UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Cadet Second Class CHRISTOPHER D. WIEST
United States Air Force

ACM 33964

24 September 2002

Sentence adjudged 13 March 1999 by GCM convened at United States Air Force Academy, Colorado. Military Judge: J. Jeremiah Mahoney.

Approved sentence: Dismissal and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Frank Spinner (argued), Colonel James R. Wise, Lieutenant Colonel Timothy W. Murphy, Captain Bryan A. Bonner, and Captain Patrick J. Dolan.

Appellate Counsel for the United States: Lieutenant Colonel Michael E. Savage (argued), Colonel Anthony P. Dattillo, and Lieutenant Colonel Lance B. Sigmon.

Before

SCHLEGEL, ROBERTS, and PECINOVSKY
Appellate Military Judges

OPINION OF THE COURT

PECINOVSKY, Judge:

The appellant was convicted, contrary to his pleas, of intentionally accessing a protected computer, without authorization, and recklessly causing damage, in violation of 18 U.S.C. § 1030(a)(5)(B), and Article 134, UCMJ, 10 U.S.C. § 934. He was acquitted of three specifications of knowingly causing the transmission of a program, information, code or command, and intentionally causing damage without authorization to a protected computer, in violation of 18 U.S.C. § 1030(a)(5)(A), and Article 134, UCMJ. His approved sentence was a dismissal and forfeiture of all pay and allowances.

The appellant raises four issues: 1) Whether the military judge abused his discretion by denying the appellant a continuance to obtain civilian counsel of choice; 2) Whether the military judge erred in instructing on the lesser included offense when he failed to instruct that the unauthorized access to the computer system must have been intentional; 3) Whether the military judge erred in instructing that the appellant's mistake of fact had to be reasonable, instead of merely honest; and 4) Whether the evidence was factually and legally sufficient.

We hold that the military judge did not abuse his discretion by denying a continuance to obtain civilian counsel of choice. We also hold that the military judge did not err in instructing on the lesser-included offense, because the intent aspect of the offense was contained in the mistake of fact instruction. We need not reach the issue of whether the military judge erred in instructing that the appellant's mistake of fact had to be reasonable, instead of merely honest, because the appellant was not materially prejudiced by the instruction. Finally, we hold that the findings are factually and legally sufficient.

I. Facts Concerning the Charged Offenses

The appellant was a cadet at the United States Air Force Academy (Academy). While at the Academy, he sought to use his computer to communicate simultaneously with others through Internet chat rooms using Internet Relay Chat (IRC). However, the Academy did not permit its computer system to be used to access Internet chat rooms, and developed a firewall to block IRC access through its network.

The appellant unsuccessfully attempted to persuade Academy officials to create an IRC server on the Academy network to permit Internet chatting. Circumventing the Academy prohibition against using its network to conduct Internet chatting, the appellant went outside the Academy network, through the firewall, and accessed an Internet Service Provider (ISP) to facilitate his Internet chatting. He accessed an ISP called "Wildstar" and conducted Internet chatting using the screen-name "kwahraw," which was his cadet squadron's name, "Warhawk," spelled backwards.

The appellant testified that a friend, Mr. Rod Cordova, gave him an account on an IRC server, named "Landoflakes." Mr. Cordova was an 18-year-old Information Systems Assistant at the Duke University Housing Management Office. Landoflakes utilized the IRC software program, BitchX, which Wildstar did not have. According to the appellant, Mr. Cordova informed him that the appellant's Landoflakes account had been cancelled, but that Cordova would set up a new account for him at another server, named Icom, where Mr. Cordova was a systems administrator. The appellant testified that he used the Icom account only for Internet chat and mail. He admitted using the IRC software program, BitchX, but denied downloading BitchX or another IRC program,

Eggdrop, onto Icom's computer. BitchX is a program that enables a user easier access to IRC channels and Eggdrop is a program used to control IRC sessions.

According to the appellant, he stopped using the Icom account when it would not allow him to log in. He stated that he contacted Mr. Cordova, who allowed him to use his (Cordova's) screen-name, "hog", and password to try to log in. The appellant testified he attempted to again log in to Icom with first his screen-name, "kwahraw," and then with Mr. Cordova's screen-name, "hog."

In the meantime, the actual systems administrator at Icom had been receiving complaints that his network was sluggish and the monitor display was jerky. He discovered that these problems were caused by two unauthorized IRC programs, BitchX and Eggdrop, running on his network. These unauthorized programs were generated by a user named "kwahraw," who logged onto Icom from the Internet address, "heimdall.usafa.mil." This was the Internet address of Internet users from the Academy network. He discovered a number of programs on the "kwahraw" account concerning IRC, including a "buffer overflow" program designed to gain "root" access to operating systems, such as Icom's, by overwhelming the computers' printing ports.[1] He testified that the "kwahraw" account was not authorized to use Icom. Icom's administrator installed security systems onto Icom to prevent further unauthorized access and the use of the IRC programs. It took the administrator four to five days to secure Icom's system. Accounting for his time at $100 per hour, he testified that Icom's direct losses amount to $6300 for his labor costs.

The security measures installed in the Icom system were tested by "kwahraw" (the appellant) the day after they were installed. Icom's logs recorded a failed log on attempt by "kwahraw" originating from "heimdall.usafa.mil" followed eight seconds later by a second failed attempt by "hog" initiated from "heimdall.usafa.mil." The Icom administrator contacted the Air Force and the investigation led to the appellant, who operated his computer from his Academy dorm room under the screen-name, "kwahraw."

The appellant's basic defense was honest mistake of fact. He testified that he acted under the honest belief that Mr. Cordova had authority to set up an Icom account and to allow the appellant to use his (Cordova's) screen-name "hog" and password to access Icom. However, Mr. Cordova, called as a defense witness, denied removing the appellant from Landoflakes or telling him that his account had been cancelled. He also denied accessing Icom or giving the appellant his screen name, "hog," to use to access Icom. He testified that he had observed the appellant running the Eggdrop program and BitchX on several occasions.

[1]"Root" access gives the user the ability to change any aspect of the computer's function from a computer at a remote location.

The government's case focused upon the lack of authorization to use the Icom account, the appellant's computer savvy, and his involvement in IRC activities. The appellant used his Academy computer to make "telnet" and "FTP" connections. Telnet refers to "terminal-emulation protocol" and means two computers talking to one another. Through telnet, a user can control a destination computer by entering commands on a remote computer. FTP stands for "file transfer protocol" and is the connection by which information, such as computer programs, can be exchanged, downloaded, and uploaded. In addition to the evidence that the appellant made telnet and FTP connections with his Academy computer, the IRC programs, BitchX and Eggdrop were found on the appellant's computer. The "buffer overflow" program, found on the appellant's computer, would have allowed the appellant to access an ISP, such as Icom, through its printer port.

While the appellant claimed to have had insufficient knowledge to "hack" into an ISP, such as Icom, or to understand how the BitchX or Eggdrop program worked, evidence introduced at trial was contrary to his claims. The appellant's own handwritten notes referenced certain computer commands, which would activate BitchX and other IRC programs. The appellant's professed lack of "hacking" experience is contrary to evidence from his own IRC chat. For example:

> <kwahraw> my telnet to landoflakes has been blocked
> <kwahraw> damn firewall
>
> . . .
>
> <kwahraw> Now I have to re-hack the firewall again and make myself a whole (sic)
>
> . . .
>
> <kwahraw> Jarin: I have already hacked it once
>
> . . .
>
> <kwahraw> having worked with their (sic) network security, and since my roommate was prior enlisted and helped code their software, I know how to a make a "whole" (sic)?
> <kwahraw> at least for a telnet

In addition, the logs showed 140 telnet connections between the appellant's Academy Internet address and Icom, and one FTP transaction in which a large amount of data (1 MegaByte) was transmitted.

II. Facts Concerning the Request for Delay

On July 27, 1998, the charges were preferred against the appellant. An Article 32, UCMJ, 10 U.S.C. § 832, hearing (Article 32) was scheduled for 4 August 1998, but was delayed until 16 September 1998, based upon the appellant's request to be represented by circuit defense counsel.

During the Article 32 hearing, trial counsel provided the defense with computer logs from an Air Force monitoring office at Kelly Air Force Base (AFB), Texas. A witness from the Academy's computer network security office erroneously testified that "firewall" logs, which would have recorded Internet transmissions to and from the Academy's network, were not available. Notwithstanding the defense request, the Academy firewall logs were not provided to the defense because trial counsel did not understand what they were. A report from the Academy's computer network security office did reference the elusive firewall logs, but the report was not completed until after the Article 32 hearing and a copy was not provided to the defense until 20 January 1999, just 13 days prior to the scheduled trial date of 2 February 1999.

After a defense computer consultant analyzed the firewall logs, defense counsel moved for a new Article 32 investigation based upon this newly discovered evidence. On 2 February 1999, the military judge held a hearing on the defense motion. During this hearing, the military judge made several comments concerning the competency of defense counsel for relying upon the assertion that the firewall logs did not exist and for not independently investigating the existence of such logs. The military judge then denied the defense motion, after hearing testimony from the Article 32 investigating officer that her recommendation for trial would not have changed even if the firewall logs had been introduced at the original Article 32 hearing.

At the same hearing, following the denial of the defense motion, the appellant attempted to release his military counsel and requested new military counsel based upon the military judge's comments about his defense lawyers. The military judge granted a delay for the appellant to seek new counsel. After trial counsel indicated that the government witnesses would be available on 8 March 1999, the military judge made it clear to all parties that the trial would reconvene on 8 March 1999, and that any new defense counsel must be available and prepared to proceed on that date. New military defense counsel were detailed and the military judge informed them that they must be must be available and prepared to proceed on 8 March 1999. The court recessed on 4 February 1999.

On 10 February 1999, Mr. Frank Spinner, filed a notice of appearance and indicated he had been retained by the appellant on 8 February 1999. Based upon his schedule, he requested a delay and a new trial date of 19 April 1999, six weeks after the scheduled trial date of 8 March 1999. Mr. Spinner stated that his conflicting schedule

consisted of a trial in *United States v. Ashby* through 26 February 1999, an Article 32 hearing set for 1-5 March 1999, sentencing hearings in *Ashby I* and *Ashby II* scheduled for mid-March to the end of March, a Continuing Legal Education (CLE) course in Colorado from 15-18 April 1999, and other office matters. He stated that he would prepare for the appellant's trial from 12-14 April 1999 and to commence trial on 19 April 1999. The military judge responded on 10 February 1999 and informed Mr. Spinner that 8 March 1999 was the trial date and that he must be available and prepared for trial by that date.

On 18 February 1999, the appellant's new military defense counsel, moved for a continuance until 19 April 1999, to allow Mr. Spinner to be present to represent the appellant. The military judge denied the motion on 19 February 1999. He noted that Mr. Spinner was already committed to a trial in the *Ashby* case on 8 March 1999. The military judge further found that "Mr. Spinner's [sic] proposes to squeeze this trial in with his long-planned CLE trip to Colorado Springs, despite the fact that he was not available until 17 May 99 to resume trial in the *Morgan* case at Langley AFB."

Trial reconvened on 8 March 1999, with all parties present, except for Mr. Spinner. In lieu of an appearance by Mr. Spinner, military defense counsel submitted an affidavit from Mr. Spinner. In the affidavit, Mr. Spinner stated that from 4 February to 4 March 1999 he was representing Captain (Capt) Ashby in a trial at Camp Lejeune, NC. He stated that he returned home to Virginia on 5 March 1999. He planned on departing for Fort Lewis, Washington on 9 March 1999 to prepare for an Article 32 for Major General (Gen) Hale. According to Mr. Spinner, the *Hale* Article 32 was originally scheduled for 1 March 1999, but was delayed to 3 March 1999, then to 10 March 1999, and finally to 16 March 1999.

On 8 March 1999, military defense counsel renewed their motion for a continuance until 19 April 1999, to allow Mr. Spinner to be present as civilian counsel to represent the appellant. The military judge denied the motion finding that Mr. Spinner's earliest trial date for the *Morgan* case at Langley AFB was 17 May 1999 and attached a page from the Air Force Times to the record noting that it contained at least nine civilian attorneys who consider themselves specialized in military law.

The military judge noted that Mr. Spinner's schedule had changed with the conclusion of the *Ashby* trial on Wednesday of the previous week. He found that Mr. Spinner could have flown to the Academy on Thursday night and would have had Friday, Saturday, and Sunday to get up to speed with two fully prepared military counsel. The military judge stated that a court-martial takes priority over an Article 32. He further found, based upon a contact with the Navy/Marine Corps Judiciary, that Mr. Spinner had a preliminary motion scheduled for 18-19 March 1999 in the navigator court-martial case, the companion case to *Ashby*. He found that trial in that case was scheduled for 22 March 1999 to 10 April 1999 and was scheduled to resume on 19 April 1999. He found

that a second trial for Capt Ashby was set for 3 May 1999. Finally, the military judge found that Mr. Spinner was scheduled to be at Langley AFB on 14 May 1999 for the *Morgan* case. Based upon these factual findings, the military judge denied the motion for a continuance.

III. Denial of Continuance

A decision by a military judge denying a motion for a continuance is reviewed under an abuse of discretion standard.[2] *United States v. Weisbeck*, 50 M.J. 461, 464 (1999*); United States v. Miller*, 47 M.J. 352, 358 (1997). An abuse of discretion exists "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.'" *Weisbeck*, 50 M.J. at 464 (quoting *Miller*, 47 M.J. at 358). The abuse of discretion standard applies "even where failure to grant a continuance would deny an accused the right to a civilian counsel." *Miller*, 47 M.J. at 358 (citations omitted).

This Court has defined the abuse of discretion standard stating:

> When testing for an abuse of discretion, this Court does not substitute its judgment for the military judge's. More than a difference of opinion is necessary to constitute an abuse of discretion. Instead, this Court tests for whether the ruling is arbitrary, clearly unreasonable, or clearly erroneous.

United States v. Grant, 38 M.J. 684, 688 (A.F.C.M.R. 1993), *aff'd*, 42 M.J. 340 (1995).

In *Grant*, we emphasized that "the right to counsel of choice, including civilian counsel of choice, is not absolute and must be balanced against the need for the expeditious administration of justice." *Id*. at 689 (citations omitted). "[A]bsent a *clear* abuse of that discretion, the military judge's decision will not be overturned." *Id.* (emphasis in original).

In determining whether there was a clear abuse of discretion by the military judge, two separate factual settings must be examined. The 8 March 1999 trial date had been clearly set by the military judge on 4 February 1999, when the trial recessed. This date was established prior to any contact between the appellant and Mr. Spinner. All parties were aware of the military judge's unequivocal position that trial would resume on 8 March 1999. A month-long continuance was granted to allow the appellant sufficient time to obtain new counsel and for the counsel to prepare for trial.

[2] This Court heard oral argument on the assigned error of whether the military judge abused his discretion denying a continuance to obtain civilian counsel of choice.

The appellant retained Mr. Spinner as counsel on 8 February 1999, knowing that he would not be available for trial on the scheduled date of 8 March 1999. On 10 February 1999, Mr. Spinner made a written entry of appearance, and requested a delay until 19 April 1999. The military judge responded to Mr. Spinner on the same day very clearly advising him that "[t]he date for resumption of this ongoing trial is 8 March 1999. If you wish to represent the accused you need to be present and prepared on that date."

On 18 February 1999, the appellant's new military defense counsel moved for a continuance until 19 April 1999, to allow Mr. Spinner to be present. The military judge denied the motion for a continuance on 19 February 1999. In so doing, he made the following factual findings:

> On 10 February 1999, Mr. Frank Spinner entered an appearance as counsel. At the time Mr. Spinner was already committed to trial proceedings in the *Ashby* case at Camp Lejeune, NC on 8 Mar 1999-either sentencing on the first trial, or commencement of Capt Ashby's second trial. Mr. Spinner's (sic) proposes to squeeze this trial in with his long-planned CLE trip to Colorado Springs, despite the fact that he was not available until 17 May 99 to resume trial in the *Morgan* case at Langley AFB.

The military judge determined that the appellant elected to "form a purported attorney-client relation with a civilian attorney he has yet to meet, who was at the time-and still is-engaged in ongoing trials at Camp Lejuene, NC." He denied the motion for a continuance concluding that "[t]he accused has been afforded ample opportunity to find additional counsel," that his original counsel have not been released by the court, and that his new military counsel have been at the Academy preparing for trial. The military judge was insistent that any counsel, military or civilian, had to be available for trial by 8 March 1999 and that Mr. Spinner was not available.

In determining whether the military judge abused his discretion in denying the motion for delay on 10 February 1999 and the motion for continuance on 19 February 1999, we look to a number of factors including, "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," *Miller*, 47 M.J. at 358 (citing F. Gillian and F. Lederer, *Court-Martial Procedure* § 18-32.00 at 704 (1991)) (footnotes omitted).

The appellant cannot claim surprise because when the appellant retained Mr. Spinner on 8 February 1999, he knew the trial date was 8 March 1999. All parties were clearly on notice by the military judge that the trial would reconvene on 8 March 1999.

The only "surprise" to the appellant and the only "evidence involved" were the Academy firewalls logs, the existence of which had been provided to the appellant on 20 January 1999. The appellant's expert computer consultant had an opportunity to thoroughly examine the firewall logs. On 4 February 1999, the government offered to reopen the Article 32 investigation to allow the appellant to present matters for consideration by the convening authority. A new Article 32 investigating officer was appointed on 12 February 1999, pursuant to a defense request. However, the defense objected to the reopening of the Article 32 investigation. The "new evidence" of the firewall logs was in the hands of the defense on 20 January 1999, prior to the court-martial being convened on 2 February 1999. The appellant was given the opportunity to submit matters concerning the firewall logs to a new Article 32 investigating officer, but did not avail himself of that opportunity. The trial was recessed on 4 February 1999 and scheduled to reconvene on 8 March 1999, giving the appellant, his expert consultant, and his new military counsel, with the assistance of his prior counsel, sufficient time to review the "new evidence" of the firewall logs and to prepare for trial. The "surprise" of the "new evidence" of the firewall logs did not justify a continuance beyond the established trial date of 8 March 1999.

The "length of the continuance" factor supports the denial of the requested continuance. On 10 February 1999 and again on 18 February 1999, the appellant requested a continuance until 19 April 1999, to allow Mr. Spinner to be available to represent him. Although Mr. Spinner asserted that he would be available on 19 April 1999, the military judge made factual findings, which challenge that assertion. The military judge found that Mr. Spinner "was not available until 17 May 99 to resume trial in the *Morgan* case at Langley AFB." Mr. Spinner had committed himself to represent Capt Ashby, Gen Hale, and Colonel (Col) Morgan in court-martial proceedings prior to his taking on the appellant as a client. According to Mr. Spinner, these prior commitments prevented him from being available for the appellant's clearly established trial date of 8 March 1999. The military judge made a factual finding, which questioned Mr. Spinner's availability for 19 April 1999. Mr. Spinner's unavailability for even a 19 April 1999 trial date was a reasonable consideration for the military judge in his denial of the motion for a continuance.

The factor of "prejudice" to the government was not developed by either party on the record. While the trial date of 8 March 1999 was based upon the availability of the government witnesses, the issue of whether the witnesses would have been available on the proposed date of 19 April 1999 was never explored on the record by the government or the defense. Therefore, this Court is not able to determine whether the government would have been prejudiced with additional expenses or the unavailability of witnesses due to the proposed continuance. *See United States v. Royster*, 42 M.J. 488, 490 (1995*); United States v. Sharp*, 38 M.J. 33, 389 (C.M.A. 1993).

The appellant did receive "prior continuances" in this case. The initial Article 32 investigation was delayed to allow the appellant to obtain circuit counsel. The Article 32 report was submitted to the appellant on 29 September 1998, and he was granted a delay until 10 October 1998, to provide additional matters in response to the report. Finally, the appellant was granted a delay from the original trial date of 2 February 1999 until 8 March 1999 to obtain new counsel.

The factor of the "possible impact on verdict" is the great unknown in this case. On 10 and 19 February 1999, when the military judge denied the motions for a delay and a continuance, respectively, there was no way for him to know whether the absence of Mr. Spinner would have had any effect upon a verdict. The military judge thoughtfully commented at trial on 8 March 1999 that:

> [N]ot everyone can be represented by F. Lee Bailey, Johnny Cochran, or even Mr. Frank Spinner. The plain fact is that these attorneys, by virtue of their notoriety are often contacted, but they don't have enough time in their schedule.

The military judge had set a trial date of 8 March 1999 prior to the appellant's retaining of Mr. Spinner. Mr. Spinner, because of his schedule was not reasonably available to represent the appellant.

The *Miller* factors of "substitute testimony or evidence" and "availability of witness or evidence requested" do not apply to this case. The "timeliness" of the request for a continuance is not an issue here. However, the timing of the appellant's retention of Mr. Spinner on February 8th, given the established trial date of 8 March 1999, is a factor supporting the military judge's denial of the continuance request. The "good faith" of the appellant was a possible consideration of the military judge in denying the continuance. The "use of reasonable diligence" by the appellant could have been taken into account by the military judge.

The final *Miller* factor of "prior notice" favors the military judge's denial of the motion for a continuance. The appellant was given sufficient time from 2 February 1999 until 8 March 1999 to obtain new counsel, be they military or civilian. The appellant chose to retain Mr. Spinner, notwithstanding the fact the Mr. Spinner was not available on the scheduled trial date. Based upon these factors, we hold that the military judge did not abuse his discretion in denying the motion for a delay on 10 February 1999 and the motion for a continuance on 19 February 1999.

When trial reconvened on 8 March 1999, the appellant, through military counsel, renewed his motion for a continuance. A slightly different factual scenario then existed. By then, the government had again suffered expenses for the witnesses to travel to the Academy for trial. An additional continuance until the proposed date of 19 April 1999

would cause additional expenses for the witnesses to travel to the Academy for a third time for trial.

All parties were present, except for Mr. Spinner. The military judge inquired of Mr. Spinner's whereabouts and the appellant replied that, "he is currently at Major General Hale's Article 32." His military defense counsel clarified that Mr. Spinner had submitted an affidavit stating that he was currently at his home in Virginia. The trial of Capt Ashby ended on March 4th and Mr. Spinner had returned home on 5 March 1999. He stated that:

> On 9 March I depart for Fort Lewis, Washington, to prepare for an Article 32 hearing scheduled to commence on 16 March 1999. This hearing, in the case of Major General Hales, was originally scheduled to commence on 1 March and was delayed first to 3 March, then to 10 March and finally to 16 March because of the unexpected length of the Ashby trial.

Rather than appear at the appellant's trial in Colorado, Mr. Spinner was at home in Virginia on 8 March 1999. The military judge made findings of fact that, in his representation of Col Morgan at Langley AFB, Mr. Spinner's earliest available trial date was 17 May 1999. The case was docketed in January 1999. That trial date had since been slipped to 24 May 1999, with the consent of counsel for both sides.

Military defense counsel asserted that Mr. Spinner would still be able to make a 19 April 1999 trial date. The military judge questioned counsel about Mr. Spinner's pending trial in the *Ashby* case at Camp Lejeune, which Mr. Spinner had indicated had priority. He also commented that:

> [I]n ruling on a continuance I took into account the accused's desire for civilian representation. I also took into the account the fact when this trial was recessed there was (sic) four and a half weeks available for retaining civilian counsel if the accused's (sic) desired and wanted to be prepared. Obviously Mr. Spinner did not fall into that category. . . . If Mr. Spinner could not be prepared and available today, then he should not have undertaken the representation.

The military defense counsel then contacted Mr. Spinner and stated that Mr. Spinner would be available for trial on 19 April 1999. He noted that Mr. Spinner had just finished the *Ashby* case and that he didn't see how Mr. Spinner "could be here today and be prepared." The military judge responded with an additional factual finding. He found that the *Ashby* case was over on Thursday, 4 March 1999. Mr. Spinner could have flown to the Academy on Thursday night and had "Friday, Saturday, and Sunday to get up to speed with two fully prepared military counsel."

The military judge noted that no Article 32 investigation of any service takes priority of a referred general court-martial, especially an ongoing court-martial, such as this case, which had been continued expressly for the purpose of finding replacement counsel. He found that when the *Ashby* trial ran long, the *Hale* Article 32 was rescheduled. However, the Article 32 was not scheduled around the appellant's ongoing court-martial. Instead, Mr. Spinner "elected to give priority to his preparation for an appearance in the Hale Article 32." He concluded that Mr. Spinner is "by his own determination, not present and not prepared, and therefore, not available to represent the accused at this trial."

Additionally, the military judge found the following facts. Based upon information from the Navy/Marine Corps Trial Judiciary, Mr. Spinner was scheduled for preliminary motions for 18-19 March 1999 in the *Slater* trial. The *Slater* court-martial was further docketed for court-martial for 22 March through 10 April 1999. Resumption of trial was docketed for 19 April 1999 and the second trial in the *Ashby* case was set for 3 May 1999. The military judge repeated his earlier factual finding that Mr. Spinner is scheduled for 24 May 1999 in the *Morgan* trial at Langley AFB.

Given these extensive factual findings concerning Mr. Spinner's availability and the prejudice to the government from producing the witnesses for a third time, we hold that the military judge did not abuse his discretion in denying the motion for a continuance. On 8 March 1999, when the trial reconvened, Mr. Spinner was not at trial; he was at home. The military judge found that, even with his busy schedule, Mr. Spinner could have appeared at the appellant's trial with three full days of preparation. While military defense counsel protested that Mr. Spinner would not have been able to prepare, Mr. Spinner's own 10 February 1999 letter to the military judge says otherwise. In Mr. Spinner's own words, he proposed "to use 12-14 April to prepare for Cadet Wiest's trial and commence trial on 19 April" following his CLE in Colorado Springs from 15-18 April 1999.

When the *Ashby* trial ended on 5 March 1999, Mr. Spinner's schedule opened up, providing him with the three days he said he needed to prepare for the appellant's trial. Instead, Mr. Spinner chose to travel home. The military judge did not abuse his discretion in denying the request for a continuance, especially when Mr. Spinner could have been there at trial, and when Mr. Spinner indicated that he was moving for the continuance to preserve the issue for appeal.

III. Unauthorized Access Instruction

The appellant was convicted of an offense under 18 U.S.C. § 1030(a)(5)(B). This statute provides that an individual commits an offense if he "intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage." The appellant argues that the military judge erred in instructing on the

offense when he failed to instruct that the unauthorized access to the computer system must have been intentional.

Prior to argument, the military judge discussed his proposed instructions with counsel and considered the appellant's motion to dismiss the lesser included offense as unconstitutional. As an alternative to dismissal, defense counsel proposed that the military judge should instruct the members that the appellant had to "1) intentionally access a protected computer, 2) know his access was unauthorized and 3) knowingly cause damage as described by the statute."

The military judge found the lesser included offense of 18 U.S.C. § 1030(a)(5)(B) to be constitutional. Defense counsel then raised the issue of the appellant's intent with respect to the predicate fact of "unauthorized access." The military judge stated that he would address the issue with a mistake of fact instruction, stating "[O]bviously, if there is a mistake as to authorization for access, that would defeat one of the elements, and it would be an affirmative defense."

The military judge asked counsel if there were objections and defense counsel responded:

> ADC: Your Honor, accepting the ruling, we have no – I just do believe that the authorization must have had some sort of intent requirement. But, I just want to make that clear for the record. I'm sure beyond that, we have no objections to them.

The military judge instructed the members as follows:

> MJ: First, that on more than one occasion, between on or about 1 November and 15 December 1997, at or near the Air Force Academy, the accused accessed a protected computer. Second, that the accused did so intentionally. Third, that such access was without authorization. Fourth, that such conduct caused damage to a protected computer, namely, the Interlink Communications computer system. And, fifth, that the accused's conduct in causing such damage was reckless.

Addressing defense counsel's concern as to the issue of the appellant's intent with respect to the predicate fact of "unauthorized access," the military judge provided the members with a mistake of fact instruction. After reading the instructions to the members, the military judge again asked whether there were any objections to the instructions as given, or whether there was a request for additional instructions. Trial and defense counsel both responded, "No."

a. Standard of Review

A military judge's instructions on findings, relating to questions of law, are reviewed de novo. *United States v. Maxwell*, 45 M.J. 406, 425 (1996). When a military judge omits a portion of an instruction on an element of a charged offense, such omission will be reversible error unless the omission is harmless beyond a reasonable doubt. *United States v. Mance*, 26 M.J. 244, 256 (C.M.A. 1988).

b. Analysis

Initially, we note that the government argues the appellant waived this issue by failing to object to the instructions as given. While defense counsel did not specifically object to the instructions after they were given to the members, defense counsel did raise the issue of the appellant's intent with respect to the predicate fact of "unauthorized access." In defense counsel's motion addressing the constitutionality of 18 U.S.C. § 1030(a)(5)(B), he suggested that the military judge instruct that the appellant must "know his access was unauthorized."

While not clearly stated in the form of an objection, it is clear that defense counsel took issue with the instruction concerning authorization of access to the computer, stressing that he wanted "to make that clear for the record."

However, here, as in *Maxwell*, we need not invoke the waiver rule because of our resolution of the instruction issue. While the military judge did not specifically instruct the appellant intentionally knew that he lacked authorization to access the computer, the mistake of fact instruction addressed the issue of the appellant's knowledge of the authorization. The instructions, as a whole, must be examined to determine if the military judge properly instructed the members. *See Maxwell*, 45 M.J. at 424 ("[A] reviewing court must examine the instructions as a whole to determine if they sufficiently cover the issues in the case and focus on the facts presented by the evidence.")

While the military judge did not specifically address the mens rea required for the "without authority" portion of the offense, the mistake of fact instruction did specifically address the knowledge aspect of the "without authority" portion of the offense. The mistake of fact instruction must, therefore, be examined to determine whether it sufficiently addressed the mens rea requirement. Looking at the instructions, as a whole, the military judge did not err in instructing the members on this offense.

IV. Mistake of Fact Instruction

The appellant argues that the military judge erred in instructing that the appellant's mistake of fact had to be reasonable, instead of merely honest. Government disagrees with the appellant's characterization of the charged offense as a specific intent offense

crime and argues that the military judge properly instructed that the mistake of fact relating to the knowledge of the authorization must be reasonable.

In *United States v. Binegar*, 55 M.J. 1, 5 (2001), our superior court addressed the issue of whether a mistake of fact instruction must include a requirement of a reasonable belief, or simply an honest belief. In *Binegar*, the Court found legal error when the military judge in that case gave a mistake of fact instruction requiring an honest and reasonable belief. *Id*. at 6. Having found legal error, the Court examined the error and found that the appellant was materially prejudiced by the error. The Court found prejudice for several reasons. *Id.* During argument, the trial counsel exploited the erroneous instruction by focusing the members' attention upon the reasonableness aspect of the erroneous "honest and reasonable" instruction. *Id.* As opposed to the present case, in *Binegar*, the government presented a substantial case on the unreasonableness of the appellant's conduct. *Id*. The Court, in *Binegar*, concluded that the government's substantial case concerning the unreasonableness of the appellant's conduct created "a reasonable possibility that the members resolved this case against appellant on this basis." *Id*.

The reasonableness of the appellant's "mistake of fact" as to "authorization" in the present case was never an issue. Rather, the entire case rested upon the appellant's credibility and the honesty of his "mistake of fact," not the reasonableness of the "mistake of fact." Trial counsel never mentioned the "reasonableness" of the appellant's mistake of fact and evidence was not presented concerning the unreasonableness of the appellant's belief that his access to the Icom was authorized. This case was a swearing contest. The appellant testified that he believed that Mr. Cordova had given him authorization to access Icom. Mr. Cordova, on the other hand, testified that he never gave authorization to the appellant to access Icom.

Trial counsel based his case upon the lack of credibility of the appellant. During argument, trial counsel focused the members' attention upon 15 different statements by the appellant, which trial counsel stated were directly contradicted by the evidence. Similarly focusing upon honesty and not reasonableness, defense counsel argued that the appellant's mistake of fact was an honest belief, emphasizing that, "Cadet Wiest told you the truth." Trial counsel concluded his argument stating, "[t]he defense's case, or theory, that Hog is anyone but Cadet Wiest lies heavily, in fact entirely, upon the credibility of Cadet Wiest. The evidence is overwhelming that Cadet Wiest is not honest."

Unlike the facts in *Binegar*, here, the appellant was not prejudiced by evidence of reasonableness and an argument focusing upon the reasonableness of a mistake of fact. Therefore, whether the military judge should have instructed that the mistake of fact need only be an honest belief, as opposed to a reasonable belief, the appellant was not prejudiced. Argument by both trial and defense counsel and the evidence before the members went to the honesty of the appellant's belief that he had authorization to access

Icom. The court members resolved the honesty issue against the appellant on this specification. Therefore, the appellant was not prejudiced by a potential error in the military judge's instruction concerning a reasonable mistake of fact. Absent prejudice, we need not even reach the issue of whether the military judge erred in his mistake of fact instruction. Article 66(c), UCMJ, 10 U.S.C. § 866(c).

V. Factual and Legal Sufficiency

Under Article 66(c), UCMJ, we will approve only those findings of guilt we determine to be correct in both law and fact. The test for legal sufficiency is whether, when the evidence is viewed in the light most favorable to the government, any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (2000). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

The appellant argues that the evidence was factually and legally insufficient for three reasons. First, he argues the evidence showed an honest belief that the appellant's access to Icom was authorized. Second, he argues that the evidence was insufficient to conclude that his mere access to Icom actually caused damages. Third, the appellant argues that the government failed to establish that the alleged damages actually amounted to the $5,000 minimum required for a conviction under 18 U.S.C. § 1030(a)(5)(B).

a. Honest Belief that Access was Authorized

As discussed above, we need not reach the issue of whether the offense under 18 U.S.C. § 1030(a)(5)(B) is a specific or a general intent crime requiring solely an honest belief or an honest and reasonable belief that access to Icom was authorized. The evidence before the members concerned the honesty and credibility of the appellant. The appellant's basic defense was honest mistake of fact. He alleged that he acted under the honest belief that Mr. Cordova had authority to set up an Icom account and to allow the appellant to use his (Cordova's) screen-name "hog" and password to access Icom. However, when Mr. Cordova testified, he denied removing the appellant from Landoflakes or telling the appellant that his account had been canceled. He also denied accessing Icom or giving the appellant his screen-name, "hog," to access Icom. He further testified that he had observed the appellant running the Eggdrop and BitchX programs on several occasions. The court members apparently believed Mr. Cordova and did not buy the appellant's version of the facts. We agree with the members.

Applying the test for legal sufficiency, we hold that, when the evidence is viewed in the light most favorable to the government, any rational fact finder could have found

that the appellant did not have an honest belief that access to Icom was authorized and that the essential elements of the crime were proven beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Reed*, 54 M.J. at 41. Applying the test for factual sufficiency, we hold that, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves are convinced that the appellant did not have an honest belief that access to Icom was authorized and are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

b. Access Caused Damage

The appellant alleges that the evidence showed that his access to Icom did not cause damage to the computer system, as required under 18 U.S.C. § 1030(a)(5)(B). However, the evidence showed that the damage to Icom was caused by the appellant. The systems administrator at Icom testified that he had been receiving complaints that his network was sluggish and the monitor display was jerky. He discovered IRC programs, BitchX and Eggdrop, running on his network without authority. These unauthorized programs were generated by "kwahraw," the appellant's screen-name, coming from the Academy network. The evidence showed that a number of programs on the appellant's Icom account concerning IRC, including a program allowing the appellant to operate the IRC programs from a remote location. Icom's administrator installed security systems onto Icom to prevent further unauthorized access and to prevent the further use of the IRC programs.

Applying the test for legal sufficiency, we hold that, when the evidence is viewed in the light most favorable to the government, any rational fact finder could have found that the appellant's unauthorized access to Icom caused the damage to Icom beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Reed*, 54 M.J. at 41. Applying the test for factual sufficiency, we hold that, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves are convinced that appellant's unauthorized access to Icom caused the damage to Icom beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

c. Damage in Excess of $5,000

The appellant alleges that the government failed to establish that the alleged damages to Icom amounted to the $5,000 minimum required for a conviction under 18 U.S.C. § 1030(a)(5)(B). However, the evidence is undisputed that the Icom systems administrator worked for four to five days to repair and secure Icom's system and that his hourly rate was $100. No evidence was presented and no argument was even made at trial or on appeal that the $6300 total was inaccurate. The appellant's argument is that the damages should not include expenses "making a computer system more secure than it was before the breach." In *United States v. Middleton*, 231 F.3d 1207, 1212 (9th Cir. 2000), the Ninth Circuit Court of Appeals affirmed a district court's rejection of a

defense requested instruction containing these same words used in the appellant's argument. The Court of Appeals approved an instruction that included within the definition of damages "measures . . . reasonably necessary to resecure the data, program, system, or information from further damage." *Id*. at 1213.

Here, as in *Middleton*, the damages to the computer system included expenses to re-secure the hacked computer network to prevent further damage. Applying the test for legal sufficiency, we hold that, when the evidence is viewed in the light most favorable to the government, any rational fact finder could have found that the appellant's unauthorized access to Icom caused the damage to Icom in excess of $5,000, beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Reed*, 54 M.J. at 41. Applying the test for factual sufficiency, we hold that, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves are convinced that appellant's unauthorized access to Icom caused the damage to Icom in excess of $5,000, beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

Conclusion

We hold that the military judge did not abuse his discretion by denying a continuance to obtain civilian counsel of choice. We also hold that the military judge did not err in instructing on the lesser included offense, as the intent aspect of the offense was contained in the mistake of fact instruction. We need not reach the issue of whether the military judge erred in instructing that the appellant's mistake of fact had to be reasonable, instead of merely honest, because we hold that the appellant was not materially prejudiced by the mistake of fact instruction. Finally, we hold that the findings are factually and legally sufficient.

The sentence is modified to a dismissal and forfeiture of two-thirds pay per month until the dismissal is executed. *United States v. Warner*, 25 M.J. 64, 67 (C.M.A. 1987).

The approved findings and the modified sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *Turner*, 25 M.J. at 325. The approved findings and modified sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator