UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MATTHEW D. JOLIVET
United States Air Force

ACM 38123

30 September 2013

Sentence adjudged 30 September 2011 by GCM convened at Ramstein Air Base, Germany. Military Judge: Donald R. Eller.

Approved Sentence: Bad-conduct discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Matthew T. King.

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

Before

ORR, HELGET, and WEBER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Senior Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of four specifications of assault consummated by a battery; one specification of burglary; one specification of false official statement; and one specification each of communicating a threat, unlawful entry, and obstruction of justice, in violation of Articles 128, 129, 107, and 134, UCMJ, 10 U.S.C. §§ 928, 929, 907, 934, respectively. Consistent with his pleas, the appellant was found guilty of one specification of willful disobedience of a noncommissioned officer, in violation of

Article 91, UCMJ, 10 U.S.C. § 891.[1] The members sentenced the appellant to a bad-conduct discharge, confinement for 2 years, total forfeiture of all pay and allowances and reduction to E-1. The convening authority approved the adjudged sentence.

Before this Court, the appellant assigned 13 errors: (1) The appellant was subjected to cruel and unusual punishment or illegal treatment while confined at the Mannheim, Germany, Confinement Facility; (2) The facially unreasonable delay between the completion of trial and the convening authority's action deprived the appellant of his post-trial due process right to a speedy review;[2] (3) The pretrial confinement review officer and the military judge each abused their discretion in denying the appellant's requests for release from pretrial confinement; (4) The specifications of Additional Charge II, all violations of Article 134, UCMJ, were not properly investigated pursuant to Article 32, UCMJ, 10 U.S.C. § 832, and should be dismissed; (5) The specification of Charge I, willful disobedience of a noncommissioned officer's lawful order, was improvidently pled to, or was otherwise legally insufficient; (6) The facts supporting the specifications of Charges II, III, Additional Charge I, and Additional Charge II are insufficient to support the members' finding of guilty; (7) The military judge's decisions to disallow evidence of Airman First Class (A1C) JK's new relationship to show motive to fabricate were abuses of discretion; (8) The military judge's decision to allow evidence of A1C JK's character for peacefulness was an abuse of discretion; (9) The military judge's decision to allow the text messages sent by the appellant to another Airman was an abuse of discretion; (10) The military judge's decision to disallow testimony from an Air Force Office of Special Investigations (AFOSI) agent regarding the statement made by A1C JK in response to the question of whether the appellant was physically trying to hurt her, was an abuse of discretion; (11) The military judge's decision to admit Prosecution Exhibit 14, a confinement disciplinary report, was an abuse of discretion; (12) The sentencing argument by the trial counsel was improper and overzealous, violating the appellant's right to a fair trial; and (13) The military judge failed to properly instruct the members during sentencing deliberations after they asked the trial court, "Can we specify counseling?"

Finding no error that materially prejudices a substantial right of the appellant, we affirm.

Background

The charges in this case stem from the appellant's rather tumultuous relationship with A1C JK. They met in June-July 2010 and started dating in August 2010. Beginning

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[1] Consistent with his pleas, the appellant was found not guilty of two specifications of aggravated assault and one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928. He was also found not guilty of another specification of aggravated assault, but was found guilty of the lesser included offense of assault consummated by a battery.

[2] Assignments of error 2 through 13 are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

in October-November 2010, they began having problems and by January 2011, they were having frequent arguments. Eventually, the arguments became physical and ultimately led to the appellant assaulting A1C JK on several occasions by grabbing her shoulders and shaking her with his hands, grabbing her arms and waist, and grabbing her on the neck. On one occasion, he unlawfully broke into and entered A1C JK's dorm room and assaulted her. Then, on divers occasions, he violated his first sergeant's lawful order to have no contact with A1C JK and communicated threats to A1C JK. He also made a false statement to his supervisor about how he injured his hand, and obstructed justice by instructing A1C JK to falsely tell AFOSI agents that he did not cause a bruise on her side.

On 29 January 2011, Staff Sergeant (SSgt) BL invited A1C JK, Senior Airman (SrA) AG, and a few others over to his house before heading out later that night. The appellant was not invited, but after he called to be included he went to SSgt BL's house. At some point in the evening, the appellant and A1C JK started arguing in the kitchen area and he wanted her to go outside, but she refused. According to A1C JK, he then grabbed her wrist and tried to pull her out the door. A1C JK pulled away but eventually agreed to go outside with him. During their argument, he grabbed A1C JK's shoulders and started shaking her. While outside, he forcefully grabbed her left side causing her pain. Later that night, while in the bathroom of a local bar, A1C JK lifted her shirt to show SrA AG three round finger marks on the front of her left ribs.

On 31 January 2011, A1C JK was interviewed by ZP5 JR, a host nation security forces contractor on Ramstein Air Base (AB). During the interview, ZP5 JR observed A1C JK texting and asked to see her cell phone. There were messages from "Matt J," referring to the appellant, who was also being interviewed by security forces. The first one read, "[JK] is going to fuck me. I told her to stick to her story and leave it all behind us." A1C JK replied, "Fuck you." The second message read, "Stick to the story. Tell them I did not bruise you. If they want to see it, say it came from sex or something."

A1C JK testified that on approximately 5-6 occasions during their arguments, the appellant became angry and grabbed her arms and shoulders and started shaking her. This frightened her. A1C JK testified that on a separate occasion in early March 2011, while getting ready in her dorm room to go out with some of her friends, she and the appellant started arguing so she asked him to leave. While holding her door open trying to get the appellant to leave, he slammed her arm down causing it to hit the door handle. She proceeded to her bathroom and the appellant followed. She continued to tell him to leave, which caused the appellant to become very angry and punch the bathroom door. The appellant's hand immediately began to swell. On 8 March 2011, the appellant informed his supervisor, Technical Sergeant (TSgt) BS, that he broke his hand while working on his car. In completing a safety mishap report the appellant stated, "The wind was very strong and blew the door closed onto my left hand and fractured it."

On 4 April 2011, the appellant's first sergeant, Master Sergeant (MSgt) LS, issued him a verbal order to have no contact by any means with A1C JK. Due to the appellant having violated the order, MSgt LS reaffirmed the no-contact order on 20 April 2011. A1C JK had sought this order.

On the night of 14 April 2011, upon returning from a trip to Munich, Germany, A1C JK found the appellant sitting outside her dorm room. He was still subject to the no-contact order. The appellant wanted to go inside her dorm room to talk, but A1C JK refused. Instead, they stayed outside and he asked her questions about her trip and their relationship. At some point, he mentioned he felt suicidal and that it would be A1C JK's fault if anything happened to him. When their conversation ended he went to his room. Approximately 30 minutes later he returned and they started talking with her door cracked open. The conversation turned for the worse so she attempted to close her door, but he forced his way into her room. She started yelling for him to leave, but he refused and told her to "shut up" and "stop screaming." He then tackled her on the bed, held her down against her will, and put his hands over her mouth to prevent her from screaming. When A1C JK attempted to bite him, the appellant put his hands on her throat.

SrA JS, who lived on the second floor above and across the hall from A1C JK's room, heard A1C JK yelling so he responded to her room. A1C JK's door was closed so SrA JS knocked on her door which the appellant opened. The appellant and A1C JK both appeared to be out of breath. A1C JK was sitting on her bed and SrA JS noticed that she was massaging her neck. At some point, A1C JK grabbed the phone and threatened to call the cops. The appellant responded by tackling A1C JK on the bed again and ended up on top of her with both of his hands on her throat. SrA JS immediately pulled the appellant off of her and tried to convince him to leave which he eventually agreed to do. A1C JK heard the appellant outside her dorm room yelling that he wanted to chop her up with a machete so no one would ever find the pieces.

On 27 April 2011, as A1C JK got out of her vehicle in the dorm parking lot, the appellant approached her again and started asking her questions about their relationship. As A1C JK started to walk away towards her dorm room, he walked in front of her preventing her from going into her room. He wanted to know why she broke up with him and she told him that she was "done being scared in a relationship." He then started saying things like: "I'm going to slit your brake lines;" "I hope you fucking crash your car and die;" and, "I can get people to rape you, that's not hard." He also said he wanted to pour acid in her face. At this point, SrA JS and SrA JC were nearby and overheard the conversation. They approached the appellant and convinced him to leave A1C JK alone.

Cruel and Unusual Punishment

The appellant's confinement at the Mannheim, Germany, Confinement Facility included periods of pretrial and post-trial confinement, implicating Articles 13 and 55 of the UCMJ, 10 U.S.C. §§ 813, 855, as well as the Eighth Amendment.[3]

We review de novo the application of the facts to the law and whether the appellant is entitled to credit for Article 13, UCMJ, violations. *United States v. Crawford*, 62 M.J. 411, 414 (C.A.A.F. 2006). Article 13, UCMJ, prohibits: (1) intentional imposition of punishment on an accused before his or her guilt is established at trial; and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial. *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005). "The first prohibition of Article 13[, UCMJ,] involves a purpose or intent to punish, determined by examining the intent of detention officials or by examining the purposes served by the restriction or condition, and whether such purposes are 'reasonably related to a legitimate governmental objective.'" *Id.* (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 (1979); *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997)). "The second prohibition of Article 13[, UCMJ,] prevents imposing unduly rigorous circumstances during pretrial detention." *Id.* The burden rests upon the appellant to show a violation of Article 13, UCMJ. *Crawford*, 62 M.J. at 414.

We review claims of cruel and unusual post-trial punishment de novo. *United States v. Wise*, 64 M.J. 468, 473 (C.A.A.F. 2007); *United States v. Pena*, 64 M.J. 259, 265 (C.A.A.F. 2007). "In our evaluation of both constitutional and statutory allegations of cruel or unusual punishment, we apply the Supreme Court's Eighth Amendment jurisprudence 'in the absence of legislative intent to create greater protections in the UCMJ.'" *Pena*, 64 M.J. at 265 (quoting *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006)). "Denial of adequate medical attention can constitute an Eighth Amendment or Article 55[, UCMJ,][4] violation." *United States v. White*, 54 M.J. 469, 474 (C.A.A.F. 2001) (citing *United States v. Sanchez*, 53 M.J. 393, 396 (C.A.A.F. 2000)). However, medical care provided to inmates need only be reasonable, not "perfect" or "the best obtainable." *Id.* at 475 (quoting *Harris v. Thigpen*, 941 F.2d 1495, 1510 (11th Cir. 1991)). To prevail, the appellant "must show: (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [his] health and safety; and (3) that he 'has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ,'" 10 U.S.C. § 938. *Lovett*, 63 M.J. at 215 (omission in original) (footnotes and citations omitted).

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[3] U.S. CONST. amend. VIII.

[4] In addition to prohibiting "cruel or unusual punishment," Article 55, UCMJ, 10 U.S.C. § 855, prohibits "[p]unishment by flogging or by branding, marking, or tattooing" and "[t]he use of irons . . . except for the purpose of safe custody." None of the specific prohibitions are at issue here.

The appellant spent 156 days in pretrial confinement, 155 days of which were served at Mannheim. As a result of the findings of three disciplinary boards, the appellant spent approximately 137 days in disciplinary segregation. Additionally, the appellant spent 77 days in post-trial confinement at Mannheim.

The appellant asserts that he was subjected to an oppressive environment created by Sergeant Major (SGM) JG while he was in both pretrial confinement and post-trial confinement at the Mannheim Confinement Facility. An Army Regulation 15-6 investigation, which occurred in October-December 2011 while the appellant was in post-trial confinement. It revealed that SGM JG's temperamental, demeaning, toxic leadership was the root cause of a hostile environment at the Mannheim Confinement Facility. According to one of the witnesses interviewed in the investigation, SGM JG went out of his way to single out the appellant. He also took a book away from the appellant when he was authorized to have it. SGM JG also tried to influence the Disciplinary and Adjustment Board members to vote the way he wanted. Another witness testified that SGM JG postponed one of the appellant's boards so that he would be able to preside over it. SGM JG served as the president for each of the appellant's three disciplinary boards at Mannheim. In his post-trial Declaration, the appellant claims that the conditions at Mannheim caused him both psychological and physical stress. He also claims that he developed several hernias, rectal bleeding, diarrhea, and vomiting. In his post-trial clemency submission, the appellant raised this issue and requested the convening authority to grant him two for one credit for time served in pretrial confinement. The convening authority did not grant any additional credit.

The Government's position is that the appellant failed to raise this issue at trial. In fact, specifically informed the military judge that he had not been punished in any way prior to trial that would constitute illegal pretrial punishment under Article 13, UCMJ. The Government also claims the appellant has not submitted any evidence to substantiate his medical conditions and there is no indication his medical conditions continued after he was transferred to Miramar. Further, the Army investigative report does not indicate that the appellant was subjected to unlawful treatment while he was confined at Mannheim. Although one of the witnesses stated that SGM JG took a book away from the appellant, she also stated that she had never heard of him hazing the prisoners.

We find that the appellant has not established a violation of Article 13, UCMJ, occurred in this case. Although the Army investigation revealed that SGM JG was a toxic leader, there is no evidence that he hazed any of the prisoners. All of the findings concerned actions toward the staff, not the prisoners. Further, having a book taken away and delaying a disciplinary hearing by five days, as occurred in this case, did not give rise to any intent to punish. Additionally, we do not find the imposition of approximately 137 days in segregation to be a violation of Article 13, UCMJ. The appellant has not shown that he did not commit the infractions which led to the segregation, nor are we in a position to second-guess the confinement facility officials. *King*, 61 M.J. at 228.

Likewise, we find the appellant has also not shown he suffered cruel and unusual punishment under Article 55, UCMJ, or the Eighth Amendment. Although the appellant may have developed certain medical conditions while at Mannheim, he has failed to show an objectively and sufficiently serious act or omission resulting in the denial of necessities or that prison officials were indifferent to his medical conditions. Accordingly, the appellant has failed to establish either a violation of Articles 13 or 55, UCMJ, or the Eighth Amendment.[5]

Post-Trial Delay

The second assignment of error alleges that the facially unreasonable delay between the completion of trial and the convening authority's action deprived the appellant of his due process right to a speedy review. The appellant's court-martial concluded on 30 September 2011, and the convening authority took action on 6 March 2012, 158 days later. The appellant requests this Court set aside the findings and sentence as a result of this delay.

We review de novo claims that an appellant was denied his due process right to a speedy post-trial review and appeal. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). In conducting this review, we assess the four factors laid out in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Id*. at 135 (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *United States v. Toohey*, 60 M.J. 100, 102 (C.A.A.F. 2004)). There is a presumption of unreasonable appellate delay when the "action of the convening authority is not taken within 120 days of the completion of trial." *Id*. at 142.

Because the delay in this case is facially unreasonable, we would customarily analyze each factor and determine whether the factor weighs in favor of the Government or the appellant, then balance our analysis of the factors to determine whether there has been a due process violation. However, when we assume error but are able to directly conclude that any error was harmless beyond a reasonable doubt, we need not 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.

Having considered the totality of the circumstances and the entire record in light of the *Barker* factors, we conclude that any denial of the appellant's right to speedy post-trial review and his appeal was harmless beyond a reasonable doubt, and that relief is not

[5] Since this issue deals with post-trial assertions of fact, we look to the principles of *United States v. Ginn*, 47 M.J. 236 (C.A.A.F 1997), to determine whether or not to order an evidentiary hearing. As we are able to resolve this issue based on the appellate filings and the record, no hearing is required.

otherwise warranted. *United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Pretrial Confinement

The third assignment of error alleges the pretrial confinement review officer (PCRO) and military judge abused their discretion in denying the appellant's request for release from pretrial confinement.

We review both a military magistrate's and military judge's ruling on the lawfulness of pretrial confinement for abuse of discretion. *United States v. Gaither*, 45 M.J. 349, 351 (C.A.A.F. 1996); *see also United States v. Dvonch*, 44 M.J. 531, 532 (A.F. Ct. Crim. App. 1996). A military judge reviews de novo whether confinement should be continued pendente lite. *Id.* In both cases, the appellate court's review is limited to the facts before the deciding official, applying an abuse of discretion standard. *Id*. at 351-52.

On 28 April 2011, the appellant's commander ordered him into pretrial confinement for the alleged offenses of aggravated assault and communication of a threat. The PCRO reviewed the case and decided to continue pretrial confinement. On 23 June 2011, A1C JK deployed to Southwest Asia for a six-month tour. On 29 June 2011, trial defense counsel requested that the PCRO release the appellant from confinement based on the premise that the appellant would not engage in additional serious misconduct because A1C JK was no longer stationed in Germany. On 8 July 2011, the PCRO denied this request finding that there was a high probability that the appellant would attempt to contact witnesses in an effort to influence their testimony, he could still attempt to contact A1C JK by e-mail, phone, or text, and the appellant had shown a willingness to disregard the no-contact order.

At trial on 22 August 2011, the civilian defense counsel submitted a motion requesting the military judge to release the appellant from continued pretrial confinement. The military judge denied this request, finding that the PCRO did not abuse his discretion in keeping the appellant in pretrial confinement. Furthermore, even if the PCRO had abused his discretion, the military judge found there was sufficient evidence presented justifying continued pretrial confinement. This evidence consisted of what was presented to the PCRO plus a 3 May 2011 memo from Major MH, Staff Psychiatrist, who determined that the appellant demonstrated multiple traits of Antisocial Personality Disorder including impulsivity, irritability, aggressiveness, deceitfulness, and that he justifies or blames others for his own actions. The military judge considered lesser forms of restraint and determined they were inadequate to ensure the appellant would not commit further misconduct or ensure his presence at trial.

On appeal, the appellant asserts the PCRO and military judge failed to account for the fundamental change in circumstances forming the basis of the appellant's pretrial confinement when A1C JK deployed away from Germany. Additionally, the appellant argues that the PCRO lacked any legitimate basis to find a high probability the appellant would attempt to obstruct justice by influencing witness testimony. As a result, the appellant claims he spent an excess of 99 days in pretrial confinement, from 23 June 2011, when A1C JK left Germany, until 30 September 2011, when he transitioned to post-trial confinement. The appellant requests, pursuant to Rule for Courts-Martial (R.C.M.) 305(k), one extra day of administrative confinement credit for each of the 99 extra days he spent in pretrial confinement, and that we apply the credit to offset the bad-conduct discharge or forfeiture of pay and allowances.

We deny the appellant's request. Considering the appellant had a history of flaunting military authority and previous attempts by his command to control his behavior had failed, his continued disciplinary problems while in pretrial confinement and his overall defiant attitude, neither the PCRO's nor the military judge's decision to continue pretrial confinement amounted to an abuse of discretion.

Article 32, UCMJ, Investigation

The fourth assignment of error alleges that the Article 134, UCMJ, specifications of Additional Charge II were not properly investigated under Article 32, UCMJ.

We review a military judge's denial of a motion challenging the sufficiency of an Article 32, UCMJ, investigation for an abuse of discretion. *United States v. Burfitt*, 43 M.J. 815, 816-17 (A.F. Ct. Crim. App. 1996). The military judge's findings of fact are reviewed on a "clearly erroneous" standard. *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004). An abuse of discretion involves more than a difference of opinion; instead, the challenged ruling must be "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." *United States v. Clark*, 62 M.J. 195, 202 (C.A.A.F. 2005).

When the Article 134, UCMJ, charge and specifications were initially preferred and investigated, the specifications (then-Charge VII) failed to include the terminal element of Article 134, UCMJ. When listing the elements for each specification of Article 134, UCMJ, the Investigating Officer included the terminal element, but did not make any specific findings of fact and conducted no analysis concerning the terminal element of each offense. Subsequently, the appellant's commander preferred Additional Charge II and its specifications, all of which contained the terminal element. The convening authority referred Additional Charge II and its specifications without an additional Article 32, UCMJ, investigation. At trial, the civilian defense counsel submitted a motion to dismiss Additional Charge II and its specifications for lack of a proper investigation pursuant to Article 32, UCMJ. The military judge made findings of fact and conclusions of law, and denied the motion. The military judge found that the

new Additional Charge II and its specifications had been properly investigated since the investigating officer had listed the elements indicating that they had been considered; therefore, the Government was under no obligation to either reopen the previous Article 32, UCMJ hearing, or conduct a new hearing.

On appeal, the appellant argues that the addition of the terminal element language in the specifications constitutes a major change requiring a new Article 32, UCMJ, hearing. We disagree.

Considering that the investigating officer included the terminal element in listing the elements of the charged offenses, a reasonable inference can be drawn that the investigating officer's internal analysis considered all of the elements and that the investigating officer determined sufficient evidence had been presented by the Government meeting the terminal element. Additionally, it is unlikely that the Government would have presented any additional evidence on the terminal element had a new Article 32, UCMJ, hearing been ordered. Accordingly, we find the military judge did not abuse his discretion in denying the request for a new Article 32, UCMJ, hearing.

Guilty Plea

In the fifth assignment of error, the appellant asserts he improvidently pled to Charge I and its Specification alleging that he violated the no-contact order issued by his first sergeant. In a post-trial declaration, the appellant states, "The military judge should not have found me guilty of the violation of the no contact order, as it was the government who chose not to move myself or A1C [JK] from the same dorm, despite my previous attempts to be moved via my request through my First Sergeant. Therefore contact was inevitable despite the level of caution I displayed in avoiding direct contact."

"[We] review a military judge's decision to accept a guilty plea for an abuse of discretion and question of law arising from the guilty plea de novo. In doing so, we apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." *United States v. Ferguson*, 68 M.J. 431, 433-34 (C.A.A.F. 2010) (quoting *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2010)).

In this case, there is nothing in the record suggesting that the appellant's pleas were improvident or that he misunderstood the meaning and effect of his pleas. The military judge fully explained the elements of the offense and the consequences of pleading guilty, and the appellant testified as to why he felt he was guilty. The appellant explained that he understood the terms of the no-contact order given to him by his first sergeant on 4 April 2011, that he had no concerns as to whether or not the order was lawful, and that he felt the order was reasonably necessary to safeguard and protect the

morale, discipline, and usefulness of the members of the command at Ramstein AB, Germany. The appellant admitted that he violated the no-contact order on 14 April 2011, when he went down to A1C JK's room to speak to her, and, again on 27 April 2011, when he approached A1C JK in the parking lot. Additionally, the appellant stated that his contact with A1C JK was free and voluntarily, he could have avoided having these conversations with A1C JK, and he had no legal justification or excuse for not obeying the order. Accordingly, we find that the military judge did not abuse his discretion in accepting the appellant's guilty plea.

Factual Sufficiency

In the sixth assignment of error, the appellant claims all of the remaining charges and specifications are factually insufficient. We disagree.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). 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." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). 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).

In the appellant's declaration, primarily paragraph six, he points out what he believes are numerous incongruities with the evidence in this case. We have thoroughly reviewed the appellant's claims along with the entire record of trial. We have also outlined the salient facts in the "Background" discussion above. Having weighed the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt the appellant is guilty of the offenses for which he was convicted.

Evidentiary Issues

In his seventh through eleventh assignments of error, the appellant claims the military judge abused his discretion on several evidentiary issues. He specifically avers the military judge abused his discretion when he: disallowed evidence of A1C JK's new relationship; allowed evidence of A1C JK's character for peacefulness; admitted Prosecution Exhibit 7, text messages sent by the appellant; disallowed testimony of an AFOSI agent regarding a statement made by A1C JK to the question of whether the appellant was trying to hurt her; and admitted Prosecution Exhibit 14, the confinement disciplinary report.

This Court reviews a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010).

We have reviewed all of the challenged rulings made by the military judge and have determined no abuse of discretion occurred. Concerning A1C JK's alleged new intimate relationship, the defense proffered that the evidence would show bias by the victim. The military judge conducted a Mil. R. Evid. 403 balancing test and determined that any possible relevance was significantly outweighed by the dangers of unfair prejudice, confusion of the issues, and needless presentation of evidence.

Regarding the military judge permitting evidence of A1C JK's character for peacefulness, this occurred after the defense elicited testimony that A1C JK had assaulted the appellant. In making his decision, the military judge specifically discussed the assault allegation and found that the defense had "raised evidence concerning the alleged victim as an aggressor," permitting the Government to rebut the inference under Mil. R. Evid. 404(a)(2).

Concerning the admissibility of the text messages, during the testimony of SrA JC, the Government offered a copy of text messages sent between SrA JC and the appellant, in order to show the appellant's state of mind. To justify the entirety of the texts, the Government offered a theory of adoptive admission by the appellant which the military judge rejected. However, the military judge did allow the texts from the appellant in order to show his state of mind on 25 April 2011 which was during the charged timeframe, but excluded the texts sent by the other airman. The originally offered texts became Appellate Exhibit XX and the redacted version became Prosecution Exhibit 7 which was admitted without objection.

During the testimony of AFOSI Special Agent NS, the defense counsel attempted to ask her whether A1C JK thought the appellant was trying to hurt her. The defense counsel argued this was a state of mind question intended to show there was no offensive touching by the appellant. The military judge sustained the objection on both hearsay grounds and speculation on the basis that the question was asking the victim to delve into the mind of the appellant.

During the sentencing phase of the trial, the defense introduced several character letters, many of which depicted the appellant as a peaceful person. In rebuttal, the Government offered three documents concerning the appellant's conduct while in pretrial confinement. The military judge ultimately only admitted Prosecution Exhibit 14, a one-page document listing the infractions committed by the appellant in pretrial confinement,

to rebut the character picture created by the defense exhibits. He also provided a limited instruction to the members indicating that Prosecution Exhibit 14 could only be used in evaluating the character letters.

We find the military judge properly evaluated all of the challenged evidence, applied the correct law, and made well-reasoned decisions. Accordingly, issues 7-11 are without merit.

Sentencing Argument

In his twelfth assignment of error, the appellant asserts the trial counsel's sentencing argument was improper and overzealous. Specifically, he claims trial counsel inappropriately referenced the confinement facility disciplinary reports under Prosecution Exhibit 14 to argue for a harsher sentence, and was overzealous in arguing the principles of general deterrence and protection of society without referencing misconduct committed by A1C JK.

"Improper argument is a question of law that we review de novo." *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011) (citing *United States v. Pope*, 69 M.J. 328, 334 (C.A.A.F. 2011)). "When no objection is made during the trial, a counsel's arguments are reviewed for plain error." *United States v. Burton*, 67 M.J. 150, 152 (C.A.A.F. 2009) (citing *United States v. Schroder*, 65 M.J. 49, 57-58 (C.A.A.F. 2007)). 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. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011) (citing *United States v. Powell*, 49 M.J. 406, 463-65 (C.A.A.F. 1998)).

As discussed previously, Prosecution Exhibit 14 is a disciplinary report that consists of various infractions committed by the appellant while in pretrial confinement. Upon being admitted into evidence, the military judge provided the following limiting instruction to the members:

> That document is provided to you solely for the purpose of evaluating the character letters in light of one additional document that you have which is now Prosecution Exhibit 14. You are cautioned, and I'll give you more instructions in a minute, you are to sentence the accused only for the offenses of which he has been found guilty in this courtroom.

During her sentencing argument, the trial counsel stated the following:

> During your deliberations, we'd also would like you to turn your attention to Prosecution Exhibit 14 that shows the disciplinary adjustment report at

> the confinement facility. This happened after all the incidents. He's still getting into trouble.

After making this statement, the military judge reminded the trial counsel that he had provided the members with a limiting instruction on the proper use of Prosecution Exhibit 14 and cautioned her not to run afoul of the limiting instruction. The trial counsel did not mention Prosecution 14 again.

We find that the trial counsel's argument was not improper as she did not cross the line in complying with the military judge's limited instruction on Prosecution Exhibit 14. Additionally, as A1C JK was not on trial, it was appropriate for the trial counsel not to reference any misconduct that may have been committed by A1C JK. Accordingly, no error occurred, plain or otherwise.

Sentencing Instruction

In the appellant's last assignment of error, he claims the military judge failed to properly instruct the members during sentencing deliberations.

Rule for Courts-Martial 1005(a) requires the military judge to give the members appropriate instruction on sentence. We review a military judge's instructions for abuse of discretion. *United States v. Hopkins*, 56 M.J. 393, 395 (C.A.A.F. 2002) (citing *United States v. Greaves*, 46 M.J. 133, 138 (C.A.A.F. 1997)). "The military judge has considerable discretion in tailoring instructions to the evidence and law." *Id.* Military judges also have broad discretion concerning instructions on collateral matters. *United States v. Duncan*, 53 M.J. 494, 499 (C.A.A.F. 2000). "Failure to object to an instruction or to omission of an instruction before the members closed to deliberate on the sentence constitutes waiver of the objection in the absence of plain error." R.C.M. 1005(f). In the context of a plain error analysis, the appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. *Girouard*, 70 M.J. at 11 (citing *Powell*, 49 M.J. at 463-65).

During sentencing deliberations, the members asked the military judge, "Can we specify Counseling?" The president went on to explain they meant "medical/psychological counseling not administrative counseling." The military judge initially instructed the members that they could not do so; however, the civilian defense counsel objected to that instruction. The civilian defense counsel drafted a proposed special instruction modifying the suspension of sentence instruction found in Department of the Army Pamphlet 27-9, *Military Judge's Benchbook*, ¶ 8-3-34. The military judge agreed to read the first paragraph of the proposed instruction which he provided after the members returned with the sentence. This paragraph reads as follows:

> You have no authority to suspend either a portion or the entire sentence. Likewise, you have no authority to specify any treatment as that is not a lawful punishment. You do have the authority, either individually or collectively, to make recommendations to the convening authority.

The civilian defense counsel did not further object to this course of action.

The appellant now claims that the military judge should have instructed the members about clemency prior to rendering the sentence in this case. We disagree. The military judge's initial instruction correctly answered the question posed by the members as there is no right for the appellant to have the members instructed regarding clemency prior to announcement of the sentence. Additionally, although not required, the instruction ultimately provided by the military judge was appropriate. Accordingly, no error occurred, plain or otherwise.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[6] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[6] We note the Court-Martial Order (CMO) needs correction as it fails to include the Charge and Specification (Charge II) under Article 108, UCMJ, 10 U.S.C. § 908, which was dismissed during trial. We order the promulgation of a corrected CMO.