UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant RONALD L. BREWER
United States Air Force

ACM 34936

28 April 2004

Sentence adjudged 12 October 2001 by GCM convened at Bolling Air Force Base, District of Columbia. Military Judge: Thomas G. Crossan.

Approved sentence: Confinement for 18 months and reduction to E-2.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Kyle R. Jacobson.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Lieutenant Colonel Jennifer R. Rider.

Before

PRATT, MALLOY AND GRANT
Appellate Military Judges

OPINION OF THE COURT

MALLOY, Judge:

Contrary to his pleas, the appellant was convicted by a general court-martial of a single specification of wrongfully using marijuana on divers occasions over a year's time, in violation of Article 112a, UCMJ, 10 U.S.C.§ 112a. A panel of officers and noncommissioned officers sentenced him to confinement for 18 months and reduction to airman. Prior to action, the convening authority waived mandatory forfeitures for 6 months for the benefit of the appellant's son. He otherwise approved the sentence as adjudged and the case is now before this Court for mandatory review under Article 66(c), UCMJ, 10 U.S.C. § 866 (c).

The appellant has raised five assignments of error for our consideration. He asserts: 1) The government improperly severed the appellant's relationship with his confidential defense expert consultant; 2) The military judge erred by refusing to permit the appellant to present a mosaic of alibi witnesses (to counter the permissive inference under Article 112a, UCMJ), creating an error violative of the Due Process Clause; 3) The military judge erred by striking the cross-examination of a government witness describing the circumstances surrounding the seizure of a hair sample from the appellant; 4) The military judge erred by refusing to answer a court member's question regarding the impact of a reduction in rank on the appellant's retired pay; and 5) The evidence is factually insufficient to support the appellant's conviction.

After careful consideration of these assignments of error, as well as our review of the entire record of trial, we affirm.

I. Background

This is a drug prosecution based almost exclusively on scientific evidence. On 7 August 2000, the appellant, a Master Sergeant with over 23 years of active military duty, was randomly selected to provide a urine sample as part of the Air Force's drug testing program. The appellant's sample was sent to the Air Force Drug Testing Laboratory, Brooks Air Force Base (AFB), where it tested positive for the presence of the metabolite of marijuana at a level above the cutoff established by the Department of Defense for marijuana. After officials at Bolling AFB (the appellant's home station) were notified of the results of this urinalysis, a military magistrate authorized, on 5 October 2000, the seizure of a hair sample from the appellant for further drug testing. In due course, the appellant's hair sample was sent to Psychemedics Corporation, a private drug-testing Laboratory, where it tested positive for the presence of the metabolite of marijuana. As the Psychemedics laboratory report indicates: "The presence of this human metabolite indicates the subject has ingested marijuana." This test was the basis for the divers use allegation. As the government expert witness, Dr. Carl Selavka, explained, unlike a urinalysis, hair testing made it possible to detect multiple uses extending back a significant number of months from the date the hair sample was collected.

II. Denial of Lt Kukoski as an Expert Consultant

A. Background

The appellant's positive urinalysis and positive hair analysis formed the basis for the present charge and specification, alleging divers use of marijuana between 5 October 1999 and 5 October 2000. This, however, was not the original charge and specification preferred against the appellant and referred to a court-martial as a result of this evidence. The present charge and specification were preferred on 27 April 2001, and referred to trial and served on the appellant on 19 June 2001. Documents in the record of trial,

including the military judge's findings on the appointment of a defense expert consultant, indicate that earlier charges were preferred in December 2000. For unexplained reasons, those charges were withdrawn sometime in April 2001. However, prior to their withdrawal, the military judge, who was the same military judge presiding over this case, granted a defense motion for the appointment of Lieutenant (Lt) Cynthia Kukoski, USN, as the defense confidential expert consultant. The military judge's order, dated 26 March 2001, contained the following caveat, however: "If contrary to the representation made in the motions, Lt Kukoski is unavailable, then an adequate substitute confidential expert consultant is ordered."

Although the appellant was served with the present charge and specification on 19 June 2001, he did not request the appointment of a confidential consultant for this case until 10 August 2001. In that letter, the appellant asked the convening authority for the appointment of Lt Kukoski as his expert consultant. This letter indicated that the defense counsel had contacted Lt Kukoski about the case and had worked with her in the past, but it said nothing about her having any involvement as a confidential consultant on the earlier charges or that there was any specific reason why she needed to be appointed to this case. Specifically, it did not allege that Lt Kukoski was already serving as a confidential member of the appellant's defense team. Indeed, it can be surmised from a typographical error requesting that Lt Kukoski be made available on 10 April 2001, that this letter was probably a regeneration of an earlier request made in support of the withdrawn charges. On 17 August 2001, the convening authority responded to the defense counsel, indicating he was denying the request for Lt Kukoski and appointing Lt Thomas Bosy, USN, under an order of confidentiality, as a substitute for Lt Kukoski. When this issue was raised at trial, the military judge held that the appellant was not entitled to a specific expert consultant and that the convening authority had provided an adequate substitute for Lt Kukoski. Again, although not entirely clear from the record, it appears Lt Kukoski was not appointed simply because she was unavailable.

B. Discussion

We find no merit to the argument that the appellant was entitled as a matter of right to the appointment of Lt Kukoski as an expert consultant for the defense simply because she had been previously made available to assist the defense with charges that were ultimately withdrawn. The convening authority was on firm legal footing when he appointed Lt Bosy to assist the defense. There was a significant gap between the time Lt Kukoski was conditionally made available by the military judge in March 2001 to assist with the original charges and the appellant's request in August 2001 for her assistance in this case.

Unlike the appellant, we can find no factual basis in the record of trial to support his claim that, prior to receiving the appellant's August 2001 request, the convening authority "acquiesced" in the defense use of Lt Kukoski following the referral of a new

charge in June 2001. Moreover, there is nothing in the record to suggest that Lt Kukoski--or for that matter any other expert beyond the government's--was needed to help the appellant perfect his theory of the case. While the civilian defense counsel did advocate a generalized need for the assistance of Lt Kukoski during the initial Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, he made clear from opening statement onward that "[t]here was no real scientific dispute in this case." As he told the members during opening statement:

> The reason we agree with the scientific expert--substantially agree--is that the conclusions that he reaches, the science in this case, the hair and urine testing, are not inconsistent with the scenario that I described above. If Master Sergeant Brewer had unknowingly ingested marijuana by eating spaghetti sauce during the summer containing a drug, it's not likely that he would have felt intoxicated.

This remained the appellant's theory of the case throughout the trial.

That the appellant was entitled to the assistance of a competent expert consultant in a prosecution built almost entirely on expert testimony seems to be beyond dispute. *See United States v. Burnette*, 29 M.J. 473, 475 (C.M.A. 199) ("very little, if any, showing of necessity was required to entitle the defense to expert assistance in the interpretation of drug analyses."); *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986). It is equally clear, however, that the defense is not entitled to the appointment of a specific expert, *United States v. Warner*, 59 M.J. 573 (A.F. Ct. Crim. App. 2003), and that the government discharges it obligation of providing expert assistance to the defense when it makes a competent expert available, regardless of whether or not the defense accepts the offered expert assistance. *Burnette*, 29 M.J. at 476. It is only in the extraordinary case that a specific expert should be appointed. *United States v. Tharpe*, 38 M.J. 8 (C.M.A. 1993). This is not such a case.

The fact that Lt Kukoski had been made available to assist with the dismissed charge does not, in our view, change this conclusion, particularly in the context of this case. A significant amount of time elapsed between the time the military judge ordered that Lt Kukoski, or other comparably qualified expert, be appointed to assist the defense in March 2001 and the appellant's second request for her assistance on 10 August 2001. When the convening authority received this request, he had the discretion to make his decision based on the availability of valuable government resources. The appellant, on the other hand, did not have the right to commandeer Lt Kukoski as his expert consultant without the convening authority's approval and without regard to her availability to serve in that capacity. *Tharpe*, 38 M.J. at 14, n. 4. It would appear the appellant's trial defense counsel understood this reality and that is why they requested the appointment of Lt Kukoski for this trial. Had they really believed that the convening authority had already

"acquiesced" in her appointment, as now claimed, there would have been no need for their August 2001 request for expert assistance.

In any event, we find no prejudice to the appellant. As noted, he did not challenge the accuracy of either the urinalysis or the hair analysis. His trial strategy was not to challenge the government's expert but to show the expert's testimony was consistent with his defense of unknowing ingestion. Though this strategy failed, it did not fail because his trial defense counsel was not well prepared for the task. *See United States v. Kelly*, 39 M.J. 235, 238 (C.M.A. 1994) ("Defense counsel are expected to educate themselves to attain competence in defending an issue presented in a particular case"). Under the circumstances, we do not believe that the appellant was prejudiced by not having the expert of his choice. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

We review a military judge's decision regarding a request for expert assistance for abuse of discretion, *United States v. McAllister*, 55 M.J. 270 (C.A.A.F. 2001), and we review his legal conclusions de novo. *United States v. Sullivan*, 42 M.J. 360 (C.A.A.F. 1995). We hold that the military judge did not abuse his discretion when he refused to appoint Lt Kukoski as an expert consultant and his decision was not influenced by an incorrect application of the law.

III. The Appellant's Mosaic Alibi Defense

A. Background

The appellant's defense in this case was that he was the victim of unknowing ingestion of marijuana. In support of this defense, he called his girlfriend, Michelle Betz, with whom he lived, and a friend of his nephew's, Donald Richards. Michelle Betz testified that during at least part of the charged timeframe, the appellant's 21-year-old nephew, Michael Harris, was living with her and the appellant. She was aware that Michael Harris and Donald Richards would, on occasion, hang out in the appellant's semi-finished basement, but neither she nor the appellant was aware that they were smoking marijuana while in the basement. She testified that she and the appellant were very strict about such things and would never have allowed the use of marijuana in their home. According to Michelle Betz, Michael Harris abruptly departed the home in the fall of 2000, which departure roughly corresponded with the news of the appellant's positive urinalysis.

Donald Richards testified that he and Michael Harris did, unbeknown to the appellant, occasionally smoke marijuana in the appellant's basement and outside of his house. On one occasion, Michael offered Donald a serving of spaghetti that Michael said contained marijuana. The spaghetti was served from a large pan on the stove and some spaghetti remained in the pan after Donald was served a portion. The appellant's unknowing ingestion was predicated on the testimony of Michelle Betz and Donald

Richards. Unfortunately for the appellant, there was no evidence that the appellant ever ate any of the spaghetti containing marijuana or that he was ever present when Donald and Michael were smoking marijuana. Indeed, his presence would have been inconsistent with Michelle Betz's testimony that they were very strict concerning such matters and that the conduct would never have been allowed. With this background, we turn to the appellant's alibi defense.

In addition to the testimony of Michelle Betz and Donald Richards, the appellant wanted to call four individuals (two Master Sergeants and two civilians) who would testify that: 1) each had significant contact with the appellant during the charged timeframe, 2) each "ha[d] training and/or experience with behaviors typical of marijuana abuse so that each could recognize symptoms of marijuana use or abuse," and 3) each would offer their opinion that the appellant was not under the influence of marijuana on the occasions that they saw him. One of these individuals would testify he did, however, "observe[] behavior which led [him] to suspect that Michael Harris and his friend Donald Richards were using marijuana."

The military judge granted a government motion in limine to exclude the testimony of these four individuals "due to a lack of showing by the defense of relevancy and necessity."

B. Discussion

We do not agree with the appellant that this proffered testimony was evidence of an alibi, mosaic or otherwise. In our view, the military judge correctly determined that the admissibility of this testimony turned on the question of relevancy and was to be resolved under Section IV of the Military Rules of Evidence.

To call this evidence an alibi is a misuse of that term. In *United States v. Brooks*, 25 M.J. 175, 178 (C.M.A. 1987), the then Court of Military Appeals provided what we believe is the commonly understood meaning of alibi:

> Alibi--which in Latin means "elsewhere"--is a term applied to an accused's claim that he was at another place when the crime was committed. By introducing evidence that he was elsewhere at the time, the accused provides a foundation for the inference that he could not have committed the crime.

(Citations omitted).

Here, the government, of course, offered no evidence concerning the circumstances under which the appellant used marijuana because it had no such evidence to offer. The prosecution was built on scientific evidence and the permissive inference of wrongful use

that may be drawn from such evidence. *United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001). While the record does not disclose the precise location or time of the appellant's drug use, since he did not dispute the scientific evidence that marijuana had indeed entered his system, we are certain that he could not defend against the charge based on the assertion that he was at another place each time the offense was committed. Accordingly, we reject his assertion that he was denied the opportunity to present an alibi defense.

The real issue is whether the testimony that these individuals did not see the appellant use marijuana, or observe any evidence that he was under the influence of it, on specific occasions within the charged timeframe, was relevant to a fact in issue and properly admissible. Although the appellant was free to present evidence of his good military character or law abidingness, such character evidence is not "an essential element of an offense or defense" so as to permit testimony of specific instances of conduct under Mil. R. Evid. 405(b). *United States v. Schelkle*, 47 M.J. 110, 111 (C.A.A.F. 1997). Thus, testimony concerning good military character or law-abidingness is limited to reputation or opinion testimony under Mil. R. Evid. 405(a). In this case, the appellant sought to have these witnesses testify as to specific instances of conduct, i.e., that on the occasions that they observed him, he did not use drugs or appear to be under the influence of drugs. However, "a mere assertion of nonobservation of criminal conduct does not equate to reputation or opinion evidence." *Id*. at 112. *See also United States v. Williams*, 205 F.3d 23, 34 (2d Cir. 2000) ("A defendant may not seek to establish his innocence . . . through proof of the absence of criminal acts on specific occasions") (quoting *United States v. Scarpa*, 897 F.2d 63, 70 (2d Cir. 1990)).

We are not unmindful of the fact that the appellant had a good tactical reason to avoid putting his good military character in issue. The trial counsel was aware that the appellant had been tried and acquitted of marijuana use in the late 1980s. The military judge did not allow the trial counsel to ask Michelle Betz questions about this past case because the door had not been opened. However, the appellant ran the risk that any testimony concerning his good military character could have resulted in cross-examination of his witnesses about this prior marijuana charge to test their opinion of his good military character. *United States v. Pruitt*, 46 M.J. 148 (C.A.A.F. 1997).

This testimony was lacking in probative value for other reasons too. First, we are reminded of what our superior court recognized long ago about why illicit drug use presents such a serious threat to military readiness, even where, as here, the abuser may not appear to the casual observer to be under the influence of an illicit drug.

> The risk, disturbingly, often cannot be obviated by keeping a person under the influence of a drug off the job for, unlike use of alcohol, there frequently are only marginally visible indications of the influence of drugs. Even when the user is not then under the influence, there may be dangerous

> psychological pressures on him which, themselves, could affect his performance adversely. Moreover, all this may be said of the service person performing what may be perceived as the most routine and mundane duty, for there is no individual in our modern armed forces whose performance may not touch others in a significant way.

United States v. Trottier, 9 M.J. 337, 346 (C.M.A. 1980) (footnote omitted). While much has changed in the last 24 years, this observation concerning the difficulty of ferreting out military drug users remains as true today as it was in the past.

Second, not only does the proffered testimony of these four individuals lack probative value, it appears to undercut--albeit unwittingly--the very argument the appellant was attempting to make concerning innocent ingestion. It is to be recalled, this defense was based on the failure of the appellant or his girlfriend to detect Michael Harris' and Donald Richards' marijuana use in their home, right under their noses. One may reasonably ask, therefore, how is it that these four witnesses could detect something that neither the appellant nor his girlfriend could detect in respect to someone who was living under the same roof?

We do not mean to imply that the lack of evidence is never relevant, for there is, indeed, to borrow the appellant's term, a mosaic of evidence in every criminal case. This "mosaic of evidence that comprises the record before a jury includes both the evidence and the lack of evidence on material matters. Indeed, it is the absence of evidence that may provide the reasonable doubt that moves a jury to acquit." *United States v. Thompson*, 37 F.3d 450, 453 (9th Cir. 1994). Here, there was neither an admission from the appellant concerning his marijuana use nor a single witness who observed such use. Without a doubt, this lack of evidence was highly relevant to the question of whether the government proved its case beyond a reasonable doubt to the satisfaction of the court members and was clearly fair argument for the appellant. It does not follow from this observation, however, that the fact there were some individuals who were of the opinion that the appellant was not under the influence of marijuana at the time of their observation of him is relevant evidence.

We review a military judge's exclusion of testimony for abuse of discretion. *Sullivan*, 42 M.J. at 360. We hold that the military judge did not abuse his discretion in excluding such testimony.

IV. The Striking of a Portion of a Government Witness' Testimony

Crystal Whittaker, a member of the Joint Drug Enforcement Team at Bolling AFB, presented the appellant with the search and seizure authorization for a hair sample and escorted him to the base medical clinic for collection of this sample by a medical officer. The appellant, although not hostile or insubordinate, was somewhat recalcitrant

in cooperating with Crystal Whittaker without assurance that this was a compelled activity. He therefore insisted on speaking with his civilian attorney before complying with the magistrate's authorization and, after speaking with counsel, asked that his section commander issue a written order directing him to comply with the magistrate's authorization. Ultimately, Major Robert Zajac, a medical officer, collected a sample of the appellant's pubic hair without incident. The appellant's recalcitrance when presented with the search authorization and while undergoing the collection of his pubic hair, was offered by the trial counsel as "consciousness of guilt" evidence and set the stage for the appellant's claim that the military judge erred in striking a portion of Ms. Whittaker's testimony.

The purpose of the appellant's cross-examination of Crystal Whittaker was to show that this was not a consensual search and seizure and that is why the appellant was reticent to participate in the exercise. As the appellee notes in its brief, this led to a series of confusing questions concerning the difference between a search based on consent and one based on probable cause. The military judge eventually sustained an objection to a defense question seeking to establish that the appellant was ordered to provide the sample--something the members already knew. The military judge sustained the objection to some of defense counsel's questions because voluntariness was not an issue, the questions were confusing and he was not going to allow the questioning to continue under Mil. R. Evid 403.

We find no merit in the appellant's assertion that the military judge abused his discretion in sustaining an objection to these questions. *See generally* 2 Steven A. Childress & Martha S. Davis, *Federal Standards of Review* § 4.02 (3d ed. 1999). In any event, after the military judge sustained the objection, the civilian defense counsel was allowed to reframe his questions and explain why the appellant was less than thrilled by the prospect of having his pubic hair seized. We find no error and no prejudice. Article 59(a), UCMJ.

V. The Court Member's Retirement Question

A. Background

During sentencing, the military judge instructed the members on the effect a punitive discharge would have on the appellant's possible retirement, as follows:

> A punitive discharge will affect an accused's military future with regard to his legal rights, economic opportunities, and social acceptability.
>
> In addition, a punitive discharge terminates the accused's military status and the benefits that flow from that status, including the possibility of becoming a military retiree and receiving retired pay and benefits.

Following closing argument by counsel, the following exchange occurred between a court member and the military judge concerning reduction in rank:

> MBR: Just a question for clarification. Both the government and defense counsels [sic] came up with a partial recommendation for reduction in grade. My question is whatever reduction in grade is decided upon by the members, does that carry on into retirement?
>
> MBR: Let me just go back and use as an example, reduction to E-6. If that were the verdict of the jury, would that be--he would be retired as an E-6 with E-6 benefits?
>
> MJ: Let me advise the members your duty is to determine what you believe is an appropriate sentence in this case. If that includes reduction, I can't see into the future as to what it holds for Master Sergeant Brewer as to what rank he would retire at if he were allowed to retire because I don't know what your sentence is. It is difficult to answer other than to say that could be a collateral issue. Your duty is to determine what you believe an appropriate sentence is for this accused. I am hoping I'm answering your question and giving you some guidance.

There was no objection to this answer. However, as a result of a question from another court member concerning when the appellant was eligible to retire, the military judge held an Article 39(a), UCMJ, session. Following this session, the military judge reiterated the following to the members:

> MJ: In response to two court member questions, again let me read you one part of the instruction. It is the duty of each member to vote for a proper sentence for the offense of which the accused has been found guilty. You have the information that we can provide to you. Any other matters that have not been provided to you are too speculative for us to provide guidance and we are unable to provide that guidance.

Again, there was no defense objection to the instruction.

B. Discussion

The appellant now complains that the military judge failed to properly instruct the members on the impact a reduction in rank would have on his retirement. We disagree for three reasons. First, we believe the military judge's instruction was fully compliant with the case law concerning instructions on a retirement-eligible accused. Second, the information concerning the impact a reduction would have on retired pay was, in fact,

before the court as the military judge instructed them. Third, the appellant waived any objection to the instruction by failing to object to it. *United States v. Henderson*, 29 M.J. 221 (C.M.A. 1989).

This clearly was one of those cases in which the impact of an adjudged punishment on the appellant's retirement was "the single most important sentencing matter" to the appellant and the court members. *United States v. Griffin*, 25 M.J. 423, 424 (C.M. A. 1988). The members sentenced the appellant to a period of confinement nine times that requested by trial counsel but they did not sentence him to a punitive discharge or reduction to the lowest enlisted grade. The instruction on the effect of a punitive discharge, quoted above, was fully compliant with the requirement of *United States v. Boyd*, 55 M.J. 217 (C.A.A.F. 2001). In addition, an instruction on the impact of a punitive discharge on retirement benefits is required if there is an evidentiary predicate for the instruction. *Id*. It appears that this instruction was of significant importance to the members.

In addition to this instruction, the information before the members included the appellant's personal data sheet, which included information on his entire service, including the start date of his current term, and a defense exhibit captioned "Estimated Loss of Retirement Pay." This latter document purported to show the pecuniary impact a reduction in rank would have on retired pay at each rank between E-1 and E-6 at the one-year, 10-year, 20-year and 30-year points. *See United States v. Luster*, 55 M.J. 67 (C.A.A.F. 2001) (holding it was error to exclude this type of evidence).

Thus, contrary to the appellant's assertion, the members did have sufficient information on the impact a reduction in rank would have on his retirement pay. If anything, the failure of the military judge to more fully explain all of the collateral consequences of a reduction in rank, was to the appellant's advantage. What the members were not told, and what the appellant's "Estimated Loss of Retirement Pay" exhibit apparently fails to consider, is that, assuming the appellant obtains retired status, he will, by operation of law, have the benefit of a mandatory grade determination and advancement in grade to the highest grade satisfactorily held, when his active duty service and time on the retirement list totals 30 years. *See* 10 U.S.C. § 8964; Air Force Instruction (AFI) 36-3203, *Service Retirements*, ¶ 7.4 (12 Sep 2003). After this grade determination, the appellant's retired-pay will be recomputed. *See* 10 U.S.C. § 8992; AFI 36-3203, ¶ 7.7. This, of course, assumes that the Secretary of the Air Force approves the appellant's retirement. *See* 10 U.S.C. § 8914; *Cedillo v. United States*, 37 Fed. Cl. 128 (1997) (Retirement is not guaranteed for an enlisted member who completes at least 20 but less than 30 years of service and it is entirely within the discretion of the Secretary of the Air Force who may, but need not, approve retirement.)

In reviewing this issue, we are reminded of former Chief Judge Everett's cautionary observation that a military judge "is less likely to be informed as to collateral,

than as to direct, consequences" of a sentence and thus "for practical reasons and in the exercise of his sound discretion" is entitled to limit the advice he provides on some collateral matters. *Griffin*, 25 M.J. at 425 (Everett, C.J., concurring). This discretion, of course, does not extend to an instruction on the effects of a punitive discharge. *Boyd*, 55 M.J. at 217.

We hold that the military did not abuse his discretion by failing to give a required instruction. Even assuming otherwise, any instructional error was waived by the failure of the defense counsel to object. *United States v. Gilley*, 56 M.J. 113 (C.A.A.F. 2001).

VI. Sufficiency of the Evidence

The appellant argues that evidence is factually insufficient to support the finding that he used marijuana on divers occasions notwithstanding the unchallenged testimony of Dr. Selavka. We disagree.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, including the appellant, as did the trial court, we are convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)); Article 66(c), UCMJ. Reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). "The factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). After reviewing the record and applying this standard, we are satisfied of the appellant's guilt beyond a reasonable doubt.

VII. Conclusion

The approved 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; *Reed*, 54 M.J at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

LAQUITTA J. SMITH
Documents Examiner