UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JEREMY R. LYSON
United States Air Force

ACM 38067

16 September 2013

Sentence adjudged 14 October 2011 by GCM convened at Holloman Air Force Base, NM. Military Judge: J. Wesley Moore.

Approved Sentence: Bad-conduct discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall; Dwight H. Sullivan; Major Matthew T. King; Major Daniel E. Schoeni; Captain Timothy M. Cox; and Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Gerald R. Bruce, Esquire; and Captain Brian C. Mason.

Before

ORR, ROAN, and MARKSTEINER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MARKSTEINER, Judge:

Contrary to his pleas, the appellant was convicted, by a general court-martial composed of officer and enlisted members, of two specifications of aggravated sexual assault of a child who had attained the age of 12 years, but not yet attained the age of 16 years, in violation of Article 120, UCMJ, 10 U.S.C. § 920. In accordance with his pleas, he was convicted of one specification of underage alcohol consumption and three

specifications of providing alcohol to a minor in violation of Article 134, UCMJ, 10 U.S.C. § 934.

On appeal before this Court, the appellant assigns the following errors: (1) Whether there was a discovery violation when trial counsel failed to turn over potential *Brady*[1] material; (2) Whether it was an abuse of discretion to deny a motion to continue as defense counsel did not have equal pretrial access to the complaining witnesses, violating Article 46, UCMJ, 10 U.S.C. § 846; (3) Whether three court members were interlopers and the proceedings were, therefore, a nullity; (4) Whether the members' findings on Specifications 1 and 2 of Charge I were factually insufficient; (5) Whether it was an abuse of discretion not to admit extrinsic evidence of the complaining witnesses' lies; (6) Whether it was error that the military judge did not sua sponte instruct on the lesser-included offense of abusive sexual contact when the facts supported that instruction; (7) Whether it was an abuse of discretion to deny the challenge for implied bias against Senior Master Sergeant (SMSgt) BB; (8) Whether it was an abuse of discretion to deny the challenge for implied bias against Master Sergeant (MSgt) DR; and (9) Whether it was error that the military judge did not sua sponte excuse First Lieutenant (1Lt) KS after he was caught falling asleep during closing arguments.[2]

Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Procedural Background

On 22 April 2013, the appellant filed a motion to attach various documents associated with the case of *United States v. Cooksey*, tried at Holloman Air Force Base (AFB), New Mexico on 12 March 2012. This Court denied that motion based on the failure of the motion to articulate the relevance of the documents sought to be attached to the record. On 6 May 2013, the appellant re-filed his motion to attach documents, this time articulating the relevance of the documents sought to be attached as follows:

> The attachments from *United States v. Cooksey* are relevant because the two cases are factually intertwined. Appellant's counsel's post-trial investigation suggests that trial counsel failed to turn over potential *Brady* material from pretrial interviews with AT, TG, and PH. . . . The trial counsel's interview of, *inter alia*, PH is the subject of matter of Issue I . . . of Appellant's assignment of errors. Thus, in deciding the merits of this issue, it is relevant for this Court to consider the fact that [Airman First Class (A1C)] Cooksey was *twice* acquitted in part because his defense counsel had unfettered access to AT, TG, and PH. That is especially true because both Appellant and A1C Cooksey offered the same defense for

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).
[2] Errors 7, 8, and 9 are raised pursuant to *United States v. Grostefon*, 12 M.J. 341 (C.M.A. 1982).

> having intercourse with underage girls: that the girls had misrepresented their ages and that they were reasonably and honestly mistaken about the girls' ages.

(Emphasis in original). This Court denied that 6 May 2013 Motion to Attach Documents.

On 7 June 2013, the appellant filed a "Suggestion For En Banc Reconsideration" of this Court's denial of his 6 May 2013 Motion to Attach Documents, arguing – to paraphrase – that: (1) it has been this Court's practice to "err on the side of inclusion," noting that all of the appellant's counsel's motions to attach have been granted in 21 other cases; (2) the appellant demonstrated sufficient relevance of the *Cooksey* documents to justify attachment to the record, as illustrated by the fact that A1C Andrew Cooksey was involved in the same course of conduct as the appellant and the outcome of his trials were different because he had greater access to witnesses; and (3) the *Cooksey* documents are being offered for the limited purpose of demonstrating prejudice.

We hereby reconsider our previous denial, admit the *Cooksey* documents, vacate that denial, and, having revisited the issue, now attach the *Cooksey* documents to the record for our consideration in addressing the merits of this appeal.[3]

Factual Background

The appellant and his roommate, A1C Cooksey, were accused, in general terms, of having unlawful sexual contact with, and providing alcohol to, three minor females (PH, 13 years old; TG, 14 years old; and AT, 14 years old) in the home the appellant and A1C Cooksey rented in Alamogordo, NM, over the Memorial Day weekend of 2010.[4] Upon receiving a text message from one of the females, the appellant picked up the girls in his car outside a movie theater and drove them back to his house. Over the course of that evening and the next day he provided them alcohol and had sex with two of the females – first with AT and later with TG. At trial, the appellant was charged with unlawfully having sex with AT and TG, and with providing alcohol to all three of the females. A1C Cooksey was charged with unlawfully having sex and sodomy with PH, and was acquitted when tried by state authorities. Subsequently, when tried by court-martial, A1C Cooksey was acquitted of the underage sex charge, but convicted of the sodomy charge. The members sentenced him to no punishment. The convening authority's staff judge advocate subsequently recommended the convening authority dismiss the sodomy charge, and the convening authority did so.

[3] Although we are reconsidering our previous denial of the appellant's motion outside of the 30-day window addressed in Rule 19(a) of the Court's rules of procedure, we do so noting that no petition for a grant of review of that denial has been filed with the United States Court of Appeals for the Armed Forces. Accordingly, pursuant to our statutory authority, and Rule 1.3 of our rules, we hereby waive application of Rule 19(a) in this instance.

[4] The offenses were charged as having occurred between on or about 28 May and 1 June 2010.

ASSIGNED ERRORS

(1) Whether there was a discovery violation when trial counsel failed to turn over potential Brady material

Trial defense counsel submitted to the Government a request that trial counsel produce copies of their notes from interviews conducted with the three minor victims in the case. Government counsel asserted the work product privilege and declined to provide copies of their interview notes. The military judge denied a defense motion to compel the production of Government counsel's interview notes, observing that the notes of Dr. MC, a Government consultant who was present during Government counsel's interviews of the witnesses in the appellant's case, had already been provided to the defense, and that trial counsel's notes would therefore be cumulative.

The appellant argues that in the course of participating in pretrial interviews with Government counsel in preparation for both A1C Cooksey's and the appellant's cases, AT's, TG's, and PH's versions of various facts and details were, at times and to varying degrees, inconsistent. The appellant also directs our attention to an exchange that took place between trial and defense counsel and the military judge in response to a defense objection based on Mil. R. Evid. 404(b) about what appeared to be a change in one of the witness's accounts of the weekend's events during the Government's case-in-chief.

Specifically, TG testified at trial that AT had sex with the appellant on two occasions instead of only a single occasion. After the defense objected on the basis of uncharged misconduct and lack of notice to the defense, the trial counsel told the military judge that was the first time she had learned that this particular witness alleged two separate sexual encounters with the appellant instead of only one. When the military judge asked defense counsel if they accepted trial counsel's representation in that regard, defense counsel responded, "I have no way of rebutting it." The appellant urges us to conclude that the prosecutor's question about a second sexual encounter "tends to indicate that the senior trial counsel had knowledge that the witnesses were telling inconsistent versions of the events."

The appellant argues that trial counsel's failure to turn over her interview notes, which the appellant appears to presume would detail these inconsistencies, constituted a violation of the duty to disclose exculpatory information under Rule for Courts-Martial (R.C.M.) 701 and *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Additionally, the appellant argues that, following the exchange above, the military judge should have sua sponte ordered the production of the prosecutors' notes, and that failure to do so amounted to plain error.

R.C.M. 701(a)(6) states, "The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to: (A) Negate the guilt of the accused of an offense charged; (B) Reduce the degree of guilt of the accused of an offense charged; or (C) Reduce the punishment." "[T]he Government violates an accused's 'right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment.'" *United States v. Behenna*, 71 M.J. 228, 237-38 (C.A.A.F. 2012) (quoting *Smith v. Cain*, 132 S.Ct. 627, 630 (2012)). "Evidence is material when 'there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.' To be material, the evidence must have made the 'likelihood of a different result . . . great enough to undermine[] confidence in the outcome of the trial.'" *Id*. (alteration in original) (citation omitted).

"Interview notes prepared by a lawyer or his representative are not automatically excluded from discovery by the defense on the basis that the notes are work product." *United States v. Vanderwier*, 25 M.J. 263, 268 (C.M.A. 1987). However, "[e]ven though liberal, discovery in the military does not 'justify unwarranted inquiries into the files and the mental impressions of an attorney.'" *Id*. at 269 (quoting *Hickman v. Taylor*, 329 U.S. 495, 510 (1947)).

The principle witnesses in the case at bar were three teenage girls, who, while in the company of the appellant, became intoxicated and engaged in sexual activities with him and his roommate. Trial defense counsel conceded that the appellant provided the minors alcohol and had sex with AT and TG, but argued that he honestly and reasonably believed they were 16 years of age or older when he did so. Trial defense counsel pointed to numerous instances where the girls had acted older than their true ages by, for example, smoking cigars, pouring their own alcoholic drinks, and using adult language. Additionally, it was undisputed that they had held themselves out as being older than they actually were on their respective MySpace pages. The appellant's counsel now argues that "as the sole issue was the honesty and reasonableness of Appellant's mistake [as to the girls' ages], attacking the girls' consistency surely would have undermined their credibility. And the members might have voted differently if they found the girls only slightly less credible."

The military judge could have ordered the Government to produce copies of the notes at issue for an in camera inspection before ruling. Doing so would have been "a sound practice that protects the rights of all concerned and aids in appellate review." *Vanderwier*, 25 M.J. at 269 (military judge's refusal to order trial counsel to produce interview notes was not abuse of discretion where notes had never been signed or adopted by the interviewee and substance of notes was incorporated in other materials made available to accused). In the case now before us, as in *Vanderwier*, the notes at issue were never signed or adopted by the witnesses, and appellant's trial defense counsel was provided notes taken by Dr. MC during the witness interviews. At the end of the day, the

members appear simply to have rejected the notion that the appellant could have been honestly and reasonably mistaken as to the girls' ages.

The record contained more than ample evidence supporting their decision to do so, including, but not limited to, the following facts introduced: the appellant picked the girls up in his car in front of a movie theater, where three of them sat on top of one another in the passenger seat, and drove them to his home; he lived around the corner – a three or four minute walk – from TG's grandfather's house and had dated TG's older sister, ST; ST testified she told the appellant that TG was only 13 years old prior to the date on which the offenses occurred; and the appellant had played cards with ST at TG's grandfather's house and saw TG there.

Additionally, the members viewed a video recording of the appellant being questioned by Alamagordo, NM authorities about his involvement with the girls. During that interview the appellant initially denied having any idea how the girls got to his house. He repeatedly denied providing them any alcohol, and initially admitted he knew TG was only 15 years old, but denied having sex with her. The appellant did not alter his story until after being confronted with the information that the girls had all provided statements contrary to his version of events. Additionally, at one point during the interview, the detective who interviewed the appellant directly commented about the girls' appearance and discussed his own opinion about the believability of the appellant's assertion that he was unaware they were minors:

> Detective: Now, I interviewed all three of the girls, okay. Not one of them – you know, maybe with respect to TG, okay, TG doesn't look to me like she's over 15 or 16 years old. She looks to me like – she looks like the oldest one to me. . . AT doesn't look like she's more than 12, and PH, she looks exactly what I thought, 13 years old. . . . What I'm telling you is this – I'm not trying to make you second guess yourself here, what I'm telling you is this: Without even knowing what their age factually is, just from looking at their faces, they don't look older than 13….TG looks like she may be 15 or 16, okay, but nothing older. Do you understand what I'm saying?
>
> Appellant: I understand where you're coming from.
>
> . . . .
>
> Appellant: I didn't realize their actual ages at all.
>
> Detective: Yeah. I know that's what you're telling me, okay, but I still look at the other side of the issue here, the common sense issue. I saw right

away that they did not look – I mean with respect to TG, PH and AT, they just don't look like they're over 12 or 13 years old, you know?

If trial counsel's notes had contained reference to inconsistencies in the girls' statements, such inconsistencies could possibly have been favorable to the defense to the extent they may have informed the members' impression of the girls' credibility. The better practice would have been for the military judge to inspect them in camera, however, we find no abuse of discretion in his failure to do so. *See Vanderwier*, 25 M.J. 263. Additionally, based on our review of the entire record, any inconsistencies that may have been reflected in the trial counsels' notes would not have been material because they would not, in our view, have had a reasonable probability of leading to a different outcome in the case. *See Behenna*, 71 M.J. 228. We therefore find this issue to be without merit.

(2) Whether it was an abuse of discretion to deny the motion to continue, and/or abate, and/or dismiss the proceeding[5] *as defense counsel did not have equal pretrial access to the complaining witnesses, violating Article 46, UCMJ*

A1C Cooksey's case was tried prior to the appellant's. A1C Cooksey's defense counsels' pretrial interviews of the three minor victim-witnesses left those victims and their respective guardians disinclined to participate in any further interviews with defense counsel – including those representing the appellant. TG eventually participated in a telephone interview with the trial defense team, but despite vigorous encouragement by the Government, neither AT nor PH submitted to a pretrial interview with the defense counsel.

Citing the Fifth and Sixth Amendments,[6] Article 46, UCMJ, and R.C.M. 703(f)(2) and 907, trial defense counsel moved the court to dismiss Specification 2 of Charge I (sex with AT) and Specifications 3 and 4 of Charge II (providing alcohol to AT and PH) based on the defense's unequal access to the two primary witnesses in the case. In the alternative, the defense argued the military judge should continue the case or abate the proceedings "until such time the girls are willing to submit to a pretrial interview." The military judge denied the motion in a written ruling.

We review the military judge's refusal to abate, dismiss, or continue the proceedings in the case at bar for an abuse of discretion. *United States v. Weisbeck*, 50 M.J. 461 (C.A.A.F. 1999); *United States v. Alston*, 33 M.J. 370 (C.M.A. 1991); *United States v. Dooley*, 61 M.J. 258 (C.A.A.F. 2005).

[5] We note that although the caption of Assigned Error (2) in the appellant's 22 April 2013 filing is limited to the trial judge's denial of a continuance, the narrative under that subject heading addresses, in various places, the trial judge's denial in reference to a continuance, abatement, and dismissal. We therefore address all three theories here.
[6] U.S. CONST. amends. V, VI.

With regard to abatement or dismissal, the military judge noted, inter alia: that trial counsel had vigorously encouraged the girls to submit to defense interviews; that trial counsel had proposed a number of alternatives to do so; defense counsel had been provided tape recorded statements and transcribed trial testimony of the girls in a related case containing "substantial fodder for potential cross-examination"; and that despite having had months to analyze what they had been provided the defense never requested to take a deposition or in any other way enlist the aid of the court in facilitating an opportunity to speak with the witnesses. Recognizing that dismissal is a drastic remedy, courts must therefore evaluate whether alternative remedies are available. *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) (citing *United States v. Cooper*, 35 M.J. 417, 422 (C.M.A. 1992)). In light of the trial judge's handling of these competing interests in the case at bar, we find no abuse of discretion in his resolution of the issue in a manner that allowed the case to proceed.

With regard to continuance, we assess whether there is an abuse of discretion "where 'reasons or rulings of the' military judge are 'clearly untenable and . . . deprive a party of a substantial right such as to amount to a denial of justice.'" *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (quoting *Guggenmos v. Guggenmos*, 359 N.W.2d 87, 90 (1984)) (citing *Pettegrew v. Pettegrew*, 260 N.W. 287 (1935)). We apply the factors identified in *United States v. Miller*, 47 M.J. 352 (C.A.A.F. 1997), when assessing whether there was an abuse of discretion. The *Miller* factors include: "'surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice.'" *Id*. at 358 (quoting F. Gilligan and F. Lederer, *Court-Martial Procedure* § 18-32.00 at 704 (1991) (footnotes omitted). Applying the *Miller* factors to the facts at bar, the military judge's denial of the motion to continue was not an abuse of discretion.

Surprise and prior notice. There was no surprise. The defense was aware of the substance of the girls' testimony, as well as their refusal to participate (unavailability) in pretrial defense interviews well in advance of trial. These factors mitigate in favor of the appellee.

Nature of evidence and substitute testimony. The defense generalized a need to more fully investigate the girls' stories by conducting interviews in support of their theory that the appellant was reasonably mistaken as to the girls' ages. Though not a substitute for an interview, defense had been previously provided transcriptions of the girls' prior testimony about the general character of activities surrounding that weekend – including admissions that they had initially misrepresented their true ages to the appellant and A1C Cooksey – as well as audio-taped recordings of their statements to civilian authorities regarding their specific actions with the appellant. These factors mitigate in favor of the appellee.

Length of continuance, availability of witnesses, use of reasonable diligence, and timeliness of request. Trial defense counsel did not particularize the duration of a proposed continuance. Rather, they argued, open-endedly, that the required duration of the continuance should last "until such time the girls are willing to submit to a pretrial interview." There was no representation that the witnesses would make themselves available for an interview at any time in the future. Additionally, though trial defense counsel had been aware of the difficulty regarding access to the victims for some time, they neither requested a deposition nor further enlisted the aid of the court in facilitating an opportunity to speak with the witnesses until the eve of trial. These factors mitigate in favor of the appellee.

Prejudice to opponent and prior continuances. The defense was provided copies of statements both witnesses had made to civilian authorities, and testified in previous proceedings about issues substantially similar to those involved in the case at bar, including the fact they portrayed themselves as older than their actual ages. The defense was also given an opportunity to call the witnesses in an Article 39(a), UCMJ, 10 U.S.C. §839(a), session but declined to do so. Finally, the Government never opposed the interviews sought by defense; on the contrary, it did everything in its power to encourage the witnesses to consent to such interviews. This factor mitigates in favor of the appellee.

Good faith of the moving party. There has been no challenge as to the good faith basis of trial defense counsel's request, and the record would contradict any suggestion that trial defense counsel acted in other than good faith in requesting the continuance. This factor mitigates in favor of the appellant.

Possible impact on verdict. While it is possible that pretrial interviews with these witnesses would have improved the defense's position or strengthened the defense's posture at trial, based on the availability of other substantial information for analysis, case preparation, and cross examination, we believe such improvement – if any – would have been minimal. This factor mitigates – albeit only slightly – in favor of the appellant.

We are not convinced that continuing the trial would have provided meaningful additional access to information not already available to the defense in the case. Having applied the *Miller* factors to the case at bar, we hold the military judge did not abuse his discretion by denying the defense request for a continuance.

(3) Whether three court members were interlopers and the proceedings were, therefore, a nullity

Charges were referred for trial by general court-martial on 19 July 2011. On 29 September 2011, the appellant, through his detailed defense counsel, requested trial by

a panel composed of officer and enlisted members. On 7 October 2011, the convening authority selected enlisted members to serve on the panel. The trial began on 10 October 2011. Following two successive rounds of voir dire and challenges that brought the number of enlisted members below the quorum required under R.C.M. 503(a)(2), the convening authority detailed MSgt DR, Technical Sergeant (TSgt) AM, and TSgt AH to be court members in the case at bar. He did so in response to an accompanying 12 October 2011 memo from the 49 WG/CC that included background information and explained the reasons additional enlisted members needed to be added to the panel. Specifically, he identified the enlisted members to be assigned to the court-martial by placing his initials next to their names on a memo under a heading reading, in pertinent part: "1st Ind, Pretrial Advice – U.S. v. A1C Jeremy R. Lyson, 849th Aircraft Maintenance Squadron, Holloman AFB, NM. Pursuant to Article 25, UCMJ, [10 U.S.C. § 825,] the following persons are detailed to serve as court members in the general court-martial of United States v. A1C Jeremy R. Lyson." He also signed the memo, which was dated 12 October 2011.

Special orders reflecting the required additions to the panel were prepared in accordance with the convening authority's selections. The final convening order, Special Order No. A-4, was erroneously dated 12 July 2011, but the text of the order clearly referenced earlier, correctly dated orders it amended: "All cases referred to the general court-martial convened by Special Order A-56, this headquarters, dated 19 July 2011, as amended by Special Order A-2, this headquarters, dated 7 October 2011, and Special Order A-3, this headquarters, dated 11 October 2011, *in which the court has not yet been assembled*, will be brought to trial before the court hereby convened." (emphasis added).

Appellant now argues that the inclusion of the phrase uncustomary in amended orders, "in which the court has not yet been assembled," renders the trial a nullity because on 11 October 2011, after calling the court to order but before voir dire and before entertaining and ruling on any challenges, the trial judge announced "the court is assembled." Because MSgt DR, TSgt AM, and TSgt AH were added after that announcement, the appellant argues, they were interlopers.

We review jurisdictional questions de novo. *United States v. Ballan*, 71 M.J. 28, 32 (C.A.A.F. 2012) (citing *United States v. Alexander*, 61 M.J. 266, 269 (C.A.A.F. 2005)). Military law "distinguishes between jurisdictional and administrative errors in the convening of a court-martial. . . . Jurisdiction depends upon a properly convened court, composed of qualified members chosen by a proper convening authority, and with charges properly referred. . . . [However,] [a]dministrative errors in the drafting of a convening order are not necessarily fatal to jurisdiction, and may be tested for prejudice under Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2000)." *United States v. Adams*, 66 M.J. 255, 258-59 (C.A.A.F. 2008) (citations omitted).

In *Adams*, after challenges and excusals brought the number of members below the required quorum, the convening authority detailed additional members to the panel. The special order subsequently issued to add members to the panel included the following language: "[a] general court-martial *is hereby convened*. It may proceed at Ellsworth AFB, SD to try such persons as may be properly brought before it. The court will be constituted as follows . . . ." *Id*. at 258. (citation omitted) (emphasis added). The language of the amending order appeared to call into question whether members were to be added to the already empaneled members, or whether an entirely new court-martial was to be convened. Reviewing the record in its entirety and the context in which the amending order was issued, this Court concluded there was "no doubt everyone, including the defense, knew the five members named in [the amending order] were additional members selected to bring the court back up to quorum . . . ." Using our authority under Article 59(a), UCMJ, we concluded that the error was administrative rather than jurisdictional, found no prejudice, and affirmed. *United States v. Adams*, 2007 WL 2050718 (A.F. Ct. Crim. App. 2007), *aff'd by*, *Adams*, 66 M.J. 255.

As in *Adams*, the errors in the case now before us are administrative and not jurisdictional in nature. The parties concede that the 12 July 2011 date appearing on Special Order A-4 was an obvious administrative error, which should have read 12 October 2011. Additionally, we find use of the uncustomary language "in which the court has not yet been assembled," to be, at worst, an imprecise and perhaps confusing restatement of the practical implication of R.C.M. 911. A trial judge following R.C.M. 911, and heeding the advice provided in the discussion section, will essentially re-announce that the court is assembled every time new members are added to compensate busted quorums in cases like the one before us. Notably, the trial judge in this case did just that, again announcing "the Court is assembled" just after 1742 hours on 12 October 2011, when the court convened with the newly added members, MSgt DR, TSgt AM, and TSgt AH, then present.

Further, the uncustomary language notwithstanding, there is no evidence that the convening authority intended to condition the addition of the added enlisted members to the court-martial panel on whether or not the court-martial had been assembled; a reading of the record unmistakably reflects the contrary. The convening authority identified new enlisted members on 12 October 2011 in exactly the same manner he did the day before in a case he – and all the participants – clearly understood to be a case in progress.

We find no prejudice to any substantial right of the appellant in relation to this assigned error. *See* Article 59(a), UCMJ.

(4) Whether the members' findings on Specifications 1 and 2 of Charge I were factually insufficient

At trial, the defense did not contest that the appellant provided alcohol to, and had sex with AT and TG. Rather, they argued that the appellant honestly and reasonably believed they were both 16 years of age or older. Trial defense counsel argued that AT, TG, and PH had all held themselves out, through statements and conduct, as being older than 16 years of age, as described in the discussion addressing assigned error (1) above.

Before this Court, the appellant urges us to find insufficient evidence to sustain his conviction of Charge I and its specifications because A1C Cooksey, who was tried in a civilian court and by court-martial, was acquitted of having sex with PH.[7] A1C Cooksey was convicted by court-martial of engaging in sodomy with PH. The members sentenced A1C Cooksey to no punishment for the sodomy charge, and the convening authority subsequently set aside the sodomy conviction in accordance with the staff judge advocate's recommendation. In his post-trial R.C.M. 1105 submission to the convening authority, A1C Cooksey's trial defense counsel argued the jury that convicted A1C Cooksey on the sodomy charge did so only because at the time of his trial reasonable mistake of fact was not a defense to the charge of sodomy, as it was to the charge of unlawful sexual contact. Ergo, goes the appellant's argument, because two juries who heard the case against A1C Cooksey essentially believed he was reasonably mistaken about PH's age, the verdict of the jury who rejected the appellant's argument that he was similarly mistaken about AT's and TG's ages is not factually supported by the evidence. We disagree.

We review issues of factual and legal sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). When evaluating factual sufficiency, we look at "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). In conducting this unique appellate role, we take "a fresh, impartial look

[7] In his Assignments of Error, the appellant plainly states "[t]hat the companion case, *United States v. Cooksey*, resulted in a full acquittal before a civilian jury and a partial acquittal before members (with no adjudged punishment, and followed by the convening authority setting aside the finding of guilty) demonstrates how weak the evidence was." Similarly, in his 6 May 2013 Motion to Attach Documents, the appellant argues "[t]hat a New Mexico jury voted by a margin of 11-1 that A1C Cooksey reasonably and honestly believed that PH was of age and that Air Force members likewise found him not guilty for the same reason – for a charged offense which occurred on the same night, in the same apartment, with the same group of girls misrepresenting their ages – goes to factual sufficiency of the evidence in this case." In his later submissions, the appellant notes that he "does not offer the documents from [and, by implication, information about] *Cooksey* to prove that there was legal error, as the Government repeatedly suggests. . . . He offers them for a limited purpose—to show prejudice," eventuated by his lack of equal access to witnesses and by the government's failure to turn over the prosecutor's notes. The appellant's various filings cast some confusion on whether he wishes us to consider the A1C Cooksey materials substantively in relation to assigned error (4) (insufficiency of evidence) or only as it relates to portions of this Court's analysis requiring an evaluation of potential prejudice in relation to assigned error (2). We address both.

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.

However reasonable it may be, or may not be, to conclude that A1C Cooksey's trial defense counsel was correct in his post-trial submission that the two juries who acquitted A1C Cooksey believed he was reasonably and honestly mistaken about PH's age,[8] such a conclusion would add little to our analysis of the appellant's case. In the appellant's case, a separate factfinder considered evidence about the appellant's actions with two different girls, and was informed by what may well have been a completely different set of contextual facts, including, but not limited to, those discussed in the background section above. Having reviewed the record, and applying the *Washington* standard, we are firmly convinced of the appellant's guilt beyond a reasonable doubt. *See Turner*, 25 M.J. 324.

Accordingly, we find the appellant's assignment of error on this issue to be without merit.

(5) Whether it was an abuse of discretion not to admit extrinsic evidence of the complaining witnesses' lies

Trial defense counsel sought to admit several printed screen shots of entries posted by AT and PH on the social networking site MySpace. In some screen shots the girls misrepresented their ages as being older than they actually were. AT had posted a profile stating her age as 21, and PH had posted various profiles showing her age as being 17 and 18. AT testified that she met the appellant through MySpace, and that she occasionally posted comments describing her involvement in activities including drinking, smoking, and looking for parties. AT denied posting questions about the location of parties on the appellant's MySpace page, stating instead that PH, who had access to AT's MySpace account password, would post messages and or contact the appellant through AT's MySpace account without AT's knowledge. PH denied doing so.

Trial defense counsel sought to admit the printouts arguing they were admissible under Mil. R. Evid. 404(b) as character for untruthfulness, under Mil. R. Evid. 608(c) as evidence of bias or motive to misrepresent, and under Mil. R. Evid. 401 as relevant evidence of the appellant's mistake of fact. The military judge ruled that defense counsel was free to cross-examine the witnesses about the information contained in the printouts, but did not admit them into evidence. He concluded that the postings on PH's page,

[8] We recognize here, that the appellant's reasonable mistake of fact defense, correctly assigning the evidentiary burden to the prosecution, would be phrased: "that the juries who heard A1C Cooksey's cases were not convinced beyond a reasonable doubt that he lacked an honest and reasonable belief that PH was 16 years of age or older." We have paraphrased a bit for readability's sake, but apply the correct standard throughout this opinion.

ostensibly from the girls to the appellant, expressing remorse for the appellant's situation would not make any fact or consequence in the case more or less likely. As to the printouts showing postings on what appeared to be AT's page, he observed that she denied making or concurring in the postings, and there was conflicting evidence on that point. The military judge clearly articulated various theories of admissibility supporting his decision to allow trial defense counsel to cross-examine the witnesses about the content of the printouts, however, he provided little rationale distinguishing his decision to allow cross-examination on the substance of the printouts, while disallowing copies of the printouts to be admitted. On appeal, the appellant argues the military judge's refusal to admit the paper copied screenshots constituted an abuse of discretion resulting in the deprivation of his Sixth Amendment[9] right to effectively confront and cross-examine AT. We disagree.

Our superior court "reviews a military judge's decision to admit evidence for an abuse of discretion. . . . 'The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013) (citations omitted). The absence of clearly articulated reasons supporting the military judge's decision to allow the substance of the printouts before the members – at least through cross-examination – but not the printouts themselves, renders our abuse of discretion analysis somewhat problematic. However, even if we assume, as the appellant argues, that the military judge's decision to exclude the MySpace printouts was an abuse of discretion eventuating a constitutional error, not all such errors require reversal in every instance. "Error of a constitutional nature does not require reversal unless an appellate court determines that a reasonable likelihood existed that the excluded evidence could have affected the judgment of the trier of fact." *United States v. Colon–Angueira*, 16 M.J. 20, 28 (C.M.A. 1983). If we determine beyond a reasonable doubt that the error was harmless, no relief is warranted. *Chapman v. California*, 386 U.S. 18 (1967); *United States v. Mobley*, 34 M.J. 527 (A.F.C.M.R. 1991). "In making this determination, we must consider the totality of the evidence in the case; that is, the context in which the unwarranted preclusion occurred." *United States v. Whitaker*, 34 M.J. 822, 830 (A.F.C.M.R. 1992) (citing *Delaware v. Van Arsdall*, 475 U.S. 673 (1986)).

Although the appellant was not permitted to admit the paper printouts of the various MySpace postings, his trial defense counsel conducted extensive cross-examination, reading verbatim from those exhibits when pointing out inconsistencies in the witness' testimony. There is little doubt that the minor victims in this case had, at one time or another, misrepresented their actual ages on their MySpace pages. That fact was made clear to the members. However, based on the totality of evidence in the case – again, including, but not limited to, the facts recounted above we find no reasonable

[9] U.S. CONST. amend. VI.

likelihood that the trier of fact would have acquitted the appellant if the printouts were admitted, and we are convinced beyond a reasonable doubt that any error eventuated by the trial judge's exclusion of such printouts was harmless. *See Whitaker*, 34 M.J. 822.

We therefore find the appellant's assignment of error in this regard without merit.

(6) Whether it was error that the military judge did not sua sponte instruct on the lesser included offense of abusive sexual contact when the facts supported that instruction

The appellant was charged with two specifications of aggravated sexual assault of a child. At the close of evidence, prior to taking an evening recess, the military judge asked counsel to be prepared the following day to propose instructions, particularly highlighting his desire to hear their thoughts about "whether any counsel sees any lesser included offenses [(LIOs)] raised." The following day, the judge asked if either side requested instructions on LIOs, and both counsel responded in the negative. The military judge did not instruct the members on the offense of abusive sexual contact with a child as an LIO.

The appellant now asserts that the military judge should have instructed the members as to the LIO because TG equivocated on the stand about whether the appellant penetrated her vagina with his penis. Accordingly, the appellant argues, because the question of actual penile penetration was raised, the trial judge should have resolved the LIO issue in favor of the appellant and also instructed the members on the offense of abusive sexual contact with a child.

Abusive sexual contact with TG was not, and is not, an LIO of aggravated sexual assault of TG, as charged in this case. Specifically, as appellee notes, there are two charging options by which to allege an unlawful "sexual act" under Article 120, UCMJ: first, an option requiring penile penetration, however slight, and second; an option requiring penetration, however slight, by other than the penis "with an intent to . . . arouse or gratify the sexual desire of any person." *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 45.a.(t)(1)(A)-(B) (2008 ed.). Whereas the first option contains no specific intent element, the second requires a specific intent to arouse or gratify sexual desire. The charging language required to allege an unlawful "sexual contact" under Article 120, UCMJ, requires an "intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person . . . with an intent to . . . arouse or gratify the sexual desire . . . ." *MCM*, Part IV, ¶ 45.a.(t)(2) (2008 ed.). The appellant was specifically charged with "engag[ing] in a sexual act, to wit: penile penetration of the vulva, with TG" under the first charging option, which does not entail the specific intent element.

"Whether an offense is an LIO is a question of law that is reviewed de novo." *United States v. Girouard*, 70 M.J. 5, 9 (C.A.A.F. 2011) (citing *United States v. Miller*,

67 M.J. 385, 387 (C.A.A.F. 2009)). "[Our superior court] applies the elements test to determine whether one offense is a lesser included offense of another." *United States v. Tunstall*, 72 M.J. 191, 194 (C.A.A.F. 2013) (citing *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010)). "'Under the elements test, one compares the elements of each offense. If all of the elements of offense X are also elements of offense Y, then X is an LIO of Y. Offense Y is called the greater offense because it contains all of the elements of offense X along with one or more additional elements.'" *Tunstall*, 72 M.J. at 194 (quoting *Jones*, 68 M.J. at 470). Accordingly, because abusive sexual contact requires proof of a specific intent element not found in the elements of the greater offense with which the appellant was charged, it is not an LIO, and the military judge committed no error by not giving the LIO instruction.[10]

(7, 8) Whether it was an abuse of discretion to deny the challenges for implied bias against Senior Master Sergeant (SMSgt) BB and MSgt DR

One of trial defense counsel's voir dire questions asked the members, to paraphrase, whether a person has an affirmative obligation to ask for identification or other proof of a person's age before having sex with that person. SMSgt BB and MSgt DR answered questions in group voir dire about this subject that caused trial defense counsel to follow up with them in individual voir dire. Trial defense counsel challenged both members for cause, citing actual and implied bias as the bases for challenge against SMSgt BB. Additionally, trial defense counsel described the bases for challenge against MSgt DR as "he's heard something about this case. . . [and] [s]econd, he said that someone under 30, they had some kind of obligation on the part of the member to verify age. That raises similar concerns; he discussed this extensively."

The appellant argues the military judge abused his discretion by not granting challenges against SMSgt BB and MSgt DR because both "demonstrated inflexible opinion[s] that men should verify identification before having sex with young women to ensure that they are not minors."

"[T]he text of R.C.M. 912 is not framed in the absolutes of actual bias, but rather addresses the appearance of fairness as well, dictating the avoidance of situations where there will be substantial doubt as to fairness or impartiality. Thus, implied bias picks up where actual bias drops off because the facts are unknown, unreachable, or principles of fairness nonetheless warrant excusal." *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008). Challenges for cause based on implied bias are reviewed on an objective standard, through the eyes of the public. *United States v. New*, 55 M.J. 95 (C.A.A.F. 2001). "Implied bias exists 'when most people in the same position would be

[10] Even if we were to consider abusive sexual contact to be a potential LIO of aggravated sexual assault of a child, on the facts in the appellant's case we would find that penetration in fact occurred and therefore abusive sexual contact was not sufficiently raised by the evidence to require the military judge to instruct the members on that LIO. *See United States v. Griffin*, 50 M.J. 480 (C.A.A.F. 1999).

prejudiced.'" *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996) (quoting *United States v. Smart*, 21 M.J. 15, 20 (C.M.A. 1985)). When reviewing an allegation of implied bias, we focus on "'the perception or appearance of fairness of the military justice system.'" *New*, 55 M.J. at 100 (quoting *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999)). Accordingly, "'[i]ssues of implied bias are reviewed under a standard less deferential than abuse of discretion but more deferential than de novo.'" *United States v. Miles*, 58 M.J. 192, 195 (C.A.A.F. 2003) (quoting *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)).

Based on the totality of the record before us, and applying the standards articulated above, we have no basis upon which to contradict the military judge's rulings with regard to these two members. The discussion pertaining to the challenge against SMSgt BB revolved primarily around what the military judge characterized as an illustration of a problem that commonly arises in voir dire "when you ask law exam questions of non-lawyers. It just begs for confusion asking members what they believe a legal obligation is when they have received no instructions as to what the law is." The discussion pertaining to the challenge against MSgt DR dealt primarily with what the judge described as "kind of what [MSgt DR's] personal standard would be in order to insulate himself from even the possibility of being accused of something," and not a formal or legal obligation of any sort. Citing his personal observations of their demeanor when answering questions, and referencing the liberal grant mandate, the military judge said he was convinced both members would follow the law and apply it as he instructed them.

The appellant notes that the military judge granted causal challenges against two other potential members, arguing that he should therefore have granted the challenges against SMSgt BB and MSgt DR for the same reason. Distinguishing the causal challenge he granted against the first of those other two potential members, the military judge noted, unlike MSgt DR whose answers on this subject reflected a personal philosophy, the other member's answer suggested he would find an official obligation to verify a person's age. As to the second causal challenge the military judge granted on similar grounds. He explained that the member's expectation that a military member should verify the age of a potential sex partner "that would clearly appear to be 40 . . . a bit outside of the norm of what would contribute to a fulsome discussion of the reasonable person standard."

We find the appellant's assignment of error in this regard without merit.

(9) Whether it was error that the military judge did not sua sponte excuse 1Lt KS after he was caught falling asleep during closing arguments

Roughly a half-hour after the trial court closed for findings deliberations, the military judge called an Article 39(a), UCMJ, hearing to address an issue brought to his

attention during the recess. Specifically, the assistant trial counsel and one of the observers who had been watching the case from the gallery noted that 1Lt KS, one of the court members, appeared to be dozing off during closing arguments.

The military judge and both counsel thoroughly voir dired the member, who explained that he had been up late the night before attending to business in his squadron, but that though he was very drowsy, he felt he didn't miss anything. The trial judge informed defense counsel that he would entertain a challenge for cause, and would consider having the member listen to the tapes of the closing arguments. After thoroughly discussing the issue, the military judge concluded "at this time, I will take him at his word that he did hear the arguments and that he did not miss anything. He did initially say [he didn't miss] 'anything of importance.' When he was given the opportunity to clarify that further, I think what he said was he just didn't miss the substance of what was said, was what I took from what he said."

Trial defense counsel had the last word on the issue, noting, "Your Honor, we have nothing further to add. We're not going to challenge him and we're not going to request he re-hear the arguments from counsel."

"[C]ourt members have an obligation to remain attentive, and the military judge has the responsibility to ensure that they do so." *United States v. West*, 27 M.J. 223, 224 (C.M.A. 1988). Whether the court member was asleep is a question of fact, and a military judge's findings of fact, supported by competent evidence in the record, will not be disturbed on appeal. *United States v. Burris*, 21 M.J. 140 (C.M.A. 1985). The military judge was sensitive to his responsibility, investigated the situation, and determined that the member heard the arguments and didn't miss anything. Accordingly, we find this issue without merit.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[11] Articles 59(a), UCMJ, and Article 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

[11] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time this case was docketed with the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, 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." *United States v. Moreno*, 63 MJ. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. See *United States v. Allison*, 63 MJ. 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 that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court