UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JIMMY HUGHES
United States Air Force

ACM 37958 (f rev)

28 August 2013

Sentence adjudged 1 April 2011 by GCM convened at Charleston Air Force Base, South Carolina. Military Judge: Dawn R. Eflein (sitting alone) and Rodger A. Drew (*DuBay* hearing).

Approved Sentence: Dishonorable discharge, confinement for 4 years, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Nicholas D. Carter; Captain Shane A. McCammon; and Philip D. Cave (civilian counsel).

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Tyson D. Kindness; Major Charles G. Warren; Captain Thomas J. Alford; and Gerald R. Bruce, Esq.

Before

ORR, ROAN, and MARKSTEINER
Appellate Military Judges

UPON FURTHER REVIEW

ROAN, Senior Judge:

Contrary to his pleas, the appellant was convicted by a military judge sitting alone at a general court-martial of one specification of rape, one specification of forcible sodomy, and one specification of disorderly conduct, in violation of Articles 120, 125,

and 134, UCMJ, 10 U.S.C. §§ 920, 925, 934, respectively.[1] The adjudged and approved sentence consisted of a dishonorable discharge, confinement for four years, and reduction to E-1.

The appellant raises several issues for our consideration: (1) Whether the specification of Charge III fails to state an offense; (2) Whether the evidence was legally and factually sufficient to sustain the appellant's convictions; (3) Whether a post-trial *DuBay* hearing should be ordered to determine if the trial defense counsel failed to provide appellant with effective assistance in making his selection on forum;[2] (4) Whether the military judge had a sua sponte duty to recuse herself because she had acted as the deposition officer in the same case; and (5) Whether the trial defense counsel were ineffective. Following the *DuBay* hearing, the appellant raises a supplemental assignment of error contending the hearing judge's findings of fact were clearly erroneous.

Background

The appellant and Airman First Class (A1C) DJ were casual acquaintances stationed at Aviano Air Base, Italy. A1C DJ testified that after a Halloween party in 2009, she and several other individuals, to include the appellant, went to an off-base bar. After drinking some amount of alcohol, A1C DJ returned to Aviano Air Base with her roommate Senior Airman (SrA) Fairbanks and Staff Sergeant (SSgt) Medlock. The appellant returned to base separately. Upon arriving at their dormitory suite, SrA Fairbanks went into her room, while A1C DJ and SSgt Medlock went into A1C DJ's room.[3] A1C DJ lied down on her bed, and SSgt Medlock lied down on a futon couch. A1C DJ testified that as they were trying to fall asleep, the appellant entered the room uninvited. He first lied down on the futon with SSgt Medlock, then came over to A1C DJ's bed, where he climbed on top of her and tried to kiss her. A1C DJ said she pushed the appellant off and told him to stop. The appellant became angry and left the room. A1C DJ testified that the next day he sent her a text message apologizing.

About a week later, on 7 November 2009, A1C DJ and SrA Fairbanks hosted a party in the common area of their suite. The appellant was invited to attend. A1C DJ testified she drank most of a bottle of vodka that evening, became tired, and went into her bedroom to change and go to sleep. As she started to remove her clothing, A1C DJ saw the appellant in her room. She testified that he grabbed her by the arms, pushed her onto the futon, and forced her legs up against her. After pulling down her pants and

[1] The appellant was acquitted of one specification of unlawful entry in violation of Article 134, UCMJ, 10 U.S.C. § 934.
[2] Pursuant to an order by this court, a post-trial hearing was conducted on 2 April 2013 in accordance with *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).
[3] Airman First Class (A1C) DJ's living area consisted of two separate bedrooms, a shared bathroom, and a common room.

underwear, the appellant orally sodomized her and engaged in sexual intercourse against her will. A1C DJ said she tried to get off the futon, but was unable due to the appellant's weight and the effects of the alcohol. She also testified she kept telling the appellant "no" while he was engaging in the sexual actions.

Failure to State an Offense

In Specification 1 of Charge III, the appellant was charged with drunk and disorderly conduct "prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces." By exceptions, he was found guilty of disorderly conduct prejudicial to good order and discipline. On appeal, the appellant argues the specification fails to state an offense because the government did not allege the Article 134 terminal element. The appellant's argument is without merit. Both clauses 1 and 2 of Article 134 were explicitly alleged in the Specification.[4]

Legal and Factual Sufficiency

The appellant avers that the evidence is neither legally nor factually sufficient to support his conviction. He argues that the Government's case was based on A1C DJ's implausible and inconsistent testimony, which also conflicted with the testimony of other witnesses and was not supported by physical or direct evidence tying the appellant to the offenses.

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). 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 are ourselves] convinced of the [appellant's] guilt beyond a reasonable doubt." *Id*. at 325.

Considering the evidence produced at trial in a light most favorable to the prosecution, we find that a reasonable fact finder could have found beyond a reasonable doubt all of the elements of the offenses in question. Further, after reviewing the record of trial, we are ourselves convinced beyond a reasonable doubt of the appellant's guilt.

The appellant was charged, inter alia, with rape and forcible sodomy. To prove its allegation of rape beyond a reasonable doubt, the government had to prove the appellant

[4] The appellant was acquitted of unlawfully entering the dwelling house of A1C DJ, as alleged in Specification 2 of Charge III. We believe the appellant's assignment of error was intended to apply to this Specification, as it did not allege the Article 134, UCMJ, terminal element. As he was acquitted of the Specification, any error is moot.

caused A1C DJ to engage in a sexual act by using force against A1C DJ. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 45.a.(a)(1) (2008 ed.). In the context of the specification alleged, force is defined as "action to compel submission of another or to overcome or prevent another's resistance by . . . (C) physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct." *MCM*, Part IV, ¶ 45.a.(t)(5). To convict on the specification of forcible sodomy, the government had to prove beyond a reasonable doubt that: (1) the appellant engaged in unnatural carnal copulation with A1C DJ, and (2) that the act was done by force and without A1C DJ's consent. *MCM*, Part IV, ¶ 51.b.

A1C DJ testified that the appellant engaged in oral sex and sexual intercourse against her will. Her testimony, standing alone, could provide sufficient factual and legal evidence to support the appellant's conviction. On appeal, as he did at trial, the appellant attempts to impugn A1C DJ's credibility, arguing her testimony was unbelievable and uncorroborated. The evidence contained within the record of trial provides otherwise. The government's case was built on more than A1C DJ's allegations. Several government witnesses testified about events prior to and following the charged offenses, and their testimony both buttressed A1C DJ's testimony and discredited the appellant's.

SrA Fairbanks testified that she and A1C DJ were having a party in their dorm room. She observed A1C DJ drinking heavily and at one point went to check on her in her room. Upon opening her door, A1C DJ said to SrA Fairbanks, "Get him out." SrA Fairbanks entered the room, found the appellant hiding in A1C DJ's closet, and escorted him out of the area. Later that evening, SrA Fairbanks went back to A1C DJ's room. The area was in disarray, and A1C DJ appeared angry and disheveled. She also saw A1C DJ's tank top was ripped. Later SrA Fairbanks received a text message from the appellant saying he was "sorry for whatever he did to [her] friend."

SrA Somersville testified that she saw the appellant leave A1C DJ's room and return ten minutes later, saying he wanted to retrieve his cigarettes. SrA Somersville told him to wait outside while she went into A1C DJ's room. A1C DJ was very upset and said, "I don't want him here. Can you tell him to leave[?]" When SrA Somersville opened the door to give the appellant the cigarettes, the appellant appeared nervous and said, "I'm sorry, I shouldn't have done that," and, "I f[***]ed up. I apologize." SrA Somersville further testified that prior to the appellant returning to A1C DJ's room, she observed SrA Fairbanks and A1C DJ having an argument, and A1C DJ appeared distressed. She heard A1C DJ say, "Look what he did," and, "[H]ow could you leave [me] alone in the room with [the appellant]." SrA Somersville also noted A1C DJ's neck was red.

Capt Johnson testified she was the alternate Sexual Assault Response Coordinator (SARC) for Aviano Air Base when A1C DJ reported she had been sexually assaulted in her dormitory room. Capt Johnson explained to A1C DJ the difference between a

restricted and unrestricted report, and A1C DJ chose to make a restricted report that would not be conveyed to anyone else. A1C DJ did not identify her assailant by name. Rather, she related that her assailant had been attending a party she and her roommate were having, and that at a previous party the assailant had been "hitting" on her and asking for sex. She told Capt Johnson that during the party she had not been feeling well, so she went into her room and closed the door, and that is when her assailant jumped out from her closet, pushed her onto a chair, and began to sexually assault her.

TSgt Martinez testified that she went to A1C DJ's room after A1C DJ missed a mandatory training session. A1C DJ told her she had been sexually assaulted by another Security Forces member during a party but did not want to report it because the assailant was married. TSgt Martinez also testified that she saw marks on A1C DJ's forearms. Approximately two months later, TSgt Martinez accompanied A1C DJ to the SARC office because A1C DJ's initial restricted report had become unrestricted. A1C DJ was told that because the report was no longer restricted, she was required to identify her assailant. At that time, A1C DJ named the appellant.

SSgt Medlock testified that she attended a unit Halloween party and went to an off-base bar with A1C DJ and SrA Fairbanks. After the party, the three women returned to the base and SSgt Medlock went into A1C DJ's room and lied down on a futon. The appellant came into the room uninvited, lied down beside SSgt Medlock, and tried to kiss her, but she spurned his advances. The appellant then went to A1C DJ's bed, and SSgt Medlock heard A1C DJ say, "Stop," "I'm tired," and, "I don't want this" before the appellant left the room.

SSgt Mobely, a public health technician, testified that after A1C DJ tested positive for a sexually transmitted disease (STD), she asked A1C DJ to identify her sexual partners. After being told that her remarks were made in confidence, A1C DJ identified the appellant. SSgt Mobely asked A1C DJ where she met the appellant. A1C DJ said, "[I]t wasn't wanted," and, "[I]t was rape." SSgt Mobely called the appellant and told him he had been named as a contact of someone who tested positive for an STD. SSgt Mobely testified that after she told the appellant he would have to be tested himself, the appellant became evasive and asked whether that was necessary. When told testing was required, the appellant told SSgt Mobely, "Well, I don't understand why, who it would be, or why because they've been only local nationals." SSgt Mobely instructed the appellant to come in for an appointment to discuss the STD, but the appellant missed the meeting and had to be ordered to attend. The appellant eventually tested negative for the STD.

The appellant testified during findings. He said the evening of the party A1C DJ asked him to come into her room, that she was the aggressor, and he tried to reject her advances because he was married. He said that he heard a knock on the door and hid in the closet because he thought being in A1C DJ's room put him "in a bad position." The

appellant admitted to sending a text message to SrA Fairbanks the next day saying he needed to talk with her. When asked whether SrA Somersville had a motive to lie about what she observed, he admitted he was not aware of one. He also conceded on cross-examination he might have told SSgt Mobely he slept with foreign nationals when asked about an STD, but that such a statement would have been a lie. When asked why he would have said he slept with foreign nationals if he hadn't, he answered, "There was no reason." Regarding the week before the November party, the appellant acknowledged he went to A1C DJ's room, but claimed SSgt Medlock and A1C DJ initiated any physical contact. He denied getting into bed with A1C DJ or SSgt Medlock and stated he did not kiss either individual.

After weighing the testimony and evidence presented at trial, we find the various governmental witnesses both support and corroborate A1C DJ, in particular the testimony of SrA Somersville. It is noteworthy A1C DJ and the appellant were not close friends, they had not dated, and there was no evidence of any prior sexual relationship between the two to indicate consensual sexual activity took place in A1C DJ's room.[5] Further, we find it persuasive A1C DJ did not seek out police or command intervention, nor did she name the appellant until compelled to do so. Assessing the entire record, we cannot divise a reason for A1C DJ to have fabricated being sexually assaulted by the appellant, and decline to attribute such a motive without reason and evidence to do so.

Conversely, the appellant's own testimony appeared evasive, contradictory, and unsupported by other witnesses. His text message to SrA Fairbanks apologizing for his actions, and his statement to A1C DJ that he "f***ed up," overheard by SrA Somersville, are particularly condemning. The fact finder was in the best position to weigh and evaluate the credibility of witnesses and A1C DJ's testimony. *United States v. Peterson*, 48 M.J. 81, 83 (C.A.A.F. 1998); *see Jackson v. Virginia*, 443 U.S. 307, 319 (1979). While there may be some inconsistencies in A1C DJ's testimony, the fact finder "may believe one part of a witness' [sic] testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). We have considered the evidence produced at trial with particular attention to the matters raised by the appellant. Considering the evidence in the light most favorable to the prosecution, and having made allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt that the appellant is guilty of rape and forcible sodomy.

Recusal of the Military Judge

At the Article 32, UCMJ, 10 U.S.C. § 832, hearing, the investigating officer determined A1C DJ was unable to testify because she was receiving in-patient psychiatric care at Charleston AFB, South Carolina. A deposition officer was subsequently

[5] Despite the appellant's protestations to the contrary, the evidence established at trial sufficiently shows how the appellant would be able to sexually assault A1C DJ in her room in the manner she described.

appointed to take A1C DJ's testimony in accordance with Rule for Courts-Martial (R.C.M.) 702. The deposition was initially scheduled for 10 January 2011, but was deferred due to A1C DJ's medical condition. The deposition order was rescinded on 2 February 2011 and reissued by the convening authority on 17 February 2011. Col Eflein detailed herself to the appellant's court-martial as the military judge on 9 February 2011 and was appointed as the new deposition officer on 7 March 2011. The deposition took place on 18 March 2011.[6]

At trial, the military judge did not specifically mention on the record that she had served as the deposition officer, and trial defense counsel, who had been present at the deposition, did not object to Col Eflein serving as the military judge. The appellant now argues that the military judge had a sua sponte duty to recuse herself because her appointment and service as the deposition officer called into question her impartiality.

A military judge must recuse herself when her impartiality "might reasonably be questioned." R.C.M. 902(a). "'[W]hen a military judge's impartiality is challenged on appeal, the test is whether, taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions." *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011) (alteration in original) (quoting *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000)). The appearance of impartiality is reviewed on appeal objectively and tested under the standard of, "[A]ny conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the judge's disqualification." *United States v. Kincheloe*, 14 M.J. 40, 50 (C.M.A. 1982) (quotation marks omitted). While an appellant has a constitutional right to an impartial judge, "[t]here is a strong presumption that a [military] judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings." *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001).

Applying the requisite tests from our superior court, we conclude that Col Eflein was not disqualified from the appellant's case as a result of having served as a deposition officer at an earlier proceeding. R.C.M. 902(b) sets forth specific grounds under which a military judge must disqualify herself. Being assigned as a deposition officer is not listed as an automatically disqualifying reason. Therefore, we must determine whether this involvement might objectively call into question her impartiality. We hold that it does not.

R.C.M. 702(f) outlines the duties of a deposition officer. Our superior court has stated such responsibilities are primarily ministerial in nature. *United States v. Washington*, 46 M.J. 477, 483 (C.A.A.F. 1997). We find that to be true in the appellant's

[6] The deposition was ultimately not used at trial because the military judge found A1C DJ available to testify.

case. As a deposition officer, Col Eflein would not have been called upon to ask her own questions or make conclusions of law or findings of fact. While she would have had the opportunity to hear A1C DJ's testimony and could have made a personal determination of the witness's credibility, this fact alone does not disqualify her from being detailed as the military judge. Military judges are often required to hear facts for limited purposes which they later disregard if consideration would be improper, and judges are not required to recuse themselves under these circumstances. *United States v. Howard*, 50 M.J. 469, 471 (C.A.A.F. 1999). Opinions held by judges as a result of what they learned in earlier proceedings "do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994), *quoted in Howard*, at 471-72 (Sullivan, J., concurring).

Prior to the beginning of opening statements, the military judge made the following comment:

> Prior to this session, I had a very brief conference under Rule for Court-Martial 802, that was attended by counsel for each side. No rulings were made. I simply reminded both sides that although I have been on this case for awhile now, this trial begins a particularly distinct and separate new phase of this court-martial process. As the fact-finder in this case, I will -- I have the ability and I will disregard everything that I have learned about this case up until this minute. The records I reviewed, the deposition that I attended, none of that will have any play in this court-martial. Both sides need to present their cases as if I had never heard anything, because that is how I will consider the evidence.

The military judge then asked the appellant:

> Now, Airman Hughes, do you understand, or have you had adequate time to talk to your counsel, that even though you and I have spent a number of days together now in court, and I've reviewed a lot of different documents, under the law, nothing that has happened in this courtroom so far can be considered by me, and I'm telling you it won't be considered by me, but have you had the opportunity to talk to your lawyers about that?

After the appellant indicated that he had spoken to his attorneys, the military judge asked, "In any way, do you want me to get you a different judge to hear this case, or are you confident in what your lawyers have told you, and that this case will begin anew right now?" The appellant responded, "I'm confident, ma'am."

Based on the record of trial and the findings from the *DuBay* hearing, we find the military judge sufficiently indicated to the appellant that although she had been the

deposition officer prior to trial, she would not consider information obtained during that proceeding during the fact-finding portion of the trial. We are also convinced that the appellant understood this situation and made a knowing and deliberate decision not to seek a different military judge to preside over his court-martial.

Moreover, trial defense counsel did not object to the military judge presiding over the court-martial, despite having been at the deposition and having ample opportunity to challenge her participation in the trial. Indeed, trial defense counsel specifically stated during the *DuBay* hearing that he thought the presence of a senior military judge serving as the deposition officer would be beneficial in providing oversight to the proceedings and "keep the government counsel potentially in check in the event that [the area defense counsel] and I needed to object to portions of the testimony." The trial defense counsel further stated that he "firmly believe[d] in a military judge's ability to compartmentalize" what she learned during the deposition from the facts she obtained during the trial.

Because the appellant did not object at trial, we review the issue of impartiality for plain error. *Martinez*, 70 M.J. at 157. Plain error occurs when: (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007). We find no error occurred in this case as a result of the military judge previously having served as the deposition officer. Even were we to conclude the military judge erred in not disqualifying herself, we find no evidence the appellant suffered material prejudice as a result of the military judge remaining on the case.

Forum Selection

After being re-advised of his R.C.M. 903 forum options, the appellant elected to be tried by military judge alone.[7] On appeal, the appellant claims that he made an uninformed forum decision based on misleading and incomplete advice from his defense counsel.

In his post-trial affidavit, the appellant states that the military judge made ex parte comments to his defense counsel concerning A1C DJ that adversely affected his choice of forum. Specifically, the appellant says the military judge commented to his attorneys and the defense expert that "people with [a] bi-polar [condition] are weird" and "I wonder if him having sex with her made her cross-eyed." Following these comments, the appellant says he met with his defense counsel to discuss forum selection. The appellant contends that his attorneys recommended he be tried by the military judge because they believed the military judge had already made a credibility determination concerning A1C DJ that would be to his benefit. The military judge did not indicate on the record that she

[7] At the time of his initial arraignment on 7 March 2011, the appellant indicated that he wanted to be tried by a panel of officer and enlisted members. The appellant changed his forum selection on 30 March 2011.

had made the above remarks to counsel, and the trial defense counsel did not challenge the military judge when given the opportunity.

Both of the trial defense counsel, Maj CM and Capt AD, submitted affidavits concerning the advice they gave the appellant regarding forum selection. Maj CM acknowledged that the military judge made a comment to the effect of, "Can we all agree that people with bi-polar disorder are weird." He also thought that the military judge made a similar comment to the defense expert relating to A1C DJ's credibility. Both Maj CM and Capt AD stated, however, that these comments were not the reason they recommended the appellant be tried by military judge alone. Rather, their advice was the product of discussions between themselves, the defense expert, the appellant, and the Chief of the Air Force Trial Defense Division, Col Kenny, concerning the pros and cons of being tried by a military judge versus members. A key part of their recommendation was:

> [W]e felt that as an experienced judge, she would be less swayed by the explosive and sensitive testimony of [A1C DJ]. [A1C DJ] had been extremely emotional in her videotaped deposition, and we strongly felt that if she came across as credible, her testimony could have an incredible impact on court members, who were not necessarily used to hearing from [victims], especially for a case involving an allegation of sexual assault.

Both counsel said they believed the military judge would not let A1C DJ's testimony undermine their own expert's testimony. Finally, defense counsel believed that a sentence coming from a military judge would be "much more lenient" than one coming from panel members.

Because there were factual inconsistencies between the appellant's affidavit and those of his trial defense counsel, we ordered a post-trial hearing to determine the extent of the military judge's out-of-court comments and the context in which they were made. *See United States v. Parrish*, 65 M.J. 361, 363 (C.A.A.F. 2007) ("Article 66(c) does not authorize [this Court] to decide disputed questions of material fact pertaining to a post-trial claim, solely or in part on the basis of conflicting affidavits submitted by the parties. Rather, the record of trial must be expanded through [a *DuBay*] hearing . . ." (citations omitted) (internal quotation marks omitted)).

The hearing was held on 2 April 2013. The military judge assigned to conduct the post-trial hearing (*DuBay* judge) made detailed findings of fact. We review the *DuBay* judge's findings of fact under a clearly-erroneous standard. *United States v. Wean*, 45

M.J. 461, 462-63 (C.A.A.F. 1997). We find the *DuBay* judge's findings of fact supported by the record and adopt them as our own.[8]

Maj CM testified that he began to reconsider his earlier recommendation concerning forum choice after becoming aware of SrA Somerville's expected testimony that placed the appellant in A1C DJ's room, thereby corroborating a key component of A1C DJ's allegation. At that point, Maj CM became less confident that the appellant would be acquitted and became concerned sentencing proceedings would become necessary. If that occurred, he was concerned court members would render a harsher sentence than a military judge.

Maj CM testified that he agonized over forum selection to the point that he called his supervisor, Col Kenny, to discuss an appropriate forum selection. This was apparently the first time he had contacted Col Kenny for such advice. Maj CM, Dr. Rath, and the appellant were present during the conversation. Maj CM and Col Kenny examined the advantages and disadvantages of both forums, and Maj CM ultimately decided trial by a military judge was the most advantageous forum for the appellant. Col Kenny agreed with his conclusion.

The *DuBay* judge found that Maj CM and Capt AD ultimately advised the appellant to select trial by military judge for several reasons. Col Eflein had been a mental health nurse prior to becoming a judge advocate. Because of this background, and because of the volume of mental health records that would be reviewed during the trial, trial defense counsel believed she would better understand A1C DJ's mental health condition than court members. Trial defense counsel also felt Col Eflein would be more willing to consider Dr. Rath's expert testimony concerning the victim's mental health background. Additionally, due to Col Eflein's military justice experience, trial defense counsel believed she would be better able to temper her response to A1C DJ's emotional testimony, and would be able to better focus on evaluating the facts when deliberating on findings. Finally, trial defense counsel believed that, in the event of a conviction, Col Eflein would likely render a more lenient sentence than court members, given A1C DJ's fragile emotional state.

The *DuBay* judge inquired into the military judge's comments "people with [a] bi-polar [condition] are weird" and "I wonder if him having sex with her made her cross-eyed." Col Eflein admitted to making the remark concerning A1C DJ's bi-polar condition. She said she made the quip during an R.C.M. 802 conference in the presence of both trial and trial defense counsel, in a humorous attempt to diffuse simmering tension between the two attorneys. She regrets having made the statement, but said she did not intend the comment to be a judgment on A1C DJ's credibility. Maj CM was

[8] Having found the *DuBay* judge's findings of fact were supported by the record and not clearly erroneous, and having considered the basis for the appellant's supplemental assignment of error, we find this issue to be without merit.

asked about the bi-polar remark, and he agreed it was not made ex parte and thought at the time Col Eflein made the comment in a joking manner. He stated that Col Eflein's comments did not factor into his forum recommendation.

As to whether Col Eflein commented on A1C DJ having sex with the appellant, Col Eflein testified she did not recall making such a statement, but did not deny that she might have. Maj CM testified that he heard Col Eflein make the statement, but could not recall when or where. He was certain it was not made ex parte. He also stated he thought Col Eflein was trying to be humorous and was not commenting on the victim's credibility. The *DuBay* judge concluded it was likely Col Eflein in fact made the remark while she, trial counsel, and trial defense counsel were having dinner together following A1C DJ's deposition.

With regard to the out-of-court conversation with Dr. Rath, Col Eflein testified that following A1C DJ's deposition she and Dr. Rath had lunch in the airport while awaiting their respective flights. Both Col Eflein and Dr. Rath testified that their conversation did not involve the appellant's case and Col Eflein did not make any comments concerning A1C DJ specifically.

Dr. Rath recalls having lunch with Col Eflein at the airport, but states he did not discuss the appellant's case with her. He also does not remember discussing the appellant's forum selection with trial defense counsel or changing his opinion as a result of any pretrial statements made by Col Eflein.

Even viewing the matter in a light most favorable to the appellant, that is, even assuming the trial defense counsel was downplaying the impact the military judge's pretrial statements had on his forum recommendation, we find no error prejudicial to the appellant. "[J]udicial remarks made during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Howard*, 50 M.J. at 472 (Sullivan, J., concurring) (quoting *Liteky*, 510 U.S. at 555). Such remarks do not divest the military judge of the appearance of impartiality required for a court-martial unless they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. *Id.* at 471-72. Likewise, "[s]imply because a judge possesses and has expressed, even publicly[,] predilections on an issue of law to be litigated before him does not mean the judge is disqualified to sit and resolve such issue." *United States v. Bradley*, 7 M.J. 332, 334 (C.M.A. 1979) (citing *Laird v. Tatum*, 409 U.S. 824 (Memorandum of Mr. Justice Rehnquist) (1972)).

Based on the record and the military judge's actions and rulings throughout the trial, we do not find a "deep-seated" antagonism toward the appellant that made fair judgment of his case impossible. While we would remind all military judges to tread carefully when making extemporaneous out-of-court remarks to counsel, we find no

evidence in this case to indicate that the military judge was biased against the appellant. Indeed, the military judge made several pretrial rulings favorable to the appellant, including siding with the defense regarding the issue of A1C DJ's availability and refusing to change the court-martial venue despite the trial counsel's request.[9] Her courtroom demeanor appears to be that of a seasoned jurist who made sound and reasoned decisions based on the law and the facts before her.

The record establishes that the appellant was sufficiently advised by both his trial defense counsel and the military judge concerning his forum options. We are satisfied that based on the record as a whole, the appellant made a knowing forum selection and was not misinformed by the military's judge's inelegant remarks concerning A1C DJ's bi-polar condition or A1C DJ having sex with the appellant. Instead, it appears the appellant chose to be tried by the military judge in part because he incorrectly thought she might have made a credibility determination he hoped would be favorable to his case. We are convinced the trial defense counsel's recommendation, and the appellant's ultimate decision on an appropriate forum, were made with due deliberation, and were not the result of the military judge's pretrial comments or a ruse to sway the appellant to elect a forum of judge alone. We also find the appellant has suffered no prejudice in this case resulting from the military judge's comments.

Ineffective Assistance of Counsel

Claims of ineffective assistance of counsel are reviewed by applying the two-prong test set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This test generally requires the appellant to show trial defense counsel's conduct was both deficient and resulted in prejudice denying the appellant a fair trial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005). Such claims are reviewed de novo. *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009). Our superior court applies the *Strickland* test through a three-part analysis:

> 1. Are appellant's allegations true; if so, is there a reasonable explanation for counsel's actions?
>
> 2. If the allegations are true, did defense counsel's level of advocacy fall measurably below the performance . . . [ordinarily expected] of fallible lawyers?
>
> 3. If defense counsel was ineffective, is there a reasonable probability that, absent the errors, there would have been a different result?

United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (alteration in original)

[9] The convening authority changed the court-martial venue in accordance with Rule for Courts-Martial 906(b)(11).

(quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991) (internal quotation marks omitted).

The appellant bears the heavy burden of establishing that his trial defense counsel was ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001). The law presumes counsel to be competent, and we will not second-guess a trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 409-10 (C.M.A. 1993) (citing *Strickland*, 466 U.S. at 689; *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977)). To prevail on a claim of ineffective assistance of counsel, the appellant "must rebut this presumption by pointing out specific errors made by his defense counsel which were unreasonable under prevailing professional norms. The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987) (citation omitted).

In his affidavit to this court, the appellant argues that his counsel were ineffective for a litany of reasons.[10] We have considered his arguments and reviewed the record of trial and his trial defense counsels' affidavits filed in reply. It is unnecessary to discuss each ineffective assistance allegation in detail, as we find that defense counsel provided reasonable explanations for their actions throughout the preparation and execution of the appellant's defense. In particular, the trial defense counsels' rationale regarding forum choice, given the facts of the case, the military judge's background as a mental health nurse, the concern about members giving A1C DJ too much credibility because of her fragile emotional state, and the logical possibility of an increased sentence if he was convicted by members, was reasonable under the circumstances.

We are convinced that the appellant's trial defense counsel acted within the prevailing norms expected of competent counsel and conclude the appellant's assertion of error is without merit.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[11,12] Article 66(c), UCMJ,

[10] This issue was raised and briefed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[11] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

[12] We note the Court-Martial Order (CMO), dated 22 June 2011, requires correction. The CMO should reflect the date the convening authority took action, 21 June 2011, vice 22 June 2011. The findings of Specification 1 of

10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

Charge III should reflect the exception of the two words "drunk and" vice "drunk." Additionally, the excepted words "or of a nature to bring discredit upon the armed forces" should be demarcated with a closing quotation mark. Finally, the CMO erroneously omits the language of the Action reflecting the waiver of mandatory forfeitures. Accordingly, the Court orders the promulgation of a corrected CMO.