UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JOHN A. JACKSON, JR.
United States Air Force

ACM 37417

15 August 2011

Sentence adjudged 1 November 2008 by GCM convened at Ramstein Air Base, Germany. Military Judge: William E. Orr, Jr. (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 5 years and 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Shannon A. Bennett; and Major Phillip T. Korman.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Jeremy S. Weber; Major Michael A. Burnat; Major Naomi N. Porterfield; Major Charles G. Warren; and Gerald R. Bruce Esquire.

Before

BRAND, ROAN, and WEISS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

WEISS, Judge:

Appellant was tried by a military judge sitting alone as a general court-martial. Contrary to his pleas, he was convicted of one specification of rape and one specification of assault consummated by a battery, in violation of Articles 120 and 128, UCMJ, 10 U.S.C. §§ 920, 928.[1] The adjudged and approved sentence extends to a dishonorable

[1] Appellant was acquitted of a second specification under Article 128, UCMJ, 10 U.S.C. § 928.

discharge, confinement for 5 years and 6 months, and reduction to E-1. Appellant assigned the following errors on appeal: (1) The military judge erred in admitting prior acts evidence under Military Rule of Evidence (M.R.E.) 404(b); (2) Factual and legal insufficiency of his convictions for rape and battery; (3) Prosecutorial misconduct; and (4) Ineffective assistance of counsel.[2] For the reasons set forth below, we affirm.

Factual Background

The testimony of Ms. SH, a German national, was the primary basis of Appellant's conviction. Appellant met SH in early September 2006 at a night club in Weilerback, Germany. Within a couple of weeks, SH moved into Appellant's home in Weilerback, where she and Appellant lived together, until he deployed to Iraq sometime in January 2007. While they lived together, they enjoyed an active sexual relationship, but they also frequently engaged in heated arguments. SH testified that shortly after moving in with Appellant he started to become possessive, controlling, and jealous. SH nevertheless continued to live with Appellant although she still maintained her own apartment in Rodenback, Germany.

In December 2006, a few weeks before Christmas, SH and Appellant got into an argument. Both were quite angry and yelling at each other. As was his usual practice during their arguments, Appellant went upstairs to his computer room so he could be alone. SH followed him upstairs and continued the argument. Appellant told her to leave the house and started packing her things which was not uncommon during their arguments. SH decided to leave, testifying that she was "hysterical" as she tried to enter Appellant's computer room to get a pull-over garment. Appellant held her back by her arm. She then lost her balance and fell down. SH testified that she was on her back and Appellant grabbed her by the ankles. She struggled to hold on to the door frame and railing, but Appellant pulled her loose and dragged her down about 15 steps of the spiral staircase. At the bottom of the stairs, Appellant released her. SH stated that she felt more humiliated than hurt, but testified to having bruises on her ankles. Despite the evening's events, SH did not leave the house and she and Appellant slept together that night. The next day, Appellant apologized for pulling her down the stairs.

SH and Appellant were still living together when he deployed in January 2007. After Appellant deployed, SH moved back to her own apartment in Rodenback. In the beginning, she missed Appellant and thought they would still be together when he returned from Iraq, but she began to realize that the relationship wasn't healthy. At some point, SH decided to break up with Appellant but didn't want to do so while he was deployed because she didn't want to upset him while he was in a dangerous environment. Whatever change of heart SH experienced, she continued to call and send Appellant

[2] The assigned errors alleging factual and legal insufficiency of the battery conviction, prosecutorial misconduct and ineffective assistance of counsel are filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

weekly romantic e-mails with an attachment of her daily diary called "missing my baby." Some of these e-mails contained sexually explicit language expressing SH's desire to have sexual relations with Appellant.

SH resumed a relationship with PM, a former boyfriend, on 12 February 2007. She continued this relationship with PM during the remainder of Appellant's deployment, as well as after he returned to Germany at the end of May 2007. Even after she began dating PM again, SH did not tell Appellant about PM or that she was ending their relationship. She continued to send regular e-mails to Appellant professing her love and how much she missed him. She testified that she did this just "to keep up appearances" for Appellant and "pretended everything would be okay" so he would be happy while he was deployed.

Appellant returned to Germany from his deployment on about 30 May 2007. Although SH was now dating PM, she couldn't bring herself to break up with Appellant so she tried to act "weird" in the hopes Appellant himself would break off the relationship. SH denied having sexual relations with Appellant after he returned from his deployment but she did see him several times, which included taking Appellant to a barbeque at her father's house, having dinner with him at her apartment, and stopping by his house while she was out jogging. SH testified that around mid-July, Appellant finally told her the relationship wasn't going to work and that they should end the relationship. SH still hoped they could remain friends.

SH testified that on 29 July 2007, she was bored and had not seen Appellant for a week or two, so she sent him a text message to ask if he wanted to come over to her place. Appellant responded that he would stop by later. At about 1900 hours, Appellant arrived at SH's home. She invited him in and they sat on opposite ends of the couch. SH wore a T-shirt and jogging pants. They discussed "things" for about an hour, then Appellant starting talking about their relationship in a very personal and intimate way. Appellant wanted to kiss her but SH refused by saying, "I don't want that . . . I just want to be friends." Appellant then said that friendship between them could only work if she took care of his needs. He became angry and left the apartment but after a brief period came back inside. Appellant told SH that he could have had sex with other women that night but didn't because he was saving himself for her. SH testified that she felt sorry for Appellant and didn't want him to think she didn't like him. She wanted to show him that she still cared for him, but not in a sexual way, just as friends, so she asked him to close the door and sit down on the couch again. SH then took Appellant by the hand or arm, led him to the couch, sat down next to him, and put her hand on his knee to calm him down. SH told him that she still liked him but didn't want sex. SH allowed Appellant to hug her but Appellant then attempted to kiss her again. She tried to push him away, but Appellant said she had to take care of his needs. Despite her repeated refusals, Appellant put his arm around SH and continued his advances. She started "crying and whimpering"

but he wouldn't stop. SH testified that Appellant didn't threaten her or raise his voice, and described him as being "not violent but demanding."

At this point SH felt "I just wasn't myself anymore . . . I kind of left my body." SH didn't clearly recall how they got from the couch to her bedroom or how she and Appellant became undressed. SH testified she thought Appellant led her by the arm, but not in a rough manner, or she followed him in a "zombie way" to the bedroom. She said it was a "weird memory . . . we were on the couch and suddenly we were in the bed." Once they were in the bedroom, Appellant still had his arm around her and put SH on the bed, laid on top of her, and then engaged in vaginal intercourse. While this was happening, SH testified she didn't remember having any thoughts: "I was just crying and I stared at the ceiling." After Appellant was finished, SH felt sick and went to the bathroom to throw up. When she came out of the bathroom Appellant told her he was disappointed in her and then he left.

Following Appellant's departure, SH called her friend Stephanie to come pick her up. When Stephanie arrived, SH was crying and she told her friend what had happened with Appellant. Stephanie saw a wet spot on the sheets and put them in a bag in case the police needed them. Stephanie wanted SH to go to the police that night but SH refused. Instead she went to Stephanie's house to spend the night. At trial, when asked why she didn't go to the police that night, SH testified "I don't know—because I hadn't figured it out yet if it was my fault." When asked why it would have been her fault, she testified: "Maybe because I really didn't fight him off. Like, I tried in the beginning but then I just let him do this. I could have, whatever, tried to kick him, use all of my power and my body to fight him off and I didn't do it." When asked why she didn't fight him off, she said, "I don't know. I just wasn't myself anymore." SH offered that maybe she thought Appellant would become violent or that it would become worse if she fought back. She said she really didn't know why and wasn't really thinking at the time.

The next day, SH went to the police to report the incident. At the police station, she called her father, a lawyer, who helped her file the report. SH testified that she later went to a hospital for an examination but that it was too late to obtain any physical evidence.

Admission of Uncharged Acts

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . ." M.R.E. 404(b).[3] The essence of the Rule is that evidence of this type must be offered for a proper purpose

[3] *Manual for Courts-Martial, United States* (*MCM*) (2005 ed.) was applicable at the time of Appellant's trial.

other than to demonstrate the propensity of an accused to commit the crimes charged. *United States v. Acton*, 38 M.J. 330, 333 (C.M.A. 1993) (citing *United States v. Castillo*, 29 M.J. 145, 150 (C.M.A. 1989). Our superior court in *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989), established a three-part test for the admission of evidence under M.R.E. 404(b): (1) Does the evidence reasonably support a finding by the fact-finder that Appellant committed prior crimes, wrongs, or acts? (2) Does the evidence make a fact of consequence more or less probable? (3) Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice under M.R.E. 403? *Id*. "If the evidence fails to meet any one of these three standards, it is inadmissible." *Id*.

In response to the prosecution's notice of intent to offer evidence of uncharged misconduct or acts under M.R.E. 404(b), and prior to entering his pleas, Appellant made a motion *in limine* to exclude all such evidence. The prior acts evidence involved numerous instances of what the prosecution characterized as "the controlling, manipulating, and dominating nature" of Appellant's relationships with three different women, Ms. CH, Ms. EJ, and SH (the alleged victim of the charged offenses), over the course of more than a decade. The prosecution sought to offer this evidence as probative of Appellant's motive and plan to assault and rape SH, and to explain why SH did not physically resist the rape.

The military judge denied the defense motion following an evidentiary hearing in which he heard the testimony of the three women. The judge made written findings of fact and conclusions of law. He specifically found each witness to be credible and applied the *Reynolds* test in making his ruling to admit the evidence under M.R.E. 404(b). In doing so, he determined that (1) the fact-finder could reasonably find that the relationships Appellant had with these three women were as they testified; (2) this evidence showing Appellant's desire for domination and control over women made it more probable that Appellant had a motive and plan for committing the charged offenses; and (3) the testimony of CH, EJ and SH was probative of Appellant's motive and/or plan and not unfairly prejudicial under M.R.E. 403. The military judge concluded that the evidence of prior acts met all the requirements of the *Reynolds* test and was therefore admissible.

During the prosecution's case-in-chief, the deposition testimony of CH and EJ was read into the record and SH testified. In opening statement and in closing argument, the prosecution emphasized its theme of Appellant's strong desire for domination and control over women, especially sexual domination, as shown by the evidence of other acts, which they argued culminated in the battery and rape of SH. The defense argued that SH's testimony was not credible and that she had motive to fabricate her rape allegation. In addition, the defense argued that SH's own testimony raised a reasonable doubt as to consent, or that Appellant was honestly and reasonably mistaken as to her consent.

Motive for a criminal act tends to answer why an accused committed the charged act. *United States v. Jenkins*, 48 M.J. 594, 598 (Army Ct. Crim. App. 1998) (citations omitted). Evidence of motive is relevant "to show the doing of an act by a person as an outlet for [an] emotion . . . [h]owever, the prior acts of conduct must be the type which reasonably could be viewed as 'the expression and effect of the existing internal emotion'. . . [m]oreover, this same motive must be shown to have existed in appellant at the time of the subsequent charged acts." *United States v. Watkins*, 21 M.J. 224, 227 (C.M.A. 1986) (citations omitted). *Black's Law Dictionary* defines "plan" as a method of action for accomplishment of a particular act or object, or as a method of putting into effect an intention. *Black's Law Dictionary* 1036 (5th ed. 1979). "Plan is a commonality of purpose that links otherwise disparate [acts] as stages in the execution of a singular scheme." *Jenkins*, 48 M.J. at 600. In analyzing a plan we consider "whether the uncharged acts establish a 'plan' of which the charged act is an additional manifestation, or whether the acts merely share some common elements." *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004).

"A military judge's decision to admit or exclude evidence is reviewed under an abuse of discretion standard." *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006) (citing *McDonald*, 59 M.J. at 430). "[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *Id*. (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). We now, therefore, review whether the military judge abused his discretion in admitting the evidence of the uncharged acts.

The first prong of *Reynolds* requires that a preponderance of the evidence reasonably supports a finding that Appellant committed the uncharged acts. *United States v. Morrison*, 52 M.J. 117, 121-22 (C.A.A.F. 1999) (citing *Huddleston v. United States*, 485 U.S. 681, 690 (1988)). Here, each of the three women testified about uncharged acts which, if believed, would support a finding that Appellant committed the acts. The military judge found the witnesses to be credible. Therefore, the threshold test is satisfied.

In applying the second prong of *Reynolds*, we first consider the logical relevance of the uncharged acts described by SH and EJ as evidence of Appellant's motive and plan to batter and rape SH. *See Barnett*, 63 M.J. at 394-96. SH testified to a variety of acts that frequently occurred during the course of her relationship with Appellant, including his repeated calls wanting to know where she was and who she was with, his looking through her phone data to determine if she was calling and texting other men, and about how he became upset if she didn't answer her phone. She testified that Appellant didn't like her going out without him, didn't want her to stay at her best friend's house anymore, wouldn't allow male co-workers to drive her home, and accused her of cheating on him. She testified that Appellant berated her housekeeping, personal hygiene, weight, child rearing and cooking abilities, and even controlled what music they listened to and what

movies they watched. She also testified that, during arguments, Appellant would start packing her clothes as if to put her out of his house.

In reference to their sexual relationship, SH testified that Appellant made her shower before they were intimate and that his sexual needs were paramount. He would often demand sex even when she didn't feel like it, and sometimes she gave in or acquiesced to his demands just to avoid an argument. She also related an instance in which Appellant wanted SH to fight him off during sex as if they were playing out a rape, but she refused, and testified about an occasion when they were having anal sex and SH told Appellant it hurt, but instead of immediately stopping, Appellant told her he was almost finished and briefly continued on.

Appellant's estranged wife, EJ, testified to a number of uncharged acts that occurred during her marriage to Appellant, over two years before the charged acts against SH. Similar to acts described by SH, EJ testified how Appellant expected his sexual needs to be satisfied, how she would give in to Appellant's sexual demands on occasion just to avoid an argument, and how she would not object to anal sex in order to avoid an argument with Appellant. She testified that Appellant would check her phone records to see who she was calling; he would require her to carry her mobile phone with her, even in the bathroom, so he could always call and know where she was; and she couldn't seem to meet Appellant's housekeeping standards.

She also testified that Appellant did not like her going out and tried to cut her off from family and friends by making them feel unwelcome, refusing to fix her car, and by locking her in the house. He accused her of cheating if she went to the grocery store, and once required her to leave a party with girlfriends, accusing her of being with another man. EJ also described an incident that occurred during an argument in which Appellant raised his fist to her and said he would have to leave or he was going to hit her. EJ testified that, when she separated from Appellant, he did not return some of her belongings and kept her dependent identification card and passport. Finally, she testified that she was still married to Appellant, although separated from him, because he would not sign divorce papers.

In considering the logical relevance of the testimony of SH and EJ, especially given the posture of the defense case, we find that many of the prior acts described by SH and EJ that occurred during their respective relationships with Appellant are strikingly similar. The uncharged acts to which they testified amount to more than sporadic instances of jealously or possessiveness; rather, these acts reasonably reflect Appellant's strong desire to dominate and control women, including his desire for sexual control. We find this evidence probative of a motive to batter and rape SH in that battery and rape may be viewed logically as an ultimate expression of an emotion or desire to dominate and control women, and that numerous acts of such domination and control are also

evidence of Appellant's plan, with battery and rape of SH being a logical additional manifestation of that plan. *See Jenkins*, *Watkins*.

In applying the third prong of *Reynolds*, the military judge found this evidence legally relevant as well after conducting the M.R.E. 403 balancing test and determining its probative value was not substantially outweighed by the danger of unfair prejudice. *See McDonald*, 59 M.J. at 429. We agree, and find that the military judge did not abuse his discretion in admitting the testimony of SH and EJ as proof of motive and plan under M.R.E. 404(b).

Applying the same analysis, we find that the military judge did abuse his discretion in admitting the testimony of CH regarding other acts. CH was involved in a dating relationship with Appellant that began over ten years before the charged acts of battery and rape against SH, a relationship different from the marriage and live-in relationships that Appellant maintained with EJ and SH. CH testified to only four uncharged acts that occurred during the two years they dated, from November 1996 to December 1998. These few acts of jealous behavior were infrequent relative to the two-year period of their relationship and were remote in time from the charged offenses. In addition, CH testified that, at the time of their relationship, she did not feel Appellant's behavior was unreasonable. She also testified that Appellant did not demand sex from her or force himself on her, and that their relationship did not end badly. We find the very nature and circumstances of these prior acts have very little, if any, probative value as evidence of a motive or plan to commit the battery and rape of SH. Thus, failing to pass muster as logically relevant under the second prong of *Reynolds*, we find the military judge abused his discretion in admitting the testimony of CH; however, we find this error was harmless and did not result in material prejudice to a substantial right of Appellant. Article 59(a), UCMJ, 10 U.S.C § 859(a); *see McDonald*, 59 M.J. at 430-31; *Barnett*, 63 M.J. at 397.

Factual and Legal Sufficiency

Appellant asserts that his convictions for rape and assault consummated by a battery are legally and factually insufficient.[4] 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)). In resolving questions of legal sufficiency, we are "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v.*

[4] The issue raised regarding the assault consummated by a battery (Specification 1 of Charge II) is submitted in accordance with *Grostefon*, 12 M.J. at 436.

Barner, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). 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 accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

Turning first to the rape charge, Appellant attacks his conviction on the basis of the following: that SH lacked credibility because she sent misleading e-mails to Appellant during his deployment and could not recall details of the rape; that she had a motive to fabricate the rape allegation because of her relationship with PM; that the prosecution failed to present any physical or forensic evidence of the rape and failed to prove sexual intercourse by force and lack of consent beyond a reasonable doubt; and finally, that the evidence demonstrated Appellant's honest and reasonable mistake of fact as to SH's lack of consent. We disagree.

To prove the offense of rape, the prosecution was required to establish that Appellant committed an act of sexual intercourse by force and without the consent of SH. Art. 120, UCMJ.[5] We find the testimony of SH is credible and proves each element of rape by showing that she clearly manifested her lack of consent with her words, her attempts to push Appellant away as he demanded that she satisfy his sexual needs, and by her crying and emotional collapse as he persisted to force himself upon her and engage in an act of sexual intercourse. *See generally United States v. Webster*, 40 M.J. 384, 386-87 (C.M.A. 1994); *United States v. Bright*, 66 M.J. 359, 363 (C.A.A.F. 2008). The prosecution also offered the testimony of SH's friend, Stephanie, to whom SH reported the rape shortly after it occurred, and who went to SH's home that night, observed SH's condition, and saw a substantial wet spot on the sheets (presumably from semen), all of which tended to corroborate SH's testimony. As further corroboration, the prosecution called another friend, Susan, who testified that, as Appellant's return-date from his deployment got closer, SH became scared that Appellant might "flip" when SH told him their relationship was over. Susan described SH as appearing scared and "totally not there" when she saw SH two or three days after the rape. In addition, the prosecution offered an expert witness in psychology, Dr. McBride, who testified about typical behaviors of sexual assault victims, including that a woman who perceives potential harm or a threat to her personal integrity often will respond with helplessness, and that it is normal for a woman to blame herself for a rape and experience depression afterwards. Again, this evidence provides further corroboration of SH's testimony of being raped.

[5] The alleged rape as charged took place prior to 1 October 2007 (prior to the effective date of the current Article 120, UCMJ, 10 U.S.C. § 920) and therefore the elements of Art. 120, UCMJ, identified in the 2005 edition of the MCM were applicable to Appellant's offense.

As to the mistake of fact defense, if the evidence raised a mistake of fact as to consent, and if Appellant held such a mistaken belief, we find beyond a reasonable doubt that the evidence amply demonstrates that any such mistake as to consent was neither honest nor reasonable and Appellant's affirmative defense fails. *See* Rule for Courts-Martial (R.C.M.) 916 (j)(1).

In addressing the assault conviction in violation of Article 128, UCMJ, we find that SH's testimony that Appellant angrily pulled her down a spiral stairway by her ankles against her will, satisfies the elements of assault consummated by a battery in that Appellant did bodily harm to SH and that the bodily harm was done with unlawful force or violence.

We have considered the evidence produced at trial in a light most favorable to the government and conclude that a reasonable fact-finder could have found, beyond a reasonable doubt, all of the essential elements of the rape and battery specifications of which Appellant was convicted. We have also carefully considered the evidence under the standard for factual sufficiency and are convinced beyond a reasonable doubt that Appellant is guilty of the charges and specifications of which he was convicted.

Prosecutorial Misconduct [6]

Appellant raises prosecutorial misconduct for the first time on appeal. "Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996). Appellant claims the prosecution intimidated a potential defense witness.

In Appellant's post-trial sworn declaration he alleges that "the prosecution went beyond legal means to threaten and to intimidate SSgt S, a friend and colleague, from providing testimony about Ms SH's false statements concerning a particular incident in my case. The prosecution threatened SSgt S and successfully intimidated SSgt S from exposing another example of Ms SH's dishonesty and unreliability as a witness." The "incident" to which Appellant refers is not in dispute. At trial, Appellant's defense counsel first raised the matter on cross-examination of SH, in which she admitted to stopping by Appellant's home while jogging and confronted Appellant about the presence of what she perceived were underage girls. SH testified the girls appeared young but that she had no idea as to their actual age and acknowledged they could have been 18 years old. Appellant also submitted the sworn declaration of SSgt S in support of his claim. SSgt S's declaration makes reference to an afternoon barbeque he attended at Appellant's home in July 2007 in which four women were present, who looked to him

[6] Submitted in accordance with *Grostefon*, 12 M.J. at 436.

as "mature and above age." SSgt S stated he was interviewed by the prosecution and told them the women appeared to be in their twenties. SSgt S further stated he intended to give a statement to the defense but the prosecutor "threatened [him] with an Article 15 if [he] signed the planned statement." He also stated that he felt "intimidated by the prosecutor's threat," and, after consulting counsel, he decided to invoke his rights and he declined to give a statement "helpful to the defense."

It is clear from the record and the declarations that, prior to trial, Appellant's trial defense counsel had or should have had the facts necessary to raise a claim of prosecutorial misconduct at trial but elected not to do so; as such, the issue is ordinarily waived. *See* R.C.M. 905(e); *United States v. Henry*, 42 M.J. 231, 234-35 (C.A.A.F. 1995); *United States v. El-Amin*, 38 M.J. 563, 564 (A.F.C.M.R. 1993). Accordingly, we hold that Appellant, by failing to raise prosecutorial misconduct at trial, waived his right to make this claim on appeal.

Even if we did not apply waiver to this issue, Appellant's claim still fails. Assuming for argument's sake that the prosecutors engaged in misconduct, such misconduct "does not in itself mandate dismissal of charges against an accused or ordering a rehearing in every case where it has occurred." *Meek*, 44 M.J. at 5. We instead test for prejudice and we find none. *Id.*; *see also United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005). We find that any testimony SSgt S may have offered did not relate to any of the charged offenses. Whatever the adverse impact on SH's credibility, it would have been minimal at best because Appellant's trial defense counsel questioned her about the incident at trial and she readily admitted she did not know the actual ages of the women and they may have been older than she thought. In addition, SSgt S's declaration that he believed the women appeared to be in their twenties did not create a major disparity between the two versions. If the prosecutor did commit a violation of a legal norm it certainly did not prejudice a substantial right of Appellant, and was harmless under all the facts of this case. *Meek*, 44 M.J. at 5.

Ineffective Assistance of Counsel [7]

In his sworn post-trial declaration, Appellant alleges ineffective assistance of counsel because his senior trial defense counsel failed to photograph the spiral staircase at Appellant's residence, the interior of SH's bedroom, and a view of the parking area in front of her residence—all related to the crime scenes. Appellant also claims his defense counsel was ineffective by failing to request a grant of immunity in order to obtain the testimony of SSgt S. In support of this allegation, Appellant submitted the sworn declaration of SSgt S. Appellant asserts that the offer of this evidence at his trial would have damaged the credibility of SH, the prosecution's primary witness, and the failure to

[7] Submitted in accordance with *Grostefon*, 12 M.J. at 436.

do so "harmed" his defense.[8] In response to Appellant's claims, the Government submitted post-trial sworn declarations from Appellant's trial defense counsel, Major LA and Captain SM.

Ineffective assistance of counsel claims are reviewed de novo. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002) (citing *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997)). Service members unquestionably have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000)). Claims of ineffective assistance of counsel are reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). *See United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). When there is a lapse in judgment or performance, we ask: (1) Whether the trial defense counsel's conduct was in fact deficient, and if so; (2) Whether the counsel's deficient conduct prejudiced the defense. *Strickland*, 466 U.S. at 687; *see also United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001) ("Acts or omissions that fall within a broad range of reasonable approaches do not constitute a deficiency"). 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) (citing *Strickland*, 466 U.S. at 687); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001). Counsel is presumed 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, 410 (C.M.A. 1993).

When conflicting affidavits create a factual dispute, we cannot resolve it by relying on the declarations alone; rather, we must resort to a post-trial fact-finding hearing. *United States v. Ginn*, 47 M.J. 236, 243, 248 (C.A.A.F. 1997). In the case at hand, however, at least as to the photographs, the declarations do not conflict. There is no dispute that Appellant's defense counsel did not take the requested photographs or offer photographic evidence at trial. As to the immunity issue, there is conflict between the declarations. The conflict involves the circumstances of a barbeque Appellant hosted at his home (the same incident referred to above in the prosecutorial misconduct discussion) and SSgt S's recollection of that event and defense counsels' recollection of their interview with SSgt S about the event. Even if this issue, which is unrelated to the charged offenses, was resolved in Appellant's favor and defense counsel were successful in obtaining immunity for SSgt S, his testimony's negligible impact on the credibility of SH, if any, would not have provided Appellant any relief. *Id*. Therefore, we can decide the question of the effectiveness of counsel without ordering a post-trial fact finding hearing. *Id*.

[8] Appellant claims dissatisfaction with only one of his defense counsel, Major LA, and states he is satisfied with his other defense counsel, Captain SM, who Appellant believed "had my very best interests at heart." However, we evaluate the combined performance of the defense team as a whole for Appellant's claims. *See United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004) (citing *United States v. McConnell*, 55 M.J. 479, 481 (C.A.A.F. 2001)).

We now turn to whether defense counsels' actions constitute deficient professional conduct and whether Appellant suffered prejudice as a result of his counsels' deficient conduct. We answer both questions in the negative. Appellant's trial defense counsel made reasoned tactical and strategic decisions not to obtain the photographs and witness immunity, balancing the potential benefits against the possible negative consequences, and we will not second-guess these tactical and strategic decisions. We find counsels' conduct was not deficient.

Moreover, even if we assumed the conduct was deficient, we find no prejudice. The test for prejudice on a claim of ineffective assistance of counsel is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In light of the entire record, whatever impact it may have had on SH's credibility had this evidence been offered, it certainly is not reasonably probable that the result of the trial would have been different. Under the aforementioned facts, we find no prejudice.

Speedy Post-Trial Review

Though not raised as an issue on appeal, we note that the overall delay of more than 800 days 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) Appellant's assertion of the right to timely review and appeal; and (4) prejudice. *See also United States v. Moreno*, 63 M.J. 129, 135-36, 142-43 (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. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in Appellant's case.

Having considered the totality of the circumstances and the entire record, we conclude that any denial of Appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

Conclusion

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

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court