on the appellant's case consonant with a fair and impartial system of military justice. In our view, most people in the same position as Col G, based on the facts and circumstances developed at trial concerning the assaults against his wife and sister, would not be prejudiced. *United States v. Napolitano*, 53 M.J. 162, 167 (2000); *United States v. Warden*, 51 M.J. 78, 81 (1999).

II. Legal and Factual Sufficiency

The appellant contends on appeal that the evidence is legally and factually insufficient to support his conviction on any of the offenses. We do not agree.

We are guided in this analysis by our statutory mandate found in Article 66(c), UCMJ, 10 U.S.C. § 866(c), and the decisions of our superior courts. We may affirm only those findings of guilt that we find are correct in law and fact and determine, on the basis of the entire record, should be approved. *Id.*

The test for legal sufficiency is whether any rational trier of fact, when viewing the evidence in the light most favorable to the government, could have found the appellant guilty of all essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (2000).

The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). In conducting this unique appellate role, we are required to conduct a de novo review of the entire record of trial, taking "a fresh, impartial look at the evidence" and applying "neither a presumption of innocence nor a presumption of guilt" and "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (2002).

Given the nature of the crimes, each of the offenses rested largely, and for the most part solely, on the testimony of these four women. The thrust of the defense at trial, and now on appeal, was that their testimony was inconsistent, implausible, and unworthy of belief. Our analysis focuses on the testimony of these four key witnesses and is set forth below in chronological order, consistent with the framework of the appellant's assignments of error.

A. Senior Airman (SrA) NF

The court members found the appellant guilty of attempting to develop or maintain an intimate personal relationship with SrA NF. They also found him guilty of engaging in consensual sodomy with her.

At the time of the offenses, SrA NF was a 17-year-old high school student. She enrolled in the Delayed Entry Program (DEP) in September 1995 and entered active duty in June of 1996. As part of the DEP, she had regular contact with the appellant, including group activities with other high school students in the program. One evening in the fall of 1995, she saw the appellant in his office and stopped in to say hello. He asked her to have dinner with him, and although she was hesitant, she agreed to go with him after he told her how he did not want to eat alone. While at his house, they ate pizza, watched television, and played video games. The appellant also discussed the details of his sexual relationship with his current girlfriend. As SrA NF left his apartment, she went to shake his hand. At that time, the appellant pulled SrA NF towards him, kissed her, and attempted to insert his tongue into her mouth. She testified that the appellant called her at some point after this encounter to see if she was okay with what happened. He also asked her not to say anything.

She returned to the appellant's apartment several weeks later after he invited her to have dinner with him, telling her he was lonely. While sitting on the couch, the appellant approached her, moved her legs, and began to kiss her. He removed her shirt and pants, kissed her on her stomach and breasts, and had her perform oral sodomy on him. After he ejaculated, they had vaginal intercourse. Before she left his apartment, he asked her not to tell anyone.

SrA NF did not report these two incidents to anyone until Air Force Office of Special Investigations (AFOSI) agents approached her in April 1999 while they were investigating the other allegations in this case. In fact, she remained friendly and cordial with the appellant. For example, after completing her initial military training and being assigned to an installation near the appellant, SrA NF and her roommate found an apartment in the same complex as the appellant. Further, she agreed to serve as his "recruiter assistant," a two-week assignment given to recent graduates of basic training. This voluntary program allows new airmen to work with their recruiter in their hometown without having to take leave.

The appellant asserts that SrA NF's testimony is inherently unbelievable because she would have totally avoided any contact with him if the alleged events in his apartment were as distasteful and unpleasant as she testified. We are not persuaded by this argument. It is unlikely SrA NF would create such an unflattering story about herself just to get the appellant in trouble, especially given she was a military member subject to the *Uniform Code of Military Justice* throughout the trial and investigative process. Our

independent assessment of the facts developed in the record leads us to conclude that although SrA NF viewed her prior consensual sexual contact with the appellant as shameful and embarrassing, she was able to deal with him professionally thereafter and simply "acted like it never happened." She learned to avoid situations that would lead to unwelcome sexual advances. For example, she turned down all his subsequent requests to have dinner and go to a drive-in movie. When the AFOSI agents asked her if the appellant had ever engaged in any "unprofessional or improper" conduct with her, she was obligated to answer truthfully. We find no credible motive for her to fabricate a story against the appellant.

The appellant's major focus at trial was on the inconsistencies in SrA NF's statements to authorities about her two visits to the appellant's apartment. Her statements were generally consistent throughout the investigative process with the major exception being the date of the events. In fact, she was almost a year off in her estimate of when the events occurred. Nonetheless, any discrepancies in SrA NF's testimony may be attributed to the difficulty of recalling lesser details of a significant event after a substantial period of time has passed. It was only after she reviewed documentation, including a copy of the appellant's lease and her own personnel records, that she was able to firmly fix the time frame. In addition, Airman (Amn) Longo, one of SrA NF's fellow high school students and also a DEP member, testified about her involvement in the DEP with the appellant and SrA NF. Based on her knowledge, she was able to corroborate the general time frame consistent with the in-court testimony of NF. To the extent there were inconsistencies in NF's testimony, they do not seriously call into question the reliability of her recollection of the important details of the event itself. The evidence need not be free from all conflict for us to be convinced of an accused's guilt beyond a reasonable doubt. *United States v. Roberts*, 55 M.J. 724, 731 (N.M. Ct Crim. App. 2001), *pet. denied*, 56 M.J. 467 (2002).

Therefore, we hold that the evidence is legally and factually sufficient to establish that the appellant violated the then-existing general regulation prohibiting him from attempting to develop or maintain an intimate personal relationship with SrA NF, a female recruit, and further, that he engaged in consensual sodomy with her. In this regard, we independently determined that the evidence constitutes proof of each element beyond a reasonable doubt after weighing the evidence and making allowances for not having observed the witnesses. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

B. Recruit MB

In 1997, MB was a 25-year-old recruit who entered the DEP under the guidance of the appellant. He was convicted of attempting to develop or maintain an intimate personal relationship with her in violation of the then-existing lawful general regulation governing recruiter conduct. These improprieties occurred shortly after she met the

appellant and while she was participating in the DEP. MB testified that the appellant discussed personal, intimate matters with her. For example, he asked about her dating situation and discussed his extra-martial affairs, as well as those of his ex-wife and current wife. He also informed her that he had been unfaithful to his first wife. Specifically, he told her that he was caught having sex with another woman during a birthday party for his ex-wife. He also told MB that he thought his current wife was unfaithful and discussed the intimate details of their sex life. On another occasion, he made repeated comments about the dress she was wearing and told her she "had nice legs and a nice rear end." These conversations were intended to express his willingness to develop an intimate sexual or dating relationship with MB.

On yet another occasion, MB testified that while in the car together, appellant made her very uncomfortable by touching her hair and telling her she was beautiful and how, compared to his wife, she was more his "type" of woman. On two occasions while she was in the DEP, he asked her to dinner, telling MB that his wife was out of town and he hated to eat alone. She declined both invitations.

Although the appellant was found guilty of attempting to develop or maintain an intimate personal relationship with MB, he was acquitted of forcing or ordering MB to go to basic training. He now avers that it is "inexplicable" that they would find him not guilty of this offense, yet convict him of the other. We disagree.

It is well recognized that members may acquit an accused for any number of reasons, some of which may never be apparent from a reading of the record of trial. Such is the present case. It is possible the members had reasonable doubts based on MB's enlistment contract, which was admitted into evidence and reflected she was clearly on notice of her obligations once she entered the DEP. This interpretation, while merely speculative, would still be consistent with the appellant's attempt to develop or maintain an intimate personal relationship with MB. In any event, inconsistent verdicts do not necessarily impeach findings of guilty. *United States v. Watson*, 31 M.J. 49, 53 (C.M.A. 1990) (quoting *United States v. Powell*, 469 U.S. 57, 65 (1984)). We do not believe that the court members' not guilty verdict on the one charge in any way impeaches the guilty findings as to the other offense.

Appellant's contention that MB's testimony was not credible is similarly unpersuasive. Although two defense witnesses opined she was untruthful, her testimony was an internally consistent and richly detailed description of the appellant's conversations with her, replete with sexual innuendo and his failed attempts to date her. Moreover, Amn Emeigh, who was in the DEP with MB, testified that on one occasion at an air show, she saw the appellant put his arm around MB in what she considered an unprofessional manner. She said MB looked uncomfortable. This corroboration, however minor, does confirm the nature of the relationship between appellant and MB.

The evidence is legally and factually sufficient to support the offense involving MB. While we have the independent power and responsibility to weigh the credibility of the witnesses in determining factual sufficiency, we are especially mindful of our duty under Article 66(c), UCMJ, to recognize that the trial court saw and heard the witnesses when the evidence presented to the factfinders consists primarily of witness testimony. Considering all the evidence in the case, we are convinced beyond a reasonable doubt the appellant attempted to develop and maintain an intimate personal relationship with MB.

C. Amn DC

At trial, both sides focused a great deal of attention on the four allegations raised by Amn DC. In addition to alleging that the appellant attempted to develop or maintain an intimate personal relationship with Amn DC while she was a recruit, the government also charged the appellant with forcibly sodomizing and indecently assaulting Amn DC and twice threatening to "fuck up her life" if she told anyone. The court members found the appellant guilty as charged for attempting to develop or maintain an intimate personal relationship and for making the threats. With regard to the other two offenses, however, the court members found the appellant guilty of the lesser included offenses of attempted forcible sodomy and indecent acts.

In 1999, Amn DC was a 17-year-old high school student interested in enlisting in the Air Force. Her recruiter was Staff Sergeant (SSgt) Thompson, one of the appellant's subordinate recruiters. SSgt Thompson's computer was not functioning properly, so arrangements were made for Amn DC to work with the appellant to complete her enlistment application. She needed to complete her application quickly so she could finalize the enlistment process at the Military Entrance Processing Station (MEPS), where she was scheduled to go a few days later.

Amn DC left school early, and since she worked after school and planned to go to her waitress job upon completing the application, she had called her supervisor ahead of time to let her know she might be late. Amn DC arrived in the appellant's office in the early afternoon of 22 February 1999. The application process was completed largely without incident, except for the appellant flirting with Amn DC and telling her she was his "type."

After completing the application, the appellant and Amn DC got something to eat at a restaurant across the street called Dugout's. Their conversation initially included topics about the Air Force, but eventually digressed into an inquiry into Amn DC's dating habits and whether she had ever "slept" with anyone. Upon departing the restaurant, the appellant advised Amn DC that she needed another document for her MEPS appointment. He informed her that the document was at his house, which was "[n]ot even 10 minutes away. A couple of blocks from Dugout's."

She followed him there in her own car and pulled up in front. She initially planned to wait in the car, but the appellant asked her to come inside to wait and get a drink. After she entered the house, he locked the door, which caused her enough concern to ask him why. He said it was just his habit. Amn DC followed the appellant through his house and sat on a couch while he made a phone call. As soon as the call was complete, the appellant turned around with what Amn DC described as an "intense" and "sexual" look and told her, "You knew something was going to happen when you came here."

As he approached her, he removed his shirt and pants. Amn DC closed her eyes. He spread her legs, grabbed her shoulders, and placed his penis between her lips. Because she had her teeth "bared," however, his penis did not enter her mouth. She immediately became angry, shoved him away, and attempted to stand up. The appellant pushed her back, causing her to slide off the couch and onto the floor, where he pinned her legs and shoulders to the ground with his legs and hands. He attempted to kiss her and touched her breasts and vaginal area. At about this time she loudly told the appellant, "This is not going to happen." During this altercation, the appellant repeatedly told her to look at his penis, saying that he would be "better than [her] boyfriend."

Amn DC managed to free herself and started to leave the house, but before she could do so, he grabbed her shoulders and stopped her. He went into his bedroom, located near the front door, and brought out two knives, apparently hidden underneath the mattresses. He told Amn DC that if his wife, an active duty military member who was out of town at the time, found out what had happened, that she would kill him. He advised Amn DC he wasn't sure what his wife would do to her if she found out. The appellant also warned her that if she told anyone, he would "fuck up her life." Amn DC then departed the house without any discussion of the document she supposedly needed to process at the MEPS.

Several weeks later, after Amn DC successfully completed her trip to the MEPS, SSgt Thompson, her primary recruiter, went to Amn DC's high school to present her with her enlistment paperwork. Although it was not the standard procedure, the appellant accompanied him. Amn DC's teacher would not allow the men to make a classroom presentation, but allowed Amn DC to go out into the hallway to receive her paperwork. The three of them chatted in the hallway for a while until the appellant pulled Amn DC aside and talked to her privately. He asked her if she had told anyone what happened. She testified that when she told him she had not revealed anything, he said, "If I did, he would fuck up my life." At trial, SSgt Thompson confirmed that the appellant and Amn DC had gone off for a brief period of time while they were hanging around in the hallway. When SSgt Thompson questioned the appellant about it, the appellant told him not to worry.

Before departing the school, the three agreed to meet for lunch later that day. During lunch, the appellant put his hand on Amn DC's upper thigh, causing her to have a "knee jerk" reaction. Her knee hit the table and caused items on the table to shake. SSgt Thompson confirmed that the table shook, but attributed it to horseplay. He also testified that several days later, the appellant told him he shouldn't believe Amn DC.

The defense aggressively attacked Amn DC's story in an attempt to show she had never been at his house. In this regard, they focused on minor discrepancies in the statements she gave investigators and her description of his house. The primary defense strategy, however, was to establish where the appellant and Amn DC were throughout the afternoon through documentary evidence and stipulated testimony. The appellant was able to provide convincing evidence of his probable whereabouts throughout that afternoon.

The most pertinent time frame was a 39-minute period from 1639 hours, which was reflected on a cash register receipt from Dugout's, to 1718 hours, when the appellant's ATM card was used at a local grocery store. The appellant argues that it would have been "impossible" for the events described by Amn DC to occur during this 39-minute period. In further support of this argument, the appellant provided evidence showing he made a long distance phone call from his home phone at 1657 hours lasting for 12 minutes, and another call from his cell phone at 1711 hours lasting for 2 minutes. This 39-minute time frame would also have to reflect the time it took for the appellant and Amn DC to travel the short distance from the restaurant, which Amn DC testified would take no more than 10 minutes. This leaves an 8-minute period from 1649 hours to 1657 hours for the events Amn DC described to transpire. The record establishes:

1639 hours	-	Payment made for meal at Dugout's Restaurant
1649 hours	-	Approximate arrival at appellant's house
1657-1709 hours	-	Home phone used to call Wichita Falls for 12 minutes
1711-1713 hours	-	Cell phone used to call Wichita Falls for 2 minutes
1718 hours	-	Appellant's ATM card used at a local grocery store
1719 hours	-	Amn DC clocks in at her work

After a careful review of the record, we are convinced that the events could have easily occurred in this 8-minute period. First, Amn DC testified that the appellant was on the phone in his home office for a short period of time as soon as they entered the house and he locked the door.[2] Immediately after the phone call, he began to undress and attempted to place his penis in her mouth. After struggling with him on the floor and trying to avoid looking at his penis, she quickly attempted to depart the apartment, but was stopped while he retrieved the knives from the bedroom next to the front door and

[2] Although the defense exhibits reflect long distance and cell phone calls, the stipulated testimony expressly notes that the documents do not reflect local calls made from the home.

threatened her. The events described by Amn DC are therefore consistent with the evidence provided by the appellant at trial as to his whereabouts that afternoon.

The other major attack on Amn DC's testimony was that her description of the interior of the appellant's home was inaccurate. On the contrary, her description was corroborated to a high degree by the testimony of other witnesses, establishing her familiarity with the floor plan and interior design and clearly indicating she was in his home at some point.

Witnesses further corroborated Amn DC's testimony that she met with the appellant on that day, went to lunch with him, and had called her supervisor to say she was late. SSgt Thompson also corroborated important events, such as the time at Amn DC's high school where she was pulled aside by the appellant and the lunch later that day when her knee hit the table. SSgt Thompson also testified that when it appeared that Amn DC might make a complaint against the appellant, the appellant pulled him aside as he was leaving work and said, "Don't believe anything she says, she's crazy." This blatantly self-serving statement reflects a consciousness of guilt and an amateurish attempt to attack Amn DC's credibility at the pre-accusatory, pre-investigative stage.

We hold that the appellant was properly convicted of attempting to develop or maintain an intimate personal relationship with Amn DC in violation of the then-existing general regulation governing recruiter conduct, of attempted forcible sodomy of Amn DC, of indecent acts against Amn DC, and of threatening Amn DC on two occasions. It was clear he was "grooming" Amn DC for an intimate personal relationship during their lunch at Dugout's Restaurant. When he asked about her dating situation and whether she had ever slept with anyone, he was testing the waters to see how open she was to discussing sexual matters. His dishonorable intentions were also evident when he tricked her into going to his house by telling her he had a document there that she would need for her MEPS appointment a few days later. Similarly, his comment, "You knew this was going to happen when you came here" immediately after he hung up the phone is credible evidence of his intent to form an intimate personal relationship with Amn DC. Even when she clearly manifested her lack of consent to sodomy by baring her teeth and struggling to get away, he immediately proceeded to pin her down and fondle this obviously non-consenting female recruit. In order to avoid detection, he threatened her not once, but twice.

We conclude that any rational trier of fact, when viewing the evidence in the light most favorable to the government, could have found the appellant guilty of all elements of all of the offenses beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. at 319; *Reed*, 54 M.J. at 41. Further, after giving "a fresh, impartial look at the evidence" and applying "neither a presumption of innocence nor a presumption of guilt", we independently determine the evidence constitutes proof of each element beyond a reasonable doubt. *Washington*, 57 M.J. at 399.

D. Airman Basic (AB) DS

Finally, the appellant challenges the legal and factual sufficiency of the evidence relating to the two offenses supported by the testimony of AB DS, the only victim on active duty at the time of the offenses. The first offense involves an indecent act. In addition to this charge, the government alleged that the appellant was derelict in his duty to refrain from sexual harassment. In this regard, they offered documentary and testimonial evidence to establish his specific duty to refrain from sexual harassment.

In March of 1999, SSgt Thompson had AB DS assigned to him as a recruiter's assistant. AB DS began her temporary assignment as a recruiter's assistant by going to a local high school with SSgt Thompson. The appellant happened to drop in that day to see how things were going. At the conclusion of their recruiting efforts at the high school, the appellant suggested that the three of them meet for lunch. In an effort to be alone with AB DS, he told SSgt Thompson to post recruiting materials at local businesses on his own while he and AB DS stopped at several sporting goods stores to buy sports equipment for his sons and do some on-site recruiting.

During the time they were going to the stores and driving around town, the appellant told AB DS jokes about oral sex and blondes, commented on DS's fingernails, and discussed his wife's marital infidelities. At one point, he followed behind her and repeatedly made comments about the size and shape of her buttocks and indicated he wanted to grab them. In an attempt to avoid the unwanted comments, she would slow down so he was no longer behind her. However, whenever she got in front of him, the comments began again.

The harassment continued at lunch when they met up with SSgt Thompson. The appellant reached under the table and grabbed AB DS's upper thigh. She scooted closer to SSgt Thompson to avoid further contact.

After lunch, the three returned to SSgt Thompson's office. It was a slow day, and at one point AB DS decided to get some water from a nearby store. The appellant volunteered to go with her to get some candy. As they were standing in the candy aisle, the appellant said, "This hasn't happened to me in a long time." When AB DS turned to look at him, he pointed down to his groin area and she saw his uniform pants were bulging and that he had an erect penis. She immediately turned to walk away, but the appellant grabbed her arm and told her to stay in place until his erection went away. She complied in order to avoid a scene in front of other shoppers, especially since they both were in uniform.

Again, after a thorough review of the record, we conclude the case is legally and factually sufficient, and that the appellant is guilty of all the elements of each of the offenses involving AB DS beyond a reasonable doubt.

III. Conclusion

Although not raised as an assignment of error, we note that General Court-Martial Order No. 39, 30 June 2000, Headquarters Twenty-First Air Force, is incorrect. We will order corrective action in our decretal paragraph.

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *Washington*, 57 M.J. at 399. A corrected court-martial order shall be prepared to reflect the time frame of 1 July 1995 to 31 October 1995 in Specification 1 of Charge I and Specification 1 of Charge II and to delete all references to Air Training Command Regulation 33-2 in Specification 1 of Charge I. Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator