UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman DAVID J. JANSSEN
United States Air Force

ACM 37681 (recon)

22 July 2013

Sentence adjudged 13 December 2009 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: Don M. Christensen.

Approved sentence: Bad-conduct discharge, confinement for 9 years, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; Major Daniel E. Schoeni; Captain Christopher D. James; and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Lieutenant Colonel Linell A. Letendre; Major Deanna Daly; Major Scott C. Jansen; Major Tyson D. Kindness; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and SOYBEL[1]
Appellate Military Judges

PER CURIAM:

On 4 August, 9 September, and 9-13 December 2009, the appellant was tried by a general court-martial composed of officer members at Malmstrom Air Force Base, Montana. Contrary to his pleas, the appellant was convicted of one specification of violating the order of a superior noncommissioned officer, one specification of rape, two specifications of assault consummated by a battery, one specification of obstruction of

[1]Upon our own motion, this Court vacated the previous decision in this case for reconsideration before a properly constituted panel. Our decision today reaffirms our earlier decision.

justice, and one specification of breaking restriction, in violation of Articles 91, 120, 128, and 134, UCMJ, 10 U.S.C. §§ 891, 920, 928, 934.[2] The members sentenced the appellant to a bad-conduct discharge, confinement for 12 years and eight months, forfeiture of $1,300 pay per month for 12 years, and reduction to E-1. On 19 June 2010, the convening authority approved only so much of the sentence that called for a bad-conduct discharge, confinement for 9 years, and reduction to E-1.

The case was initially docketed with this Court on 24 June 2010. The appellant filed his assignment of errors on 19 January 2011 and supplemental assignment of errors on 23 March 2011. On 20 July 2011, this Court granted the appellant's motion to remand the case for the preparation of a substantially verbatim record of trial. A new transcript was prepared and the convening authority issued a new Action in this case on 2 April 2012. Consistent with the original Action, the new Action approved only so much of the sentence that called for a bad-conduct discharge, confinement for 9 years, and reduction to E-1.

Before this Court, the appellant argues that: (1) The evidence is factually insufficient to support his conviction for rape;[3] (2) The evidence is factually and legally insufficient to support his conviction for breaking restriction; (3) Specifications 3 and 4 of Charge IV fail to state offenses; (4) The sentence is inappropriately severe because of unreasonable post-trial delay; and (5) Trial defense counsel provided ineffective assistance of counsel.[4]

Background

In January 2009, the victim, Ms. BAS, moved to Great Falls, Montana, to be with the appellant. BAS and the appellant had previously dated when they both lived in Minnesota. They broke up, reunited on Facebook in 2007, and by 2009 had developed an ongoing relationship, during which they would have sex once, maybe twice a day. BAS described the beginning of their relationship as "very sweet," but it later turned "very rocky" as the appellant became, in her words, "very controlling." BAS also testified that they had many arguments, and she had, on occasion, tried to leave the appellant after some of their arguments. Additionally, she stated they often would have "make-up" sex at some point after an argument.

One of those arguments occurred on 15 February 2009. BAS testified that morning she knew "it was going to be a day of walking on eggshells" because the appellant had started talking to her in a loud voice. She went shopping for some diapers for her son and the appellant's daughter. While shopping, BAS had an angry

[2] The appellant was acquitted of one specification of communicating a threat and one specification of obstructing justice, in violation of Article 134, UCMJ, 10 U.S.C. § 934.
[3] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[4] This issue was raised pursuant to *Grostefon*.

conversation with her father, which led to a telephonic argument with the appellant that continued after she returned home. When she got home, BAS tried to check on her son, but the appellant prevented her from doing so by barricading the kitchen area with some chairs. As their argument continued, the appellant pushed BAS into the bedroom. BAS testified that she struggled to no avail, trying to get away through the bedroom window and door, but the appellant used some "wrestling" techniques to pin her to the bed.

At some point, the appellant let BAS sit on the edge of the bed, but he would not let her leave the bedroom. She testified that the appellant began to shove her hard enough to nearly knock her off the bed. The appellant than pulled her back onto the bed and began to kiss her, but BAS resisted by clenching her teeth. BAS then testified as follows:

> Then I remember . . . he had lift[ed] my shirt up and he . . . kiss[ed] me on my neck and he had lifted my shirt up and started kissing on my breasts and then I remember he started to take off my pants and I told him no and he didn't say anything. And I said no again and he said, "What does no mean? No like you don't want to or no like please don't stop." And I said, "No, I don't want to." And as that conversation happened, he continued and at that point . . . in my mind I was thinking, "Shut the door, shut the door, shut the door."[5] And I remember him straddling on top of me and I was trying to thrust him off with my hips, trying to push him off with my hands on his shoulders.

BAS further stated that she could not push the appellant off her because he was too strong. The appellant penetrated her vagina with his penis and, after having sex with her, "[h]e just finished, got up, and walked into the kitchen." As BAS was putting on her pants, the appellant came back into the room. She grabbed a nearby pen and threatened to stab the appellant. A scuffle ensued, and the appellant tied her hands using a belt and rope. When the appellant relaxed the belt, BAS distracted him, broke free, and ran out of the bedroom. She ultimately got out of the house and called 911.

Local Cascade County law enforcement officers arrived on the scene and arrested the appellant. After being advised of his rights, the appellant admitted to engaging in a verbal and physical assault with BAS:

> [P]robably towards the beginning . . . we were arguing a little bit, she had her hand on the door, [and] I was trying to figure out what was going on[. She was] trying to get out the window out of the room and then she was just sitting on the bed [in the bedroom], and I just went and sat next to

[5] This was a dissociative technique BAS used to help her cope with traumatic situations. It allowed her to escape a traumatic experience in her mind while still perceiving the event as it occurred. She testified she learned this technique from another situation that had nothing to do with the appellant.

> her. She wasn't saying anything; she was just sitting there, and I tried to get her calm. I went and sat next to her and I was like what's wrong? I put my arm around her and I was kissing her and she was kissing [me] back and she helped me lift her shirt up, you know, that's not like she was really struggling, and then . . . I guess, she wasn't really doing anything[. S]he was just kind of laying there and like I said she pulled her shirt up, she lifted her legs up, she didn't really push me away. So I guess I wasn't really sure what was going on and I told her . . . "You know you can say no" and she said, "No" . . . I said, "No, what[?" and] she said, "No, I don't want to" . . . I said, "Don't want to say no or don't want to have sex[?]" . . . [S]he didn't say anything, and . . . I was already into it and that was it.

The appellant continued by saying that BAS was "just kind of laying there." When asked what this meant, the appellant explained:

> [O]ne time she grabbed my legs and I—I mean she wasn't just totally like—she wasn't like sleeping or a dead person would be or anything, but no it wasn't like normal sex, and that's why I said that and maybe I should have stopped then, but I guess I didn't think. You know, I figured if she didn't want to she would have said no—pushed me away . . . or made it clear especially when I asked her "Do you mean no you don't want to have sex or no you don't want to say no" and she didn't say anything.

When detectives challenged his story, the appellant admitted that having sex with BAS at that time "probably wasn't a smart decision."

Factual Sufficiency of the Evidence

The appellant first argues that the evidence is factually insufficient to support his conviction for rape. Specifically, the appellant argues that the Government bore the burden of proving beyond a reasonable doubt that mistake of fact as to consent did not exist in this case, and they failed to do so. As such, the appellant asserts that we must set aside his rape conviction.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of factual sufficiency de novo. *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] are [ourselves] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In assessing factual sufficiency, we must make allowances for the fact that we have not seen the witnesses or directly heard their testimony. *Washington*, 57 M.J. at 399. 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; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

The facts are legally sufficient to support the appellant's conviction for rape. BAS and the appellant had a telephonic argument while BAS was shopping that continued once she returned home. The appellant kept BAS from accessing her son by barricading the kitchen. The appellant pushed BAS into the bedroom, where she tried to escape through the window before being stopped by the appellant. After being pushed and shoved, BAS eventually sat on the bed with the appellant as he tried to kiss her. BAS tried to resist the appellant's advances but found him too persistent. BAS told the appellant "no" twice as he progressed and before he asked, "What does no mean?" BAS tried to push the appellant off her before he penetrated her vagina but found him to be too strong. The appellant restrained BAS with a belt and rope after the altercation and after she tried to stab him with a pen. BAS eventually broke free and called 911.

The members had before them the testimony of BAS, the 911 recording, the testimony of the responding officer and local detectives, the appellant's videotaped interview, and other physical evidence. In addition, the military judge properly instructed the members on the elements of rape as well as the definitions of force, consent, and mistake of fact as to consent. The members were in a position to weigh and assess the credibility of the witnesses and determine whether or not the appellant's claim of mistake of fact was reasonable. Moreover, the evidence need not be free of all conflict for a rational fact-finder to convict an appellant beyond a reasonable doubt. *See United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). The members "may believe one part of a witness'[s] testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of the accused's guilt beyond a reasonable doubt. *See Turner*, 25 M.J. at 325.

Article 134, UCMJ, Specifications and Terminal Element

In Specification 3 of Charge IV, the appellant was charged and convicted of obstruction of justice by using BAS's Facebook account to send a fictitious electronic message.[6] In Specification 4 of Charge IV, the appellant was charged and convicted of breaking restriction after being restricted to the limits of Malmstrom Air Force Base. Although not challenged at trial, the appellant argues that each specification fails to state an offense because neither—expressly or by necessary implication—alleges the terminal element required for an Article 134, UCMJ, offense. We agree.

[6] As charged, Specification 3 of Charge IV read in part that the appellant did "wrongfully endeavor to impede an investigation . . . by deleting records of electronic communication between [the appellant] and [BAS] and by using [BAS]'s Facebook account to send a fictitious electronic message denying [the appellant]'s involvement in physically abusing [BAS]." The members found the appellant guilty, but excepted the words "by deleting records of electronic communication between [the appellant] and [BAS], denying [the appellant]'s involvement in physically abusing [BAS]." The members found the appellant not guilty of the excepted words.

Whether a charged specification states an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted). "A specification states an offense if it alleges, either expressly or by [necessary] implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *Id*. (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)). *See also* Rule for Courts-Martial 307(c)(3). In the case of a litigated Article 134, UCMJ specification that does not allege the terminal element but which was not challenged at trial, the failure to allege the terminal element is plain and obvious error, which is forfeited rather than waived. *United States v. Humphries*, 71 M.J. 209, 215 (C.A.A.F. 2012). The remedy, if any, depends on "whether the defective specification resulted in material prejudice to Appellee's substantial right to notice." *Id*. To determine whether the defective specification resulted in material prejudice to a substantial right, this Court "look[s] to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Id*. at 215-16 (citations omitted).

In accordance with *Humphries*, we are compelled to disapprove the findings of guilty to the obstruction of justice specification and the breaking restriction specification alleged under Charge IV as a violation of Article 134, UCMJ. Neither specification alleges the terminal elements and neither side mentioned the terminal elements during the trial. We find nothing in the record to satisfactorily establish notice of the need to defend against the terminal elements, and there is no indication the evidence was uncontroverted as to the terminal elements.

On consideration of the entire record and pursuant to *Humphries*, the findings of guilty to Specifications 3 and 4 of Charge IV are set aside and dismissed.[7] Reassessing the sentence on the basis of the error noted, the entire record, and in accordance with the principles of *United States v. Sales*, 22 M.J. 305 (CM.A. 1986), we are confident the members would have imposed the same sentence. Dismissing the obstruction of justice and breaking restriction specifications does not substantially change the sentencing landscape. The appellant still stands convicted of rape, assault consummated by a battery, and disobeying a lawful order, for which the maximum imposable punishment remains confinement for life. This Court finds that the sentence, as approved by the convening authority, is appropriate for the remaining offenses.

Ineffective Assistance of Counsel

The appellant alleges that his trial defense counsel were ineffective for failing to introduce evidence in findings, under Mil. R. Evid. 412, that BAS was raped by her brother as a child, which led to her "dissociative state"; introduce prior inconsistent statements of BAS; or introduce evidence from the appellant's ex-wife about the

[7] Because we dismiss and set aside Specifications 3 and 4 of Charge IV, we need not address the appellant's assignment of error challenging the legal and factual sufficiency of Specification 4 of Charge IV.

demeanor of BAS a few hours after the assault and rape. The appellant submitted a post-trial affidavit to support his claim of ineffective assistance of counsel. In turn, the Government countered with affidavits from the appellant's two trial defense counsel.

This Court reviews claims of ineffective assistance of counsel de novo. *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (citing *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006). When reviewing such claims, we follow the two-part test outlined by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Id.* at 76. Under *Strickland*, the appellant has the burden of demonstrating:

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

Id. (quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997); *Strickland*, 466 U.S. at 687) (internal quotation marks omitted).

Judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000) (citing *Strickland*, 466 U.S. at 689). When there is a factual dispute, appellate courts determine whether further fact-finding is required under *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997). If the facts alleged by the defense would not result in relief under *Strickland*, the Court may address the claim without the necessity of resolving the factual dispute. *Ginn*, 47 M.J. at 248.

We have applied the standards in *Ginn* and conclude that we can resolve this issue without additional fact-finding. We find that the appellant's trial defense counsel executed effective trial strategies and tactics regarding the issues the appellant now raises. First, the military judge declined to admit evidence, under Mil. R. Evid. 412, related to BAS being previously raped. Even without this evidence, trial defense counsel still conducted an effective cross-examination of BAS regarding her dissociation technique. Second, trial defense counsel strategically chose not to offer recordings of some of BAS's prior inconsistent statements. In their affidavits, defense counsel stated they knew she had made some recorded statements consistent with what the appellant told law enforcement during his interrogation. Because they considered BAS's consistent statements harmful to their case, they decided that offering recorded inconsistent statements by BAS would open the door for the Government to offer her consistent statements on rebuttal. They deemed this course of action "useless at best and detrimental at worst." Finally, defense counsel interviewed the appellant's ex-wife about her interaction with BAS at the time of the rape, but concluded that she did not offer any useful information. Examining the appellate filings and the record as a whole, we hold

that the appellant was not denied effective assistance of counsel. *See Strickland*, 466 U.S. at 687.

Post-Trial Delay

Citing *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002), the appellant argues that the unreasonable post-trial processing in this case warrants relief. The appellant argues that this Court should reduce his confinement by one day for each day by which the 120-day standard set forth in *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006) was exceeded in this case. The appellant calculates his relief as 841 days, measured from the date the court-martial ended, 13 December 2009, to the date of the convening authority's second Action, 2 April 2012.

In *Tardif*, our superior court held that Article 66(c), UCMJ, empowered the service courts to grant sentence relief for excessive post-trial delay without showing actual prejudice, as is required by Article 59(a), UCMJ, 10 U.S.C. § 859(a). *Tardif*, 57 M.J. at 224. Having reviewed the legislative and judicial history of both Articles, the Court concluded that the power and duty to determine "sentence appropriateness under Article 66(c)," UCMJ, is distinct from and broader than that of determining sentence legality under Article 59(a), UCMJ:

> Article 59(a)[, UMCJ,] constrains the authority to reverse "on the ground of an error of law." Article 66(c)[, UMCJ,] is a broader, three-pronged constraint on the court's authority to affirm. Before it may affirm, the court must be satisfied that the findings and sentence are (1) "correct in law," and (2) "correct in fact." Even if these first two prongs are satisfied, the court may affirm only so much of the findings and sentence as it "determines, on the basis of the entire record, should be approved."

Id. (citing *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998)). The Court remanded the case to the lower court to determine whether relief was warranted for excessive post-trial delay, notwithstanding the absence of prejudice: "[A]ppellate courts are not limited to either tolerating the intolerable or giving an appellant a windfall. The Courts of Criminal Appeals have authority under Article 66(c)[, UCMJ,] . . . to tailor an appropriate remedy [for post-trial delay], if any is warranted, to the circumstances of the case." *Id*. at 225.

In *United States v. Brown*, 62 M.J. 602 (N.M. Ct. Crim. App. 2005), the Navy-Marine Corps Court of Appeals identified a "non-exhaustive" list of factors to consider in evaluating whether Article 66(c), UCMJ, relief should be granted for post-trial delay. Among these factors are the length and reasons for the delay, the length and complexity of the record, the offenses involved, and the evidence of bad faith or gross indifference in the post-trial process. *Id*. at 607. Finding gross negligence in a delay of almost

30 months from adjournment of trial until receipt of the record for review, the court disapproved the adjudged bad-conduct discharge. *Id*. at 607-08.

Although unfortunate, the delays in this case ultimately ensured the appellant received a fair appellate review.[8] Certainly, it would have been preferable to have had a fully accurate record of trial at the outset for this Court to review. This also would have precluded the appellant's case from winding its way through two rounds of post-trial processing. Even so, we find no evidence of bad faith or gross indifference to the post-trial processing of the appellant's case sufficient to prompt sentence relief. Nor do the other suggested factors in *Brown* cause us to exercise our power under Article 66(c), UCMJ, to provide a windfall remedy to the appellant.

Conclusion

The findings of guilty to Specifications 3 and 4 of Charge IV are set aside, and the specifications are dismissed. The remaining findings and the sentence, as reassessed to a bad-conduct discharge, confinement for 9 years, and reduction to E-1, is correct in law and fact, and no error prejudicial to the substantial rights of the appellant remains.[9]

[8] What follows is a summary of the key dates in this case. The trial concluded on 13 December 2009, and the convening authority took action 190 days later, on 21 June 2010. The case was initially docketed with this Court on 24 June 2010. The appellant submitted his initial assignment of errors on 19 January 2011 and a supplemental assignment of errors on 23 March 2011. On 20 July 2011, this Court remanded the record of trial to the convening authority to prepare a substantially verbatim record of trial. The court reporter received the order to re-transcribe the record of trial on 7 September 2011, and completed the transcription on 16 September 2011. Defense counsel completed her review on 27 January 2012, and trial counsel authenticated the record on 1 February 2012. The Staff Judge Advocate's Recommendation (SJAR), defense request for clemency, and addendum to the SJAR were processed between 21 February 2012 and 27 March 2012. The convening authority issued the second Action on 2 April 2012, and the case was re-docketed with this Court on 21 April 2012. The appellant filed new assignments of error on 28 September 2012. Following the allegation of ineffective assistance of counsel, the Government sought and received affidavits from trial defense counsel and submitted them on 26 November 2012. The Government filed its answer to the assigned errors on 13 December 2012.

[9] In *United States v. Moreno*, 63 M.J. 129, 135, 142 (C.A.A.F. 2006) our superior court established guidelines that trigger a presumption of unreasonable delay in certain circumstances: (1) when the action of the convening authority is not taken within 120 days of the completion of trial, (2) when the record of trial is not docketed by the service Court of Criminal Appeals within 30 days of action, and (3) when appellate review is not completed with a decision rendered within 18 months of docketing the case before the Court of Criminal Appeals. As noted in the body of our opinion, the total period of time from trial to action was greater than 120 days. In addition, the total period from the date this case was docketed with the Court and completion of review exceeds 18 months. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Moreno*, 63 M.J. at 135. 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 the appellant's case. The post-trial record contains no evidence that the delay has had any negative impact on the appellant. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

Article 66(c), UCMJ. Accordingly, the modified findings and reassessed sentence are AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court