**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman ANDREW M. MONTELONGO**
**United States Air Force**

**ACM S31882**

**14 December 2012**

Sentence adjudged 27 August 2010 by SPCM convened at Vandenberg Air Force Base, California. Military Judge: W. Shane Cohen

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for the Appellant: Major Michael S. Kerr; Major Scott W. Medlyn; and Major Andrew J. Unsicker.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Jason S. Osborne; Captain Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and CHERRY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HARNEY, Judge:

Contrary to his pleas, a special court-martial composed of officer members convicted the appellant of one charge and one specification of wrongful use of Oxycodone, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The members sentenced the appellant to a bad-conduct discharge and reduction to E-1. The convening authority approved the sentence as adjudged.

Before this Court, the appellant raises the following assignments of error: (1) the military judge abused his discretion by admitting a video showing a person other than the

appellant smoking some substance, (2) Air Force officials denied the appellant due process by providing him with de facto assurances of immunity, (3) the appellant's conviction was obtained through vindictive prosecution, (4) the evidence is legally and factually insufficient to support his conviction, (5) the military judge erred by not declaring a mistrial, and (6) the appellant's sentence is inappropriately severe. Although not raised by the appellant, we also will review whether the admission of testimonial hearsay within the report from the drug testing laboratory and the expert's repetition thereof was harmless beyond a reasonable doubt. Having reviewed the record of trial, we find no error that materially prejudices a substantial right of the appellant, and affirm.

*Background*

This is the appellant's second court-martial. His legal journey began in July 2009, when the Air Force Office of Special Investigations (AFOSI) investigated the appellant and other airmen for illegal drug use. On 6 November 2009, the appellant pled guilty to, inter alia, wrongful use of Fentanyl and Dextroamphetamine. A panel of officer members sitting as a special court-martial sentenced the appellant to five months of confinement, restriction to base for two months, forfeiture of $500.00 pay per month for eight months, reduction to E-2, and a reprimand.

On 8 October 2009, the convening authority gave the appellant testimonial immunity to testify against Airman BW, who was also part of the drug ring. BW's court-martial convened on 29 March 2010 and concluded on 31 March 2010. The appellant testified pursuant to the grant of immunity regarding BW's use and distribution of Fentanyl. BW was acquitted. On 7 April 2010, the AFOSI sought and received authorization to search the appellant's room and urine. The search authorization was based on a controlled buy for Oxycodone on 6 April 2010 that targeted another Airman but which implicated the appellant. The appellant provided a urine specimen on 7 April 2010, which tested positive for Oxycodone. The search of his room uncovered a hollowed out pen that tested positive for Oxycodone residue. On 16 June 2010, the Government preferred charges against the appellant for wrongful use of Oxycodone between on or about 1 April 2010 and 7 April 2010. Additional facts will be included as necessary in the body of this opinion.

*Admissibility of Video*

Part of the prosecution's case rested upon the testimony of an AFOSI confidential source, JM, and a video he recorded on his cell phone. As a confidential source, JM was assisting with an AFOSI investigation of Airman AL. JM testified that, on 6 April 2010, he gave AL, in the appellant's presence, $120.00 for three Oxycontin pills. The three Airmen agreed to meet later in the appellant's room so JM could receive his pills. When they met in the appellant's room later in the evening, JM received the pills from AL. JM testified that, after he received the pills from AL, the appellant gave him a pill bottle to

hold the drugs. JM stated that AL decided to smoke his pills, at which point JM pulled out his cell phone and recorded the scene. The video depicts AL kneeling on the floor smoking the Oxycontin pill using foil paper. AL has a lighter underneath the foil paper. He is holding a hollowed out pen to his mouth and inhaling the fumes from the pills. The video shows the appellant in the background near a window. Upon leaving the appellant's room, JM turned the video and Oxycontin pills over to the AFOSI.

The appellant argues that the military judge abused his discretion by admitting the video because it shows AL and not the appellant smoking some type of substance.[1] 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); *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005); *United States v. Gilbride*, 56 M.J. 428, 430 (C.A.A.F. 2002); *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997); *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). An abuse of discretion occurs when the findings of fact are clearly erroneous or the conclusions of law are based on an erroneous view of the law. *United States v. Hollis*, 57 M.J. 74, 79 (C.A.A.F. 2002). 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.'" *White*, 69 M.J. at 239 (citations omitted).

We find that the military judge did not abuse his discretion when he admitted the video over defense objection. In his ruling, the judge found the video relevant and, after conducting a Mil. R. Evid. 403 balancing test, concluded that the probative value was not substantially outweighed by the danger of unfair prejudice. The military judge noted that the defense did not object to JM testifying about what he saw even without the video and that the video did not contain any shocking images:

> I mean, I don't see that what's there is so egregious that I'm worried about it shocking the conscience of the members. I mean, I think there is more danger with a child pornography case and seeing a child pornography image that there is, you know, that kind of shocking the conscience type stuff than seeing [AL]. In fact, your client's actions, if anything, appear fairly innocuous . . . .

The military judge continued:

> [T]here being no objection to the testimony [of JM], I do find that there is some relevance there; knowledge, the accused being present in the room where there was access to drugs. I mean, there is potential relevance there.

[1] The appellant raises this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

> Like I said, if [JM's] going to testify about it under no defense objection, I definitely don't see that this video – and if someone disagrees later, I just don't see how it would be an increasingly unfair prejudice on the part of the accused. In weighing the balancing test I don't believe its probative value is substantially outweighed by the danger of unfair prejudice when the witness can testify about it. It's not a gory image, it's nothing.

In our opinion, the military judge's ruling was not "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *White*, 69 M.J. at 239.

*De Facto Immunity from Prosecution*

In his next assignment of error, the appellant argues that the appellant was denied due process because Air Force officials provided him with de facto immunity from prosecution.[2] We disagree.

The appellant filed a pretrial motion to dismiss the charges against him on the grounds that his immunized testimony against BW had been used to establish the investigation and evidence against him in the case sub judice. Specifically, the appellant argues that the Government failed to "wall off" members of the prosecution who interviewed and prepared the appellant for his testimony against BW from any involvement in his later prosecution. The military judge conducted an extensive hearing on the motion, taking testimony from Special Agent JPL, and Captains AH, DR, CM, and SR.[3] The military judge considered the defense motion, Government response, evidence, and arguments. He denied the motion and issued extensive findings of fact and conclusions of law.

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[2] The appellant raises this issue pursuant to *Grostefon*.

[3] Special Agent JPL was the lead investigator in the case against AL that implicated the appellant. Captain AH was initially detailed as trial counsel to prosecute the appellant in this case until 2 August 2010**.** Captains CM and DR were then detailed as the trial counsel in this case. The military judge found that JPL did not use the appellant's immunized testimony to draft any affidavits related to the search authorizations in this case. The judge also found that AH did not use the appellant's immunized testimony to draft the charge in this case, but based her charging recommendation and proof analysis on the evidence obtained during the investigation initiated on 1 April 2010. Captain SR was the Chief of Military Justice during the initial investigation and prosecution of the appellant, during BW's court-martial, and during the investigation of AL. After issuing his findings of fact and conclusions of law, the military judge warned the prosecution to do a better job of taking care of immunized testimony. The judge noted that the prosecution was "lucky" that the appellant had not said anything in his immunized testimony that was related to this case. He continued by saying:

> As an office, I know you guys are taking the brunt of my frustration right now, but I have to put it on the record, because I feel it needs to be in the record. What bothers me the most is, like I say, I mean, it doesn't change my ruling on what the law is and the facts that were, but this is where [the Court of Appeals for the Armed Forces] gets upset with legal offices is because legal offices need to have a little bit more respect for immunized testimony than what we've seen here.

We agree with the military judge on this point.

Whether the Government has carried its burden to show, by a preponderance of the evidence, the appellant's prosecution was based on sources independent of the immunized testimony is a preliminary question of fact. We will not overturn a military judge's resolution of that question unless it is clearly erroneous or is unsupported by the evidence. *United States v. McGeeney*, 44 M.J. 418, 423 (C.A.A.F. 1996). The Supreme Court has held that the Government may not use testimony compelled by a grant of immunity. *Kastigar v. United States*, 406 U.S. 441, 454, 458-459 (1972). The Government has a "heavy burden" to show non-use of immunized testimony. The Government must do more than negate the taint; rather, the prosecution has the "affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Id*. at 460.

Our superior court has detailed four factors to consider when deciding whether the Government's evidence against an appellant was obtained from a source wholly independent of the immunized testimony. *See United States v. England*, 33 M.J. 37 (C.M.A. 1991); *United States v. Gardner*, 22 M.J. 28 (C.M.A. 1986). Those factors are as follows: (1) Did the appellant's immunized statement reveal anything which was not already known to the Government by virtue of the appellant's own pretrial statement? (2) Was the investigation against the appellant completed prior to the immunized statement? (3) Had the decision to prosecute the appellant been made prior to the immunized statement? (4) Did the trial counsel who had been exposed to the immunized testimony participate in the prosecution? *England*, 33 M.J. at 38-39; *Gardner*, 22 M.J. at 31-32.

In this case, the military judge found that the appellant's crime occurred after he gave the immunized testimony against BW. As such, the judge framed the issue as follows:

> Does the fact that members of the prosecution and investigative team had knowledge of prior immunized testimony from an accused on a wholly unrelated case and matter for which the accused is not currently being tried and which predated the discovery of new evidence related to an entirely new criminal offense create a presumption of taint sufficient that the government must prove by a preponderance of the evidence that such prior testimony played no part in the current prosecution?

Although the military judge found that this scenario created a "presumption of taint," he concluded that the Government satisfied its burden of proof: "[T]here is no evidence that the immunized testimony of the accused led to the discovery of the evidence in this case."

The judge summarized his findings and rationale related to the four factors from *England* and *Gardner* [4] but declined to apply them prospectively to the crime at issue in this case:

> Although this court does not foreclose the possibility that there could be a case in which the criteria could be applied to future investigations and cases unknown to the government at the time of the accused's immunized testimony, this court finds that common sense and legal precedent would require at least some modicum of evidence connecting the contents of the accused's prior statements to the opening of an investigation or the use of evidence at trial. In this case, the evidence presented at the hearing indicated just the opposite. There was nothing presented by [the appellant] that led to the investigation of Airman Basic [AL] or the discovery of the [appellant] with Airman Basis [AL] by the confidential source on the day of 6 April.

Based on the record of trial, we find that the military judge thoroughly addressed this issue and memorialized his decision in his detailed findings of fact and conclusions of law. In our opinion, the military judge's decision to deny the appellant's motion was not clearly erroneous or unsupported by the evidence. *McGeeney*, 44 M.J. at 423.

*Vindictive Prosecution*

The appellant alleges that his conviction should be set aside and dismissed with prejudice because of vindictive prosecution.[5] He claims that he was singled out for prosecution in bad faith because of BW's acquittal.

Allegations of vindictive prosecution are reviewed de novo. *United States v. Argo*, 46 M.J. 454, 463, (C.A.A.F. 1997). "To support a claim of selective or vindictive

[4] The military judge stated as follows:

> [T]his court declines to apply the four Gardner criteria, 22 M.J. 28, 1986, prospectively in this case. However, in order to be consistent with prior cases, this court will apply them with respect to the testimony provided at the previous trial.
>
> Did the accused's statement reveal anything which was not already known to the government by virtue of the accused's own pretrial statement? Yes. The government learned that the accused had used Adderall with Airman [BW], and that the accused had not disclosed this information previously to the OSI. Two, was the investigation against the accused completed prior to the immunized statement? Yes. The investigation at issue against the accused was completed, and he had already been tried and convicted at court-martial for use of Fentanyl and Adderall. Three, had the decision to prosecute the accused been made prior to the immunized statement? Yes. The accused had already been tried and convicted at the time the statement was made, and those statements were only made with respect to the offenses to which he had already been tried and convicted. Four, did the trial counsel, who had been exposed to the immunized testimony, participate in the prosecution? Not at that time.

[5] The appellant raises this issue pursuant to *Grostefon*.

prosecution, an accused has a 'heavy burden' of showing that 'others similarly situated' have not been charged, that 'he has been singled out for prosecution,' and that his 'selection . . . for prosecution' was 'invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.'" *Id.* at 463 (quoting *United States v. Garwood*, 20 M.J. 148, 154 (C.M.A. 1985), *quoted in United States v. Hagen*, 25 M.J. 78, 83 (C.M.A. 1987)).

We find that the appellant was not singled out for prosecution. BW was tried on 29 March 2010 and acquitted. Shortly thereafter, the AFOSI initiated an investigation of AL that led to the appellant's use of Oxycontin. The AFOSI sought, received, and executed a search authorization of his dormitory room and his urine. The appellant has not shown that any of the impermissible reasons for prosecuting him were present in this case.

*Legal and Factual Sufficiency*

The appellant next argues that the evidence was legally and factually insufficient to support his conviction for wrongful use of Oxycodone.[6] We disagree.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder 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 *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In resolving legal-sufficiency questions, "[we are] bound to draw every reasonable inference from the evidence in favor of the prosecution." *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993) (quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)); *see also United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

We have examined all the evidence admitted at trial. The evidence consisted of, inter alia, the appellant's positive urinalysis for Oxycodone; the testimony of JD, who

[6] The appellant raises this issue pursuant to *Grostefon*.

used Oxycondone with the appellant; the testimony of JM, who saw the appellant in the presence of Oxycodone less than 24 hours before the appellant's urinalysis; and the hollowed out pen seized from the appellant's room that tested positive for Oxycontin residue. We have carefully weighed and considered the evidence in the light most favorable to the prosecution. We have made allowances for not having personally observed the witnesses. We have paid particular attention to the matters raised by the appellant. We find the evidence legally and factually sufficient to support his conviction and are convinced beyond a reasonable doubt that the appellant is guilty of the charge and specification of which he was convicted.

*Failure to Declare a Mistrial*

During trial defense counsel's findings argument, the fire alarm bell sounded in the courtroom. The parties, military judge, and the members evacuated. When court reconvened, the military judge offered trial defense counsel the option to start her argument from the beginning or to readjust her argument as appropriate. The military judge stated that, during the fire alarm, he took precautions to ensure that there were no "co-minglings [sic], cross-connections, anything along those lines, among witnesses, all those sorts of things." Assistant trial defense counsel moved for a mistrial, which the trial judge denied, stating that he did not find the incident rose to the level of a mistrial or created any prejudice. In an abundance of caution, however, the military judge asked each member if they recalled the trial defense counsel's argument up to the point they evacuated the courtroom. All members replied "yes." Trial defense counsel then restarted her argument, recapped her earlier points for the members, and finished without any further interruption. The appellant asserts that the military judge erred by not declaring a mistrial.[7]

We review a military judge's ruling on the decision whether to grant a mistrial for an abuse of discretion. *See United States v. Lavender*, 46 M.J. 485, 489 (C.A.A.F. 1997). "As a matter of military law, the decision to declare a mistrial is within the sound discretion of the military judge." *United States v. Rosser*, 6 M.J. 267, 270-71 (C.M.A. 1979). Additionally, a mistrial is a "drastic remedy" to be used sparingly so as to prevent manifest injustice. *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990). In this case, the judge gave trial defense counsel the option on how to proceed with her argument, polled each member to determine their recall, and determined that it was appropriate to press forward with the proceedings. Under these circumstances, we find that the military judge acted appropriately and did not abuse his discretion.

[7] The appellant raises this issue pursuant to *Grostefon*.

*Sentence Severity*

The appellant asserts that his sentence was inappropriately severe when compared to that of JD and BW.[8] We have reviewed the appellant's sentence and find it was not inappropriately severe.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ. We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). Additionally, "[t]he Courts of Criminal Appeals are required to engage in sentence comparison only 'in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.'" *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). Sentence comparison is generally inappropriate unless this Court finds that any cited cases are "closely related" to the appellant's case and the sentences are "highly disparate." *Lacy*, 50 M.J. at 288. "[A]n appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.' If the appellant meets that burden . . . then the Government must show that there is a rational basis for the disparity." *Id.*

We do not find sentence comparison appropriate in this case. BW was tried and acquitted of his alleged drug use. This leaves us without a sentence to compare with that received by the appellant. The members were aware of JD's misconduct, non-judicial punishment, and grant of immunity. Even so, they adjudged a sentence against the appellant that included a bad-conduct discharge, which was within the range of permissible options available to the members. We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all other matters contained in the record of trial. We find that the approved sentence was clearly within the discretion of the convening authority, was appropriate in this case, and was not inappropriately severe.

[8] The appellant raises this issue pursuant to *Grostefon*.

*Testimonial Hearsay*

Although not raised by the appellant, we specified the following issue for review: whether the admission of testimonial hearsay within the drug testing report (DTR) and the expert's repetition of testimonial hearsay were harmless beyond a reasonable doubt. We conclude that the admission of the testimonial hearsay was harmless beyond a reasonable doubt.

The Government offered the DTR, showing that the appellant tested positive for Oxycodone. The DTR consisted primarily of machine-generated printouts and various routine chain of custody entries that do not review, summarize, or certify any results. Other documents in the DTR, however, do involve review or certification of results. Specifically, the DTR contains a DD Form 2624, *Specimen Custody Document – Drug Testing* (February 1998), with the certification of a Laboratory Certifying Official (LCO) that "the laboratory results indicated on this form were correctly determined by proper laboratory procedures, and they are correctly annotated." In this case, the LCO was Jai Dev, who did not testify at trial. In addition, the DTR contains reviews of initial immunoassay, rescreen immunoassay, and gas chromatograph/mass spectrometry (GC/MS) confirmatory tests signed by multiple reviewing authorities, of whom none testified at trial.

The Government called Dr. HN, an expert in pharmacology and a LCO at the Air Force Drug Testing Laboratory (AFDTL), to explain the DTR. Dr. HN testified that she was familiar with the procedures at the AFDTL, particularly the immunoassay test and the GC/MS. Dr. HN's testimony consisted in large part of analyzing and explaining the machine generated report for the appellant's positive urinalysis test. She also provided her own expert opinion of the results. On cross-examination, the trial defense counsel questioned Dr. HN about some prior issues with the AFDTL machines and personnel, including incidents involving tube-swapping and mispouring, plus the suspension, decertification, and retraining of some individuals who participated in the testing of the appellant's sample. On re-direct, Dr. HN stated that she saw nothing in the documentation related to this case showing a "mix-up" with the appellant's sample.

At the outset, we first consider whether portions of the drug testing report contain testimonial hearsay. We find that the LCO's certification on the DD Form 2624 that "the laboratory results indicated on this form were correctly determined by proper laboratory procedures, and they are correctly annotated" is testimonial hearsay. *See United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011). Additionally, we find that the rescreen and GC/MS reviews, as well Dr. HN's reference to them, constituted testimonial hearsay. Analysts doing a rescreen and confirmation test on a specimen identified as presumptively positive "must reasonably understand themselves to be assisting in the production of evidence." *Id.* at 302-03 (footnotes omitted).

Having found testimonial hearsay was erroneously admitted, we must evaluate its impact on the case. In assessing constitutional error, the question is not whether the admissible evidence is sufficient to uphold conviction but "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23 (1967), *quoted in United States v. Blazier*, 69 M.J. 218, 227 (C.A.A.F. 2010). Among the factors we consider are (1) the importance of the testimonial hearsay to the prosecution's case, (2) whether the testimonial hearsay was cumulative, (3) the existence of other corroborating evidence, (4) the extent of confrontation permitted, and (5) the strength of the prosecution's case. *Sweeney*, 70 M.J. at 306 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). We review de novo whether a constitutional error is harmless beyond a reasonable doubt. *United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005). Where the prosecution has only a laboratory report to prove its case, testimonial hearsay that validates the laboratory results increases in importance and, depending on the posture of the case, may have a reasonable possibility of influencing the verdict. Such is not the case here.

Having applied the *Van Arsdall* factors to the record in this case, we are convinced that the erroneous admission of testimonial hearsay was harmless beyond a reasonable doubt. The court members heard the testimony of JD, who used Oxycodone with the appellant, and the testimony of JM, who saw the appellant in the presence of Oxycodone less than 24 hours before the appellant's urinalysis. The members heard testimony from AFOSI agents who conducted the search of the appellant's room, where they found the hollowed out pen. The members heard testimony from Dr. LF, the lab expert who tested the hollowed out pen and confirmed it tested positive for Oxycodone. They heard Dr. HN explain multiple machine-generated printouts of urinalysis testing of the appellant's urine. They heard Dr. HN offer an independent opinion that the tests showed the presence of Oxycodone in the appellant's urine. They heard Dr. HN acknowledge possible problems at the laboratory but that those problems did not impact the appellant's testing. We find that the testimonial hearsay was cumulative with the expert's own opinion; was corroborated by the Government's evidence; and had little, if any, impact on the overall presentation of the case. Therefore, we do not find a reasonable possibility that the testimonial hearsay evidence contributed to the appellant's conviction.

## *Conclusion*

We have reviewed the record in accordance with Article 66, UCMJ. The findings and the sentence are determined to be correct in law and fact and, on the basis of the entire record, should be approved. [9] *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F.

[9] We find that the appellate delay in this case was harmless beyond a reasonable doubt. *United States v. Moreno*, 63 M.J. 129, 135–36 (C.A.A.F. 2006) (reviewing claims of post-trial and appellate delay using the four-factor analysis in *Barker v. Wingo*, 407 U.S. 514 (1972)).

2000). Accordingly, the findings of guilty and the sentence are

AFFIRMED.

OFFICIAL


STEVEN LUCAS
Clerk of the Court