UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ADAM D. DOUGLAS
United States Air Force

ACM S31059

28 January 2009

Sentence adjudged 03 November 2005 by SPCM convened at Hill Air Force Base, Utah. Military Judge: Nancy Paul (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 12 months, and reduction to E-1.

Appellate Counsel for the Appellant: Terri R. Zimmermann, Esquire (civilian counsel) (argued), Lieutenant Colonel Mark R. Strickland, Major John S. Fredland, Captain Timothy M. Cox, and Kyle R. Sampson, Esquire (civilian counsel).

Appellate Counsel for the United States: Captain Ryan N. Hoback (argued), Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, Major Jefferson E. McBride, and Major Donna S. Rueppell.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

FRANCIS, Senior Judge:

Contrary to the appellant's pleas, a military judge sitting as a special court-martial convicted him of multiple offenses, including: one specification each of failing to go to his appointed place of duty at the time prescribed, dereliction of duty, making a false official statement, distribution of methamphetamine, carnal knowledge, and sodomy of a child under the age of 16 years, in violation of Articles 86, 92, 107, 112a, 120, and 125,

UCMJ, 10 U.S.C. §§ 886, 892, 907, 912a, 920, 925; and two specifications of violating a lawful general regulation, also in violation of Article 92, UCMJ. The adjudged and approved sentence includes a bad-conduct discharge, confinement for 12 months,[1] and reduction to the grade of E-1.

The appellant raises three assignments of error, each of which is discussed in detail below.[2] Although not raised by the appellant, the Court also examined whether he is entitled to relief because of appellate processing delays. Finding no prejudicial error, we affirm.

Unlawful Command Influence

The appellant asserts the military judge erred when she did not dismiss the charges and specifications after she found unlawful command influence and when she found that the unlawful command influence did not affect the findings stage of the trial. We agree in part, but find no prejudice to the appellant.

At the beginning of trial, the defense moved to dismiss all charges and specifications, alleging unlawful command influence by the appellant's immediate supervisor, Master Sergeant (MSgt) B. The basis for the motion was twofold. First, according to the defense, MSgt B had twice ordered the appellant not to contact potential witnesses against him. Second, MSgt B had spread so many rumors about the appellant's alleged criminal conduct and had been so outwardly hostile to the appellant that others were afraid to come forward as character witnesses on the appellant's behalf.

After an extensive hearing, the military judge found that MSgt B's actions created a hostile atmosphere that effectively discouraged witnesses from providing character statements on the appellant's behalf and thus amounted to unlawful command influence. The military judge also found that although that influence did not adversely affect the findings portion of the trial, it could potentially affect the appellant's sentencing case. Having so found, the military judge nonetheless denied the defense motion to dismiss, opting instead to delay the trial and order preparation of a memorandum for signature by the appellant's and MSgt B's commander, inviting and encouraging all unit personnel who wished to do so to assist in the appellant's defense and to promptly report any attempt to dissuade them from doing so. In this regard, the military judge's written ruling specifically directed that the trial counsel and defense counsel work together to prepare the memorandum for the commander's signature and that, once approved by the military judge, the memorandum was to be provided to the defense for use in securing desired witnesses. The military judge's ruling also "strongly recommended" that the appellant be

[1] The appellant was awarded 60 days of confinement credit for illegal pretrial punishment.
[2] In conjunction with his assignments of error, the appellant moved to attach a number of documents to the appellate record. The motion to attach is hereby granted. The Court heard oral argument on all three assignments of error on 19 November 2008.

removed from MSgt B's supervision, that MSgt B be ordered not to talk to anyone about the allegations against the appellant other than trial or defense counsel, and that the orders not to contact witnesses be rescinded.[3] Trial was thereafter delayed from 18 August 2005 until 1 November 2005 to allow implementation of the military judge's order.

We review questions of unlawful command influence de novo, deferring to findings of fact made by the trial judge unless they are clearly erroneous. *United States v. Denier*, 43 M.J. 693, 698 (A.F. Ct. Crim. App. 1995) (citations omitted).

The prohibition against unlawful command influence arises from Article 37(a), UCMJ, 10 U.S.C. § 837(a), which provides:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

In determining whether or not unlawful command influence exists, "[t]he test is 'some evidence' of 'facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial in terms of its potential to cause unfairness in the proceedings.'" *United States v. Harvey*, 64 M.J. 13, 18 (C.A.A.F. 2006) (quoting *United States v. Biagase*, 50 M. J. 143, 150 (C.A.A.F. 1999)). "If the military judge concludes that the defense has raised the issue of unlawful command influence . . . '[t]he [g]overnment must prove beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings or did not affect the findings and sentence.'" *Id.* (quoting *Biagase*, 50 M. J. at 151).

Unlawful command influence is not solely the product of illicit action by a formal commander, but can also be exercised by those cloaked with the "mantle of command authority." *United States v. Ayala*, 43 M.J. 296 (C.A.A.F. 1995) (quoting *United States v. Stombaugh*, 40 M.J. 208, 211 (C.M.A. 1994)) (additional citations omitted). Thus, the

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[3] Although the military judge couched this portion of the ordered corrective action as "strong recommendation[s,]" it is clear from the context that they were directive in nature.

actions of an enlisted member can, under the right circumstances, result in the equivalent of unlawful command influence. *See United States v. Sullivan*, 26 M.J. 442 (C.M.A. 1988) (addressing two aspects of unlawful command influence, one concerning remarks to enlisted members by the unit first sergeant about rehabilitation for drug offenders). Moreover, in addition to unlawful command influence, Article 37(a), UCMJ, prohibits persons subject to the code from attempting to coerce or influence the actions of a court-martial. This provision has been interpreted to preclude unlawful interference with access to witnesses. *Stombaugh*, 40 M.J. at 212-13. As a practical matter, it makes no difference whether the challenged action is called unlawful command influence or unlawful interference with access to witnesses, because the test applied by the courts is the same for both. *Id.* at 213-14.

Where a violation of Article 37(a), UCMJ, is found, military judges have broad discretion in determining appropriate corrective action, with the goal being to dissipate any taint of the perceived illicit influence. *United States v. Gore*, 60 M.J. 178 (C.A.A.F. 2004). Although dismissal of the affected charges is one possible remedy, it is a "drastic" action of last resort, to be used only when no other remedy is deemed appropriate. *Id.* at 187. Appellate courts review the particular remedial action chosen by the judge for abuse of discretion. *Id.* "An abuse of discretion means that 'when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'" *Id.* (quoting *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993)) (additional citations omitted). "[T]he abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." *Id.* (citing *United States v. Wallace*, 964 F.2d 1214, 1217 n.3 (D.C. Cir. 1992)). However, we must be convinced beyond a reasonable doubt that the remedy chosen was sufficient to remove the taint of the unlawful influence. *Gore*, 60 M.J. at 186 (citing *Biagase*, 50 M.J. at 151).

Applying the above, we conclude that MSgt B's actions constituted either the appearance of unlawful command influence or intentional interference with potential defense witnesses. Prior to the events here at issue, MSgt B and the appellant were both Air Force recruiters serving the Butte, Montana area, where they worked out of geographically separated offices. On 6 May 2004, after the appellant came under investigation for some of the offenses for which he was court-martialed, MSgt B issued the appellant a "cease and desist order as it pertains to tampering, talking to and extracting information from witnesses that are part of an ongoing investigation." He followed that up with another order on 11 May 2004, prohibiting the appellant from talking to other members of his flight, whether on or off duty, about anything other than official business. Further, he required that any communication be done via e-mail and that MSgt B be copied on every such e-mail. Neither order encompassed an end date

and, despite a complaint from the defense in July 2005 (more than a year later), both still remained in effect at the time of trial.

In June 2004, the appellant was transferred from his office into MSgt B's office, thereafter working directly under MSgt B's daily supervision. The appellant testified that after the transfer, MSgt B, among other things, continually made degrading remarks about him, both to his face and to others; spread rumors about the appellant, telling people that he was guilty; and told the appellant to "stop" when he tried to get character statements.[4]

The appellant testified that as a result of these actions, at least one co-worker, Technical Sergeant R, initially agreed to provide a character statement, but then changed his mind when MSgt B told him not to, and that another potential character witness, Staff Sergeant M, said he would not provide a statement because he "did not want to get involved." The appellant testified that he also asked some of the federal Marshalls who worked in his building to provide statements, but they too declined. He later heard that the Marshalls had been warned off by their own team leader, who said they "had to work with that man," meaning MSgt B. Finally, the appellant testified that he also asked the unit's civilian secretary, Ms. T, to provide him a statement.

Ms. T confirmed that there was palpable animosity between MSgt B and the appellant. She further indicated that although MSgt B never told her not to write a statement for the appellant, she felt that MSgt B, who was her direct supervisor, would have been angry if she had done so and that she would have suffered repercussions at work. As a result, she was reluctant to talk to the appellant's counsel until the commander gave her permission to do so. Even during the course of her testimony at trial, she remained concerned enough that she did not want MSgt B in the courtroom, as she did not want him to hear what she had to say.

The defense also called Mr. R, a civilian janitor for the federal building in which MSgt B's office was located. He testified that he heard others in the building (none working for MSgt B) express concern about providing character statements on the appellant's behalf and was himself verbally reprimanded for helping the appellant, being instructed: ". . . have you learned your lesson? Keep your mouth shut." Further, he heard at least one of the federal Marshalls say that he "did not want to get involved because it could affect his position as a court security officer," and that he would only speak out if subpoenaed. Mr. R's supervisors also told him, with respect to his testimony before the court, to limit himself to "yes" or "no" answers.

[4] The appellant also testified to other extensive maltreatment by MSgt B in connection with a separate motion for illegal pretrial punishment credit.

Based on the above, the military judge correctly found that MSgt B's actions constituted unlawful command influence and improper interference with witnesses, in violation of Article 37(a), UCMJ, and that it had the potential to negatively impact the appellant's sentencing case. Although MSgt B was not a commander, he was Ms. T's direct supervisor and exercised supervisory authority over the other Air Force recruiting personnel who worked with the appellant. His actions were sufficient to deter, or potentially deter, them from providing favorable character references. Further, although MSgt B exercised no authority over Mr. R, the federal Marshalls, or any other non-Air Force civilian working in the building, it is clear from Mr. R's testimony that MSgt B's actions also negatively influenced, or had the potential to negatively influence, the willingness of those individuals to come forward on the appellant's behalf.

We find error, however, in the military judge's determination that the same actions did not have the potential to negatively impact the findings portion of the trial. Mil. R. Evid. 404(a)(1) permits the defense to introduce evidence of pertinent character traits of an accused. That includes evidence of good military character during findings to attempt to persuade the trier of fact that the accused acted in conformity with that character. *United States v. Schelkle*, 47 M.J. 110, 112 (C.A.A.F. 1997). The military judge did not provide an explanation for her conclusion that MSgt B's actions did not have the potential to affect findings, nor do we find any basis in the record to support such a holding. Character statements sought by the appellant in this case certainly could have been used to attempt to mount a good military character defense and, if used for that purpose, would have been relevant for findings purposes. Indeed, the defense motion to dismiss clearly evidenced a potential intent to use the desired character statements in that way, indicating in part that MSgt B's actions denied the appellant the "opportunity of fully exploring all possible defenses, to include the defenses of good military character and law-abidingness."

Notwithstanding the above, we find no prejudice to the appellant. First, we find no abuse of discretion in the type of corrective action ordered by the military judge. Ordering rescission of the restrictive orders issued by MSgt B, directing that the appellant's commander issue a memorandum specifically inviting witnesses to come forward for the appellant, and delaying the trial for more than two months to allow the defense to obtain the desired evidence, considered collectively, were reasonably calculated to dissipate any potential taint from MSgt B's actions. Indeed, our superior court has specifically approved of similar corrective actions in other cases. *Sullivan*, 26 M.J. at 443-44. Dismissal of the charges was not required. Second, despite the military judge's erroneous rulings as to the potential impact of MSgt B's actions on findings, we are convinced beyond a reasonable doubt that the corrective action ordered by the military judge was ultimately *implemented* in a manner broad enough to dissipate any potential taint as to *both* findings and sentence. The commander's memorandum, which was drafted in cooperation with the defense and approved by the military judge, did not, by its terms, restrict itself to sentencing evidence. Rather, it simply referenced the

potential for witnesses to extol the virtues of the appellant's "good military character." That broad language, coupled with the fact that the corrective action was completed after motions and *before* the findings portion of the trial, certainly allowed the defense the opportunity to obtain and present evidence of the appellant's good military character for findings purposes had they wished to do so. They did not.

In reaching this determination, we find no merit in the appellant's assertion that the record fails to establish that the corrective actions ordered by the military judge were ever completed or that they were effective. The appellant points to the fact that the copy of the commander's memorandum attached to the record as an appellate exhibit is unsigned and the lack of evidence in the record as to who, if anyone, was provided the memorandum.

Having considered the record in its entirety, we are satisfied that the commander's memorandum was in fact issued and that it was provided to the defense for the appellant's use in securing the assistance of any witness he and his counsel deemed appropriate. The whole purpose of the memorandum, and the accompanying trial delay, was to aid the defense in securing witnesses. In this regard, when orally explaining her ruling prior to delaying the trial, the military judge reiterated that the purpose of the commander's memorandum, once worked out by counsel and approved by the court, was for the appellant and his counsel to use "in whatever fashion you think [appropriate] in securing character statements that you feel are necessary for your court-martial." When the court reconvened, the military judge, relative to the commander's memorandum, noted that the parties had indeed agreed upon appropriate language and directed that a copy of the memorandum, dated 25 August 2005, be included in the record as an appellate exhibit. She then specifically asked the defense: "[D]id the defense receive a copy of that memorandum *for their use*?" (emphasis added). Counsel replied: "We did, Your Honor." Thereafter, the military judge, after discussing some other preliminary matters, asked whether there was anything else that they needed to take up before proceeding with the trial. Again, the defense responded in the negative. If, as the appellant now suggests, the commander's memo had not been signed and provided to the defense, or if they had not been able to use it as intended, or still found reluctance on the part of any potential witness, they would certainly have said so at the time. That they did not, indicates that all went as ordered and the letter was indeed effective.

This is not to suggest that the burden is on the defense to prove the negative, i.e., that the judge's corrective action was not effective. Once the specter of unlawful command influence has been fairly raised, the burden remains squarely on the government to demonstrate that it did not affect the findings and sentence. *Harvey*, 64 M.J. at 18. However, faced with a specific query from the military judge that was obviously intended to determine if the ordered corrective action had been implemented, the defense was obligated to say so if it had not been implemented or if they had still

encountered problems, which the government would then be obligated to further address. The defense's failure to raise any such problems at that point is instructive.

Discovery Violation

The appellant asserts that his Fifth Amendment[5] right to due process and Sixth Amendment[6] right to confront and cross-examine the witnesses against him were violated when the government failed to disclose the juvenile adjudication records of complaining witness JJL. We find error, but again conclude that it is harmless.

JJL was a known juvenile delinquent, with a history of repeated drug use, breaking into parked cars, and stealing. As a result, she had been confined in a state juvenile detention facility and at the time of trial was living in a state drug rehabilitation center.

On 6 July 2005, about a month before trial, the defense submitted an extensive discovery request. It asked, in part, for disclosure of "[a]ny evidence tending to diminish the credibility of . . . any potential witnesses including, but not limited to, prior civil or military convictions . . . and evidence of other character, conduct, or bias bearing on any witness credibility, including but not limited to, *youth court records* . . . ." (emphasis added). By response of 7 July 2005, the government, with regard to this particular discovery request, indicated it was "inquiring into whether such evidence exists." The government thereafter never produced copies of JJL's juvenile court record or any records from her stay in either the juvenile detention facility or the drug rehabilitation facility.

During discovery, the government must

> [D]isclose known evidence that "reasonably tends to" negate or reduce the degree of guilt of the accused or reduce the punishment that the accused may receive if convicted. Evidence that could be used at trial to impeach witnesses is subject to discovery under these provisions. If the government fails to disclose discoverable evidence, the error is tested on appeal for prejudice . . . .

United States v. Santos, 59 M.J. 317, 321 (C.A.A.F. 2004) (citations omitted).

With regard to potential prejudice, the test differs depending on the nature of the defense request for the undisclosed information. "[Where] the defense either did not make a discovery request or made only a general request for discovery . . . the appellant will be entitled to relief only by showing that there is a 'reasonable probability' of a

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[5] U.S. CONST. amend. V.
[6] U.S. CONST. amend. VI.

different result at trial if the evidence had been disclosed." *United States v. Roberts*, 59 M.J. 323, 326-27 (C.A.A.F. 2004) (citing *United States v. Bagley*, 473 U.S. 667 (1985)) (additional citations omitted). However, if the government failed to disclose the information in response to a specific request, "the appellant will be entitled to relief unless the [g]overnment can show that nondisclosure was harmless beyond a reasonable doubt." *United States v. Cano*, 61 M.J. 74, 76 (C.A.A.F. 2005) (quoting *Roberts*, 59 M.J. at 327). "When a 'fact was already obvious from . . . testimony at trial' and the evidence in question 'would not have provided any new ammunition,' an error is likely to be harmless." *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007) (quoting *Cano*, 61 M.J. at 77-78) (additional citations omitted).

Applying the above precepts, we begin by finding that JJL's juvenile court records, detention facility records, and drug rehabilitation facility records were all potentially fertile grounds for impeachment information and thus discoverable. *Santos*, 59 M.J. at 321. However, we find the nondisclosures harmless.

In assessing potential prejudicial impact, we first note that not all of the undisclosed information is subject to the same test. The defense request for "youth court records" qualifies as a "specific" request within the meaning of the above rules. Although the request for such records did not mention JJL by name, the government, given the attendant circumstances, clearly knew or should have known that it applied to her. She was the only juvenile complaining witness and was known to have a significant history of juvenile offenses.

The same cannot be said of the request for JJL's detention facility records and drug rehabilitation facility records. The appellant's pre-trial discovery requests make no specific reference to such records, either in connection with JJL or any other witness. Nor do we read the phrase "youth court records" as broad enough to encompass the records of JJL's confinement in a detention facility or her treatment at a drug rehabilitation center. A "court record," in the criminal law context, is the record of conviction for the offense or offenses concerned. Such a record logically does not include records compiled by a detention facility or drug rehabilitation center during the time the individual concerned was thereafter confined or receiving drug rehabilitation treatment. As a result, JJL's detention facility records and drug rehabilitation facility records fall under the general defense request for evidence tending to diminish witnesses' credibility.

With the above distinction in mind, we find the government's failure to provide the defense copies of JJL's "youth court records" harmless beyond a reasonable doubt. We also find that there is no reasonable probability that the outcome of the appellant's trial would have differed if the defense had been provided copies of her juvenile detention facility or drug rehabilitation facility records.

It is evident from the record that the defense, even without copies of her actual record in hand, was fully aware of JJL's criminal history. Indeed, an affidavit from trial defense counsel attached to the appellant's assignments of error brief admits as much, saying that he "knew that the trial counsel was aware that one of the complaining witnesses, [JJL], had been in a juvenile detention facility," and "that it was from 'behind bars' that [JJL] made the initial complaints about [the appellant] to her mother." More significantly, the trial court was made fully aware of JJL's juvenile criminal history, both through JJL's own testimony and that of other witnesses. In response to questions by the prosecution and aggressive cross-examination by the defense, JJL specifically admitted that she: had been sent to a detention facility for stealing and running away; was living in a drug treatment facility at time of trial; had stolen money; had been caught with drug paraphernalia in her room; had been caught breaking into cars and stealing; and had a long history of drug abuse involving a wide variety of drugs, including, in her words, "marijuana, speed, X, 'shrooms, acid, PCP, LSD . . . [and] . . . crack cocaine."

In addition, the defense called JJL's cousin as a findings witness, who characterized JJL as "dishonest" and "untrustworthy." In an apparent reference to the rehabilitation facility where JJL was living at the time of trial, she also testified that JJL was still living "[i]n some house to recover from drugs."

Finally, it is evident from the defense findings argument that the defense team knew even more derogatory information about JJL's past than they elected to bring out at trial. During findings argument, trial defense counsel, in an obvious reference to prostitution, commented that JJL was "selling her body on the street for drugs." The military judge stopped the argument, saying that she did not recall any such testimony. Trial defense counsel responded, "I apologize, I thought that came out."

In short, the defense was fully aware of JJL's negative history and used that information to hammer on JJL's credibility during findings argument, recalling the military judge's attention to her drug use, stealing, and breaking into cars.[7] In light of all the evidence presented at trial about JJL's past record, the potential value to the defense of an actual copy of her "juvenile court records" or the records of her stay in the detention facility or drug rehabilitation center was minimal at best, and the appellant was not prejudiced by the government's failure to provide the records prior to trial.

[7] Our conclusion that the defense was fully aware of all the derogatory information concerning JJL is consistent with their failure to raise to the military judge at trial that the government had not yet provided the requested records. At the start of the trial, the defense aggressively pursued a number of discovery items they had requested, but which had not yet been received. However, they did not raise the missing records concerning JJL. Although we do not consider the defense failure to raise the issue to the military judge to be a "waiver" of the issue, the defense counsel's failure to pursue the matter, coupled with all the negative information they brought out concerning JJL at trial, suggests they had all the required information and no longer needed the missing records.

One additional matter bears brief discussion before moving to the appellant's final assertion of error. Based on the government's failure to provide the records at issue prior to trial, the appellant asks that the Court, as an alternative to setting aside his conviction for the offenses involving JJL, order post-trial disclosure of the records as a matter of appellate discovery. Having found no basis for setting aside the appellant's conviction, we also decline to order further post-trial disclosure.

The appellant correctly notes that this Court has the power to order appellate discovery. *United States v. Campbell*, 57 M.J. 134 (C.A.A.F. 2002). To determine whether to do so, we "consider, among other things: (1) whether the defense has made a colorable showing that the evidence or information exists; (2) whether or not the evidence or information sought was previously discoverable with due diligence; (3) whether the putative information is relevant to [the] appellant's asserted claim or defense; and (4) whether there is a reasonable probability that the result of the proceeding would have been different if the putative information had been disclosed." *Id.* at 138.

Cutting straight to the last factor, it is clear from the above analysis that the result of the appellant's trial would not have differed even if the records at issue had been disclosed, in that JJL's criminal background was made known to the military judge through her own testimony and that of other witnesses. In so finding, we specifically reject the appellant's assertion, posited during oral argument, that the Court cannot make such an assessment without actually viewing the records at issue. The known relevant information here at issue is JJL's criminal record and the fact that, as a result, she spent time in a juvenile detention facility and drug rehabilitation center, all of which was exposed at trial. While the defense speculated during argument that JJL's records may contain other relevant information, such as contradictory statements made during counseling or therapy sessions, speculation alone is not sufficient. Without more, we will not order further post-trial discovery, even for review by the Court on an *in camera* basis.

Factual Sufficiency

The appellant asserts the evidence is not factually sufficient to sustain his convictions for distribution of methamphetamine, carnal knowledge, and sodomy of a child under the age of 16 years. We find to the contrary.

This Court reviews claims of factual insufficiency de novo, examining all the evidence properly admitted at trial. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency is whether, after weighing the evidence in the record of trial 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. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

The challenged offenses all involve JJL, the underage cousin of the appellant's fiancé, JW. As previously noted, JJL had a significant history of drug abuse and other juvenile offenses. When JJL found herself no longer welcome at her home, JW invited her to move in with the appellant and JW at their home in Butte. JJL testified that trouble started about a month after she moved in. She confided her drug habit to the appellant, and one day he brought her home some methamphetamine, which he used with her. JJL knew it was real based on her prior drug use, because she experienced the same effect from it. The appellant also told her it was "crystal" or "nose candy," both of which she took to mean methamphetamine. JJL testified that the appellant gave her methamphetamine on several additional occasions thereafter.

JJL also testified that when the appellant first brought her the methamphetamine, or shortly thereafter, the two began engaging in sexual intercourse, both vaginal and oral.[8] Usually, but not always, the sex was in conjunction with the drug use. When JW and the appellant later moved from Butte to Billings, JJL went with them and the sex and drugs continued at the new location. The relationship ended when JW, who did not know about the sexual relationships between the appellant and JJL or the drugs, kicked JJL out of the house for stealing money from her and the appellant.

According to JJL, she was 14 when the relationship started and 15 when it ended, and the appellant knew her age. She testified that in total, the appellant had sex with her about 6 times and gave her methamphetamine about 10 times.

Pointing to the testimony of JJL's cousin's about her poor reputation for truthfulness and to JJL's admitted history of drug abuse, theft, and other juvenile offenses, the appellant asserts that JJL's testimony is simply not credible. The appellant also directs the Court's attention to the results of a chemical analysis of his hair, admitted at trial by stipulation of the parties, which was negative for any drug use. That result, the appellant argues, directly contradicts JJL's testimony that he used methamphetamine with her and proves she is lying.

Having carefully reviewed all of the evidence of record, we are convinced beyond a reasonable doubt that the appellant is in fact guilty of the challenged offenses involving JJL.

Neither JJL's history of juvenile offenses nor the fact that a witness believed she had a poor reputation for truthfulness mandate a finding that she lied when testifying under oath at the appellant's trial. Rather, they are simply additional factors for the trier of fact and this Court to consider in assessing her testimony. Having done so, the military judge obviously found her to be credible. So do we. JJL's testimony about the offenses of which the appellant stands convicted carries the ring of truth and is sufficient

[8] JJL testified that all of the sexual activity was voluntary on her part.

by itself to establish beyond a reasonable doubt that the appellant engaged in sexual intercourse and sodomy with her on multiple occasions and that he supplied her with methamphetamine.[9]

In reaching this finding, we are unpersuaded by the appellant's argument concerning the negative hair analysis. Although the negative analysis could mean JJL was lying about the appellant using drugs, it could also be attributable to an array of other potential reasons. Maybe, as the appellee suggests, the timing of the tests or amount of the drug used was such that the use simply did not show up. Or maybe the appellant, knowing he was subject to regular drug testing, only pretended to use the drugs with JJL. However, these and other potential scenarios are at this point meaningless speculation, beyond the purview of this Court. Because the appellant was not charged with use, that offense was not the focus of the trial, and the results of the hair analysis were not explained by any witness. As a result, the negative hair analysis is simply an additional data point to be factored in by the trier of fact, and now this Court, in assessing JJL's testimony. Having done so, we, as did the military judge, continue to find her testimony about the offenses of which the appellant was convicted credible.

Finally, we also note that although JJL's testimony provided the sole direct evidence of the offenses involving her, it was corroborated in one small part by other evidence. When JJL was asked to describe the appellant, she indicated he had no hair on his pubic area. A witness to one of the appellant's other offenses testified that the appellant shaved *all* his body hair (including, by implication, his pubic hair). That testimony lends at least some indicia of reliability to JJL's testimony that she observed the appellant's pubic area during their periods of sexual intercourse, and thus bolsters her credibility.

Post-Trial Delay

The overall delay of 1072 days between the trial and completion of this Court's review is facially unreasonable. We therefore examine the delay using the four factors set out 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 (C.A.A.F. 2006). However, we are not required to separately analyze each factor where we can assume error, but nonetheless conclude that any such error was harmless beyond a reasonable doubt. *United States v. Harrow*, 65 M.J. 190, 206 (C.A.A.F. 2007). That approach is appropriate here. Having considered the totality of the circumstances and the entire

[9] Although the appellant only raises a claim of factual insufficiency, we have also considered and find that JJL's testimony is legally sufficient to support the challenged offenses. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987).

record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt. Accordingly, no relief is warranted.

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; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

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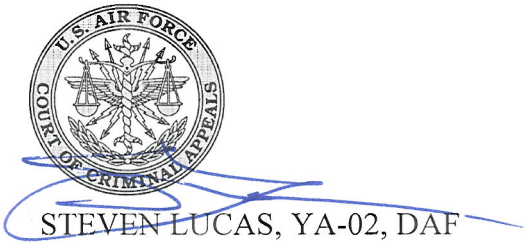

STEVEN LUCAS, YA-02, DAF
Clerk of the Court