UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant ADRIAN G. LARA
United States Air Force

ACM 37861

03 July 2013

Sentence adjudged 28 October 2010 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Jeffrey A. Ferguson.

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

Appellate Counsel for the Appellant: Major Matthew T. King; Major Ja Rai A. Williams; Captain Luke D. Wilson; and James D. Culp (civilian counsel).

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Lauren N. DiDomenico; 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:

At a general court-martial, the appellant was convicted, contrary to his pleas, of two specifications of rape and one specification of forcible sodomy, in violation of Articles 120 and 125, UCMJ, 10 U.S.C. §§ 920, 925. Officer members adjudged a sentence of a dishonorable discharge, confinement for 5 years, reduction to the grade of E-1, and a reprimand. The convening authority approved the sentence as adjudged.

On appeal, the appellant contends (1) the military judge erred by allowing certain testimony under Mil. R. Evid. 413 and allowing the substantive offenses to be considered as propensity evidence, (2) he received ineffective assistance of counsel, (3) his right to due process and a fair trial was violated when he was not called as a witness in his own defense, and (4) the evidence is factually insufficient to sustain his convictions. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Background

The appellant was found guilty of raping two victims and forcibly sodomizing a third victim.

The appellant was convicted of raping Ms. VM in 2001 when he was assigned to Kadena Air Base, Japan. The two met in 1998 while both were attending the same community college. They began dating, eventually marrying in May 1999 after the appellant completed basic training. The couple moved to Japan but their relationship soon became strained. They separated, and Ms. VM moved into a new residence where the appellant would visit her on occasion. They often argued and were no longer sexually intimate with each other. Ms. VM testified that, during one of these visits in 2001, the appellant picked her up, carried her to the bedroom, and had sexual intercourse with her, while she was telling him "no." He stopped after about five minutes when he saw her crying. Ms. VM did not report the incident to law enforcement, but she did mention it to a close friend. She returned to the United States and the couple divorced. Sometime later, after being contacted by attorneys investigating sexual assault allegations made against the appellant, she decided to disclose what had happened to her in 2001.

The appellant was also convicted of raping now-Staff Sergeant (SSgt) KB. While attending Airman Leadership School at Offutt Air Force Base, Nebraska, in June 2003, the appellant met and began dating a fellow student, SSgt KB. Their relationship produced a son in October 2004, but the couple ended their relationship several months earlier. After the appellant visited his son in Ohio in November 2008, SSgt KB invited the appellant to spend the night at her residence before he returned to his duty station. SSgt KB testified that on the evening of 11 November, the two were on the couch talking about his relationship with his then-wife, SSgt DL, and the appellant began massaging her hands. She pulled away, but he lifted her shirt and bra, kissed her breasts, and grabbed at her pants. She repeatedly said "no" but he was able to pull her pants off and moved her underwear aside. He then began sexual intercourse with her, stopping when she told him to. SSgt KB testified that after she started engaging in consensual oral sodomy with him in an effort to distract him, the appellant stepped behind her and again had sexual intercourse with her without her consent. She spent several hours the next day with the appellant and their child and then made a restricted sexual assault report to the on-base Sexual Assault Response Coordinator. After she began having psychological difficulties about what had occurred, she changed her report to an unrestricted report in

late December 2008. SSgt KB reported the incident to law enforcement in late December 2008.

The appellant was also convicted of forcibly sodomizing SSgt DL. The appellant began dating SSgt DL at Offutt Air Force Base in September 2004, and they married in January 2005. In mid-2005, the couple was assigned together at Lajes Field, the Azores, Portugal. Their relationship became strained soon thereafter. SSgt DL testified that, sometime during the summer of 2006, the appellant forced her to engage in anal sodomy while she cried and repeatedly told him no. Although she was sore after this incident, she did not seek medical attention. She also did not report it to law enforcement. Their relationship remained contentious, and the appellant made suicidal gestures on several occasions. In July 2007, they transferred to Davis-Monthan Air Force Base and divorced two years later. She reported this allegation when she was contacted by prosecutors investigating the appellant for sexual assault allegations.

Admission of Evidence under Mil. R. Evid. 413

At trial, over defense objection, the military judge allowed two of the victims to testify about uncharged instances of sexual assault allegedly perpetrated by the appellant. He also allowed testimony from Ms. NM, a friend of SSgt DL, about an occasion where the appellant sexually assaulted her. On appeal, the appellant continues to assert these instances of alleged sexual misconduct are outside the limits of Mil. R. Evid. 413 and thus the military judge erred in admitting it.

We review a military judge's decision to admit evidence for an abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (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. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (citation and internal quotation marks omitted).

Mil. R. Evid. 413(a) provides that "[i]n a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant." This includes use to demonstrate an accused's propensity to commit the charged offenses. *United States v. Parker*, 59 M.J. 195, 198 (C.A.A.F. 2003); *United States v. Wright*, 53 M.J. 476, 480 (C.A.A.F. 2000). "[I]nherent in [Mil. R. Evid.] 413 is a general presumption in favor of admission." *United States v. Berry*, 61 M.J. 91, 94-95 (C.A.A.F. 2005) (citation omitted).

There are three threshold requirements for admitting evidence of similar offenses in sexual assault cases under Mil. R. Evid. 413: (1) the accused must be charged with an offense of sexual assault; (2) the proffered evidence must be evidence of the accused's

commission of another offense of sexual assault; and (3) the evidence must be relevant under Mil. R. Evid. 401 and 402. *Id.* at 95 (quoting *Wright*, 53 M.J. at 482). For the second requirement, the court must conclude that the members could find by a preponderance of the evidence that the offenses occurred. *Wright*, 53 M.J. at 483 (citing *Huddleston v. United States*, 485 U.S. 681, 689-90 (1988)).

Once these three findings are made, the military judge is constitutionally required to also apply a balancing test under Mil. R. Evid. 403. *Berry*, 61 M.J. at 95. Mil. R. Evid. 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In the Mil. R. Evid. 413 context, "[t]he Rule 403 balancing test should be applied in light of the strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible[.]" *Wright*, 53 M.J. at 482 (second alteration in original) (citation and internal quotation marks omitted).

Accordingly, in conducting the balancing test, the military judge should consider the following non-exhaustive list of factors to determine whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice: strength of proof of the prior act (i.e., conviction versus gossip); probative weight of the evidence; potential for less prejudicial evidence; distraction of the factfinder; time needed for proof of the prior conduct; temporal proximity; frequency of the acts; presence or lack of intervening circumstances; and the relationship between the parties. *Id*. When a military judge articulates his properly conducted Mil. R. Evid. 403 balancing test on the record, the decision will not be overturned absent a clear abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000).

1. Evidence relating to Ms. VM

The appellant was charged with raping his then-wife, Ms VM, in 2001 while the two were no longer living together. The Government sought to admit, under Mil. R. Evid. 413, testimony from Ms. VM about an alleged sexual assault that occurred in 1998, before the appellant joined the Air Force. Ms. VM went to a party at the home of the appellant's parents and drank to the point of intoxication. After the appellant helped her onto a futon in a family room, Ms. VM became aware he was having sexual intercourse with her. She recalls objecting and asking him to stop but being unable to move because she was so intoxicated. Ms. VM did not report the incident and eventually married the appellant in May 1999.

The military judge found this evidence admissible under Mil. R. Evid. 413. Although the appellant was not in the military at the time of this alleged incident, the military judge found this 1998 incident would constitute a "sexual assault" offense under Texas law, and that the panel could find by a preponderance of the evidence that it

occurred. He further found the evidence would be relevant under Mil. R. Evid. 401 and 402 because it had a tendency to make it more probable that the appellant would commit other offenses of sexual assault. Lastly, he conducted an extensive analysis of the probative value of this testimony relative to its potential for unfair prejudice to the appellant. The judge concluded there was strong proof of this incident stemming from the victim's own testimony, the incident was very similar to the other allegations of sexual assault in the case and occurred within a reasonable period of time from the charged offenses, there was minimal chance that this testimony would serve as a distraction to the members, the time needed to prove it would not be unduly burdensome, and there was no indication of collusion or witness tampering amongst the women in the case.

On appeal, the appellant argues there is little similarity between this 1998 offense and those charged in the offenses involving Ms. VM, SSgt KB and SSgt DL, as the former offense occurred when the victim was allegedly substantially incapacitated and the others did not. The appellant also argues that allowing a complaining victim to establish herself as a victim by a preponderance of the evidence through Mil. R. Evid. 413 testimony eviscerates the requirement that proof beyond a reasonable doubt be presented on the charged offense, especially when no corroborating evidence was presented. Lastly, he contends the panel was likely distracted by the evidence on the Mil. R. Evid. 413 offense because more evidence was provided to "prove" that offense than the charged offense.

We disagree. The military judge properly considered the threshold requirements for admissibility of evidence and the *Wright* factors in his Mil. R. Evid. 413 and 404(b) analyses, and that he did not abuse his discretion in admitting evidence of the 1998 incident. Furthermore, we note the members were properly instructed on the permissible uses of this evidence, including: (1) the accused could not be convicted solely because the panel believed he committed this 1998 offense or solely because the panel believed he had a propensity to engage in sexual assaults, and (2) they could not use it to overcome a failure of proof for any elements of the charged offenses, all of which needed to be proven beyond a reasonable doubt.

2. Evidence relating to SSgt KB

The appellant was charged with raping SSgt KB in November 2008. Using Mil. R. Evid. 413, the Government sought to introduce testimony from SSgt KB about an incident of forcible sodomy that allegedly occurred in July 2004 when she was seven months pregnant with the appellant's child. After SSgt KB refused the appellant's request to engage in sexual intercourse, he sat on her chest and forcibly put his penis in her mouth, while SSgt KB was saying "no" and trying to push him off. SSgt KB did not report this incident until contacted by prosecutors working on the appellant's court-martial, and only recalled the incident after reading an entry in her journal from 2004.

The military judge found this evidence admissible under Mil. R. Evid. 413. He found this 2004 incident would constitute the offense of forcible sodomy and that the panel could find by a preponderance of the evidence that it occurred. He further found the evidence would be relevant under Mil. R. Evid. 401 and 402 because it had a tendency to make it more probable that the appellant would commit other offenses of sexual assault. Lastly, he conducted an extensive analysis of the probative value of this testimony relative to its potential for unfair prejudice to the appellant, concluding there was strong proof of this incident stemming from the victim's own testimony (taking into account that she recalled the incident after reading her journal), the incident was very similar to the other allegations of sexual assault in the case and occurred within a reasonable period of time from the charged offenses, there was minimal chance this testimony would serve as a distraction to the members, and the time needed to prove it would not be unduly burdensome. Although he found some evidence that SSgt KB's paternity and child support disputes may have led her to fabricate the 2004 allegation after the charged offense arose, he found this to be an unlikely possibility and one the panel could weigh during the findings case.

The appellant argues there was no actual proof the 2004 assault even occurred, because SSgt KB never reported it (even while reporting another assault), her journal entry could have been recently made, and because it was unbelievable that she would have forgotten that this incident occurred. As he did with Ms VM's testimony, the appellant argues that allowing a complaining victim to establish herself as a victim by a preponderance of the evidence through Mil. R. Evid. 413 testimony eviscerates the requirement that proof beyond a reasonable doubt be presented on the charged offense.

We disagree. We conclude that the military judge properly considered the threshold requirements for admissibility of evidence and the *Wright* factors in his Mil. R. Evid. 413 and 404(b) analyses, and that he did not abuse his discretion in admitting evidence of the 2004 incident and note that the members were properly instructed on its permissible uses.

3. Evidence relating to Ms. NM

Lastly, the Government intended to introduce the testimony of Ms. NM, SSgt DL's friend. Ms. NM described two incidents that occurred in February 2008 when the appellant and SSgt DL were in town for a social event. On the first night, the appellant spontaneously tried to kiss Ms. NM but was unsuccessful when her dog tried to bite him. Several days later, while the three were in a hotel room they had agreed to share, the appellant touched Ms. NM's vaginal area over her underwear. According to Ms. NM, the appellant's wife saw him touch her and later apologized to Ms. NM for his behavior. Ms. NM elected not to confront him or take further action.

The military judge found this evidence admissible under Mil. R. Evid. 413. He found the appellant's touching of Ms. NM's genitals, under the circumstances she described, to be abusive sexual contact, and that the panel could find by a preponderance of the evidence that it occurred. He further found the evidence would be relevant under Mil. R. Evid. 401 and 402 because it had a tendency to make it more probable that the appellant would commit other offenses of sexual assault. Lastly, he conducted an extensive analysis of the probative value of this testimony relative to its potential for unfair prejudice to the appellant, concluding there was strong proof of this incident stemming from the victim's own testimony, the incident had similarities to the other allegations of sexual assault in the case and occurred within a reasonable period of time from the charged offenses, there was minimal chance this testimony would serve as a distraction to the members and the time needed to prove it would not be unduly burdensome, and there was no indication of collusion or witness tampering among the witnesses in the case.

The appellant disagrees, contending there was insufficient proof that the incident occurred because the appellant's wife denied seeing her husband touching Ms. NM or discussing the incident with her, and because it is improbable that Ms. NM would not report such an incident if it occurred. He also argues the offenses are not similar, because he had no relationship with Ms. NM as he did with the other women. Lastly, he argues this evidence improperly allowed SSgt DL to bolster her allegations through a Mil. R. Evid. 413 allegation brought by Ms. NM, her good friend.

We disagree. We conclude that the military judge properly considered the threshold requirements for admissibility of evidence, as well as the *Wright* factors in his Mil. R. Evid. 413 and 404(b) analyses. He did not abuse his discretion in admitting evidence of the 2008 incident. Moreover, the members were properly instructed on its permissible uses.

Ineffective Assistance of Counsel

The appellant argues that his trial defense counsel's performance during the findings stage amounted to ineffective assistance. Specifically, the appellant claims that his counsel were ineffective for failing to (1) identify and call important defense witnesses, (2) establish that Ms. VM had access to the Air Force Office of Special Investigations (AFOSI) report of investigation, and (3) object to impermissible and prejudicial testimony by SSgt DL. After reviewing the record of trial, including the materials submitted on appeal, we find that trial defense counsel effectively represented the appellant throughout his court-martial.

We review claims of ineffective assistance of counsel de novo, *United States v. Wiley*, 47 M.J. 158 (C.A.A.F. 1997), under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). To establish ineffective assistance of

counsel, the appellant "must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland*, 466 U.S. at 687; *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009)). In evaluating counsel's performance under *Strickland's* first prong, appellate courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id*. at 688-89. We start with the proposition that defense counsel are presumed to be competent. *United States v. Anderson*, 55 M.J. 198 (C.A.A.F. 2001). The appellant bears the heavy burden of establishing that his trial defense counsel was ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004). The appellant must establish that the "representation amounted to incompetence under 'prevailing professional norms.'" *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) (citing *Strickland*, 466 U.S. at 690).

The appellant contends he informed his defense counsel prior to trial that a former roommate had seen SSgt KB and SSgt DL having breakfast together in either later May or early June 2009, approximately five months before SSgt KB made an unrestricted sexual assault report against the appellant. By this time, the appellant had informed SSgt DL that he was going to terminate her existing relationship with the son he had with SSgt KB. In the appellant's view, there was no reason for the two women to be meeting except to collude with each other and for SSgt DL to see his child without his knowledge, and thus is was unreasonable and ineffective for the defense counsel to not present the members with information about this meeting.

The appellant also claims it was unreasonable for the defense counsel to find and present evidence that, as an AFOSI special agent, Ms. VM's official duties gave her access to the AFOSI report of investigation. With that access, Ms. VM would have been able see the allegations made by SSgt KB and SSgt DL and would have been able to fabricate or embellish an allegation that the appellant assaulted her in 1998 and 2001, ensuring those allegations were similar to those raised by the other women.

Lastly, the appellant contends his trial defense counsel were ineffective for failing to object to the trial counsel asking SSgt DL whether the appellant had confronted her after she testified about the assaults at the Article 32, UCMJ, 10 U.S.C. § 832, investigation. He contends this constituted an overt comment to the panel that he was silently admitting her allegations were true.

In their joint declaration, the defense counsel point out that both SSgt DL and Ms. VM has made prior consistent statements before the alleged motive to lie arose, and thus attacking them on this ground was not a sound strategy. SSgt DL had reported the forcible sodomy to her friend, Ms. NM, in 2007, before she was divorced and before the appellant tried to end her relationship with his son. Similarly, Ms. VM told a counselor

in Japan that she had been sexually assaulted by the appellant, as part of an effort to secure an early return of dependents benefit. Although no records of this report existed, SSgt DL, the appellant's wife, had seen a personnel file containing this allegation.

The defense counsel also state the motives that the appellant now attributes to SSgt DL and Ms. VM are untenable, based on their investigation. They point out that SSgt DL's allegations were never included in the AFOSI report because they came to light through the legal office's investigation, and therefore Ms. VM could not have read about it even if she had improperly accessed the AFOSI report. Additionally, the demeanor of SSgt DL and Ms. NM indicated they were still fond of the appellant and regretted having to testify against him, and the counsel felt an unsupported direct assault on their credibility would have been an unsound strategic decision.

Lastly the trial defense counsel explain that their strategy with regard to SSgt DL's allegations was to pursue a mistake of fact defense, along with an argument that her allegations were improbable. This strategy included a focus on SSgt DL's lack of animus towards the appellant. According to the defense counsel, the brief exchange between SSgt DL and the trial counsel did not have an impact on the panel or the defense theory and highlighting it through a corrective instruction was strategically unwise.

Having considered the allegations raised by the appellant in his brief, the factual response provided by the trial defense counsel and the entire record of trial, we find the defense counsel's decisions were not unreasonable under the facts of this case. There are reasonable explanations for the counsels' actions and their level of advocacy was not "measurably below the performance normally expected of fallible lawyers." *United States* v. *Polk*, 32 M.J. 150, 153 (C.M.A. 1991) (citations omitted). To the contrary, the defense counsel ably and vigorously defended the appellant throughout each stage of the proceeding. The fact that the appellant was not acquitted does not invalidate the defense's performance strategy here, and we give great deference to the counsel's judgments in this area. *United States v. Morgan*, 37 M.J. 407, 409 (C.M.A. 1993); *Mazza*, 67 M.J. at 474-75.

Appellant's Failure to Testify

The appellant contends he wanted to testify at his court-martial but his defense counsel did not call him, denying him his right to due process and a fair trial. In a declaration submitted as part of his appeal, the appellant states he intended to testify at his trial. He also did not understand that he had the right to testify at his court-martial even if his defense attorneys did not want him to, and he was never given the opportunity to provide a statement or testimony at his trial. The declaration also included a detailed explanation of the testimony he would have presented at his trial and that he had given to his defense counsel in advance of the trial. Additionally, in a letter submitted by the appellant during the appeal, the appellant's superintendent states the appellant told her

during the trial that he wanted to testify but his defense counsel were not going to call him because it was the Government's job to prove his guilt and not their job to prove his innocence.

In a jointly-signed declaration submitted in response to an order by this Court, the appellant's trial defense counsel state they informed the appellant that the decision on whether to testify was his alone. The counsel advised him against testifying, based on discussions with the appellant about what he would be able to testify about. This advice was based on the appellant's answers to anticipated questions, his demeanor and disposition while answering those questions, the defense's overall case strategy, and his ability to recall the facts surrounding the allegations. Despite that opinion, the defense counsel were emphatic with the appellant that the decision on whether to testify was his alone. He agreed with their advice. Just prior to arraignment, the defense counsel again discussed this matter and the appellant signed a memorandum indicating he was electing not to testify during findings.

The appellant has styled this issue as one of constitutional dimensions, arguing it was a violation of his constitutional right to testify when he was not called to testify. However, although the right to testify in one's own behalf is a fundamental, personal right founded in the Constitution, our Court has addressed such allegations under the rubric of ineffective assistance of counsel. *United States v. Dewrell*, 52 M.J. 601, 620 (A.F. Ct. Crim. App. 1999), *aff'd*, 55 M.J. 131 (C.A.A.F. 2001).

We need not order a hearing pursuant to *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 2007), since these matters may be resolved based on the "appellate filings and the record," *id.* at 248. Notably, the appellant does not contend his defense counsel forbade him from testifying, nor rejected any request from him to do so. His declaration from his defense counsel and his signed acknowledgement of his decision not to testify "compellingly demonstrate" the improbability of his claims that he did not understand he had the right to testify regardless of his defense counsel's advice and did not get the opportunity to testify. *Id.* Additionally, the appellant made no complaint about his defense counsel during the clemency phase. In light of these facts, this claim does not have sufficient credibility to warrant further investigation by this court. *Dewrell*, 55 M.J. at 135. We further find that that the trial defense counsels' decision to advise the appellant not to testify was reasonable and appropriate, and did not constitute ineffective assistance of counsel. *Mazza*, 67 M.J. at 475 (stating that the Court "will not second-guess the strategic or tactical decisions made at trial by defense counsel" (quotation marks and citations omitted)).

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 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), *as quoted in 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 appellant argues the evidence is factually insufficient to prove beyond a reasonable doubt that he raped or sodomized the three women. For SSgt KB, the appellant points out that she made an unrestricted report only after speaking about the matter to a male friend in whom she had a romantic interest and the sexual assault examination found no physical evidence of a sexual assault. He argues she had a motive to fabricate or exaggerate the allegations because her sexual contact with the appellant was contrary to her personal vow of celibacy, she needed to defend her sexual history to her new love interest, and her custody issues over the child she shared with the appellant. For SSgt DL, the appellant points out the improbability of her claim that the appellant forcibly sodomized her without injuring her, her failure to report it and to instead continue her relationship with the appellant, and the likelihood that the appellant had a reasonable mistake of fact as to any sexual encounter that did occur. Regarding Ms. VM, the appellant argues her memory is faulty and thus her testimony is insufficient to serve as proof beyond a reasonable doubt, especially given her failure to report the event and instead to continue her relationship with the appellant.

We disagree. After weighing the evidence and making allowances for not having observed the witnesses, we are convinced beyond a reasonable doubt that the appellant raped SSgt KB and Ms. VM and forcibly sodomized SSgt DL.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[1] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).

[1] Though post-trial delay was not expressly raised as an issue on appeal, we note the appellant moved for expedited review of his case on 7 June 2013 and stated "[w]ithout the ability to have his case heard and clear his name, [he] is suffering significant prejudice" since he is in confinement. We granted the appellant's request on 10 June 2013. 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).

Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court