UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CARLOS E.F. THOMAS
United States Air Force

ACM 37896

02 July 2013

Sentence adjudged 27 June 2011 by GCM convened at Tyndall Air Force Base, Florida. Military Judge: Katherine E. Oler.

Approved Sentence: Dishonorable discharge, confinement for 150 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Anthony D. Ortiz and Captain Robert D. Stuart.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel Martin J. Hindel; Major Tyson D. Kindness; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

OPINION OF THE COURT

HECKER, Judge:

At a general court-martial, the appellant was convicted, consistent with his pleas, of attempted aggravated assault of a child under the age of 16, aggravated sexual assault of a child under the age of 16, sodomy with a child under the age of 16, communicating indecent language to a child, using a cellular phone to entice or induce a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b), and possession of images of minors engaging in sexually explicit conduct, in violation of Articles 80, 120, 125, 134, UCMJ, 10 U.S.C. §§ 880, 920, 925, 934. He was also convicted by officer members, contrary to

his pleas, of two specifications of attempting to commit aggravated sexual assault on a child, in violation of Article 80, UCMJ. The members sentenced the appellant to a dishonorable discharge, confinement for 150 months, forfeitures of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant contends: (1) the evidence is factually and legally insufficient to prove his guilt of attempted aggravated sexual assault; (2) the Article 134, UCMJ, specifications fail to state an offense because they do not allege the terminal element; (3) his guilty plea to communicating indecent language was improvident because his pleas did not establish sufficient facts of direct prejudice to good order and discipline or service discrediting conduct; (4) his convictions for attempted aggravated assault are multiplicious with the enticement specifications, or constitute an unreasonable multiplication of charges; and (5) his trial defense counsel were ineffective for failing to raise a motion for additional pretrial confinement credit based on violations of Articles 12 and 13, UCMJ, 10 U.S.C. §§ 812, 813. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Background

The appellant engaged in inappropriate relationships with three teenaged girls between 2007 and his arrest in 2010. These relationships served as the basis for most of the charges in this case.

In April 2007, before he joined the Air Force, the 22-year-old appellant contacted a 13-year-old girl in his hometown through an online social networking service centered on teenagers. Within several weeks of beginning those communications, he turned the conversation towards sexual matters and told her in crude language that he wanted to engage in sexual activities with her, including intercourse, sodomy, and digital penetration. After he repeatedly told her he wanted to meet her in person, she agreed several months later. They met at a park behind her school. He put his hand inside her clothes and rubbed her vaginal area inside her clothes. He also convinced her to engage in oral sodomy.

The appellant joined the Air Force in February 2008 and moved to Florida. The girl, by then 14 years old, continued to communicate with him. At one point, she sent him a nude photograph of herself at his request. While back in Colorado on leave, he suggested they meet again. At his direction, she left her house at night. He drove her to a vacant lot and rubbed her vaginal area and digitally penetrated her. She initially resisted his efforts to engage in sexual intercourse as she wanted to protect her virginity, but went along when he said penetration with the tip of his penis "doesn't really count." When he was finished, they talked for a few minutes and then he returned her to her house.

Meanwhile, the appellant was engaging in similar conduct with two teenaged girls he met near his duty station in Florida while serving as a volunteer coach for a girls softball team and boys baseball team. He followed a similar pattern with both girls—he texted them about mundane matters and then quickly turned the communications to inquiries about their sexual history and asking them to engage in sexual acts with him. He sent nude photographs of himself to one of the girls and both of them sent him revealing photographs of themselves. Neither of the girls engaged in sexual contact with him.

While stationed in Florida, the appellant remained in contact with the now 15-year-old minor in Colorado. During a trip there in November 2009, through text messages, she agreed to let him into her house without her parents' knowledge. At around midnight, they went into her basement and he began rubbing her vaginal area through her clothes. She again told him she did not want him to penetrate her but he continued to pressure her. Although she asked him not to, this time he fully penetrated her. She then agreed to engage in anal sodomy but he ignored her request that he stop because she was in pain, only stopping when he became concerned her parents would hear her cries. Although she was very upset, she agreed to engage in intercourse again. When she texted him later that she was in pain, he responded that she should not worry about it because having sex is normal.

After the appellant stopped communicating with the Colorado minor, she told an adult male about their contact. That man created a fake 14-year-old persona named "Angela," and soon the appellant began communicating with "her" about sexual matters through an internet chat room. After this information was passed on to the Air Force Office of Special Investigations (AFOSI) in December 2009, agents had a local security forces member assume the persona and engage in texting with the appellant. During their first text exchange, the appellant asked "Angela" if she could sneak out of her house or sneak him into it. The information was then transferred to a civilian detective who also received sexually oriented texts from the appellant and who soon asked "Angela" to meet him near her house. He was arrested by civilian authorities in his car, in which he was found with a box of condoms he had purchased on the way to the meeting. A forensic examination of the appellant's computer revealed multiple still and video images of minors engaging in sexually explicit conduct.

For his course of conduct with the minor in Colorado, the appellant pled guilty to aggravated sexual assault and sodomy of a child under 16, as well as communicating indecent language to her. For both minors in Florida, he pled guilty to violating 18 U.S.C. § 2422(b) for using his cellular phone to "persuade, entice or induce" them to engage in sexual activity, specifically the production of child pornography, and to communicating indecent language to one of them. For his conduct with "Angela," the appellant pled guilty to violating 18 U.S.C. § 2422(b) by using his cellular phone to induce someone he believed to be under 16 to engage in a sexual act and to attempted

aggravated assault on a person he believed was under 16. He also pled guilty to possession of child pornography.

The appellant also entered a guilty plea to attempting to commit aggravated sexual assault on the two minors in Florida, but the military judge found it improvident after the appellant did not admit that he had traveled to the girls' neighborhoods with the intent to sexually assault them. The Government chose to litigate the specification and the appellant was convicted of both specifications.

Factual and Legal Sufficiency

We review issues of factual and legal sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The appellant contends the evidence is factually and legally insufficient to sustain his convictions for attempting to commit an aggravated assault on the two Florida girls because the only "substantial step" he engaged in was trying to arrange to meet the girls for an unspecified purpose.

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 are "convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), *as quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, 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." *Washington*, 57 M.J. at 399.

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *Turner*, 25 M.J. at 324, *as quoted in United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). "[I]n resolving questions of legal sufficiency, we are bound to 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). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

To be guilty of an attempt, the appellant must have committed "[a]n act, done with specific intent to commit an offense . . . amounting to more than mere preparation and tending, even though failing, to effect its commission." Article 80a.(a), UCMJ. There must be a specific intent to commit the underlying offense, "accompanied by an overt act which directly tends to accomplish the unlawful purpose." *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 4.c.(1) (2008 ed.). Soliciting another to commit an

offense does not constitute an attempt. *Id.* at ¶ 4.c.(5). An accused's conduct must constitute a substantial step toward the commission of the crime and be strongly corroborative of the firmness of his criminal intent. *United States v. Byrd*, 24 M.J. 286, 290 (C.M.A. 1987). The substantial step must be a direct movement towards the commission of the offense and must be beyond preparatory steps, but it "need not be the last act essential to the consummation of the offense." *MCM*, Part IV, ¶ 4.c.(2). The substantial step must "'unequivocally demonstrate[e] that the crime will take place unless interrupted by independent circumstances.'" *United States v. Winckelmann*, 70 M.J. 403, 407 (C.A.A.F. 2013) (alteration in original) (quoting *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007)).

As applied to this case, the elements of the offenses are that (1) the appellant did a certain act, (2) with the specific intent to commit an aggravated assault upon a child under 16 [the two minors from Florida], (3) the act amounted to more than mere preparation, and (4) the act apparently tended to effect the commission of the aggravated assault.

The two girls testified at the appellant's court-martial. They both described meeting the appellant through his work with the teen softball and baseball teams. The 15-year-old met the appellant while she was watching a baseball game and they soon began using an on-line social networking service to talk about school and sports. The 14-year-old met him when she was practicing softball and he took that opportunity to tell her she had a "nice a** in those shorts" and ask her whether she would like him to take her back into the woods. The appellant was aware of how old the girls were and he began exchanging text messages with them. Those conversations soon became sexual and the appellant's modus operandi was similar for both girls.

The appellant asked both girls what they had done sexually with boys. He also asked whether they would have sexual intercourse with him, or in the alternative, engage in oral sodomy with him or touch his penis, using crude slang to describe the acts. With the 15-year-old, he also asked if she had any friends who would be interested in having sex with him and told her that he wanted to engage in anal sodomy.

He also sent both girls nude photographs of himself and persuaded them to do the same. For the 14-year-old, when the appellant sent her a picture of his bare chest and asked for a photograph in return, she sent him a picture of her in her underwear. When he asked for more, she sent him a close-up picture of her chest area. He responded with photographs of himself totally nude as well as a close-up of his erect penis. At his request, she sent him a photograph of her vaginal area. For the 15-year-old, the appellant sent her a photograph of his entire nude body, and she sent a photograph of herself wearing only underwear and a photograph of her topless.

On several occasions, the appellant asked the 14-year-old to come to his on-base dormitory room to "do stuff" but she declined. He also twice asked to meet her at a local restaurant in the nighttime. Although he did not specifically say what he wanted to do with her if they met, the girl testified that she "knew what he was getting at," given the context of their communications. On another occasion, the appellant texted her that he was a block away from her house and asked her to sneak out to go somewhere with him. She declined that request as well.

Similarly, with the 15-year-old, the appellant asked on multiple occasions if he could come to her house so they could "hang out" and do the sexual things they had been talking about, including sneaking him into her bedroom even though her parents were home. The minor would agree but then always cancelled. Sometimes the appellant would already be on his way over to her house and would call her immature for changing her mind. The two did meet in person on one occasion at a local bookstore but nothing sexual occurred.

On appeal, the appellant focuses on his attempts to meet the two minors in person, arguing that he never indicated to them it was for sexual activity. He contends such facts are insufficient to sustain his conviction for attempting to commit an aggravated assault on them because the only "substantial step" he engaged in was trying to arrange to meet the girls for an unspecified purpose. We disagree.

Our superior court has recently discussed what constitutes a "substantial step" for purposes of attempting to entice an underage child to engage in sexual activity under 18 U.S.C. § 2422(b). The Court noted that an accused's "traveling" to a location to meet a minor can constitute a substantial step and thus constitute an attempt to violate that statute. *Winckelmann*, 70 M.J. at 407 (citations omitted). Likewise, we find travel can constitute a substantial step for purposes of an attempt specification brought under Article 80, UCMJ, that alleges an accused attempted to engage in unlawful sexual conduct.

Here, the appellant arrived near the girls' homes, after engaging in multiple sexually-explicit communications which included express requests that they participate in sexual activities with him. These communications were designed to persuade the girls to engage in sexual contact with him. He did more than simply solicit them to commit the sexual offenses. He sent them nude photographs of himself and persuaded them to respond in kind, and then began trying to arrange to meet the girls. When considered within the full context of their relationship and the communications between the appellant and the girls, we find his travel to the girls' homes to be more than mere preparation and to be strongly corroborative of his intent to engage in sexual activity with them, but for the fact the girls refused to meet with him on those nights. *Byrd*, 24 M.J. at 290. In fact, the appellant used this same modus operandi with the minor in Colorado, whose testimony during the findings stage was admissible to show the appellant's propensity or predisposition to engage in sexual assault on teenaged girls and to rebut any contention

that his participation in the charged activities was the result of mistake.[1] *See* Mil. R. Evid. 413. In light of all the evidence adduced during the findings stage of the court-martial, we find the appellant's conduct constituted a "substantial step" towards the commission of aggravated sexual assault with both girls.

Having weighed the evidence in the record of trial, allowing for not having personally observed the witnesses, including the minors, we are personally convinced of the appellant's guilt beyond a reasonable doubt. Similarly, we find a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.

Failure to State an Offense

The appellant pled guilty to two specifications of communicating indecent language and one specification of wrongfully possessing visual depictions of what appears to be minors engaging in sexually explicit conduct, in violation of Article 134, UCMJ.[2] None of the charged specifications alleged the terminal element of Article 134, UCMJ.

Whether a charge and specification state an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted). Our superior court has held that failure to allege the terminal element of an Article 134, UCMJ, offense is error but, in the context of a guilty plea, the error is not prejudicial where the military judge correctly advises the appellant of all the elements and the providence inquiry shows that the appellant understood to what offense and under what legal theory he was pleading guilty. *United States v. Ballan*, 71 M.J. 28, 35 (C.A.A.F. 2012).

During the plea inquiry in the present case, the military judge advised the appellant of each element of the charged offense, to include the terminal element, and the appellant explained how his misconduct was service discrediting. Therefore, as in *Ballan*, the appellant here suffered no prejudice to a substantial right: he knew under what clause he was pleading guilty and clearly understood how his conduct violated the terminal element of Article 134, UCMJ.

Providency of Plea

[1] Here, the defense counsel elected to inform the court members that the appellant had already pled guilty to sexually assaulting and sodomizing the minor in Colorado.

[2] Because the appellant was charged with possession of "what appears to be" child pornography, his maximum sentence for this offense would be that of a simple disorder which has a maximum authorized punishment of four months of confinement and forfeiture of two-thirds pay per month for four months. *United States v.* Beaty, 70 M.J. 39, 45 (C.A.A.F. 2011).

"A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion." *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). "In reviewing the providence of [the a]ppellant's guilty pleas, we consider his colloquy with the military judge, as well any inferences that may reasonably be drawn from it." *United States v. Carr*, 65 M.J. 39, 41 (C.A.A.F. 2007) (citing *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004)). A military judge abuses this discretion when accepting a plea if he does not ensure the accused provides an adequate factual basis to support the plea during the providency inquiry. *See United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). This is an area for which the military judge is entitled to much deference. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

Our reviewing standard for determining if a guilty plea is provident is whether the record presents a substantial basis in law or fact for questioning it. *Id*. (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). At trial, the military judge must ensure the accused understands the facts (what he did) that support his guilty plea, and the judge must be satisfied that the accused understands the law applicable to his acts (why he is guilty) and that he is actually guilty. *See United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008) (citing *Care*, 40 C.M.R. 250-51); *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002).

The appellant pled guilty to communicating indecent language to the 14-year-old Florida girl and the 15-year-old who lived in Colorado. The appellant contends his guilty plea to these two specifications is improvident because his guilty plea inquiry did not establish sufficient facts to constitute conduct that was service discrediting. Relying on *United States v. Wilcox*, 66 M.J. 442, 448 (C.A.A.F. 2008), the appellant argues that his private communications with the minors failed to show a "direct and palpable connection between speech and the military mission or military environment."

We find *Wilcox* distinguishable from this case. Unlike *Wilcox*, this appellant's indecent language is not protected as free speech, as he argues. *United States v. Moore*, 38 M.J. 490, 492 (C.M.A. 1994) (finding that specifications alleging indecent language do not violate the First Amendment simply because they were private conversations). *See also United States v. Gill*, 40 M.J. 835, 837 (A.F.C.M.R. 1994). Additionally, the appellant pled guilty to the indecent language specifications. A guilty plea inquiry is less likely to have developed facts, and a decision to plead guilty may include a "conscious choice by an accused to limit the nature of the information that would otherwise be included in an adversarial process." *Jordan*, 57 M.J. at 238-39.

Even so, the appellant's responses to the military judge provide sufficient facts to find the plea provident. The military judge defined both terminal elements for the appellant and then asked him why he believed his conduct met one or both of those terminal elements. For both specifications, the appellant told the military judge he believed civilians would think less of the military if they were aware of his lewd

communications with the minors (which included language soliciting them to engage in sexual contact with him), and that his indecent language would lower the esteem of the armed forces in the eyes of the public. He further admitted that the "average person in the military community" would find the language "grossly offensive." We find no substantial basis in law and fact for questioning the providence of the plea. *Inabinette*, 66 M.J. at 322.

Multiplicity and Unreasonable Multiplication

The appellant was convicted of two specifications relating to each of the Florida minors—attempted aggravated assault and "violating 18 U.S.C. § 2422(b) by using a cellular telephone to persuade, entice or induce [her] to engage in sexual activity." Prior to findings, the military judge denied a motion to find these specifications multiplicious with each other and also ruled they did not constitute an unreasonable multiplication of charges. The appellant continues this argument on appeal.

We review issues of multiplicity de novo. *United States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007). Multiplicity is an issue of law that enforces the Double Jeopardy Clause.[3] *Blockburger v. United States*, 284 U.S. 299 (1932); *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993); *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012). Accordingly, an accused may not be convicted and punished for two offenses where one is necessarily included in the other, absent congressional intent to permit separate punishments. *See Teters*, 37 M.J. at 376; *see also* Rule for Courts-Martial 907(b)(3), Discussion. Where legislative intent is not expressed in the statute or legislative history, "it can also be presumed or inferred based on the elements of the violated statutes and their relationship to each other." *Teters*, 37 M.J. at 376-77 (citations omitted). Thus, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one[] is whether each provision requires proof of a[n additional] fact which the other does not." *Blockburger*, 284 U.S. at 304 (citation omitted). *See also Teters*, 37 M.J. at 377 (the *Blockburger* rule "is to be applied to the elements of the statutes violated"). Accordingly, multiple convictions and punishments are permitted for a distinct act if the two charges each have at least one separate statutory element from the other.

The federal enticement statue criminalizes the use of "the mail or any facility or means of interstate or foreign commerce [to] knowingly persuade[], induce[], entice[], or coerce[] any individual who has not attained the age of 18 years, to engage in . . . any sexual activity for which any person can be charged with a criminal offense . . . ." 18 U.S.C. § 2422(b). The "criminal offense" referenced in the charge serves only to

[3] U.S. CONST. amend. V.

define the type of sexual activity the accused must be trying to persuade the minor to engage in.[4]

The enticement statute, therefore, criminalizes an accused's intentional actions towards achieving a certain mental state in the minor—namely, her agreement. It does not require proof the accused intended to commit the "criminal offense" referenced in the charge nor that the minor actually engage in the sexual act. *Winckelmann*, 70 M.J. at 407; *United States v. Brooks*, 60 M.J. 495, 498 (C.A.A.F. 2005). In contrast, attempted aggravated assault of a child requires proof the accused did certain acts with the specific intent to commit that crime. Examining the disparate elements of the Article 80, UCMJ, offenses and the Title 18 offenses, as well as the distinct and separate facts needed to establish the appellant's guilt of each, we conclude the offenses are not multiplicious. *See United States v. Larson*, 64 M.J. 559 (A.F. Ct. Crim. App. 2006) (attempted carnal knowledge and attempted indecent acts not multiplicious with the federal enticement statute), *aff'd*, 66 M.J. 212 (C.A.A.F. 2008).

We similarly find against the appellant in the area of unreasonable multiplication of charges. The military judge's decision to deny relief for unreasonable multiplication of charges is reviewed for an abuse of discretion. *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004); *see also United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001). Although there is some overlap between facts that underlie the attempt and enticement specifications, they address distinctly separate criminal acts, do not misrepresent or exaggerate his criminality, do not unreasonably increase his punitive exposure, and there is no evidence of prosecutorial overreach in the Government's charging decision. *Cf. Quiroz*, 55 M.J. at 338-39.

Ineffective Assistance of Counsel

During the sentencing phase of the trial, the appellant's trial defense counsel and the appellant indicated he had not been punished in any way that would constitute pretrial punishment under Article 13, UCMJ. Through a declaration submitted on appeal, the appellant now contends his trial defense counsel were aware he had been housed for 11 months in a civilian correctional facility with post-trial inmates and illegal aliens, was subjected to tours of school-aged children coming into the facility, and was unable to be transported to his scheduled mental health appointments.

This Court reviews claims of ineffective assistance of counsel de novo. *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (citing *United States v. Perez*, 64 M.J.

[4] Here, during the guilty plea inquiry for the enticement specifications that related to the two Florida minors, the military judge listed the pertinent "criminal offenses" as aggravated sexual assault of a child and aggravated sexual contact with a child, pursuant to Article 120(d) and (g), UCMJ, 10 U.S.C. § 920(d) and (g). He later added the production of child pornography as a "criminal offense," relying on 18 U.S.C. § 2247. The appellant agreed he had successfully enticed both minors to agree to engage in sexual contact with him and produce child pornography.

239, 243 (C.A.A.F. 2006)). When reviewing such claims, we follow the two-part test outlined by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), where the appellant must demonstrate (1) a deficiency in counsel's performance that is "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) the "deficient performance prejudiced the defense . . . [through] errors [] so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. at 687.

The deficiency prong requires the appellant to show his defense counsel's performance "fell below an objective standard of reasonableness," according to the prevailing standards of the profession. *Id*. at 688. The prejudice prong requires the appellant to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. In doing so, the appellant "'must surmount a very high hurdle.'" *Perez*, 64 M.J. at 243 (quoting *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000)). This is because counsel is presumed competent in the performance of their representational duties. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001). Thus, judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." *Alves*, 53 M.J. at 289 (citing *Strickland*, 466 U.S. at 689). "[T]he defense bears the burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance." *Tippit*, 65 M.J. at 69. *See also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991) (Counsel "has a duty to make reasonable investigations to determine what the true facts are.").

In declarations submitted pursuant to this Court's order, the appellant's two trial defense counsel state they expressly explained the requirements of Articles 12 and 13, UCMJ, and asked him whether he was subjected to any odd or burdensome requirements while in confinement. The appellant said he did not know the nationalities of his fellow confinees. Although he did tell his defense counsel he was upset about the school tours, being detained with post-trial prisoners, and missing several mental health appointments, both trial defense counsel did not believe his complaints rose to the level of an Article 13, UCMJ, violation. This was based on his description of the situation, their knowledge of the facility, and their observation that he was being held alone in a single cell. The counsel explained the case law and legal standards to the appellant and he agreed with their decision to not raise an Article 13, UCMJ, motion. Notably, the appellant's declaration does not contend otherwise. He simply states he felt his defense counsel "either ignored, or downplayed these events enough that presenting them . . . seemed trivial" and that the issues should have been presented to the military judge during the trial.

Under these circumstances, we find the appellant has not met his burden under the first prong of *Strickland*, *i.e.*, he has not established factual allegations that would provide the basis for finding deficient performance. We find the appellant's explicit affirmation

at trial that he was not subjected to treatment prohibited by Article 13, UCMJ, persuasive, and he has set forth no facts that would rationally explain why he would have made such a statement had it not been true. In the absence of known conditions that might constitute Article 13, UCMJ, violations, there was obviously no legitimate basis for trial defense counsel to seek Article 13, UCMJ, confinement credit. Having found the trial defense counsel's performance did not fall "below an objective standard of reasonableness," according to the prevailing standards of the profession, *Strickland*, 466 U.S. at 688, we also find that additional fact-finding is not required in this case. *See United States v. Ginn*, 47 M.J. 236, 244-45, 248 (C.A.A.F. 1997).

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[5] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[5] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).