**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Senior Airman MICHAEL R. BEAN**
**United States Air Force**

**ACM 35422**

**15 September 2004**

Sentence adjudged 29 August 2002 by GCM convened at MacDill Air Force Base, Florida. Military Judge: Harvey A. Kornstein.

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

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Captain C. Taylor Smith.

Before

STONE, GENT, and SMITH
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignment of errors, and the government's reply thereto.

The appellant first avers the military judge erred in refusing to instruct the members that simple assault was a lesser-included offense of aggravated assault with a dangerous weapon. Even assuming there was error, we hold it was harmless. Article 59(a), UCMJ, 10 U.S.C. § 859(a). We review de novo the issue whether any error was harmless. *United States v. Gibson*, 58 M.J. 1, 7 (C.A.A.F. 2003). The government has the burden of persuasion. *Id.* The test for harmlessness is whether any instructional error had a "'substantial influence' on the findings. If it did, or if we are 'left in grave doubt, the conviction cannot stand.'" *Id*. (quoting *Kotteakos v. United States*, 328 U.S. 750, 765

(1946)). The evidence was overwhelming as to whether the appellant used a loaded firearm in a manner "likely to produce death or grievous bodily harm." We find the handgun was fully cocked, loaded with a chambered hollow-point bullet, and with the safety off. Both the probable risk of harm and the magnitude of harm were great, given the appellant's irrational behavior and extreme intoxication. We are persuaded that any error did not have a substantial influence on the findings.

Next, the appellant claims he is entitled to five additional days of pretrial confinement credit for the five days he was hospitalized in a Florida civilian medical facility for psychological evaluation immediately after the aggravated assaults. Nothing in the record suggests that military authorities were attempting to punish the appellant or circumvent his procedural due process rights. Article 13, UCMJ, 10 U.S.C. § 813; Rule for Courts-Martial 304. Indeed, nothing in the record suggests that the appellant was there for any reason other than to protect his health. *See United States v. Ruppel*, 45 M.J. 578, 585-86 (A.F. Ct. Crim. App. 1997), *aff'd*, 49 M.J. 247 (C.A.A.F. 1998). *See also* FLA. STAT. ch. 394.463 (2002) (permitting involuntary hospitalization for a "72-hour examination period or, if the 72 hours ends on a weekend or holiday, no later than the next working day thereafter").

Finally, we have considered the appellant's assignment of error raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find it is without merit.

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

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court