UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant DENNIS D. KELLER
United States Air Force

ACM 37729

15 July 2013

Sentence adjudged 28 May 2010 by GCM convened at Eielson Air Force Base, Alaska. Military Judge: Donald M. Christensen.

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

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

Appellate Counsel for the United States: Lieutenant Colonel Linell A. Letendre; Major Naomi N. Porterfield; Major Brian C. Mason; Major Michael T. Rakowski; Captain Thomas J. Alford; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HECKER
Appellate Military Judges

OPINION OF THE COURT

HECKER, Judge:

At a general court-martial, the appellant was convicted, contrary to his pleas, of three specifications of aggravated sexual assault and two specifications of abusive sexual contact, all in violation of Article 120, UCMJ, 10 U.S.C. § 920. Officer members adjudged a sentence of a dishonorable discharge, confinement for 5 years, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant contends (1) the military judge erred by denying a defense motion to suppress the results of deoxyribonucleic acid (DNA) testing after the appellant withdrew his consent for his blood to be seized and tested; (2) Article 120, UCMJ, is facially unconstitutional, and (3) the military judge committed plain error by telling the members they could not make a clemency recommendation in conjunction with the sentence. Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant contends (1) the evidence is factually insufficient to prove his guilt; (2) the military judge erred by denying the defense mistrial request after repeated violations of the appellant's rights; and (3) his sentence is inappropriately severe. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Background

The charges in this case stemmed from an incident involving the appellant and SrA KD[1] that occurred at Eielson Air Force Base, Alaska in the early morning hours of 18 July 2009. SrA KD was a young Airman who was at her first duty station. Soon after arriving, she met the appellant's wife and then became very close to the appellant's family.

On 17 July 2009, SrA KD and the appellant's wife arranged to go to the on-base club to celebrate SrA KD's 21st birthday. The appellant serving as their designated driver. While at the club, SrA KD drank multiple alcoholic drinks. Several witnesses testified that they observed her drinking shots and mixed drinks over the course of several hours. Eventually, SrA KD began to feel sick and went to the bathroom where she threw up while sitting on the floor and straddling the toilet. She next recalled being awakened there by the appellant's wife, who said she was going to call the appellant to pick them up.

SrA KD's next memory was the appellant's wife saying the appellant had arrived to take them home. Because she was unable to walk, the appellant picked SrA KD up and carried her out of the club sometime between 0100 and 0130 hours, and then helped her out of the car after arriving at his home. SrA KD next recalled being in the house, feeling sick, and throwing up in the downstairs bathroom.

She then became aware that she was in a dark bathroom, sitting upright and leaning up against what she later realized was a tub, with someone's arm around her. Based on the configuration of the bathroom, SrA KD realized she was in the master

[1] KD's rank at the time of the incident was Airman First Class (A1C). At trial, A1C KD had been promoted to Senior Airman (SrA). This Court will refer to KD as SrA KD.

bathroom. She also became aware that she was wearing a loose fitting shirt with no bra and loose short-like pants instead of the clothes she had worn to the club.

Describing herself as going "in and out" of awareness, SrA KD testified that she did not remember the exact order of events or everything that happened, but "what I do remember, I remember clearly." Through the course of her testimony, she described the appellant making contact with her chest under her shirt, putting his hand on top of hers and guiding her hand to make it rub against her genital area, his penis, and his scrotum area. SrA KD testified that her next memory was being slumped over while an object was being inserted into her vagina. The appellant then inserted his fingers partially into her vagina. SrA KD recalled being laid over the toilet with her chest on the toilet and the appellant behind her, thrusting against her while his penis partially penetrated her vagina.

SrA KD testified she did not want to engage in this conduct but described feeling as if there was nothing she could do to stop it. She said she wanted to scream and leave but she could not move as she felt like she was "paralyzed" and "helpless," although she could feel what was happening to her. She described herself as being unable to do anything about it and feeling betrayed and disgusted. She tried to tell him to stop and said she "wanted to scream and get attention but it wouldn't work."

The next morning, SrA KD left the house and called her commander's wife to tell her about the incident. The commander's wife told SrA KD to immediately come to her home and she complied. Agents from the Air Force Office of Special Investigations (AFOSI) soon arrived and interviewed her for several hours. She told agents that the appellant had sexually assaulted her. At the end of the interview, SrA KD agreed to have a sexual assault examination conducted. She turned over her clothing and a nurse took biological samples from her. Later that day, the appellant voluntarily gave a blood sample, turned over his clothing, and underwent a sexual assault examination.

The evidence obtained by AFOSI was sent for forensic testing by the United States Army Criminal Investigation Laboratory (USACIL). The appellant's DNA profile was subsequently matched to semen residue found on the outside of SrA KD's underwear. SrA KD's DNA was found on a sex toy seized from the appellant's master bathroom.

For this conduct, the appellant was charged with three specifications of aggravated sexual assault and two specifications of engaging in abusive sexual conduct with SrA KD while she was substantially incapacitated.[2]

[2] The military judge found the five specifications "multiplicious for sentencing," thus the maximum punishment included a dishonorable discharge and confinement for 30 years.

Motion to Suppress

We review a military judge's evidentiary ruling on a motion to suppress for an abuse of discretion. *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007); *United States v. Kharnsouk*, 57 M.J. 282, 286 (C.A.A.F. 2002). We review findings of fact under the clearly erroneous standard and conclusions of law de novo. *United States v. Rodriguez*, 60 M.J. 239, 245 (C.A.A.F. 2004). On mixed questions of law and fact, "a military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). Our review of a military judge's denial of a motion to dismiss is shaped by the outcome of the trial, and we consider the evidence in the light most favorable to the prevailing party. *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007) (citing *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)); *United States v. Flores*, 64 M.J. 430, 431 (C.A.A.F. 2007).

On 22 July, four days after providing his blood sample for testing, the appellant notified AFOSI that he was now revoking his consent to have his blood seized and searched by the Government. A month later, AFOSI sent the appellant's blood sample to USACIL for forensic analysis. After the testing revealed the appellant's DNA matched some of the semen stains found on SrA KD's underwear, the defense moved to suppress, arguing the appellant's sample should not have been tested after he withdrew his consent.

The military judge concluded the Government was authorized to continue with its testing of the appellant's seized blood despite the withdrawal of his consent for that testing. He also found the appellant's DNA profile from that testing would inevitably have been discovered by the Government, even if the withdrawal of consent had been honored. We find that the military judge erred in his ruling that the Government could test the appellant's blood sample after he withdrew his consent, but agree that the appellant's DNA profile would have been inevitably discovered.

Withdrawal of Consent

Over defense objection, the military judge concluded the government may search already-seized bodily fluids despite the withdrawal of consent between the seizure and the search, relying on *United States v. Weston*, 67 M.J. 390 (C.A.A.F. 2009) and electing not to follow the literal reading of Mil. R. Evid. 314(e)(3) which suggested otherwise. We review this conclusion of law de novo. *Rodriguez*, 60 M.J. at 245.

Evidence obtained from the search of a person with that individual's lawful consent is admissible, but an individual's consent "may be limited in any way by the person granting consent … and may be withdrawn at any time." Mil. R. Evid. 314(e)(1), (3). While this case was pending on appeal, our superior court issued its opinion in *United States v. Dease*, 71 M.J. 116, 120-121 (C.A.A.F. 2012), holding, in the

context of a urine sample, that military members retain a privacy interest in their bodily fluids even after they relinquished it for testing, and thus Mil. R. Evid. 314(e)(3) authorizes withdrawal of that consent at any time prior to its search.

We conclude the *Dease* analysis is applicable to the search of a military member's blood sample for a DNA profile when that sample is taken as part of a criminal investigation targeting the military member. The appellant retained a privacy interest in his blood sample after it was taken from him, due to its nature and evidentiary value. *Id*. at 120 (citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989)); *United States v. Stevenson*, 66 M.J. 15, 18 (C.A.A.F. 2008) (military members retain an objectively reasonable expectation of privacy in their DNA). The evidentiary value of the blood sample is only ascertainable after chemical analysis and examination by forensic experts. *Dease*, 71 M.J. at 120-21.

Until the blood sample was tested, the appellant maintained his privacy interest, and on 22 July 2009, he acted to protect that interest by revoking his consent to have the sample analyzed. Therefore, military authorities should not have tested the sample two months later. We conclude it was an abuse of discretion for the military judge to rule otherwise.

Having found the military judge erred on the consent issue, we must address whether the military judge also abused his discretion in ruling that the appellant's DNA profile would have been inevitably discovered. *Id*. at 121. We find that he did not.

Inevitable Discovery

The doctrine of inevitable discovery creates an exception to the exclusionary rule, allowing the admission of evidence that, although obtained improperly, would have been obtained by another lawful means. *Nix v. Williams*, 467 U.S. 431, 444 (1984). Mil. R. Evid. 311(b)(2) codifies this doctrine. Here, the result of the unlawful search may still be admissible if it "would have been obtained even if such unlawful search … had not been made." Mil. R. Evid. 311 (b)(2). "[A]bsolute inevitability of discovery is not required[,] . . . simply a reasonable probability that [the] evidence in question would have been discovered from other than a tainted source." *United States v. Tallon*, 28 M.J. 635, 639 (A.F.C.M.R. 1989).

This standard can be met if a preponderance of the evidence demonstrates that at the time the illegality occurred, the investigators possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence in a lawful manner had the illegality not occurred. *United States v. Kozak*, 12 M.J. 389, 394 (C.M.A. 1982). This requires a court to view the situation as it existed at the instant before the unlawful search and determine what would have happened had that unlawful search not occurred. As applied to this case, the evidence must demonstrate that

before the unlawful search of the appellant's blood on 17 September 2009, the agents possessed or were actively pursuing evidence or leads that would have inevitably led to the lawful discovery of the appellant's DNA profile.[3]

The prosecution and defense were focused on the withdrawal of consent issue and did not brief inevitable discovery in their pretrial motions.[4] In discussing whether the Government was authorized to test the appellant's blood once he had consensually given the sample, the following exchange occurred:

> DC: The government had every opportunity to go to a military magistrate [after the consent was withdrawn] and provide evidence to show that there was . . .
>
> MJ: Well, you would agree that if the government had done that, they would have had probable cause?
>
> DC: If they would have followed the correct procedure, sir, such as submitting an affidavit, articulating in that affidavit that there was probable cause. So, I'm not going to concede that they would have followed it.
>
> MJ: No, I'm not saying they would have done it properly, but if they had done it properly, they would have had probable cause in this case. They already had the evidence in their hand, . . . they had a complaining witness . . . they would have probable cause to get that evidence and to search them if it's already in their possession?
>
> DC: Yes, sir.

When he verbally denied the defense motion regarding the withdrawal of consent, the military judge did not provide any rationale for his decision. However, in his findings of fact and conclusions of law, which he appended to the record of trial prior to authentication, he included the following:

> [T]he court finds by a preponderance of the evidence that the accused's DNA profile would have been inevitably discovered by the government. The government was actively pursuing an investigation of "rape." As of 22 July 2009, they possessed [SrA

[3] Technically, the "illegality" in this situation occurred on 17 September (the day USACIL tested the appellant's blood sample without his consent or other authority to do so), not 22 July (the day he withdrew his consent for that testing).

[4] Because the parties had agreed the consent issue was a question of law, no testimonial evidence was presented at the motions session and the parties instead relied on the documentary evidence attached to the defense motion.

> KD's] underwear that was soiled with at least three semen stains. Moreover, [SrA KD] had specifically identified the accused as the man who had sex with her while she was incapacitated. The court has no doubt [] the OSI agents would have sought to seize and search the blood of the accused through probable cause to determine if his DNA matched that contained in the semen stains located on [SrA KD's] underwear. Thus, even if the DNA testing conducted after [the] 22 July 2009 consent revocation was unlawful, the evidence would have been inevitably discovered.

The appellant argues that the Government had the burden of proving the evidence would have been inevitably discovered and, by presenting no evidence during the motions hearing, failed to carry its burden and essentially forfeited this rationale as a basis for admission of the DNA results. He specifically notes there was no evidence presented in the motions hearing that (1) SrA KD had specifically identified the appellant as the man who had assaulted her, and (2) OSI agents would have sought to seize and search the appellant's blood through probable cause. Because of that, the appellant contends the military judge's inevitable discovery conclusion is unsupported by evidence.

The appellant is correct that no evidence about SrA KD's identification of the appellant or the timing of that identification was presented to the military judge prior to his verbal denial of the defense motion. However, evidence of that fact *was* presented during the findings portion of the trial, through her testimony and that of the AFOSI agent who interviewed her the morning of 18 July 2009, several hours after the alleged assault. Although not ideal from a procedural prospective, we do not find error here in the military judge's decision to incorporate evidence from the litigated trial into his findings on the motion to suppress, especially as the appellant does not contest the accuracy of that factual conclusion.[5] Even if he had issued factual findings in the initial Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, he could have used later-presented evidence from the trial to reconsider those findings at any time prior to his authentication of the record. Rule for Courts-Martial (R.C.M.) 905(f); *Harrison v. United States*, 20 M.J. 55, 57 (C.M.A. 1985). In doing so, he would be incorporating facts from the findings stage into his ruling on a motion.[6]

---

[5] When factual issues are involved in deciding a motion, the military judge is required to state the essential findings on the record. Rule for Courts-Martial 905(d). Although such findings can be made any time prior to authentication of the record of trial, the best practice is for the military judge to enter the ruling and essential findings contemporaneously. This gives the parties the ability to resolve any disagreements over those facts or conclusions prior to the end of the trial. *See United States v. Flores-Galarza*, 40 M.J. 900, 906 n.9 (N.M.C.M.R. 1994).

[6] Furthermore, even if this finding by the military judge was clearly erroneous simply because the evidence was not presented in the suppression hearing, we can exercise our statutory discretion under Article 66, UCMJ, to find this fact ourselves. *United States v. Bubonics*, 45 M.J. 93, 96 n.3 (C.A.A.F. 1996); *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990); *United States v. Agosto*, 43 M.J. 745, 748 (A.F. Ct. Crim. App. 1995), *rev'd on other grounds*, 46 M.J. 389 (C.A.A.F. 1997); *United States v. Neal*, 41 M.J. 855 (A.F. Ct. Crim. App. 1994). In doing so,

Based on the entire record, we find by a preponderance of the evidence that the Government was in possession of and actively pursuing leads and evidence that would have led to the inevitable discovery of the appellant's DNA through a search authorization supported by probable cause. Within hours of the alleged assault, SrA KD reported to AFOSI that the appellant had sexually assaulted her. That information alone led AFOSI to interview the appellant under rights advisement for rape and ask him to provide a sample of his blood for forensic testing. If the appellant had said "no," we find no reasonable likelihood the AFOSI agents would have forsaken that line of evidence collection, which was designed to find forensic proof linking the appellant to evidence seized from SrA KD. *United States v. Owens*, 51 M.J. 204, 210 (C.A.A.F. 1999). Similarly, we find no reasonable likelihood the AFOSI agents would have abandoned that effort once the appellant withdrew his consent. Instead, we find the agents would have continued to move forward with their efforts to seek DNA from the appellant.

Having been stymied in getting that evidence through the appellant's revocation of consent, we find the AFOSI agents would have turned to other lawful means to procure the evidence for testing. It would be unreasonable and unrealistic to conclude otherwise. Like the military judge, we find the agents would have sought the DNA evidence through a search authorization. Whether probable cause existed to support this request is a conclusion of law we review de novo.[7] *Rodriguez*, 60 M.J. at 245, *Owens*, 51 M.J. at 210-11; *United States v. Wallace*, 66 M.J. 5, 10 (C.A.A.F. 2008); *United States v. Weston*, 67 M.J. 390, 395 (C.A.A.F. 2009).

"Nonconsensual extraction of blood from an individual may be made pursuant to a valid search authorization, supported by probable cause." *United States v. Carter*, 54 M.J. 414, 418 (C.A.A.F. 2001) (citing Mil. R. Evid. 312(d)). Mil. R. Evid. 315(f)(2) provides that "probable cause to search exists when there is a reasonable belief that the … evidence sought is located … on the person to be searched." *Leedy*, 65 M.J. at 213 (probable cause "requires more than bare suspicion, but something less

---

we are allowed to consider any evidence presented in the trial of the case, and are not limited to evidence known to the military judge at the time he denied the motion to suppress at the trial. *United States v. Cordero*, 11 M.J. 210, 215 n.3 (C.M.A. 1981) (referring to *Carroll v. United States*, 267 U.S. 132, 162 (1925)). Other appellate courts have also accepted that trial testimony may be considered in determining whether error was committed in ruling on a pretrial motion to suppress. *United States v. Gray*, 491 F.3d 138, 146-54 (4th Cir. 2007); *United States v. Jones*, 239 F.3d 716, 718 (5th Cir. 2001); *United States v. Brown*, 66 F.3d 124, 126 (6th Cir. 1995); *United States v. Rowland*, 341 F.3d 774, 778 (8th Cir. 2003); *United States v. Caraballo*, 595 F.3d 1214, 1222 (11th Cir. 2010); *United States v. Villabona-Garnica*, 63 F.3d 1051, 1056 (11th Cir. 1995).

[7] According to Mil. R. Evid. 311(e)(1), when the defense moves to suppress certain evidence, the prosecution has the burden of proving, by a preponderance of the evidence that the evidence would have been obtained even if the unlawful search or seizure had not been made. Although the Government did not argue or litigate this issue at trial, this Court can still consider the issue of inevitable discovery. *United States v. Kaliski*, 37 M.J. 105, 109 (C.M.A. 1993) (service court can find inevitable discovery was established on the record even where the issue was not litigated at the trial level).

than a preponderance of the evidence"). Determining whether probable cause exists is a "practical, common-sense decision whether, given all the circumstances . . ., including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

Even assuming the defense did not concede the probable cause issue at trial, we find the Government had more than sufficient information and evidence, as early as 18 July 2009, to convince an impartial competent military magistrate that sufficient probable cause existed to issue an authorization to seize and search the appellant's blood for extraction of his DNA profile. That magistrate would have been informed that SrA KD had reported a sexual assault within hours of when it allegedly occurred, she had identified the appellant as the man who had assaulted her and the clothing she wore at the time of the assault had been taken into evidence and was available for testing. Combined, these facts "lead one to believe that it [was] more probable than not" that the appellant's DNA would be found in or on SrA KD and/or her clothing. *Leedy*, 65 M.J. at 213. Given the state of the investigation at this time and the evidence it had already uncovered, there was a reasonable belief and "fair probability" that evidence related to the sexual assault would be found in the place to be searched—in this case, DNA evidence found in the appellant's blood. *United States v. Mason*, 59 M.J. 416, 421 (C.A.A.F. 2004).

We therefore conclude, as did the military judge, that probable cause existed to seize and search the appellant's blood when the appellant was interviewed and every day thereafter. Once that blood was tested, the appellant's DNA profile would inevitably have been discovered. *Stevenson*, 66 M.J. at 16.

When "the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible." *Nix*, 467 U.S. at 448. Admission of those test results places the appellant and the Government in the same positions they would have been had the AFOSI agents honored the appellant's request to withdraw his consent for that testing. *Id.* at 447. Given that, there is "no rational basis to keep that [DNA] evidence from the [panel as] the [Government] has gained no advantage at trial and the [appellant] has suffered no prejudice." *Id.*

The Constitutionality of Article 120, UCMJ

At trial, the appellant filed a motion to dismiss the charge and its specifications, arguing that Article 120, UCMJ, included an unconstitutional burden shift. The military judge found that Article 120(t)(16), UCMJ, was unconstitutional but elected to remedy the problem through instructions to the panel. The military judge did not instruct the panel in a manner consistent with Article 120, UCMJ. Instead, he advised the members

that the Government has the burden of proving, beyond a reasonable doubt, the elements of Articles 120(c)(2) and 120(h), UCMJ, *and* that SrA KD did not consent to the sexual activities. This instruction clearly and correctly conveyed to the members the burden regime that was ultimately upheld by our superior court in *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011).

The defense objected to this instruction, arguing such an action constituted an impermissible infringement into the legislative realm by the military judge, and dismissal with prejudice was required to avoid any injury to the appellant. He continues this argument on appeal, stating *Medina* left open the question of whether it is an unconstitutional encroachment into Congress' legislative domain for a judge to give a "saving instruction" that, in effect, creates a new statute. He argues he stands convicted of violating a facially unconstitutional statute that Congress did not pass, thus violating his due process rights under the Fifth Amendment.[8] We disagree.

The constitutionality of a statute is a question of law we review de novo. *United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2005). Interpretation of a statute and its legislative history are also questions of law that we review de novo. *United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2005).

Our superior court's decision in *Medina* noted it was not the province of the Court to rewrite a statute to conform with the Constitution, as that would "invade the legislative domain," and the "responsibility clearly rests with Congress to revise [Article 120, UCMJ,] to remedy the unconstitutional statutory scheme." *Medina*, 69 M.J. at 465 n.5. The Court further noted, however, the Supreme Court's admonition that appellate courts should "give a constitutional saving construction . . . when the statute is susceptible to such a construction." *Medina*, 69 M.J. at 465 n.5.

It is a principle of severability that a holding which severs a portion of one section of the UCMJ because it is unconstitutional does not require invalidation of the entire section. *See United States v. Burney,* 21 C.M.R. 98, 104 (C.M.A. 1956). If a statute contains both constitutionally valid and invalid provisions, a court may sever the impermissible section as long as the remaining provisions are consistent with and will function in a manner consistent with Congress' basic intent in enacting the statute. *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987); *I.N.S. v. Chadha*, 462 U.S. 919, 934 (1983); *Buckley v. Valeo*, 424 U.S. 1, 108, (1976) (per curiam); *Allen v. Louisiana*, 103 U.S. 80, 83-84 (1880).

[8] U.S. CONST. amend. V.

Congress' intent in enacting Article 120, UCMJ, was to punish sexual assault crimes. Article 120(c)(2), UCMJ, is still capable of "functioning independently" even when the offending burden shifting portions are severed, and Congress would want the remaining portion to survive as "fully operative." *Brock*, 480 U.S. at 684. The military judge and our superior court's decisions have simply severed an unconstitutional burden shift and have not created a new statute that is inconsistent with the law initially passed by Congress. Therefore, the military judge, when acting in a manner that was later validated by the *Prather*[9] and *Medina* decisions, did not judicially legislate, but rather properly deployed his judicial authority to cure the statute of its deficiency.

Instruction on Clemency Recommendations

During the sentencing deliberations, the panel asked the following questions:

> If [the] sentence of confinement exceeds six months, can the court direct that forfeiture of pay be paid to dependents for six months? Or is that payment consideration solely the choice of the convening authority? I.E. can we annotate on the sentence our recommendation of payment to dependents.

During a subsequent Article 39(a), UCMJ, session, the military judge advised the parties that he intended to reiterate the law governing forfeitures and advise the panel they were limited to the sentence on the sentencing worksheet as they "cannot make, at this point, sentencing recommendations beyond their sentence." Without defense objection, the panel members were instructed:

> [Y]ou cannot direct that the forfeiture of pay be paid to the dependents for six months. The only person who has that power is the convening authority and that's within his discretion. You cannot annotate on the sentence worksheet your recommendation of payment to dependents. You are limited to the sentences that are on that worksheet and as I indicated earlier, that cannot be modified.

The convening authority ultimately deferred and waived the adjudged reduction in rank and forfeitures of pay. As such, the appellant recognizes he has not been prejudiced vis-a-vis automatic forfeitures, but argues he was still prejudiced by the military judge's instruction because it precluded the panel from making *any* clemency recommendation beyond automatic forfeitures. He therefore asks us to set aside his sentence and authorize a sentence rehearing by a panel that has not been prohibited from recommending clemency.

[9] *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011).

Where the trial defense counsel does not object to a military judge's instruction, we evaluate the issue for plain error. *United States v. Wilkins*, 71 M.J. 410, 412 (C.A.A.F. 2012). Under 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 [appellant]." *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011).

The power of a court-martial to recommend clemency to the convening authority contemporaneous with announcement of the sentence has been long recognized in the military justice system. *United States v. Weatherspoon*, 44 M.J. 211, 213 (C.A.A.F. 1996). Our superior court has called this practice one '"which must be encouraged' in light of the court-martial's legal inability, itself, to suspend any or all of a sentence." *Id.*(citations omitted); *see also* R.C.M. 1106(d)(3)(B). To effectuate this practice, the Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, has a standard instruction which informs the members:

> It is your independent responsibility to adjudge an appropriate sentence for the offense(s) of which the accused has been convicted. However, if any or all of you wish to recommend clemency, it is within your authority to do so after the sentence is announced. Your responsibility is to adjudge a sentence that you regard as fair and just at the time it is imposed and not a sentence that will become fair and just only if the mitigating action recommended in your clemency recommendation is adopted by the convening or higher authority who is in no way obligated to accept your recommendation…. You may make the court's recommendation expressly dependent upon such mitigating factors as (the (attitude) (conduct) of) (or) (the restitution by) the accused after the trial and before the convening authority's action."

D.A. Pam. 27-9, ¶ 2-7-17.

We find the military judge's instruction was plain error, as it told the panel it could not make a clemency recommendation to the convening authority regarding the payment of forfeitures to the appellant's family when at least one member of the panel was considering recommending clemency in that area. Because the convening authority ultimately effectuated that potential clemency request, we find the appellant has not met his burden of establishing that the error materially prejudiced his substantial rights regarding those forfeitures. We also find he has not made a "colorable showing of possible prejudice" regarding the potential for a clemency recommendation beyond automatic forfeitures so as to materially prejudice his substantial rights. *United States v. Powell*, 49 M.J. 460, 463-64 (C.A.A.F. 1998); *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998); *see also* Article 59(a), UCMJ, 10 U.S.C. § 859(a).

Factual Sufficiency

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] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

Pursuant to *Grostefon*, 12 M.J. 431, the appellant argues the evidence is factually insufficient to sustain his conviction for aggravated sexual assault and abusive sexual contact, because the evidence creates a reasonable doubt about (1) whether the charged acts actually occurred and (2) whether SrA KD was substantially incapacitated when the charged acts allegedly occurred. The appellant contends SrA KD's recitation of the sexual assaults were facially implausible. He further argues there are innocent explanations for the presence of the appellant's DNA, and there is insufficient evidence to prove SrA KD was substantially incapacitated at the time of the alleged incidents. We disagree. The evidence produced at trial was factually sufficient to find the appellant guilty beyond a reasonable doubt.

Denial of Motion for Mistrial

At trial, the appellant's defense counsel twice moved for a mistrial. The first request came after an AFOSI agent testified, in front of the members, that agents were assigned to interview the appellant. The military judge found this to be an improper comment on the appellant's invocation of his right to remain silent and, thus, was a constitutional error. He instructed the panel they must completely disregard the testimony about the appellant being brought in for questioning, and the members agreed they would do so.

Later in the trial, in the course of responding to a hearsay objection in front of the members, the trial counsel mentioned that a certain Security Forces member was a "potential defense witness." The military judge instructed the members to disregard that comment and reminded them the accused has no obligation to present any evidence. After the trial counsel asked a question that made clear the appellant had been arrested, the defense objected and the military judge told the panel to disregard any comment about an arrest. After both instructions, the panel indicated they could comply with the instruction. The defense, however, renewed its request for a mistrial, adding as a basis five other errors that had already occurred during the trial, to include: the unauthorized

disclosure of attorney work-product to the prosecution, improper witness preparation by the prosecutor, the prosecutor's failure to reveal certain information about a court-martial panel and to provide timely notice to the defense about testing conducted by its expert, and the staff judge advocate's interaction with a court-martial member during a break in the trial.

Although the military judge indicated he would attach findings of fact and conclusions of law to the record, he did not do so. During the trial, however, he did state he was certain the members would follow his instructions based on his observations of their demeanor and attentiveness and that the "defense witness" and "arrest" comments had no impact on the members during their deliberations.

On appeal, pursuant to *Grostefon*, 12 M.J. 431, the appellant argues these multiple violations of his rights during the trial demanded a mistrial. A mistrial is a drastic remedy to be used only sparingly to prevent manifest injustice. *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990). A military judge has discretion to "declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." R.C.M. 915(a). "We will not reverse a military judge's determination on a mistrial absent clear evidence of an abuse of discretion." *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009).

Here, we do not find clear evidence that the military judge abused his discretion in denying the appellant's requests for a mistrial. Instead, he properly examined the timing of the incidents, the requested reasons for a mistrial, and potential alternative remedies to the drastic remedy of a mistrial. *United States v. Harris*, 51 M.J. 191, 196 (C.A.A.F. 1999). Having considered the issues raised by the defense as justification for the mistrial requests and the military judge's responses to those issues, we do not find clear evidence that he abused his discretion in denying those requests.

Sentence Severity

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant argues that the adjudged and approved sentence that includes a dishonorable discharge and five years confinement is inappropriately severe "for a 16-year veteran with a spotless record with a wife and special needs child to support." We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005). Such determinations are made in light of the character of the offender, the nature and seriousness of his offense, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A. F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Although we are accorded great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J.

286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395–96 (C.M.A. 1988). Given the nature of all the facts and circumstances of this case, we have no reason to conclude that the adjudged and approved sentence is inappropriately severe for these offenses and this offender. Any sentence relief under these circumstances would amount to clemency. *Healy*, 26 M.J. at 396.

Appellate Delay

Though the appellant has not raised appellate delay as a separate issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). We also note that the appellant has filed multiple pleadings in an effort to expedite this court's consideration of his case.[10] Having considered the totality of the circumstances and the entire record, including this decision which finds against the appellant on the DNA issue, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[10] The appellant's case was docketed with this Court in September 2010 and the initial round of appellate briefing was completed in September 2011. After our superior court issued its May 2012 decision in *United States v. Dease*, 71 M.J. 116 (C.A.A.F. 2012), the appellant moved for timely appellate review, which this Court denied in June 2012. This Court then ordered supplemental briefs on the effect of *Dease* on the consent issue in this case and that briefing was completed in July 2012. In October 2012, this Court granted the appellant's request for expedited appellate review. In November 2012, the appellant filed a petition for extraordinary relief with our superior court, asking that this Court be ordered to decide his case by 2 January 2013 or order his release. That petition for the writ of mandamus was denied on 7 January 2013. On 30 April 2013, the appellant filed another petition for extraordinary relief with our superior court. That petition was denied on 19 June 2013.