UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Major JARED R. BURDIN
United States Air Force

ACM 38033

23 May 2013

Sentence adjudged 3 June 2011 by GCM convened at Peterson Air Force Base, Colorado. Military Judge: Jeffrey A. Ferguson.

Approved sentence: Dismissal, confinement for 130 days; and forfeiture of $4,421.00 pay per month for 4 months.

Appellate Counsel for the Appellant: Captain Christopher D. James; Captain Shane A. McCammon; and Philip D. Cave, Esquire (civilian counsel).

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Rhea A. Lagano; and Gerald R. Bruce, Esquire.

Before

STONE, GREGORY, and HARNEY
Appellate Military Judges

PER CURIAM:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of forcible rape upon his spouse, in violation of Article 120, UCMJ, 10 U.S.C. § 920. The court sentenced him to a dismissal, confinement for eight months, and forfeiture of all pay and allowances. The convening authority approved the dismissal, but she reduced the confinement to 130 days and reduced the forfeitures to $4,421 per month for four months.

Background

The appellant was charged with raping his wife. The victim testified that the appellant became violent in their bedroom, flipped her onto her stomach, and held her down. She "became alarmed and frightened" and yelled, "What are you doing, what are you doing, stop, stop." The appellant did not respond to her protests but instead forced apart her legs and penetrated her. She testified that he continued "to have sex for a very short period of time," ejaculated, and left the bed without saying anything.

After reporting the incident to law enforcement, the victim participated in a recorded pretext telephone call to the appellant during which she asked the appellant if he heard her tell him to stop after he pinned her to the bed. The appellant replied, "Yeah, I did. I'm sorry." During a later interview with law enforcement, the appellant again admitted that he heard his wife tell him to stop. When asked by the detective if what he did to his wife was "forced non-consensual sex," the appellant replied, "Yeah."

Sufficiency of the Evidence

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant argues on appeal that the evidence is legally and factually insufficient to support his conviction. We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)). "The test for factual sufficiency 'is whether, after weighing the evidence . . . and making allowances for not having personally observed the witnesses, [we ourselves 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 *Turner*, 25 M.J. at 325). Applying these standards to the evidence in this case and making allowances for not having observed the witnesses, we find the evidence legally and factually sufficient to prove guilt beyond a reasonable doubt.

Assistance of Counsel

The second issue raised by the appellant, again pursuant to *Grostefon*, concerns whether he received ineffective assistance of counsel. In a scattershot attack, the appellant alleges multiple failings. Chief among his complaints are that his counsel did not move to suppress his statements to law enforcement and did not request an expert toxicologist who "could have explained" his mental state at the time he made the

statements.[1] In a supplemental motion to submit documents, the appellant expands his *Grostefon* ineffectiveness claim to include his counsel's failure to utilize a law enforcement report to attack his confession and to obtain a specific expert consultant instead of the one appointed by the convening authority. Trial defense counsel submitted responsive declarations along with multiple documents from the case file relevant to the appellant's allegations.

We review claims of ineffective assistance of counsel de novo, applying the two-pronged test the Supreme Court set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007). Under *Strickland*, an appellant must demonstrate:

> (1) "a deficiency in counsel's performance that is 'so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment'"; and (2) that the deficient performance prejudiced the defense through errors "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Id. (quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997); *Strickland*, 466 U.S. at 687)) (internal quotation marks omitted). The deficiency prong requires that an appellant show that the performance of counsel fell below an objective standard of reasonableness, according to the prevailing standards of the profession. *Strickland*, 466 U.S. at 688. The prejudice prong requires a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. Evidentiary hearings are required if there is any dispute regarding material facts in competing declarations submitted on appeal which cannot be resolved by the record of trial and appellate filings. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

Applying these standards, we find that any material conflict in the respective declarations regarding this issue may be resolved by reference to the record and appellate filings without the need for an evidentiary hearing. The comprehensive declarations by trial defense counsel address the alleged deficiencies and provide sound reasons for the decisions now questioned by the appellant. Concerning the appointment and use of experts, trial defense counsel states—and the record shows—that the defense requested and received two expert consultants, one in forensic toxicology and another in forensic psychology. As explained and documented by trial defense counsel, neither expert could support the appellant's theory that medications induced him to make false admissions, neither could provide testimony that would support a motion to suppress his admissions, and neither could support a defense based on lack of mental responsibility. Although he

[1] In his assignment of errors, the appellant's civilian appellate counsel summarized the voluminous submissions provided pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), as relating primarily to these issues. We have also considered in detail the specific allegations in the submissions themselves.

lacked expert support to exclude the statements, trial defense counsel made a commendable effort to lessen their impact by arguing that the appellant was emotionally broken and would have admitted to anything, and then he urged the members to consider the emotional content of the recordings: "the weeping, the meekness, the submission, the appeasement, the acquiescence in each of those."

Concerning the supplemental allegations, the qualifications of the appointed experts were sufficient to meet the stated needs of the defense and do not support the appellant's claim that his counsel should have moved for a specific expert. *See United States v. Warner*, 62 M.J. 114, 119-20 (C.A.A.F. 2005) (citing *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985)) (holding that, upon sufficient showing the defense is entitled to reasonably qualified expert assistance but not to an expert of his own choosing). Nor do we find that the submitted police report would have provided a basis to attack the admissions. Applying the *Strickland* standard to the appellate filings and the record as a whole, we hold that the appellant was not denied effective assistance of counsel.

Post-Trial Delay

We note that the overall delay of over 18 months between the time the case was docketed at 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 M.J. 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. *United States v. Allison*, 63 M.J. 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. Nor do we find sufficient cause in this case to grant relief absent prejudice. *See United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002) (concluding that service courts have the authority under Article 66(c), UCMJ, 10 U.S.C. § 866(c), to "tailor an appropriate remedy [for post-trial delay], if any is warranted, to the circumstances of the case").

Conclusion

The approved findings and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ.

Accordingly, the approved findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court