

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Major MARK A. SELDES
United States Air Force

ACM 37265

27 October 2009

Sentence adjudged 01 February 2008 by GCM convened at Kunsan Air Base, Republic of Korea. Military Judge: Mark L. Allred.

Approved sentence: Dismissal and confinement for 3 years.

Appellate Counsel for the Appellant: William E. Cassara, Esquire (civilian counsel) (argued), Colonel Nikki A. Hall, and Major Shannon A. Bennett.

Appellate Counsel for the United States: Major Coretta E. Gray (argued), Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, and Gerald R. Bruce, Esquire.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

Contrary to his pleas, a panel of officers sitting as a general court-martial convicted the appellant of one specification of rape, one specification of conduct unbecoming an officer and a gentleman for engaging in an inappropriate relationship, and one specification of adultery, in violation of Articles 120, 133, and 134, UCMJ, 10 U.S.C. §§ 920, 933, 934. The adjudged and approved sentence consists of a dismissal and confinement for three years.

On appeal, the appellant asks this Court to set aside the findings and the sentence, reassess the sentence, or provide other appropriate relief. In support of his request, the

appellant contends: (1) the prosecution failed to prove the appellant's guilt of Charges I and II beyond a reasonable doubt; (2) the military judge erred to the substantial prejudice of the appellant when he denied the appellant's motion to admit evidence in accordance with Mil. R. Evid. 412; (3) Charges I and III are multiplicitous as a matter of law for findings and sentencing purposes with Charge II; (4) the military judge erred to the substantial prejudice of the appellant by instructing the members on evidence of a consciousness of guilt; (5) the military judge improperly severed an attorney-client relationship when he released Mr. PG, a civilian defense counsel, from participation in the defense without the appellant's consent and without good cause; (6) the military judge erred to the substantial prejudice of the appellant when he denied the appellant's motion to direct a new Article 32, UCMJ, 10 U.S.C. § 832, investigation; (7) the members were improperly selected based on factors not enumerated in Article 25, UCMJ, 10 U.S.C. § 825, and the government was able to exercise an unlimited number of ex parte peremptory challenges;¹ (8) the appellant's due process right to timely post-trial processing was violated when the convening authority (CA) took an unreasonable 178 days to act after the sentence was announced; and (9) the appellant is entitled to a new Staff Judge Advocate (SJA) Recommendation and CA action before a different SJA and a different CA because of multiple errors in the command's post-trial actions. This Court heard oral argument on Issues II and VI. Finding no prejudicial error, we affirm.

Background

The appellant was a flight surgeon assigned to the 80th Fighter Squadron at Kunsan Air Base (AB), Republic of Korea. He began his unaccompanied tour in June 2006, approximately one month after his second child was born. In early October 2006, the appellant met Ms. IST, a civilian Red Cross station manager newly assigned to Kunsan AB. The appellant and Ms. IST lived in the same dormitory, and shortly after her arrival, the appellant invited Ms. IST to a dinner party in his room. During dinner, after discovering the appellant was a doctor, Ms. IST and the appellant discussed her prescription for the drug Ambien.²

The appellant went on leave, and some time passed before they interacted again. Toward the end of October 2006, Ms. IST joined the appellant and a group of friends for dinner at an off-base restaurant. After dinner, the appellant, Captain (Capt) CC, and Ms. IST stopped in an off-base club for a drink before they returned to the base to go "hooch hopping."³ When Ms. IST woke up the next morning, she was on the appellant's couch and her skirt, stockings, and panties were off. Ms. IST asked the appellant what had happened the night before, and he replied she had come on to him, he had performed oral sex on her, and she had said no to intercourse. She accepted his explanation and later that

¹ Issues VII and IX were raised by the appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

² Ambien is a sedative prescribed for short-term treatment of insomnia.

³ Airmen assigned to Kunsan Air Base frequently refer to unofficial squadron bars as "hooches."

same day they kissed, the appellant performed oral sex on her, and Ms. IST again said no to intercourse.

Throughout the following week, the appellant and Ms. IST frequently spent time together. They discussed sex, but Ms. IST continued to say no. On 4 November 2006, Ms. IST joined the appellant and a couple of officers for a drink at one of the hooches on base. She then returned to the dormitory where she and a group of friends ate dinner and watched a movie. While there, she drank a couple of glasses of wine. After leaving her friend's room, Ms. IST stopped by the appellant's room. He walked her to her room and they watched TV. Ms. IST changed into sweatpants and a long-sleeved shirt, brushed her teeth, and told the appellant she was taking an Ambien tablet. She returned to the living room and rubbed the appellant's shoulder after he had complained it hurt.

The next thing Ms. IST remembered was waking up in bed with the appellant on top of her. She briefly saw him, and she felt him penetrating her. Groggy from the Ambien, she fell back asleep. When Ms. IST woke up the following morning, the appellant was no longer in her room. At first she thought it may have been a dream until she saw a condom in the bathroom trash can.

Five days later, after talking with several people, including friends and family, Ms. IST prepared an official statement for the Air Force Office of Special Investigations (AFOSI). After Ms. IST reported the incident, she made a pretext phone call to the appellant at the direction of AFOSI. When she confronted the appellant about his knowledge of her Ambien use on the night of 4 November 2006, he initially denied it. She persisted, and he finally stated, "Well you had taken the Ambien and you fell asleep on the couch so I left." Ms. IST then questioned the appellant about how she had gotten to her bedroom. First, the appellant explained she "fell asleep on the couch so he carried [her] to bed and then he left." He then explained they were making out in the living room and had both walked to her bedroom. They continued making out in the bedroom, but she began "acting funny." He asked her "what was up," and she said she had taken Ambien so he left. Ms. IST asked the appellant how it was that she had a memory of him having sex with her. The appellant first denied having sex with her; however, when Ms. IST confronted the appellant about the condom in the trash can, he stated, "Well we started to have sex but then you were acting funny so I put you to bed and left."

Discussion

Legal and Factual Sufficiency

The appellant contends the evidence presented at trial is factually and legally insufficient to sustain the rape and conduct unbecoming an officer and a gentleman convictions. We review claims of legal and factual insufficiency de novo, examining all the evidence properly admitted at trial. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United*

States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001) (alteration in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); see also *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987). In resolving questions of legal sufficiency, we must “draw every reasonable inference from the evidence of record in favor of the prosecution.” *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted).

The test for factual sufficiency is “whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we ourselves are] convinced of the [appellant’s] guilt beyond a reasonable doubt.” *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

We have carefully reviewed the record of trial in this case. While serving a one-year remote assignment to Kunsan AB, the appellant engaged in multiple instances of kissing and oral sex with Ms. IST, a civilian also assigned to Kunsan AB, in the week leading up to the night of 4 November 2006. At all times relevant to Charge II, the appellant was a field grade officer in the United States Air Force and a married man with two young children. His sexual relationship with Ms. IST was inappropriate and his actions constituted conduct unbecoming an officer and a gentleman.

The evidence presented through the testimony of Ms. IST shows Ms. IST woke up in her bed on the night of 4 November 2006, to find the appellant having intercourse with her without her consent. She fell back asleep, still groggy from the Ambien she had taken earlier that evening. The appellant knew Ms. IST had taken the Ambien. As a flight surgeon who had prescribed Ambien at least 82 times between July 2006 and November 2006, the appellant was familiar with its side effects. Additionally, the appellant’s DNA was found inside the condom that Ms. IST discovered in her bathroom trash can. Although the appellant claimed Ms. IST consented to intercourse and theorized she had a histrionic personality disorder which affected her credibility, the prosecution presented the testimony of a forensic psychologist and expert witness who disputed the appellant’s claim. Furthermore, when surreptitiously questioned during a pretext phone call, the appellant provided three vastly differing accounts of what had transpired in Ms. IST’s dormitory room on the night of 4 November 2006.

Considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found the appellant raped Ms. IST and committed the offense of conduct unbecoming an officer and a gentleman by engaging in an

inappropriate relationship with her. Further, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced the appellant is guilty of the charges beyond a reasonable doubt.

Admission of Evidence under Mil. R. Evid. 412

The appellant asserts the military judge erred by excluding evidence that Ms. IST had a prior sexual relationship with another married officer, Capt GA, while assigned to Kunsan AB. The brief affair between Ms. IST and Capt GA began shortly after she arrived in Korea and ended when Capt GA, who had initially told Ms. IST that he was separated and getting divorced, said he wanted to make his marriage work. The appellant suggests this evidence is admissible for two reasons: first, he argues it rebuts any claim Ms. IST made that she would not consent to intercourse with the appellant because he was married,⁴ and second, he argues her former relationship with Capt GA gave Ms. IST a motive to fabricate the rape charge. After hearing evidence on this matter, the military judge ruled the evidence was inadmissible under Mil. R. Evid. 412.

We review a military judge's ruling regarding admissibility of evidence for abuse of discretion. *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005) (quoting *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997)); *United States v. Gilbride*, 56 M.J. 428, 430 (C.A.A.F. 2002) (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). Under an abuse of discretion review, we examine a military judge's findings of fact using a clearly erroneous standard and his conclusions of law de novo. *United States v. Larson*, 66 M.J. 212, 215 (C.A.A.F. 2008); *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (citing *Ayala*, 43 M.J. at 298). Further, if the military judge performs a proper Mil. R. Evid. 403 balancing test, a test affording him wide discretion, we will not overturn his decision unless there is a "clear abuse of discretion." *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (quoting *United States v. Ruppel*, 49 M.J. 247, 251 (C.A.A.F. 1998)); see also *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995). We consider the evidence in the light most favorable to the prevailing party. *Rodriguez*, 60 M.J. at 246-47.

Mil. R. Evid. 412 bars the admission of evidence offered "to prove that any alleged victim engaged in other sexual behavior" and evidence offered "to prove any alleged victim's sexual predisposition." Mil. R. Evid. 412(a)(1)-(2). In *United States v. Banker*, 60 M.J. 216 (C.A.A.F. 2004), our superior court found an appellant must "demonstrat[e] why the general prohibition in [Mil. R. Evid.] 412 should be lifted to admit evidence of the sexual behavior of the victim" in order to defeat the exclusionary function of Mil. R. Evid. 412. *Banker*, 60 M.J. at 222 (first alteration in original) (quoting *United States v. Moulton*, 47 M.J. 227, 228 (C.A.A.F. 1997)). The Court further

⁴ In reviewing the record of trial, we are unable to find that the trial defense counsel articulated this theory of admissibility. Regardless, as discussed further in this opinion, the appellant concedes Ms. IST never claimed she would not have sex with a married man, so there was no statement to rebut.

stated the burden is on the appellant to show the proffered evidence meets one of the three enumerated exceptions of Mil. R. Evid. 412(b). *Id.* These exceptions allow the presentation of evidence of other sexual behavior by the victim if such evidence is necessary to prove someone other than the accused was the source of semen or to prove consent. Mil. R. Evid. 412(b)(1)(A)-(B). The rule also permits admission of evidence when its exclusion would otherwise “violate the constitutional rights of the accused.” Mil. R. Evid. 412(b)(1)(C).

In this case, the military judge conducted two separate analyses of the proffered evidence: first, whether evidence of a sexual relationship between Ms. IST and Capt GA was admissible, and second, whether evidence of a broader, nonsexual relationship between Ms. IST and Capt GA was admissible. The military judge concluded the sexual relationship between Ms. IST and Capt GA was precisely the type of evidence that Mil. R. Evid. 412 intends to exclude. More specifically, the military judge determined the exclusion of this evidence did not violate the constitutional rights of the appellant and the proffered evidence did not meet any other exception under Mil. R. Evid. 412(b). He further determined even if the evidence did meet one of the three enumerated exceptions of Mil. R. Evid. 412(b), its probative value did not outweigh the danger of unfair prejudice.

Regarding Ms. IST’s broader, nonsexual relationship with Capt GA, the military judge ruled Mil. R. Evid. 412 did not apply. He also found evidence of the relationship failed to meet the relevance threshold of Mil. R. Evid. 401 and its probative value was substantially outweighed by the danger of unfair prejudice, thereby rendering it inadmissible under Mil. R. Evid. 403.

We begin by affirming the military judge’s ruling that evidence of a sexual relationship between Ms. IST and Capt GA was inadmissible. There are two evident flaws with the appellant’s argument that this evidence was properly admissible to rebut any claim by Ms. IST that she would not consent to sex with a married man. First, Ms. IST did not testify at trial that she would not have consented to sex with the appellant because he was married; therefore, there was nothing to rebut on cross-examination. Second, the appellant attempts to present an overly simplistic version of Ms. IST’s testimony to support his argument. As noted, Ms. IST believed Capt GA was separated and getting divorced. Even if Ms. IST had testified that she would not consent to sex with a man who was married, this is not necessarily rebutted by the fact that she would consent to sex with a man who was separated and in the process of getting a divorce. The military judge did not abuse his discretion by excluding this evidence.

Additionally, the appellant’s suggestion that Ms. IST would lie to preserve her relationship with Capt GA is wholly unsupported by the evidence. No party disputes Capt GA ended his relationship with Ms. IST during the last 10 days of October 2006, at least two weeks before the alleged rape. Therefore, there was no relationship to protect.

This is not a situation where an alleged victim claims rape or sexual assault after being caught in the company of one lover by another. To the contrary, Ms. IST agrees she had consensual sexual interactions with the appellant before the night of 4 November 2006. Furthermore, until Ms. IST reported she had been raped, the intercourse which led to the report of rape was presumably known only to the appellant and Ms. IST. It defies logic that Ms. IST would attempt to protect a prior relationship with Capt GA by conceding she had engaged in some consensual sexual activity with the appellant but then allege the appellant had subsequently raped her.

For the same reasons, we also affirm the military judge's ruling that the broader, nonsexual relationship between Ms. IST and Capt GA was inadmissible under Mil. R. Evid. 401 and Mil. R. Evid. 403. The military judge did not abuse his discretion in determining this evidence was either completely irrelevant or, if it was relevant, its probative value was substantially outweighed by the danger of unfair prejudice.

Multiplicity

The appellant contends, for the first time on appeal, the rape and adultery charges of which he was convicted are multiplicitous with the conduct unbecoming an officer and a gentleman charge for findings or, in the alternative, represent an unreasonable multiplication of charges. We review claims of multiplicity for findings de novo. *United States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007) (citing *United States v. Roderick*, 62 M.J. 425, 431 (C.A.A.F. 2006)). The failure to make a timely request for the dismissal of a specification based on multiplicity constitutes a waiver in the absence of plain error. *United States v. Carroll*, 43 M.J. 487, 488 (C.A.A.F. 1996). "Offenses are multiplicitous if one is a lesser-included offense of the other." *United States v. Palagar*, 56 M.J. 294, 296 (C.A.A.F. 2002). They are also multiplicitous if the offenses are "facially duplicative," i.e., factually the same. *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000).

To determine whether offenses are facially duplicative, courts apply the elements test. Under this test, courts consider whether each specification requires proof of a fact which the other does not require. *United States v. Hudson*, 59 M.J. 357, 359 (C.A.A.F. 2004) (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). Rather than embracing a literal application of this test, multiplicity claims must be resolved "by lining up elements realistically and determining whether each element of the supposed 'lesser' offense is rationally derivative of one or more elements of the other offense – and vice versa." *Hudson*, 59 M.J. at 359.

The standard of review for claims of an unreasonable multiplication of charges is abuse of discretion. *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004) (quoting *United States v. Monday*, 52 M.J. 625, 628 n.8 (Army Ct. Crim. App. 1999)). "What is substantially one transaction should not be made the basis for an unreasonable

multiplication of charges against one person.” Rule for Courts-Martial (R.C.M.) 307(c)(4). Our superior court has adopted a five-part balancing test for deciding whether there has been an unreasonable multiplication of charges: (1) was there an objection for unreasonable multiplication of charges at trial; (2) are the charges aimed at distinctly separate criminal acts; (3) do the number of charges serve to misrepresent or otherwise exaggerate criminality; (4) do the number of charges unreasonably increase the appellant’s punitive exposure; and (5) is there evidence to indicate prosecutorial overreaching? *United States v. Quiroz*, 55 M.J. 334, 338-39 (C.A.A.F. 2001).

With respect to the issue of multiplicity, there was no plain error in this case because each charge requires proof of a fact that the others do not require. The charges are not multiplicitous for findings. The elements of adultery are: (1) the appellant wrongfully had sexual intercourse with Ms. IST; (2) at the time, the appellant was married to someone else; and (3) under the circumstances, the appellant’s conduct was to the prejudice of good order and discipline or was of a nature to bring discredit upon the armed forces. *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 62.b. (2005 ed.) On the other hand, the elements of the conduct unbecoming an officer and gentleman charge in this case are: (1) the appellant engaged in an inappropriate relationship with Ms. IST; (2) the inappropriate relationship with Ms. IST consisted of the appellant kissing her, performing oral sex on her, and wrongfully having sexual intercourse with her; (3) Ms. IST was not the appellant’s wife; and (4) under the circumstances, the appellant’s conduct was unbecoming an officer and a gentleman. *MCM*, Part IV, ¶ 59.b. The wrongful acts underlying the conduct unbecoming an officer and a gentleman charge are significantly broader than the conduct addressed by the adultery charge; namely, wrongful sexual intercourse. The conduct unbecoming charge encompasses all of the intimate sexual acts between the appellant and Ms. IST which occurred multiple times over the course of a week, to include an occasion when the appellant performed oral sex on Ms. IST in her living room while a fellow officer slept in an adjoining bedroom. A finding that the appellant had both kissed and performed oral sex on Ms. IST, therefore, would have been sufficient to sustain a conviction on the conduct unbecoming an officer and a gentleman charge. Thus, the underlying conduct is not the same for both charges. Further, the rape offense requires proof that the appellant committed an act of sexual intercourse by force and without consent. Clearly, neither the conduct unbecoming an officer and a gentleman charge nor the adultery charge requires such proof.

After carefully considering the five-part test endorsed by the *Quiroz* court, we find the charged offenses do not constitute an unreasonable multiplication of charges. None of the five factors is satisfied in this case. The appellant made no objection based on an unreasonable multiplication of charges at trial; each charge is aimed at distinctly separate criminal acts; the number of charges do not misrepresent or exaggerate the appellant’s criminality; the number of charges do not unreasonably increase the appellant’s punitive

exposure, as he faced a dismissal and life in prison for the rape offense alone; and there is no evidence of prosecutorial overreaching.

Military Judge's Instructions

The appellant asserts the military judge erred by instructing the panel members on evidence of consciousness of guilt. It is well established that a military judge "has substantial discretionary power in deciding on the instructions to give," even over defense objections. *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993) (citations omitted). However, both the decision to give an instruction and the substance of an instruction are reviewed de novo. *United States v. Smith*, 50 M.J. 451, 455 (C.A.A.F. 1999) (citing *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996)). Consciousness of guilt evidence may be considered by the fact finder. See *United States v. Mahone*, 14 M.J. 521, 524-25 (A.F.C.M.R. 1982). Once evidence of consciousness of guilt has been raised at trial, the military judge has a responsibility to provide instructions to the panel members on how it may be considered. *United States v. Walker*, ACM 29848, unpub. op. at 5 (A.F.C.M.R. 17 Jun 1993).

Trial counsel requested the consciousness of guilt instruction based on statements that the appellant made during a pretext phone call with Ms. IST. During this phone call, Ms. IST confronted the appellant about the rape. The appellant gave three significantly different accounts of what had happened in Ms. IST's dormitory room that night. Moreover, each account was incompatible with the next. At trial, the prosecution called Ms. IST and the AFOSI agent who had listened in on the pretext phone call. They both testified about the statements the appellant made during the call. We find the consciousness of guilt instruction, as tailored by the military judge, was a correct statement of the law and warranted in light of the evidence the trial counsel presented at trial.

Attorney-Client Relationship

The appellant argues the military judge inappropriately severed his attorney-client relationship with one of his civilian defense counsel, Mr. PG. We review issues affecting the severance of an attorney-client relationship de novo. *United States v. Barnes*, 63 M.J. 563, 565 (A.F. Ct. Crim. App. 2006) (citing *United States v. Blaney*, 50 M.J. 533, 539 (A.F. Ct. Crim. App. 1999)). The bonds of an attorney-client relationship are strong, but they may be severed over defense objection when there is "good cause shown on the record." *Id.* (citing *United States v. Baca*, 27 M.J. 110, 118-19 (C.M.A. 1988)). The courts consider the unique circumstances of each case when deciding whether good cause exists to sever an existing attorney-client relationship. *Blaney*, 50 M.J. at 540. "[W]hen an attorney 'reasonably believes' that the perceived conflict between his own interests and those of the client will *adversely affect* the quality of representation, the attorney has

good cause to sever the relationship” *United States v. Hardy*, 44 M.J. 507, 510 (A.F. Ct. Crim. App. 1996) (alteration in original).

The appellant in this case was represented by three defense counsel at his general court-martial, two civilian counsel and one detailed military defense counsel. In addition to serving as one of the appellant’s civilian defense attorneys, Mr. PG is also the appellant’s father-in-law. During the initial pre-sentencing phase of the court-martial, before the announcement of findings, the appellant affirmatively waived Mr. PG’s presence after the military judge advised the appellant that he had the absolute right to have all counsel present. That same day, the findings were announced with all the parties present. The prosecution then presented evidence to the panel members for consideration on sentencing. After the defense presented their documentary evidence, the court recessed for the night.

The appellant failed to return to court the next morning. Late that afternoon, after delaying the proceedings, the military judge held an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session and determined the sentencing hearing would proceed in the absence of the appellant pursuant to R.C.M. 801(b)(1). During this session, Mr. PG asked the military judge to release him as counsel. After reviewing the rules regarding withdrawal of counsel on the record, the military judge asked Mr. PG to explain his reasons for making the request in order to determine whether there was good cause for his release. Mr. PG explained he needed to take care of his daughter, the appellant’s wife, who had traveled to Korea for the trial. More specifically, Mr. PG stated he urgently needed to take the appellant’s wife home so that she could be in a more supportive environment. When Mr. PG’s request was made, his son-in-law had not only been found guilty of all charges, to include raping the woman with whom he was having an affair, but had also absented himself without leave in a foreign country. Additionally, it was unclear when he would be located. Mr. PG stated, “This has been a very, first of all, shock to our family. And coping with it has been very difficult not only for my daughter and her family but also for myself.” Mr. PG further explained his primary role in this case had been to put the appellant in the hands of competent counsel familiar with the military legal system, as he himself was unfamiliar with military law and the court-martial process. In fact, the retained civilian attorney and detailed area defense counsel had questioned all witnesses and made all arguments at trial. After the military judge ascertained the basis for Mr. PG’s request as well as the effect of his withdrawal on the appellant’s defense, he approved the release for good cause shown. Based on the unique circumstances of this particular case as recited above, we find the military judge did not err by severing the attorney-client relationship between the appellant and Mr. PG.

Article 32, UCMJ, Hearing

The appellant asserts he was prejudiced by a defective Article 32, UCMJ, investigative hearing prior to referral of the charges against him. Specifically, he notes

Ms. IST refused to answer questions about a previous affair, a matter the appellant sought to explore at trial.⁵ The appellant argues he should have been able to obtain this evidence from Ms. IST in order to discover potentially admissible evidence, to present a motive for her to lie, and to challenge her credibility. The appellant also argues the Investigating Officer (IO) had improper ex parte communications with the witnesses when summarizing their testimony from the hearing.

When reviewing allegations of error in an Article 32, UCMJ, investigation, we will reverse only when there is a showing of prejudice to a substantial right of the accused. *United States v. Davis*, 64 M.J. 445, 448-49 (C.A.A.F. 2007). When reviewing the military judge's findings, we will accept his findings of fact unless they are clearly erroneous. *United States v. Tippit*, 65 M.J. 69, 79 (C.A.A.F. 2007) (citing *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005)). We review his conclusions of law de novo. *United States v. Von Bergen*, 67 M.J. 290, 293 (C.A.A.F. 2009).

“An accused has a right to a ‘thorough and impartial investigation’ of all charges referred to a general court-martial.” *United States v. Castleman*, 11 M.J. 562, 564 (A.F.C.M.R. 1981) (quoting Article 32(a), UCMJ). In determining impartiality, “Article 32[, UCMJ,] investigating officers, whose functions are judicial and quasi-judicial, are held to the same standards as military judges” *Id.* (citing *United States v. Collins*, 6 M.J. 256, 258-59 (C.M.A. 1979)). Except where the parties have waived disqualification of the military judge after full disclosure of the basis for disqualification, a military judge must recuse himself “in any proceeding in which that military judge’s impartiality might reasonably be questioned.” R.C.M. 902(a). When a military judge’s impartiality is challenged on appeal, the test is whether the military judge’s actions would cause a reasonable person observing the trial to question the court-martial’s legality, fairness, and impartiality. *United States v. Foster*, 64 M.J. 331, 333 (C.A.A.F. 2007).

The appellant’s claim that his Article 32, UCMJ, hearing was defective fails for three very simple reasons. First, regarding the alleged ex parte communications between the IO and the witnesses, it is quite common in the Air Force for an IO to contact witnesses in order to finalize a written summary of their testimony. This is done without recalling all parties for the sake of expedience and does not amount to an improper ex parte communication. *See United States v. Stephens*, 66 M.J. 520, 523 (A.F. Ct. Crim. App. 2008), *aff’d*, 67 M.J. 233 (C.A.A.F. 2009).

Second, with respect to the substance of Ms. IST’s testimony, as the IO recognized and the appellant concedes, a civilian witness cannot be compelled to appear and testify at an Article 32, UCMJ, hearing. R.C.M. 405(g)(2)(B), Discussion. Thus, the IO was correct in that he could not compel Ms. IST to answer every question posed by the defense on cross-examination. He properly noted the defense objection in his report.

⁵ This matter was raised as an assignment of error by the appellant and decided against him in this opinion.

While the appellant summarily asserts the IO should have declined to consider *any* of Ms. IST's statements, he cites no law or precedent for this measure. The appellant seems to analogize a witness's refusal to testify at an Article 32, UCMJ, hearing to a witness's refusal to testify at a trial based on a privilege, thereby raising the specter of *Crawford v. Washington*, 541 U.S. 36 (2004) (holding the admission of wife's previous, out-of-court statement to police violated the Confrontation Clause⁶). We decline to extend *Crawford* to an Article 32, UCMJ, hearing. There is no basis for doing so, particularly in this case, when Ms. IST's summarized testimony from the Article 32, UCMJ, hearing was not admissible against the appellant at trial. *See* Mil. R. Evid. 804(b)(1) (stating Article 32, UCMJ, testimony is admissible only if a witness is unavailable and the testimony was recorded verbatim).

Finally, the evidence that the appellant sought to elicit was ruled inadmissible at trial under Mil. R. Evid. 412. The appellant observes Article 32, UCMJ, hearings are a useful discovery tool, and discovery is not limited to evidence admissible at trial. While true, “[d]iscovery is not a prime object of the pretrial investigation.” *United States v. Arruza*, 26 M.J. 234, 236 (C.M.A. 1988) (alteration in original) (quoting *United States v. Eggers*, 11 C.M.R. 191, 194 (C.M.A. 1953)). The primary object of an Article 32, UCMJ, hearing is “to inquire into the truth of the matters set forth in the charges, [to verify] the form of the charges, and to secure information on which to determine what disposition should be made of the case.” R.C.M. 405(a), Discussion. Moreover, this does not change the fact that, as the appellee notes, Mil. R. Evid. 412 does apply to Article 32, UCMJ, hearings. R.C.M. 405(i). Therefore, as we concluded the military judge correctly ruled the disputed evidence was inadmissible, we also conclude the appellant would not be able to obtain this evidence at a new Article 32, UCMJ, hearing.

Timely Post-Trial Processing

The appellant argues his due process right to timely post-trial processing was violated. We note the CA in this case took action 178 days after the announcement of the appellant's sentence. An appellant's assertion that he has been denied his due process right to a speedy post-trial review and appeal is reviewed *de novo*. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). In our analysis of such claims, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Id.*

For courts-martial completed after 11 June 2006, we apply a presumption of unreasonable delay when the action of the CA is not taken within 120 days of the completion of trial. *Id.* at 142. Once this due process analysis is triggered by a facially unreasonable delay, we analyze each *Barker* factor and make a determination as to

⁶ U.S. CONST. amend. VI.

whether that factor favors the government or the appellant. *Id.* at 136 (citing *Rheuark v. Shaw*, 628 F.2d 297, 303 (5th Cir. 1980)). Because the overall delay between the completion of trial and action by the CA is facially unreasonable, we examine the four *Barker* factors. When we assume error, but are able to directly conclude any error was harmless beyond a reasonable doubt, we need not engage in a separate analysis of each factor. *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances and the entire record, we conclude any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and no relief is warranted.

Remaining Issues

We considered the remaining issues the appellant has raised and find them to be without merit. *United States v. Straight*, 42 M.J. 244, 248 n.4 (C.A.A.F. 1995) (citing *United States v. Clifton*, 35 M.J. 79, 81-82 (C.M.A. 1992); *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987)).

Conclusion

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL



Christina E. Parsons
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Deputy, Clerk of the Court