UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JOSE S. MONSERRATE
United States Air Force

ACM S31649

5 January 2012

Sentence adjudged 19 December 2008 by SPCM convened at Little Rock Air Force Base, Arkansas. Military Judge: Douglas B. Cox.

Approved sentence: Bad-conduct discharge, confinement for 1 month, forfeiture of $898.00 pay per month for 1 month, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Major Shannon A. Bennett; Major Reggie D. Yager; and Major Bryan A. Bonner.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Jeremy S. Weber; Major Joseph Kubler; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

OPINION OF THE COURT

ROAN, Judge:

Contrary to his pleas, the appellant was convicted at a special court-martial composed of officer members of one specification of wrongful divers use of cocaine, one specification of drunk and disorderly conduct of a nature to bring discredit upon the armed forces and one specification of wrongfully communicating a threat, in violation of Articles 112a and 134, UCMJ, 10 U.S.C. §§ 912a, 934. The adjudged sentence consisted of a bad-conduct discharge, confinement for 1 month, forfeiture of $898.00 pay per

month for 1 month and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

The appellant raises five issues for our consideration: 1) The military judge erred by denying the appellant's motion to compel release of an un-redacted informant dossier; 2) The military judge erred by instructing the members that prejudice to good order and discipline was an element of drunk and disorderly conduct despite the appellant being charged with drunk and disorderly conduct that was of a nature to bring discredit upon the armed forces; 3) The evidence to support the charge of drunk and disorderly conduct is legally and factually insufficient; 4) The evidence to support the charge of wrongfully communicating a threat is legally and factually insufficient; and 5) The military judge abused his discretion by allowing testimony that the appellant's unit issued a no-contact order. Finding no error that materially prejudices the appellant, we affirm.

The facts relevant to each issue are discussed below.

Release of Confidential Source's Un-Redacted Dossier

The appellant was convicted of wrongful use of cocaine based in part on the testimony of Airman Basic (AB) MC, who stated she saw the appellant use cocaine three times during the charged time frame. While serving as a confidential informant for the Air Force Office of Special Investigations (AFOSI), AB MC claimed she had previously observed the appellant use the cocaine while at different parties she attended. As part of his pre-trial discovery request, defense counsel asked for a copy of the complete AFOSI confidential source dossier that accompanied the investigatory report. In response, the Government released a redacted version of the document. Trial defense counsel moved to compel release of the complete un-redacted dossier. In response, Government counsel released a less redacted version of the file but asserted the withheld portions were protected by Military Rule of Evidence 506.

At trial, the military judge was provided with an un-redacted copy of the dossier. After reviewing both the redacted and un-redacted versions, as well as affidavits from two AFOSI agents, the military judge denied defense counsel's request for release of the entire un-redacted report, finding that except for the confidential source's name, the redacted information was not relevant to the defense's preparation of its case.[1] Defense counsel made a timely objection.

The appellant contends the military judge incorrectly ruled the redacted portions of the dossier were irrelevant and thereby denied defense the opportunity to obtain

[1] The military judge specifically declined to rule whether Military Rule of Evidence 506 was applicable in this case, instead finding the redacted information was not relevant.

valuable evidence central to its case. The appellant specifically argues the redacted information consisted of:

> Identification of several different AFOSI agents who worked with the informant; records of whether the informant submitted to a polygraph or made any statements in conjunction with the investigation; the informant's contract with AFOSI promising to follow certain rules; the informant's entrapment training; the informant's motivation for working with AFOSI; AFOSI's concerns about the informant's motivation and reliability; and what AFOSI asked the informant to accomplish at each meeting during the investigation.

The appellant asserts the redacted information was both relevant and necessary to present a full defense to the charged offenses (AB MC was also the alleged recipient of the appellant's communicated threat). Because the Government presented no forensic evidence regarding wrongful drug use, the appellant was convicted solely on witness testimony, to include that of AB MC. The appellant argues that the redacted information was relevant to show AB MC's unreliability as an informant. In particular, the appellant states defense counsel could have used the excised information to evaluate the extent to which AB MC followed the confidential informant training she was given by AFOSI. Further, defense counsel could have inquired into why AFOSI did not provide AB MC with continual instruction even though they supposedly questioned her reliability as an informant. Additionally, defense counsel was unable to evaluate whether AB MC may have entrapped the appellant in order to improve her own criminal trial disposition.[2] Finally, the military judge's ruling prevented defense counsel from inquiring into why AB MC did not comply with her contractual agreement with AFOSI by divulging her relationship to AFOSI when she was later arrested by civilian authorities.

As a general rule, "the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain . . . evidence in accordance with such regulations as the President may prescribe." Article 46, UCMJ, 10 U.S.C. § 846. The President has promulgated discovery rules which appear in Rules for Courts-Martial (R.C.M.) 701-703. A military judge's ruling on the production of evidence is reviewed for an abuse of discretion. *United States v. Graner*, 69 M.J. 104 (C.A.A.F. 2010). A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision at hand is outside the range of choices reasonably arising from the applicable facts and the law. *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008).

[2] Pursuant to an agreement between Airman Basic (AB) MC and the convening authority, AB MC agreed to act as an Air Force Office of Special Investigations informant in exchange for being tried by summary court-martial for wrongful drug use.

After comparing the redacted and unredacted versions of AB MC's dossier, the military judge determined that the withheld information was not relevant and would not assist the defense in preparation of their case. We have reviewed the information in question and concur with the military judge's findings. The majority of the redacted material involves discussions between AB MC and the Special Agents on areas AB MC should concentrate on in future interactions with various suspects. Of note, none of AB MC's prior statements to AFOSI were excised from the material provided to the appellant. There were no exculpatory comments contained in the redacted sections and none of the masked information would have provided defense with additional evidence with which to impeach AB MC. The military judge correctly determined that release of such information would not have assisted defense in preparation of its case.

Trial defense counsel did a commendable job in his cross-examination of AB MC. He pointed out potential areas of bias AB MC might have against the appellant. He explored inconsistent statements between the stipulation of fact signed at AB MC's court-martial and her statements to AFOSI concerning the appellant. He also ably discredited AB MC's overall reliability and trustworthiness in many areas. Nothing in the redacted excerpts would have provided defense counsel with additional ammunition to challenge AB MC's testimony. Based on these facts, we do not find the military judge abused his discretion.

Findings Instruction

The appellant was charged, inter alia, with drunk and disorderly conduct of a nature to bring discredit upon the Armed Forces. The military judge instructed the members that:

> In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt: One, . . . the accused was drunk and disorderly; and Two, that under the circumstances the conduct of the accused was to the prejudice of good order and discipline in the Armed Forces or was of a nature to bring discredit upon the Armed Forces.

Although he did not object at trial to the above instruction, the appellant now argues the military judge erred by instructing the members that prejudice to good order and discipline was an element of the charged offense and asks this Court to set aside the appellant's conviction on this specification. We decline to do so.

The question of whether members were properly instructed is a question of law we review de novo. *United States v. Schroder,* 65 M.J. 49, 54 (C.A.A.F. 2007). When a military judge's instruction incorrectly describes elements of an offense, we analyze that error for prejudice under a standard of harmlessness beyond a reasonable doubt. *United*

States v. Upham, 66 M.J. 83, 86 (C.A.A.F. 2008) (citing *Neder v. United States,* 527 U.S. 1, 17 (1999)). Error is harmless beyond a reasonable doubt when there is no "'reasonable possibility that the evidence [or error] complained of might have contributed to the conviction.'" *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007) (brackets in original) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

The good order and discipline component of Article 134, UCMJ, is not a lesser included offense of the service discrediting element. *See generally United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010); *United States v. Miller*, 67 M.J. 385, 388-89 (C.A.A.F. 2009) (rejecting the notion that Clauses 1 and 2 of Article 134, UCMJ, are per se included in every enumerated offense, and overruling cases that held to the contrary). The appellant argues that "[t]here is no way to know whether [he] was convicted of the offense as charged or of the alternate theory of prejudice to good order and discipline; both theories were addressed before members." The appellant's argument falls short because he fails to acknowledge that the military judge specifically instructed the members as follows:

> The government has alleged that the conduct in question . . . was of a nature to bring discredit upon the Armed Forces. To convict the accused of the offense charged you must be convinced beyond a reasonable doubt of all the elements, including that of the service discrediting nature of the conduct. If you are convinced of all of the elements, except the element of the service discrediting nature of the conduct, you may still convict the accused of drunk and disorderly conduct provided you are convinced beyond a reasonable doubt that the conduct was to the prejudice of good order and discipline in the Armed Forces. In this event, you must make appropriate findings by excepting the language, "which conduct was of a nature to bring discredit upon the Armed Forces." Of course, if you are convinced beyond a reasonable doubt that the conduct in question was both to the prejudice of good order and discipline . . . and was of a nature to bring discredit upon the Armed Forces, then you may convict the accused as he is charged provided you are convinced beyond a reasonable doubt as to the other elements of Specification I of Charge II.

Based on this instruction and the members' findings, we can easily conclude the members convicted the appellant of the charged offense of drunk and disorderly conduct of a service discrediting nature. Members are presumed to follow the military judge's instructions. *United States v. Thompkins,* 58 M.J. 43, 47 (C.A.A.F. 2003). Assuming that to be the case, had the members found the appellant guilty of drunk and disorderly conduct that was prejudicial to good order and discipline, they would have excepted the language "which conduct was of a nature to bring discredit upon the Armed Forces" when they made their findings. Because that did not occur and the finding is clear on its

face, we will not overturn a determination that the appellant was both drunk and disorderly and his conduct was of a nature to bring discredit upon the Armed Forces.

Legal and Factual Sufficiency – Drunk and Disorderly Conduct

Two civilian police officers responded to a report that a car was stuck in the mud approximately 35 yards off the road and several individuals were seen trying to get it out. The officers responded at approximately 0300 and found the appellant's car with the lights on but the motor not running. The officers then met the appellant who was heading in the direction of his apartment complex adjacent to the field. The officers did not observe anyone else by the appellant's car. The appellant was highly intoxicated, stumbling and slurring his speech in response to the officers' questions. When asked if he had driven the car into the ditch, the appellant said yes and then no and repeated himself several times before telling the officer that "she drove it there." The appellant was arrested for public intoxication.

Sergeant AC, one of the responding officers, testified at trial that she was surprised the person she observed was a member of the military. BM, manager of the apartment complex where the appellant lived, testified that the appellant's car created several ruts in the field approximately 20 feet long and 6 inches deep. He stated that he "would [have] expect[ed] a little bit more out of the military." He admitted that he had not stopped renting to military personnel as a result of this event and does not hold the military in less regard than he did before the incident. BM personally paid for the damage to the field caused by the appellant.[3]

The appellant argues that his conviction for drunk and disorderly conduct was legally and factually insufficient and asks this Court to set aside the conviction and dismiss with prejudice.

We may affirm only those findings of guilt that we find are correct in law and fact and determine, on the basis of the entire record, should be approved. The test for legal sufficiency is whether any rational trier of fact, when viewing the evidence in the light most favorable to the Government, could have found the appellant guilty of all essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). In conducting this unique appellate role, we are required to conduct a de novo review of the entire record of trial, taking "a fresh, impartial look at the evidence" and applying "neither a presumption of innocence nor a presumption of guilt" and "make

[3] BM chose to pay for the damage on his own accord. There is no evidence that the appellant asked him to do so.

[our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

After applying the requisite tests, we are convinced that the evidence presented constitutes proof of each element of the charged offense beyond a reasonable doubt. There is no dispute that the appellant was intoxicated on 19 April 2008. The closer issue is whether his conduct was disorderly. We find that it was. The *Manual for Courts-Martial* defines disorderly conduct as "conduct of such a nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment thereby. It includes conduct that endangers public morals or outrages public decency and any disturbance of a contentious or turbulent character." *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 73.c.(2) (2008 ed.). The evidence, albeit circumstantial, was sufficient to conclude the appellant drove his car into a ditch while intoxicated and was unable to get it out. Apparently, someone was disturbed by the events enough to call the police and require their presence in the middle of the night. The responding officer commented that she was surprised to find the appellant was in the military and the apartment manager commented that he "would have expected a little bit more out of the military." The apartment manager also felt compelled to pay for the damages caused by the appellant. Although the evidence is not overwhelming, viewing it in a light most favorable to the Government, we find it both legally and factually sufficient to support the appellant's conviction.

Legal and Factual Sufficiency – Communicating a Threat

The appellant was convicted of communicating a threat to AB MC after he sent a text message to her cell phone that included a picture of the appellant's daughter along with the statement, "if someone keeps me from her ther [sic] gonna get dealt wit [sic]." The appellant argues the evidence presented at trial was legally and factually insufficient to support his conviction. We disagree.

The appellant contends that the words transmitted in the text message were conditional, tenuous, and ambiguous. He further argues that because of the close friendship between the appellant and AB MC, the lack of any history of violence between the two, and AB MC's acknowledgment that she had never seen the appellant become violent, the text message did not amount to an actual threat under the circumstances.

When analyzing whether statements amount to a threat under Article 134, UCMJ, we must "pay due regard to any concretely expressed contingency associated with a threat, while remaining aware that all communication takes place within a context that can be determinative of meaning." *United States v. Brown*, 65 M.J. 227, 231 (C.A.A.F. 2007). Put more simply, words are used in context and the "[l]egal analysis of a threat must take into account both the words used and the surrounding circumstances." *Id.* at

232. When putting the text message into perspective, we have no difficulty concluding that a reasonable person would have interpreted the comment as a threat.

At the time the appellant sent the text message, AB MC was an informant for the AFOSI, providing information about the appellant's criminal activities. It was certainly possible that her reports could result in the appellant being arrested and his daughter being taken from him, making the contingency a reality. AB MC testified that she was scared when she received the message and afraid the appellant might hurt her because she had just "ratted him out" to AFOSI about his drug use and he only lived three streets away from her. As a precaution, she changed the locks on her house. She had also previously received a message from the appellant where he included a picture of himself holding a gun to his head. Finally, she had earlier observed the appellant become angry, breaking his TV and ripping a poster.

When viewing the appellant's message and the context in which it was made in a light most favorable to the Government, we are convinced a rational trier of fact could have found each element of the offense beyond a reasonable doubt.

In addition to the appellant's assignment of error, we review de novo whether the charge and specification of communicating a threat under Article 134, UCMJ, survives in light of our superior court's recent decision in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). In *Fosler*, the Court of Appeals for the Armed Forces (CAAF) held that a charge and specification of adultery under Article 134, UCMJ, did not state an offense because they failed to allege the "terminal element" either expressly or by implication.[4] *Fosler*, 70 M.J. at 225. We find the appellant's case distinguishable from *Fosler* and thus affirm his conviction.

The accused in *Fosler* was charged under Article 120, UCMJ, with sexually assaulting a 16-year-old girl. He was acquitted of the Article 120, UCMJ, charge and convicted of adultery under Article 134, UCMJ. At the end of the Government's case-in-chief, the accused moved to dismiss under R.C.M. 917 and 907, arguing that the adultery charge failed to state an offense. The military judge denied the motions, finding no requirement for the Government to state which clause of the terminal element is alleged or to state either of the terminal elements in the specification. The judge then instructed the members that they could convict the accused if they found his conduct to be prejudicial to good order and discipline or to be service discrediting. The members convicted the accused of adultery; the Navy-Marine Corps Court of Appeals affirmed the findings and sentence. *United States v. Fosler*, 69 M.J. 669, 678 (N.M. Ct. Crim. App.

[4] Under Article 134, UCMJ, 10 U.S.C. § 934, the government must prove beyond a reasonable doubt that the accused engaged in certain conduct and that the conduct satisfied one of three criteria, often referred to as the "terminal element." Those criteria are that the accused's conduct was (1) to the prejudice of good order and discipline, (2) of a nature to bring discredit upon the armed forces, or (3) a crime or offense not capital. *See* Article 134, UCMJ.

2010), *rev'd*, 70 M.J. at 233. On appeal, our superior court held that the terminal element was not necessarily implied in an Article 134, UCMJ, adultery specification and dismissed the charge and specification for failure to state an offense. *Fosler*, 70 M.J. at 233.

The issue of whether a specification states an offense is a question of law that we review de novo. *See United States v. Sutton*, 68 M.J. 455, 457 (C.A.A.F. 2010). In *Fosler*, our superior court reiterated that the military is a notice-pleading jurisdiction. *Fosler*, 70 M.J. at 229 (citing *United States v. Sell*, 3 C.M.A. 202, 206 (1953)). A charge and specification is sufficient if it alleges every element of the offense expressly or by implication. R.C.M. 307(c)(3); *Sutton*, 68 M.J. at 457. This requires that the charge and specification "'contain[ ] the elements of the offense charged and fairly inform[ ] a defendant of the charge against which he must defend, and, second, enable[ ] him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *Fosler*, 70 M.J. at 229 (brackets in original) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). Failure to object to the issue of a specification's legal sufficiency does not constitute a waiver or any such legal sufficiency. R.C.M. 905(e). However, "[s]pecifications which are challenged immediately at trial will be viewed in a more critical light than those which are challenged for the first time on appeal." *United States v. French,* 31 M.J. 57, 59 (C.M.A. 1990). *See also United States v. Bryant,* 30 M.J. 72, 73 (C.M.A. 1990).

We find the appellant's case distinguishable from *Fosler*. At the outset, we recognize that the Government did not allege the terminal element in Specification 2 of Charge II. In such cases, the question is whether "using the appropriate interpretative tools, can the . . . charging language be interpreted to contain the terminal element such that an Article 134 conviction can be sustained?" *Fosler*, 70 M.J. at 229. When considering how *Fosler* implicates the assessment of whether certain charged language alleges the terminal element by "necessary implication," it is significant that *Fosler* involved a contested trial and an Article 134, UCMJ, specification that was challenged prior to findings pursuant to R.C.M. 917. *Id.* at 230. In contrast, the appellant here did not challenge the validity of the Article 134, UCMJ, specification. This distinction is critical. In *Fosler*, the majority opinion repeatedly references the case's procedural posture when discussing the more rigorous standard it used in evaluating whether the charged language alleges the terminal element by "necessary implication" in that context. Specifically, the majority stated that "[case law] does not foreclose the possibility that an element could be implied. . . . However, in contested cases, when the charge and specification are first challenged at trial, we read the wording more narrowly and will only adopt interpretations that hew closely to the plain text." *Fosler*, 70 M.J. at 230. As noted above, this is consistent with other cases holding that, although failure to state an offense is not waived by a failure to raise the issue at trial, those specifications challenged immediately at trial will be scrutinized more critically than those raised for the first time on appeal. *United States v. Watkins,* 21 M.J. 208, 209 (C.M.A. 1986) ("A flawed

specification first challenged after trial, however, is viewed with greater tolerance than one which was attacked before findings and sentence.").

In this context, we must evaluate whether the terminal element was "necessarily implied" by the language of the specification. We find that it was. The specification alleges that the appellant "did . . . wrongfully communicate to Airman First Class [MC] a threat by sending her a text message, to wit: 'if someone keeps me from her ther [sic] gonna get dealt wit [sic].'" On its face, the allegation makes clear that the appellant communicated a threat to AB MC, and thus what conduct the appellant must defend against. Furthermore, on its face, this specification contains language "the ordinary understanding of which could be interpreted to mean or necessarily include the concepts of prejudice to 'good order and discipline' or 'conduct of a nature to bring discredit upon the armed forces.'" *Fosler*, 70 M.J. at 229.

Without any other information about the attendant circumstances, the ordinary understanding of this language necessarily implies the concepts inherent in Clauses 1 and 2 of Article 134, UCMJ, and thus can be interpreted to contain the terminal element. By its very nature, camaraderie, esprit de corps, and unit cohesion will be adversely impacted when one Airman threatens harm to another. Consequently, good order and discipline within a military organization is directly impacted by such conduct. Similarly, the language of this specification necessarily implies that the conduct is of a nature to bring discredit upon the armed forces, as threatening to hurt a fellow Airman clearly has a tendency to bring the Air Force into disrepute or tends to lower it in public esteem. Therefore, this charge and specification are sufficient as they allege every element of the Article 134, UCMJ, offense expressly or by necessary implication, and fairly informed the appellant of the charge against which he must defend.

Whereas the appellant in *Fosler* challenged the adultery specification as not stating an offense at trial, the appellant in the case at bar did not. He had ample opportunity to raise an objection before and during trial to argue he was not on fair notice about the criminal allegations he was facing, to include whether Clause 1 or 2 was being alleged, or to request that the Government further define and delineate the charges against him. Moreover, the appellant did not object to the military judge's instructions defining both good order and discipline and service discrediting conduct to the members. Under the facts and circumstances of this case, we find that the charge and specification of wrongfully communicating a threat sufficiently stated an offense. The language fairly informed the appellant of the charge against him and enabled him to prepare a defense. We thus conclude that the appellant's conviction for communicating a threat under Article 134, UCMJ, survives our superior court's decision in *Fosler*.

Introduction of First Sergeant's Testimony

The appellant argues that the military judge abused his discretion by allowing the appellant's first sergeant, Master Sergeant (MSgt) PE, to testify that he issued a no-contact order to the appellant after seeing the text message on which Specification 2 of Charge II (communicating a threat) was based. Trial defense counsel objected to MSgt PE's testimony, arguing it was not relevant, invaded the province of the members by introducing MSgt PE's personal opinion on whether the message impacted good order and discipline, and raised the specter of unlawful command influence by injecting the commander's opinion on the appellant's guilt. After applying an M.R.E. 403 balancing test, the military judge overruled the objection, finding the testimony relevant to whether the text message was prejudicial to good order and discipline.

We review a military judge's decision to admit evidence for abuse of discretion and will not overturn that ruling unless it is "'arbitrary, fanciful, clearly unreasonable, or clearly erroneous,' or influenced by an erroneous view of the law." *United States v. Thompson,* 63 M.J. 228, 230 (C.A.A.F. 2006) (quoting *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)).

The appellant contends that "MSgt [PE]'s testimony did no more than instruct members on the result he believed they should reach" and the military judge should have limited his testimony to the fact he saw the text message and not permit him to offer his opinion on the impact to good order and discipline. We disagree. As discussed above, the Government had the burden of proving the message in question impacted good order and discipline. The first sergeant's testimony that he believed one Airman sending a threatening message to another Airman within the unit could harm discipline was relevant and certainly did not intrude on the members' ultimate responsibility to decide for themselves whether in fact the message did harm good order and discipline. We find the appellant's argument to be without merit.

Appellate Delay

Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time this case was docketed with the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *Reed*, 54 M.J. at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA E. DIXON, TSgt, USAF
Deputy Clerk of the Court