UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MICHAEL L. KNAPP II
United States Air Force

ACM 37718

20 March 2013

Sentence adjudged 14 June 2010 by GCM convened at Pope Air Force Base, North Carolina. Military Judge: Michael E. Savage.

Approved sentence: Dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; and Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Lauren N. DiDomenico; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HECKER, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of aggravated sexual assault for engaging in sexual intercourse with a female Airman while she was substantially incapacitated, in violation of Article 120, UCMJ, 10 U.S.C. § 920. The adjudged sentence consisted of a dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand. The convening authority approved the sentence as adjudged. On appeal, the appellant asserts (1) the evidence is factually and

legally insufficient to prove beyond a reasonable doubt that the female Airman was substantially incapacitated, (2) "human lie detector" evidence was improperly admitted at his trial, and (3) he was wrongfully convicted under an unconstitutional statute. Finding no error that materially prejudices the appellant, we affirm.

Background

Airman First Class (A1C) ELS and the appellant arrived at Pope Air Force Base in the fall of 2009 as members of the Security Forces Squadron. They were acquaintances, and both testified that they had no romantic interest in each other. Prior to the night in question, they had not engaged in any flirting, romantic behavior, or personal conversations.

On the evening of 16 December 2009, A1C ELS agreed to go with other Security Forces Squadron personnel, including the appellant, to a local nightclub after work. At her request, A1C MS served as the designated driver and drove her car. A1C ELS, A1C MS and the appellant met in her dormitory room and then went to the nightclub around midnight, where they met three other Airmen from the squadron. A1C ELS drank three beers during their 90-minute visit to the nightclub and had a "very slight buzz." The appellant had five beers and one shot of alcohol at the bar. Nonetheless, he testified that he was functional and aware of what was happening, including that A1C ELS was becoming more sociable.

As they left, at 0200, A1C ELS agreed to go to one of the Airmen's apartment for more socializing. A1C MS drove ELS's car, and the appellant rode in the front passenger seat. A1C ELS had no difficulty navigating the steps to the second floor apartment. While there, she and the appellant each had three shots of liquor and cognac, including one shot offered to her by the appellant. After drinking the last shot, A1C ELS engaged in a conversation with the party's host and remembered A1C MS approaching her and saying he was ready to leave. At that time, she checked her watch and saw it was 0313 hours. A1C ELS testified that she had no memory of anything that occurred over the next eight hours.

According to the testimony of both A1C MS and the appellant, A1C ELS began slurring her speech after drinking the shots and was "staggering." A1C MS described her as "pretty drunk" by the time they left the apartment. Because she could not walk well, A1C MS and the appellant carried her down the stairs to the car and put her inside. The appellant sat in the back seat with her. He testified that she was leaning her head against his shoulder and appeared "limp." There was no talking in the car on the way back to base. Both men testified that, upon arriving at the dormitory, they had to get A1C ELS out of the car and carry her to her room as she was stumbling. By now, she appeared "really drunk" to A1C MS. According to A1C MS, A1C ELS was not completely passed out; rather, she was "somewhat talking" and mainly apologizing.

After A1C MS unlocked her door, they laid A1C ELS down on the bed. She began to vomit and the appellant put a trashcan near her head. A1C MS testified that they cleaned her face as she could not have done it herself. The two men decided someone should stay with A1C ELS and when A1C MS said he was leaving, the appellant said he would stay. As A1C MS left the room, he saw A1C ELS asleep under her bed covers. The appellant testified that, by this time, A1C ELS was not moving or talking.

A1C P was A1C ELS's next door neighbor. He was awakened that morning by the loud sound of a door closing. He heard two male voices and then saw one man walk past his window and leave. A1C P heard a female making moaning sounds which sounded as if sexual activity was "possibly . . . going on." It was a monotone sound that continued for a few minutes and, when it stopped, he heard a male voice say several times "are you okay, are you awake." He then heard noises that sounded like someone walking around the room and sitting down.

A1C ELS testified that she awoke in her dormitory room at 1100 hours, fully-clothed and lying on top of her bed covers with the appellant sleeping next to her, also fully-clothed. She had no memory of anything that occurred after she checked her watch at the party the night before. She soon realized her belt was undone and her underwear was on sideways. A1C ELS told the appellant she did not feel well and did not remember leaving the apartment or returning to base. She testified he told her she was drunk and "pretty out of it" and needed to be carried into her dormitory room. The appellant did not tell her they had engaged in any sexual contact during the evening. Five minutes after A1C ELS woke up, the appellant left, taking the bag from her trashcan with him which, unbeknownst to her, contained a used condom. A1C ELS soon discovered an open condom wrapper on the floor, which she found confusing since it did not belong to her and she did not remember any sexual encounter.

A1C ELS and A1C MS were posted together on sentry duty later that day and discussed how drunk she had been the night before. During the shift, A1C ELS took a phone call. After hanging up, A1C MS testified A1C ELS was very upset and crying, eventually saying her neighbor had heard noises coming from her room the night before and that she had found an empty condom wrapper in her room. She was taken to the base hospital where evidence was gathered that later confirmed the appellant's semen was found inside her vagina and on her clothing.

Two agents from the Air Force Office of Special Investigations (AFOSI) interviewed the appellant. After being read his rights under Article 31, UCMJ, 10 U.S.C. § 831, and advised of their suspicion of rape, the appellant agreed to undergo a physical examination and be questioned. His initial statement was that he and A1C ELS had kissed and touched each other in her dormitory room after A1C MS left, followed by consensual sexual intercourse. By the end of the multi-hour interview, the appellant admitted that A1C ELS was unconscious when he began the sexual intercourse.

Factual and Legal Sufficiency

The appellant argues the evidence is factually and legally insufficient to sustain his conviction for aggravated sexual assault, because A1C ELS was not substantially incapacitated at the time the appellant had sexual intercourse with her. We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

The test for 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. Turner*, 25 M.J. 324, 325 (C.M.A. 1987) (quoting *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000)). 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.

"The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F 2002) (quoting *Turner*, 25 M.J. at 24). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

For this aggravated sexual assault conviction to stand, the Government must have proven beyond a reasonable doubt that the appellant engaged in sexual intercourse with A1C ELS while she was substantially incapacitated. Article 120(c)(2), UCMJ; *Manual for Courts-Martial, United States*, Part IV, ¶ 45.b.(3)(c) (2008 ed.). At trial and on appeal, the appellant admits that he had sexual intercourse with A1C ELS. He claims, however, that she was conscious and consenting to that activity when it occurred, and he stopped when he realized she had become unconscious. He thus argues this court cannot find beyond a reasonable doubt that A1C ELS was "substantially incapacitated" because, although she was described as being "really drunk," she was "not unconscious," as demonstrated by (1) testimony that she was awake and talking while in her dormitory room with the appellant, (2) the moaning sounds her next door neighbor heard that sounded like she was engaged in sexual activity, and (3) her ability to work her duty shift the following day.

When evidence is presented concerning consent or mistake of fact as to consent, the Government then has the burden of proving beyond a reasonable doubt that such

affirmative defenses did not exist. Article 120(t)(16), UCMJ; *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011). "Consent" is defined as "words or overt acts indicating a freely given agreement to the sexual conduct . . . by a competent person." Article 120(t)(14), UCMJ. If A1C ELS was substantially incapable of appraising the nature of the sexual conduct due to mental impairment or unconsciousness resulting from consumption of alcohol, she cannot consent. Article 120(t)(14)(B)(i)(I), UCMJ, For the appellant to have a legitimate "mistake of fact as to [her] consent," he must have an honest and reasonable belief, under all the circumstances, that A1C ELS consented. Article 120(t)(15). A reasonable belief is one in "which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense." *Id*. His mistake of fact cannot be based on his failure to act as a "reasonably careful person would" in trying to discover the true facts about the situation. *Id.*

In the record, there is ample evidence of substantial alcohol consumption by A1C ELS, as she needed significant assistance leaving the party, getting into a car, and going to her dormitory room. Upon arrival, she vomited into a trash can in her dormitory room and needed the appellant's assistance to clean it off. Her condition was such that A1C MS and the appellant agreed one of them should stay in the room with her. The appellant testified that, after A1C MS left, she vomited again and then spontaneously initiated sexual contact with him by rubbing his crotch, leading him to put his hand down her pants and digitally penetrate her. He claims A1C ELS removed her pants, so he put a condom on and started having sexual intercourse, which continued until he realized she was unconscious. He admits they engaged in no discussion about engaging in sexual activity; she did not reach for him, kiss him or even touch him during the intercourse; and she had not previously expressed any romantic or sexual interest in him. According to his testimony, he put her clothes back on while she was unconscious. The next morning, it was clear to him that A1C ELS had no memory of engaging in sexual activity. The appellant covered up his actions by surreptitiously removing the used condom and giving a false exculpatory statement to the nurse who examined him at the hospital later that day, by telling her he had been drinking the night before and then awoke to find himself in someone else's bed.

Having carefully weighed the facts elicited on the record, including those the appellant himself relayed to AFOSI and the court-martial panel, and having made allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt that: (1) the appellant engaged in sexual intercourse with A1C ELS while she was substantially incapacitated, (2) A1C ELS did not consent, and (3) the appellant did not have a mistake of fact as to A1C ELS's consent. Furthermore, considering the evidence in a light most favorable to the Government, we find that a reasonable fact finder could also have found this beyond a reasonable doubt.

"Human Lie Detector" Testimony

1. The Law

The defense theory of this case was that A1C ELS had freely and knowingly consented to sexual intercourse with the appellant or he mistakenly but reasonably thought she was consenting, and his incriminating statement to AFOSI that she was unconscious was the false product of improper pressure from the agents. On appeal, he contends the panel improperly heard an AFOSI agent's opinion that the appellant was acting in a deceptive and dishonest manner during the initial part of the interrogation when he said A1C ELS was awake and consenting to his advances. The appellant contends the military judge committed plain error by allowing "human lie detector" testimony to be admitted through the agent's testimony, he abused his discretion by allowing even more of this evidence to be admitted over defense objection, and then he erred by failing to provide a curative instruction to the members.

We review a military judge's ruling to admit or exclude evidence for abuse of discretion. *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010). Failure to object to the admission of evidence at trial or request an instruction forfeits appellate review of the issue, absent plain error. *United States v. Eslinger*, 70 M.J. 193, 197-98 (C.A.A.F. 2011); *United States v. Pope*, 69 M.J. 328, 333 (C.A.A.F. 2011). We review allegations of plain error de novo. *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007). The plain error standard is met when: (1) an error was committed; (2) the error was plain, clear or obvious; and (3) the error resulted in material prejudice to a substantial right. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008).

Where relevant, Mil. R. Evid. 608 permits a witness to render testimony in the form of an opinion on another witness's character for truthfulness. A witness cannot, however, provide "human lie detector" testimony, defined as "an opinion as to whether the person was truthful in making a specific statement regarding a fact at issue in the case." *United States v. Kasper*, 58 M.J. 314, 315 (C.A.A.F. 2003). Such testimony exceeds the scope of any witness' expertise, violates the limits on the admissibility of character evidence found in Mil. R. Evid. 608(a) and encroaches into the exclusive province of the panel to determine the credibility of witnesses. *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007).

Even if there is error in the admission of such testimony, reversal of the conviction is not required unless there is a finding of material prejudicial to an accused's substantial right. Such prejudice results when there is "undue influence on a jury's role in determining the ultimate facts in the case." *United States v. Birdsall*, 47 M.J. 404, 411 (C.A.A.F. 1998).

We evaluate the challenged testimony in context to determine if the witness's opinion amounts to prejudicial error. *See United States v. Eggen*, 51 M.J.

159, 161 (C.A.A.F. 1999). This Court has identified several nonexclusive factors that are germane to assessing whether "human lie detector" testimony has been offered and, if it has, its prejudicial impact: (1) the role of the Government counsel in initiating or furthering objectionable testimony; (2) the role of the defense counsel, particularly if it appears the defense initiated the testimony for strategic reasons; (3) the defense's failure to object or request cautionary instructions; (4) whether the witness has been asked for specific conclusions or opinions about the truth or falsity of another person's statements or allegations, or about whether a crime occurred; (5) whether the testimony in question is on a central or peripheral matter; (6) whether the trial was before members or by military judge alone; and (7) the remedial action, if any, taken by the military judge. *United States v. Jones*, 60 M.J. 964, 969 (A.F. Ct. Crim. App. 2005).

2. Evidence and argument at trial

The topic of the AFOSI interrogation was first broached by the civilian defense counsel (CDC) during voir dire, when he asked the members if they would agree it is "important" to know how the AFOSI agents were able to obtain an incriminating statement from the appellant. After the trial counsel's opening statement indicated the appellant's story had "evolved" and "changed" during the interrogation, the civilian defense counsel responded in his opening statement by saying the appellant falsely confessed after the agents "broke him" when they refused to accept his innocent explanation of his encounter with A1C ELS and continuously interrogated him until he changed his story simply to end the interview. The CDC then promised the members he would show why the appellant gave two different versions of the event to AFOSI and which version they should believe.

During findings, AFOSI Agent P testified that the appellant's story changed from consensual sexual intercourse to sexual intercourse with an unconscious A1C ELS. Agent P testified that, consistent with their training, the agents directed the appellant to repeat his story multiple times, which revealed significant inconsistencies in his original version. After some time, the other agent asked the appellant "Why is this [story] not making sense? Because the victim was unconscious, right?" Agent P testified the appellant nodded his head and said "yes."

When the trial counsel asked what "other nonverbal cues" the appellant gave beyond nodding his head, Agent P stated agents are "trained to pick up on nonverbal discrepancies. . . . Early on in the interview the accused would not make eye contact with me when we were talking about the sexual intercourse portion." When asked by the trial counsel why this is important to him, Agent P replied:

> That is indicating to me that there is some form of deception going on. Prior to the intercourse, the accused was very detailed, very detail oriented, would look me in the eye, talk to me, and as soon as we got to the intercourse he would look away, look at the wall, look at the floor, not look

> at [the agents], and then immediately after the sexual intercourse timeframe he would kind of come back to us and be, once again, extremely detailed…. Later on we had to ask him open-ended questions to try to get the truth out from him.

The defense did not object to this question or answer.[1] During cross-examination, the CDC elicited from Agent P that the appellant was brought to the AFOSI office in handcuffs, sat alone in an interview room for about 90 minutes and then spent 2 ½ hours undergoing evidence collection at the base hospital. The agent admitted that, when the interrogation finally began, the appellant repeatedly said A1C ELS was awake and willing when they began to have sexual intercourse and that he stopped when he saw she was no longer conscious. When asked by the CDC why the interview did not end at that point since this scenario would not constitute a crime, the following exchange occurred:

> Agent: Like I had stated earlier, sir, I am trained on picking up nonverbal cues during interviews—
>
> CDC: Okay.
>
> Agent:—and the accused was giving off several nonverbal cues which made us believe that we needed to dig a little deeper.
>
> CDC: And one of the nonverbal cues is he would not look at you when it came to him talking about the sex, correct?
>
> Agent: Correct.

On re-direct, the trial counsel followed up on this point:

> TC: On cross you talked about nonverbal cues and you said that one of them was that the accused would look away. Did you notice in the [sic] nonverbal cues about his face?
>
> Agent: Yes.
>
> TC: What was that?
>
> Agent: Whenever the accused would speak about the actual incident, while he was looking away the accused would actually get large red sun blotches—

[1] Acknowledging his lack of objection, the appellant now argues the admission of this testimony constituted plain error.

CDC: Your Honor, I'm going to object to this. This goes to like a human lie detector. There hasn't been a foundation laid for him to be able to say if he knows if somebody is lying or not.

MJ: Do you have a foundation?

TC: Your Honor, we're not asking if he's lying or not, we're just noticing different responses. Defense asked in voir dire whether you can misread people[2] and it's actually going to that point.

MJ: Well, let me ask this, Captain, aren't you drawing an inference from these responses? Otherwise, what's the relevance? What is the relevance of the observations you're seeking?

TC: Your Honor, the relevance is it's the response to being asked questions about the sexual intercourse, the actual crime, the consent itself, and how the accused responded to that. It'd be no different than what the accused said in response to a question.

MJ: Are you going to ask the witness to draw an inference from those responses?

TC: No.

MJ: Well, I'll overrule the objection at this point.[3]

TC: Again, with the face, what did you notice?

Agent: The accused would get large red sun blotches, blood coming to the surface of the skin. . . . More than once.

Although the trial counsel had already played the ten-minute segment of the appellant's video-recorded statement to AFOSI, where he admitted that A1C ELS was unconscious when he penetrated her, the defense in its case played the 100-minute recording that preceded it.[4] Immediately after the agents enter the interview room, Agent P asked the appellant what he was thinking about "because your face is awfully red." In the portions played by the defense, Agent P interrupts the appellant's recitation of events multiple times while the appellant is seen looking down at his lap or the table and also directs the appellant to look at him as he speaks. Both agents also repeatedly accused the appellant of lying or not telling the complete story, and Agent P specifically

[2] In voir dire, all members answered affirmatively when asked by the civilian defense counsel if they agreed "you can misread another person's body language," and "we can misread the opposite sex's body language."

[3] The appellant argues the military judge abused his discretion in overruling this defense objection.

[4] The first 90 minutes of the interrogation was inadvertently not recorded by AFOSI. The 100-minute recording, therefore, begins after that 90-minute session.

confronted the appellant about the lack of detail he was providing regarding the sexual contact as compared to other events from that evening. The appellant eventually admitted that A1C ELS was unconscious when he began the sexual intercourse and signed a written statement.

The trial counsel's closing argument did not mention the red blotches on the appellant's face or his lack of eye contact during the interrogation. The argument referenced how the recording introduced by the defense showed the agents confronting the appellant with his lack of detail and, in their view, nonsensical story. Pointing out that the appellant had added additional, different details during his in-court testimony, the trial counsel argued "the truth makes sense but lies keep changing because you can't keep track of the lies," and urged the panel to compare the appellant's versions of the events to each other and to what was relayed by A1C ELS and A1C MS during their testimony.

In his closing argument, the CDC reminded the panel it was important they know how the confession was derived, and the defense had shown them the entire recording so they could see how uncomfortable and emotional the interrogation had been for the appellant. He argued the AFOSI agents had unfairly interrogated the appellant, including lying to him and intimidating him with their physical presence, and the appellant gave two versions of the events because he "cracked" after the agents "broke him." Accordingly, he contended the panel should believe the appellant's first version as it was given multiple times over several hours and was corroborated by the testimony of A1C ELS's neighbor. The defense counsel also told the panel the appellant elected to testify so they could judge his demeanor and credibility, and his performance under cross-examination revealed how easily he could get "rattled" in stressful situations.

The military judge's findings instructions advised the panel that evidence had been introduced which indicated the appellant's statements to AFOSI may have been obtained through coercion, and the panel had to decide the weight or significance, if any, such statements deserved under all the circumstances, to include the tactics used by the interviewing agents. He also instructed the panel that it was their duty to determine the believability of witnesses, through consideration of each witness's intelligence, ability to observe and accurately remember events, sincerity and conduct in court, friendships and prejudices. Finally, he advised the panel that the final determination as to the credibility of witnesses in the case rested solely upon them.[5]

3. Discussion

The appellant contends on appeal that the prosecution improperly offered testimony from Agent P that he could tell appellant was acting in a deceitful and untruthful manner when discussing the sexual intercourse because (1) the appellant

[5] The appellant contends the military judge erred by not providing a specific curative instruction on the use of Agent P's testimony.

would not make eye contact, (2) large red blotches would appear on his face, and (3) his commentary became less detailed. He also argues the military judge should have provided a curative instruction to the members on their use of this testimony. When we put the challenged testimony in context and consider the seven factors found in *Jones*, we do not find its admission to be prejudicial error. *See Jones*, 60 M.J. at 969.

Although voir dire made clear that the defense was going to contest the legitimacy of the appellant's confession to AFOSI, the Government was the first party to elicit "human lie detector" testimony, namely that Agent P was trained to "pick up on nonverbal discrepancies" and that the appellant exhibited one—lack of eye contact—which, according to the agent, indicated "some form of deception was going on" during that portion of the interrogation, where the appellant was saying A1C ELS was conscious and willing. The trial counsel also brought out testimony from the agent which intimated that the appellant's lack of detail in his story was indicative of deception. In re-direct, the trial counsel returned to the idea of "nonverbal cues" and elicited testimony from the agent describing the reddening of the appellant's face when questioned about the sexual intercourse.

We note that the video-recording introduced by the defense contained evidence of the appellant's physical behavior and the agents' reactions to him, including the agents asking the appellant why his face was red, directing the appellant to make eye contact while he is relaying his story and confronting him with their belief that his lack of detail indicates he is not being truthful. Thus, considering the defense strategy, the members would have learned that the appellant's face was red, would have seen his lack of eye contact and heard the agents demanding further details and accusing him of lying. What the trial counsel elicited, however, was that these actions by the appellant constitute "nonverbal discrepancies" or "cues" which AFOSI agents are "trained" to recognize. Although the agent was not specifically asked to provide his opinion about the truth or falsity of the appellant's statements, we find that his overall testimony indicated he could tell the appellant was lying based on the appellant's physical reactions, and we thus find error.

However, with such error, reversal of the appellant's conviction is not required unless there was material prejudice to the appellant's substantial right. *See e.g.*, *Kaspar*, 58 M.J. at 319. Accordingly, "[p]rejudice results when there is 'undue influence on a jury's role in determining the ultimate facts in a case.'" *United States v. Mullins*, 69 M.J. 113, 117 (C.A.A.F. 2010) (quoting *Birdsall*, 47 M.J. at 411). Our superior court has held that no such prejudice exists in human lie detector cases if the record contains "other [corroborating] evidence" upon which the members could have relied upon in determining guilt. *Id*. at 18; *cf. Brooks*, 64 M.J. at 330.

Here, the inconsistencies and contradictions in the appellant's statements during his interrogation were obvious and would have raised questions for the panel about the veracity of his exculpatory statement, even in the absence of the agent's testimony about

the appellant's physical demeanor and lack of detail. Although the military judge did not specifically tell the panel they should disregard any testimony from the agent that implied or indicated he could tell if the appellant was lying, he did instruct it was their responsibility to determine the weight or significance, if any, of the appellant's statements to AFOSI, as well as the believability and credibility of witnesses, to include the appellant.

Based on these instructions, the overall circumstances of the appellant's AFOSI interview, the defense "false coerced confession" strategy and the totality of the evidence, including the implausible testimony of the appellant, we conclude the testimony of Agent P had no undue influence on the panel's role in determining the ultimate facts of this case. As such, the appellant has failed to demonstrate prejudice.

The Constitutionality of Article 120, UCMJ

The appellant contends he was deprived of his right to due process when (1) he was convicted under an unconstitutional Article 120(c)(2), UCMJ, and (2) the military judge erroneously instructed the members in a manner that did not employ the terms of the statute. In doing so, he recognizes the current controlling case law is adverse to his position.

As noted above, the appellant contended A1C ELS consented to the sexual intercourse or that he also had an honest and reasonable mistake of fact as to her consent. During the time period that this incident occurred, Article 120(r), UCMJ, provided in pertinent part that "[c]onsent and mistake of fact as to consent . . . are an affirmative defense for the sexual conduct in issue in a prosecution [for aggravated sexual assault]." The statute required the accused to prove the affirmative defense by a preponderance of the evidence, at which time the Government would have the burden of proving beyond a reasonable doubt that the defense did not exist. Article 120(t)(16), UCMJ.

Here, over the Government's objection, the military judge did not instruct the panel in a manner consistent with Article 120, UCMJ. Instead, he advised the members that consent and mistake of fact were defenses to the charge of aggravated sexual assault and the Government had the burden of proving beyond a reasonable doubt that consent and mistake of fact did not exist. 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) (finding that the trial judge's failure to instruct in accordance with the statutory scheme of Article 120(t)(16), UCMJ, was error in the absence of a legally sufficient explanation, but it was rendered harmless beyond a reasonable doubt when the judge instructed the members that the evidence raised the defense of consent and that the Government had the burden of disproving the defense beyond a reasonable doubt); *see also United States v. Ignacio*, 71 M.J. 125 (C.A.A.F. 2012) (per curiam).

As in *Medina*, the military judge here properly required the Government to prove this Article 120, UCMJ, offense beyond a reasonable doubt and to disprove the affirmative defenses of consent and mistake of fact by the same standard. While the military judge did not provide a detailed justification on the record as to why he deviated from the statutory scheme outlined in Article 120, UCMJ, we find that error harmless beyond a reasonable doubt.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[6] 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

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