UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant MARCUS L. WILLIAMS
United States Air Force

ACM 35122

20 February 2004

Sentence adjudged 11 January 2002 by GCM convened at Maxwell Air Force Base, Alabama. Military Judge: Sharon A. Shaffer (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 10 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Maria A. Fried, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, Major John D. Douglas, and Captain C. Taylor Smith.

Before

STONE, MOODY, and JOHNSON-WRIGHT
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, in accordance with his pleas, of one specification of desertion, one specification of larceny of a nine-millimeter Baretta handgun, four specifications of check forgery, and one specification of transporting a stolen firearm in interstate commerce, in violation of Articles 85, 121, 123, and 134, UCMJ, 10 U.S.C. §§ 885, 921, 923, 934. He was convicted, contrary to his pleas, of one specification of aggravated assault and one specification of housebreaking, in violation of Articles 128 and 130, UCMJ, 10 U.S.C. §§ 928, 930. The general court-martial, consisting of a military judge sitting alone, sentenced the appellant to reduction to E-1, confinement for 10 years, and a dishonorable discharge. The convening authority approved the sentence

as adjudged. The appellant has submitted five assignments of error: (1) That the conviction for housebreaking is neither legally nor factually sufficient; (2) That the appellant was denied his right to a speedy trial; (3) That his sentence is inappropriately severe; (4) That his right to financial privacy was violated; and (5) That he was prejudiced by prosecutorial misconduct during consideration of his speedy trial motion. These last two assignments of error were submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). In addition, this Court has considered sua sponte the factual sufficiency of the aggravated assault specification of Charge II. Finding error, we take corrective action.

I. Background

The appellant was a member of the 42d Supply Squadron at Maxwell Air Force Base (AFB), Alabama. On 4 May 2001, he entered the on-base quarters of Staff Sergeant (SSgt) P and pointed a pistol at her. He subsequently left Maxwell AFB and did not return to the custody of the Air Force until 2 June 2001, when he was apprehended at Charleston AFB, South Carolina. Additionally, over the course of several months, the appellant forged four checks with a face value of more than $75,000.

Upon his return to Maxwell AFB, the appellant was placed in pretrial confinement. The pretrial confinement hearing was conducted on 6 June 2001. In addition to authorizing the appellant's continued confinement, the hearing officer recommended a sanity board. On 26 June 2001, the appellant's counsel submitted a request for a sanity board. On 20 July 2001, the special court-martial convening authority directed that a sanity board be conducted at the 81st Medical Group at Keesler AFB, Mississippi. The board was convened on 15 August 2001, and on 19 September 2001, the board's findings were reduced to writing. The board found the appellant to be legally sane, that he could understand the nature and seriousness of the charges, that he had the capacity to know the truth surrounding the offenses, and that at the time of the offense, the appellant's mental or physical state was not affected by any head injury or other matter such as substance abuse. This report was faxed to the legal office at Maxwell AFB on 27 September 2001.

On 21 September 2001, the special court-martial convening authority appointed Major H to conduct a pretrial investigation pursuant to Article 32, UCMJ, 10 U.S.C. § 832. Major H set the hearing for 4 October 2001, and then delayed the hearing until 10 October 2001 at the request of the appellant. On 22 October 2001, the investigating officer submitted his report, recommending trial by general court-martial. On 26 October 2001, the special court-martial convening authority forwarded the charges to the general court-martial convening authority with a recommendation for a general court-martial. On 20 November 2001, the general court-martial convening authority referred the case to trial. On 30 November 2001, the chief of military justice at Maxwell AFB, Captain S, advised the eastern judicial circuit that the government would be prepared to go to trial

on 17 December 2001, but that attorneys for the appellant would not be ready until January 2002. On 18 December 2001, the chief circuit military judge set the trial for 10 January 2002. Trial commenced that day. As of 10 January 2002, the appellant had been in pretrial confinement for 222 days.

II. Speedy Trial

This Court reviews speedy trial issues de novo. *United States v. Cooper*, 58 M.J. 54 (C.A.A.F. 2003). We review a military judge's findings of fact according to a "clearly erroneous" standard. *United States v. Springer*, 58 M.J. 164, 167 (C.A.A.F. 2003).

In ruling on the appellant's motion, the military judge evaluated the evidence in light of three separate legal standards: Rule for Courts-Martial (R.C.M.) 707; Article 10, UCMJ, 10 U.S.C. § 810; and the Sixth Amendment to the United States Constitution.

A. R.C.M. 707

In considering R.C.M. 707, the military judge upheld the exclusion of four blocks of time. The first was a delay granted by the special court-martial convening authority at the request of the installation legal office. On 15 June 2001, Captain S requested that the special court-martial convening authority grant a 30-day delay from 15 June 2001 until 14 July 2001, and exclude that period from the speedy trial clock. The stated reason for the request was the need to gather evidence pertaining to the then recently discovered fraudulent check offenses and to conduct a sanity board. The special court-martial convening authority granted the delay.

Prior to referral, a convening authority is authorized to grant delays in the processing of a case. This decision is within his or her "sole discretion." R.C.M. 707(c)(1), Discussion. Reasons to grant such a delay include "time to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused . . . time requested by the defense . . . or additional time for other good cause." *Id.*

The military judge found that the convening authority did not abuse his discretion in granting the requested delay. We find no reason to disturb this conclusion. The evidence adduced on the motion establishes that, while the reason for the appellant's pretrial confinement was the housebreaking, assault, and desertion charges, the government became aware of the potentially fraudulent checks in late May 2001, just prior to the appellant's return to military control. Clearly, offenses of this sort require time to investigate, oftentimes requiring the collection of evidence in the custody of financial institutions, one of which in the instant case was located out of state. Therefore, we hold that the special court-martial convening authority properly exercised his discretion in granting the delay to allow for further investigation.

We note, however, that it is likely that the appellant was not notified of the request for the delay prior to its having been granted. Indeed, the military judge found that such notice "was not done in this case."

"Pretrial delays should not be granted ex parte . . . ." *Id*. The Discussion does not further elaborate on the nature of this requirement, and our superior court has not explicitly addressed its full significance. Its ruling in *United States v. Duncan*, 38 M.J. 476, 480 (C.M.A. 1993), is limited to facts not relevant here. The Rule itself describes the applicable procedure thusly: "[p]rior to referral, all requests for pretrial delay . . . will be submitted to the convening authority . . . ." R.C.M. 707(c)(1). The Rule embodies the procedure recommended in *United States v. Maresca*, 28 M.J. 328 (C.M.A. 1989), to "establish as a matter of record who requested what delay and for what reason." *Id.* at 332 (quoting *United States v. Schilf*, 1 M.J. 251, 253 (C.M.A. 1976)).

We note that the language in the Discussion is not explicitly mandatory, as it is in the text of other rules governing courts-martial. *See e.g.*, R.C.M. 305(i)(2)(A)(i) ("The prisoner . . . *shall* be allowed to appear . . . and make a statement); R.C.M. 1106(f) ("[T]he staff judge advocate . . . *shall* cause a copy of the recommendation to be served on counsel . . .[and] . . . the accused.") (emphasis added).

In addition, the discussions appended to the Rules for Courts-Martial are not intended to be binding. Drafter's Analysis, *Manual for Courts-Martial, United States (MCM)* A21-3 (2000 ed.). *See United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002); *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001); *United States v. New*, 55 M.J. 95, 113 (C.A.A.F. 2001); *United States v. Heryford*, 52 M.J. 265, 267 (C.A.A.F. 2000).

This notice requirement is not contained in the text of R.C.M. 701(c)(1), which imposes no procedural requirement beyond identifying the official authorized to grant delays. Therefore, while we do not condone the government's failure to notify the appellant of the proposed delay, we conclude that it did not defeat the policy underlying R.C.M. 701(c)(1), and that it did not materially prejudice a substantial right of the appellant. Therefore, we hold that this procedural flaw was harmless error.

The second block of excluded time is that which the special court-martial convening authority granted in his order directing the sanity board. Counsel for the appellant requested, in writing, such a board on 26 June 2001, and on 20 July 2001, the request was granted. The convening authority's order states that "[u]nder R.C.M. 707(c), the period of time necessary to conduct the Sanity Board . . . prepare the report, forwarded [sic] it to the parties, and permit the parties a reasonable period of time to interpret the results thereof, shall be excluded from accountability for Speedy Trial purposes." The military judge noted that, while the initial report of the board was received by counsel on 27 September 2001, the full report was not completed until 11

December 2001. The military judge excluded only that period of time from 20 July 2001 through 27 September 2001. The convening authority's action in granting the delay was within his authority, and under the circumstances not in itself an abuse of discretion. The record does not demonstrate why it took the sanity board until 11 December 2001 to provide the defense with the detailed version of its report. In any event, we find that the period of time excluded by the military judge was reasonable.

The third block of excluded time is that attributable to a defense request for a delay in the Article 32, UCMJ, investigation. The request was for a delay from 4 to 10 October 2001, a total of six days. As the investigating officer had been granted authority in the appointment letter to grant delays (*see* R.C.M. 707(c)(1), Discussion), we conclude that the military judge was correct in upholding this delay and excluding it from the speedy trial clock.

Finally, the military judge excluded the 24 days that elapsed from 17 December 2001 until 10 January 2002. This represents the period of time between the date the government stated that it would be ready for trial until the date actually set by the chief circuit military judge. The reason for the lapse of time was the unavailability of defense counsel. Because this was a post-referral delay, the military judge was the proper authority to grant it. Additionally, the reason for granting the request was to accommodate the schedule of the defense counsel. The military judge stated on the record that "it is the practice of the eastern circuit . . . that . . . where the government counsel set forth a memorandum indicating they are ready to proceed to trial on 17 December 2001, then any period after that . . . until the initial date of trial . . . is excluded for purposes of speedy trial." The military judge also stated that she would attach to the record an affidavit stating that policy. Although this was apparently never done, the evidence contained in the record of trial establishes that the delay from 17 December 2001 until the trial date was granted by a proper authority and had a rational basis. Therefore, the military judge was correct in excluding it from her speedy trial computation.

The total number of days from entry of the appellant into pretrial confinement to trial, minus the delays discussed above, was 92. Therefore, we conclude that there was no violation of the appellant's right to a speedy trial under R.C.M. 707.

B. Article 10, UCMJ

Next we must consider whether there has been a violation of the speedy trial right set forth in Article 10, UCMJ, which provides that "[w]hen any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him." In order to satisfy the requirements of this provision, the

government must act with "reasonable diligence" to bring the accused to trial. *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993).

Our superior court has held that the factors outlined by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972), apply to an Article 10, UCMJ, analysis. *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999). *See also Cooper*, 58 M.J. at 60. The *Barker* criteria include: (1) the length of any delay; (2) the reasons for such a delay; (3) the accused's assertion of his right to a speedy trial; and (4) prejudice to the defendant. *Barker*, 407 U.S. at 530-32. *See also United States v. Becker*, 53 M.J. 229, 233 (C.A.A.F. 2000).

The length of time the appellant spent in pretrial confinement and his assertion of his right to a speedy trial are clearly established in the record. Thus, we will not discuss them here in further detail. Instead, we will consider whether the delay was due to the government's failure to exercise reasonable diligence and whether there was prejudice to the appellant.

The military judge held that the government did actively pursue prosecution during the 222 days intervening between the appellant's placement in pretrial confinement and the beginning of trial. The military judge held that the government used that time to investigate the charges arising out of the forged checks, to conduct and interpret the results of a sanity board, to accomplish a thorough higher headquarters review of the case prior to referral, and to accommodate the schedule of the counsel for the defense. The judge concluded that the prosecution had exercised reasonable diligence.

We find no reason to disturb this conclusion. The government was not required to evidence "constant motion" in bringing the accused to trial--"[b]rief periods of inactivity in an otherwise active prosecution are not unreasonable or oppressive." *Kossman*, 38 M.J. at 262 (quoting *United States v. Tibbs*, 35 C.M.R. 322, 325 (C.M.A. 1965)). In the instant case, we agree with the military judge's findings of fact that there was neither negligence nor intentional delay by the government. We also find that the government exercised reasonable diligence.

In its brief in support of the motion to dismiss, the defense averred that the appellant was prejudiced in that he lost the services of his original defense counsel. Additionally, the defense asserts that, as a consequence of the government's alleged dilatory practices, vital evidence became unavailable--specifically, phone records for 4 May 2001 belonging to the assault victim were not subpoenaed until after they had been destroyed in the normal course of business. The appellant also alleged prejudice in that he was held beyond the expiration of his term of service.

To take the allegation pertaining to discovery first, it appears from the record that the defense requested production of these phone records by a written discovery request dated 12 October 2001. The government did not subpoena the records until 18 December 2001. However, the phone company's response to the subpoena stated that records of the sort requested were not maintained for more than 60 days. Therefore, these records were not available even on the date requested by the defense. The unavailability of these records is not properly attributable to delays by the government.

Concerning the right to counsel, the appellant was originally represented by an area defense counsel (ADC) as well as by a circuit defense counsel (CDC), Captain M. When the government requested the 17 December 2001 trial date, Captain M indicated that he was not available until February 2002. The appellant released Captain M and obtained the services of another CDC who, in concert with the ADC, conducted the appellant's defense at trial. The appellant's brief in support of the motion stated that "[t]he government's delay in effect affected SSgt Williams' Constitutional right to counsel. SSgt Williams was not dissatisfied with [Captain M], but released him in order to get to trial sooner."

We do not find prejudice under these circumstances. The appellant released Captain M voluntarily, and there is no basis in the record to conclude that the trial defense team was in any way ineffective. Indeed, they conducted a thorough and vigorous defense of the appellant. The record provides no basis to conclude that, had Captain M remained on the case, there was a reasonable probability that the outcome would have been more favorable to the appellant. *See Strickland v. Washington*, 466 U.S. 668 (1984); R.C.M. 502(d)(6) and its Discussion. The release of Captain M complied with R.C.M. 506(b)(3). The appellant accepted the services of the new CDC. *See United States v. Iverson*, 5 M.J. 440 (C.M.A. 1978). In any event, the appellant was statutorily entitled to only one military counsel in the first place. 10 U.S.C. § 838(b)(6). Therefore, we do not find any reason to conclude that the appellant has been prejudiced by the release of Captain M.

Finally, we see no prejudice to the appellant for being held beyond the expiration of his term of service. Preferral of charges occurred prior to that expiration date, and the convening authority did not withdraw them. *See United States v. Williams*, 55 M.J. 302, 304 (C.A.A.F. 2001). The appellant does not allege that the court-martial lacked jurisdiction over him, nor does the record provide a reason for so concluding. We see no basis to conclude that the appellant was prejudiced by these circumstances.

In addition, we have reviewed the record of trial and find no other basis to conclude that the appellant was prejudiced by the delay. Taking into account all of the foregoing, we hold that the appellant was not denied his right to a speedy trial under Article 10, UCMJ.

C. Sixth Amendment

Our superior court has held that Article 10, UCMJ, secures for an accused a greater measure of speedy trial protection than that afforded by the Sixth Amendment. *Birge*, 52 M.J. at 212; *Cooper*, 58 M.J. at 60. We will not repeat our discussion of Article 10, UCMJ, but will focus briefly on the notion of prejudice as contemplated by *Barker*.

In that case, the Supreme Court identified the most serious type of prejudice implicated by a violation of the Sixth Amendment as the impairment of the accused's right to a fair trial: "[T]he inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past." *Barker*, 407 U.S. at 532.

In the case sub judice there is no reason to conclude that the appellant was denied his ability to prepare for trial or present a defense. The unavailability of the victim's telephone records was not due to pretrial delay and there is no reason to believe that witness's memories were impaired or the quality of evidence degraded due to the passage of time. We hold that the appellant was not denied his right to a speedy trial as secured by the Sixth Amendment.

III. Legal and Factual Sufficiency of the Evidence--Housebreaking

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 elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Our superior court has determined that the test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, this Court is 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)).

The elements of housebreaking are:

> (1) That the accused unlawfully entered a certain building or structure of a certain other person; and
>
> (2) That the unlawful entry was made with the intent to commit a criminal offense therein.

MCM, Part IV, ¶ 56(b).

"[W]here an entry is otherwise unlawful, entering with consent gained by stratagem, trick, or false pretenses is nonetheless unlawful." *United States v. Vance*, 10 C.M.R. 747, 751, (A.F.C.M.R. 1953). "If, after the entry the accused committed a criminal offense inside the building or structure, it may be inferred that the accused intended to commit that offense at the time of the entry." *MCM*, Part IV, ¶ 56(c)(2). An accused's mistake of fact as to consent to the entry must be "both subjectively held and reasonable in light of all the circumstances." *United States v. Peterson*, 47 M.J. 231, 235 (C.A.A.F. 1997).

Here, SSgt P, the victim, testified that the appellant, whom she did not know, rang her doorbell. Upon the victim's answering the doorbell, the appellant asked her if he could use her telephone. The victim testified:

> I told him either wait a minute or just a minute. I closed my door. The bottom lock was already locked so I just closed the door . . . I went and got the cordless phone and when I got back to the door, to the front door, I opened it all the way completely and I opened the screen door and I handed him the phone outside and I opened my door all the way and I went to step outside, because my intention was to step outside with him while he used the phone and let my screen door lean against my back. As I made the way clear and I was walking outside, he just walked right past me and went inside the house.

The victim testified that, while in the house, the appellant attempted to make a telephone call and then pulled a nine-millimeter pistol from inside his shirt and pointed it at her. She stated that she began screaming and attempted to open the latch to the door. She stated that the appellant placed "his left hand up way high on the door" and stated for her to "come on back in the house . . . ." Eventually she succeeded in escaping.

The victim's testimony is clear, detailed, and worthy of belief. Given the facts as the victim described them, there is no reason to doubt that when the appellant entered her home he did so with the intent to commit an assault therein. Under the circumstances, his statement that he needed to use the telephone appears to have been a ruse designed to effect entry. In light of this, we conclude that the evidence does not raise a serious question of mistake of fact as to the victim's consent to the entry.

We find that there is sufficient evidence to convince a rational trier of fact beyond a reasonable doubt that the accused is guilty of the offense of housebreaking in violation of Article 130, UCMJ, and that the charge and specification are, therefore, legally sufficient. Furthermore, weighing all the evidence admitted at trial and mindful of the fact that we have not heard the witnesses, this Court is convinced beyond a reasonable doubt that the accused is guilty of the offense.

IV. Factual Sufficiency of the Evidence--Aggravated Assault

We have reviewed the facts and circumstances surrounding the aggravated assault charge and specification, and find that it is factually insufficient. The appellant was charged with committing an aggravated assault upon SSgt P "by pointing at her a dangerous weapon likely to produce death or grievous bodily harm, to wit: a loaded handgun." The appellant pled guilty to simple assault but the military judge found him guilty of the offense as charged.

Aggravated assault is an "[a]ssault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm." *MCM*, Part IV ¶ 54(b)(4)(a). "[A] weapon is dangerous when used in a manner likely to produce death or grievous bodily harm." *MCM*, Part IV ¶ 54(c)(4)(a)(i). "[A]n unloaded pistol, when presented as a firearm and not as a bludgeon, is not a dangerous weapon . . . ." *MCM*, Part IV ¶ 54(c)(4)(a)(ii); *United States v. Davis*, 47 M.J. 484, 486 (C.A.A.F. 1998). "A functional . . . magazine fed weapon is loaded if there has been inserted into it a . . . magazine containing a round of live ammunition, regardless of whether there is one in the chamber." Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 3-54-8, note 8 (1 April 2001). *See also United States v. Wingate*, 50 M.J. 118, 119 (Sullivan, J., concurring).

In the instant case, although SSgt P testified on direct examination by trial counsel that the appellant's gun contained a magazine, she was unable to say that it was loaded.

> Q: [D]o you know whether the weapon that was used . . . was loaded or not?
>
> A: I know it was loaded with a magazine.
>
> Q: So you do not know whether the magazine contained ammunition?
>
> A: No Ma'am.

There is no other evidence from which it may be inferred that, at the time of the assault, the magazine contained a round. The fact that the weapon was found loaded upon the appellant's apprehension nearly a month after the assault is too attenuated to be conclusive. Moreover, the noncommissioned officer in charge of the mobility section from which the weapon was stolen testified only as to the theft of the weapon itself a week prior, not as to ammunition. There is no basis in the record to infer that the mobility weapons were stored containing live rounds. Although the presence of a magazine in the gun at the time of the assault suggests the likelihood that it was loaded, probability is not proof beyond a reasonable doubt. Therefore, we believe that the

specification of Charge II is factually sufficient only as to the lesser included offense of assault committed with an unloaded firearm.

Because we find the evidence factually insufficient to support the appellant's conviction under the specification of Charge II, as charged, we must reassess the sentence. In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court summarized the required analysis as follows:

> In *United States v. Sales*, 22 M.J. 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id*. at 307. A sentence of that magnitude or less "will be free of the prejudicial effects of error." *Id.* at 308.

We are convinced that we can reassess the sentence. The maximum punishment for the offenses of which the appellant was found guilty included a sentence to confinement for 56 years. To find the appellant guilty of the lesser included offense of assault by means of an unloaded handgun reduces the maximum sentence to confinement by five years. We note that, by modifying the specification of Charge II to a finding of guilt as to the lesser included offense, we have not discounted any of the testimony provided by the victim. Taking into account the facts and circumstances she described, including her terror during the commission of the assault, and taking into account her testimony during the presentencing portion of the trial as to the lingering emotional effects of the crime, and taking into account all the evidence before the military judge at trial, we hold that reducing the appellant's confinement to 9 years will cure any error. We are confident that, absent the error, the sentence would not have been less than reduction to E-1, confinement for 9 years, and a dishonorable discharge.

V. Other Issues

We have examined the remaining three errors raised by the appellant and hold that they are without merit. The sentence as reassessed is appropriate to the offenses. Additionally, although the appellant claims that the checks in question were obtained in violation of his right to financial privacy, his plea of guilty waived any error concerning their admissibility. *See United States v. Rehorn*, 26 C.M.R. 267 (C.M.A. 1958); *United States v. Paige*, 23 M.J. 512, 513 (A.F.C.M.R. 1986). In any event, our superior court has held that the only remedy available to an accused under these circumstances would be civil in nature. *United States v. Wooten*, 34 M.J. 141 (C.M.A. 1992). We have examined the testimony of the chief of military justice and evaluated it in light of the totality of the evidence adduced at trial. We find no basis to conclude that this officer violated any

"legal norm or standard" such as would justify a conclusion of prosecutorial misconduct. *See United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996).

VI. Conclusion

The specification of Charge II is modified by excepting the words "a dangerous weapon likely to produce death or grievous bodily harm, to wit: a loaded handgun," and substituting therefor the words "an unloaded handgun." The findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *Reed*, 54 M.J. at 41. Accordingly, the findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

JOHNSON-WRIGHT, Judge (concurring in part and dissenting in part):

I concur with the majority's resolution of the five assignments of error (the legal and factual sufficiency of the conviction for housebreaking; the speedy trial issue; the appropriateness of the appellant's sentence; the waiver of the alleged violation of the appellant's right to financial privacy; and the lack of prosecutorial misconduct). Furthermore, I agree with the conclusion that the aggravated assault charge is not factually sufficient. However, I do not agree with the sentence reassessment as a result of this error.

In *Sales*, our superior court held if this appellate court could determine that, absent the error, the sentence would have been at least of a certain magnitude, then we may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Sales*, 22 M.J. at 307. Based on the facts and circumstances in this case, the variety of serious offenses, the persuasive aggravation evidence, and scant mitigation and extenuation evidence, it is difficult to discern with certainty that this appellant's sentence would have been at least a reduction to E-1, confinement for 9 years, and a dishonorable discharge. Arguably, the most serious offenses are the aggravated assault and desertion. How much weight did the trial judge attribute to each of these offenses? How much weight did the trial judge attribute to the aggravating factor that the gun was loaded? Was it worth 3 months, 6 months, or 10 months? Was it worth any amount of confinement? Was it worth downgrading the character of the discharge?

The evidence concerning whether the gun was loaded or not was very weak; in fact, trial counsel conceded how weak the evidence was in argument when she argued, "However, Your Honor, at a minimum we're confident we have proven beyond a reasonable doubt as well that he's guilty of housebreaking and beyond any doubt that he

assaulted Sergeant [P] at least with a real weapon, *perhaps unloaded*." (emphasis added). If we do not know what evidence in particular convinced the trial judge to sentence the appellant at trial, how can we now know, with reliable confidence, that the appellant's sentence would have been at least a dishonorable discharge, confinement for 9 years, and reduction to E-1? I respectfully dissent.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator