UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

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**UNITED STATES**

**v.**

**Technical Sergeant LANTZ E. NAVE**
**United States Air Force**

**ACM 36851**

**10 December 2008**

Sentence adjudged 17 June 2006 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Nancy J. Paul.

Approved sentence: Dishonorable discharge, confinement for 5 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Major Christopher L. Ferretti, and Captain Lance J. Wood.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Donna S. Rueppell, and Major Carrie E. Wolf.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

OPINION OF THE COURT



HELGET, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of one specification of conspiring to possess cocaine with the intent to distribute, one specification of possessing cocaine with the intent to distribute, two specifications of soliciting others to distribute cocaine, and one specification of soliciting another to purchase and possess marijuana, in violation of Articles 81, 112a, and 134, UCMJ, 10 U.S.C. §§ 881, 912a, 934. The convening authority approved the adjudged sentence to a dishonorable discharge, confinement for

five years, forfeiture of all pay and allowances, and reduction to E-1. Before this Court, the appellant asserts the following 13 assignments of error:[1]

I.

WHETHER THE APPELLANT'S COURT-MARTIAL LACKED JURISDICTION OVER HIM WHERE HE WAS NOT COURT-MARTIALED IN HIS STATUS AS A RETIREE AND THE SOLE PURPOSE FOR HIS RECALL TO ACTIVE DUTY FROM RETIREMENT WAS TO EXERCISE ACTIVE DUTY COURT-MARTIAL JURISDICTION OVER HIM.

II.

WHETHER THE APPELLANT'S SENTENCE, WHICH INCLUDED CONFINEMENT FOR FIVE YEARS AND A DISHONORABLE DISCHARGE, WAS INAPPROPRIATELY SEVERE.

III.

WHETHER THE GUILTY FINDINGS TO THE SPECIFICATION AND CHARGE OF CHARGE I ARE LEGALLY AND FACTUALLY INSUFFICIENT WHEN NO EVIDENCE WAS PRESENTED BY THE PROSECUTION THAT THE FOUR PARTIES TO THE ALLEGED CONSPIRACY REACHED A COMMON UNDERSTANDING TO ACCOMPLISH THE OBJECT OF THE CONSPIRACY.

IV.

WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUSTAIN THE APPELLANT'S CONVICTION OF SOLICITATION TO WRONGFULLY DISTRIBUTE COCAINE IN KANSAS CITY, MISSOURI, AS ALLEGED IN SPECIFICATION 1 OF THE ADDITIONAL CHARGE, WHEN NO EVIDENCE WAS PRESENTED BY THE GOVERNMENT THAT THE APPELLANT INTENDED "FRANK" TO COMMIT THE OFFENSE OF WRONGFUL DISTRIBUTION OF COCAINE ON THE DATES PRIOR TO THE APPELLANT'S INTRODUCTORY MEETING WITH "PRIMO" ON 13 FEB 2003.

V.

WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUSTAIN THE APPELLANT'S CONVICTION OF SOLICITATION TO

[1] Appellant raises issues VI, VII, VIII, IX , XI, and XII pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

DISTRIBUTE COCAINE IN KANSAS CITY, MISSOURI AS ALLEGED IN SPECIFICATION 3 OF THE ADDITIONAL CHARGE, WHEN NO EVIDENCE WAS PRESENTED BY THE GOVERNMENT THAT THE APPELLANT INTENDED MR. GB AND MR. JA TO COMMIT THE OFFENSE ON THE SAME DATE AS THE APPELLANT'S FIRST MEETING WITH THEM, AS INSTRUCTED BY THE MILITARY JUDGE.

VI.

WHETHER THE MILITARY JUDGE ERRED IN DENYING THE APPELLANT'S MOTION TO DISMISS THE CHARGES AND SPECIFICATIONS ON THE GROUNDS THAT THE GOVERNMENT ENTRAPPED THE APPELLANT IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION.

VII.

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO DISQUALIFY HERSELF UPON MOTION OF THE APPELLANT.

VIII.

WHETHER THE CHARGES AND SPECIFICATIONS MUST BE DISMISSED BECAUSE THE COURT-MARTIAL WAS NOT COMPOSED IN COMPLIANCE WITH RULES FOR COURTS-MARTIAL (R.C.M.) 201(b)(2) AND 502(a)(1), AND ARTICLE 25, UCMJ, 10 U.S.C. § 825, AND THEREFORE, LACKED JURISDICTION.

IX.

WHETHER THE MILITARY JUDGE ERRED IN NOT GRANTING THE DEFENSE MOTION FOR A MISTRIAL WHEN THE TRIAL COUNSEL WAS PERMITTED TO ELICIT, OVER DEFENSE OBJECTION, IMPROPER CHARACTER EVIDENCE FROM A GOVERNMENT WITNESS.

X.

WHETHER THE APPELLANT WAS DENIED DUE PROCESS WHEN THE MILITARY JUDGE FAILED TO ORDER PRODUCTION OF THE FBI OFFICE OF PROFESSIONAL RESPONSIBILITY INQUIRY CONCERNING THE CONDUCT OF FBI AGENTS AND THE KEY CONFIDENTIAL INFORMANT, "FRANK," RELATIVE TO THE SEXUAL ASSAULT OF A PROSTITUTE, ALLEGED TO HAVE BEEN COMMITTED BY "FRANK" AND OTHER PAID FBI

CONFIDENTIAL INFORMANTS WHILE ENGAGED IN OPERATION LIVELY GREEN AND SUBSEQUENTLY SUPPRESSED BY THE FBI AGENTS HANDLING "FRANK."

XI.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION IN GRANTING THE GOVERNMENT'S MOTION TO SUPPRESS WITNESS TESTIMONY CONCERNING THE ALLEGED SEXUAL ASSAULT OF A PROSTITUTE BY "FRANK" AND OTHER PAID FBI CONFIDENTIAL INFORMANTS WHILE ENGAGED IN OPERATION LIVELY GREEN AND SUBSEQUENTLY SUPPRESSED BY THE FBI AGENTS HANDLING "FRANK."

XII.

WHETHER THE MILITARY JUDGE ERRED IN SUSTAINING THE ASSISTANT TRIAL COUNSEL'S OBJECTION TO THE DEFENSE COUNSEL'S FINDINGS ARGUMENT DISCUSSING MATTERS OF COMMON KNOWLEDGE, NAMELY, THE 9/11 TERRORIST ATTACKS.

XIII.

WHETHER THE FINDINGS AND SENTENCE SHOULD BE SET ASIDE UNDER THE CUMULATIVE ERROR DOCTRINE.

*Background*

In January 2003, the appellant served as the Noncommissioned Officer in Charge (NCOIC) of the Hazardous Material Pharmacy at Davis-Monthan Air Force Base (AFB), Arizona. The appellant had been on active duty since 1 September 1983 and was serving his last assignment, as he retired on 30 September 2003.

On 23 January 2003, the appellant was recruited by then-Airman First Class (A1C) CB, a subordinate in the appellant's unit at Davis-Monthan AFB, to participate in an illegal drug trafficking operation from Tucson, Arizona to Phoenix, Arizona. Unbeknownst to the appellant and A1C CB, the drug trafficking operation was actually a reverse sting undercover operation, known as "Operation Lively Green," conducted by the Federal Bureau of Investigation (FBI). Operation Lively Green started as an undercover operation investigating allegations of corrupt public officials. Sometime in 2001, the FBI received information from a cooperating witness, named Specialist FA, hereinafter referred to as "Frank," that an Arizona Army National Guard recruiter by the name of DP had offered to sell Frank cocaine out of the trunk of his car. At this same time, the FBI also learned that DP and another Arizona Army National Guard recruiter

were transporting drugs throughout the United States for a known Mexican drug trafficking family in Arizona. In response, the focus of Operation Lively Green became drug trafficking.

During Operation Lively Green, Frank played the role of a "front man" or FBI cooperative witness, acting as a member of a drug cartel, a wholly fictional enterprise created for the purpose of carrying out the operation. He was paid $2,000 per month plus expenses to ensure he presented himself as a member of a major drug organization. The FBI paid him approximately $225,000 during the course of the two and a half year operation and for other roles he played with the FBI. The subjects of the operation were essentially identified and recruited by other subjects in the operation. A potential subject would meet with Frank, who would have them recruit others who were willing to participate in drug trafficking. The subjects were monetarily rewarded anywhere from $1,000 to $5,000 for finding new recruits. The amount of the reward depended upon the rank and importance of the individual recruited.

All potential subjects were interviewed by Frank in what is known as a predication meeting. The purpose of the predication meeting was to determine if the potential subjects were predisposed to commit a crime. Frank would be "wired" and the conversations were recorded. FBI agents would first listen to the tapes and then send them to their higher headquarters and a United States Attorney's office for review and legal guidance. If an individual expressed or indicated hesitancy about participating in the scheme, the FBI would not permit that individual to participate in the operation. Once a group was properly vetted, the FBI would orchestrate their transport of FBI-provided cocaine from Tucson to Phoenix or Las Vegas, Nevada.

One of these subjects was A1C CB, who had already participated in one of the drug trafficking operations. A1C CB was recruited by Sergeant M. A1C CB informed the appellant that he could make some extra money if he participated. When A1C CB and the appellant first discussed the operation, the appellant was hesitant but did inquire about the details of the operation and the legitimacy of the operation. A1C CB then contacted Frank for the predication meeting.

After obtaining FBI approval, Frank set up a predication meeting with the appellant and A1C CB on 23 January 2003 at a Fuddruckers restaurant in Tucson. While Frank was conducting the predication meeting at Fuddruckers, two FBI agents were at an adjacent table in the restaurant providing surveillance. Also present were another cooperating witness and two other subjects, Staff Sergeant (SSgt) RS and Mr. DH. After lunch, Frank, the appellant, and A1C CB went outside to the parking lot and continued their discussion in Frank's vehicle. Frank was wired the entire time and his meeting with the appellant was audio recorded.

While in the vehicle, Frank described the details of the drug trafficking operation to the appellant. The operation was scheduled for 13 February 2003. The participants would be transporting 30 kilograms of cocaine from Tucson to Phoenix. They would be using a government vehicle (GOV) and they would be required to wear their Battle Dress Uniforms (BDUs). The cocaine would be delivered to Frank's "cousin" and "uncle" in Phoenix, who were actually undercover FBI agents. The appellant would be paid $3,000 for the first drug run and the amount would increase for subsequent runs. Additionally, the appellant was told that he could make between $2,000 and $5,000 for finding new recruits. The amount varied depending upon the status of the recruit. He would be paid $2,000 for recruiting noncommissioned officers, but officers and Border Patrol agents were worth more. There was no requirement to find recruits, it was just an incentive. Frank never pressured the recruits to participate in the drug runs, and there were some recruits who decided not to participate after the predication meetings.

During the predication meeting, the appellant expressed that he had experience with trafficking drugs to Kansas City, Missouri, and he and his family could handle transporting five to six kilos of cocaine a week. He described Kansas City as the drug Mecca of the Midwest and said that he actually had some "weed" (marijuana) going to Kansas City on 24 January 2003. In addition to Kansas City, the appellant claimed he could open up new markets in other locations such as Atlanta, Georgia; South Carolina; Chicago, Illinois; and Kalamazoo, Michigan. Frank informed the appellant he would first have to speak with "Primo,"[2] the undercover FBI agent playing Frank's cousin in the operation, before he could agree to trafficking drugs to new markets. Frank explained that he planned to use the appellant twice a month but the appellant wanted to work every day. The appellant also expressed interest in trafficking drugs to Las Vegas. During this meeting, the appellant expressed his knowledge of drug trafficking by referring to cocaine as "blow keys," asking what a "bird" went for, meaning the cost of a kilogram of cocaine, using the term "Conjero," which is the name of a drug dealer in Mexico, mentioning the phrase "locked up in a cage," which is street talk for being arrested, and using the term "screaming," which refers to someone who talks to the authorities. At the end of their conversation, the appellant reminded Frank that he could open up future markets in Kansas City as well as other cities.

On 4 February 2003, the appellant called Frank because he had found a technical sergeant who was interested in being a part of the operation, provided the technical sergeant was paid $5,000. On 5 February 2003, at the request of the appellant, Frank met the appellant near a Famous Sam's in Tucson. The appellant again discussed working with Frank to transport cocaine to Kansas City and advised about the best routes to take to avoid the law enforcement checkpoints. He volunteered that he had just taken two "keys" of cocaine up to Kansas City a couple of months prior. If Frank's cocaine was pure, the appellant was interested in buying some, and again reiterated that he was

[2] "Primo" is the Spanish word for cousin.

interested in opening up new markets. The appellant also stated that he was "sitting" on 56 pounds of marijuana, and offered to sell the marijuana to Frank for $550 a pound. The appellant claimed that he had "mules," referring to a person who transports drugs, who had transported marijuana for him in the past, and further claimed that his brother-in-law actually had been caught on a previous drug run. The appellant further tried to convince Frank the technical sergeant he recruited should be paid $5,000. In this conversation, the appellant also showed his knowledge of drug trafficking by using such terms as "stamped and sealed," referring to the way cocaine is wrapped and the trademarks used by the producers of the cocaine, the term "cheddar" which is another word for money, and "rocked-up" which refers to when cocaine changes from powder to rock form.

According to Frank, the appellant spent much more time discussing his prior drug experience than any of the other potential subjects. The appellant was also much more knowledgeable about drug trafficking than the other subjects. He knew prices, locations, and lingo. Additionally, a friend of the appellant's, Mr. RM, testified concerning an incident wherein the appellant asked him to rent a vehicle for the appellant's brother-in-law, who was caught by the authorities with 30 to 100 pounds of marijuana in the rental vehicle.

On 13 February 2003, the scheduled drug run from Tucson to Phoenix occurred as planned. Eight subjects, including the appellant, met at an Eegee's restaurant in Tucson. They then proceeded in two GOVs to a Cracker Barrel restaurant located just outside Tucson, where they met up with Frank and the other undercover agents. The cocaine was delivered and given to the subjects who were all in BDUs. Approximately 30 kilograms of cocaine contained in four locked black bags were loaded in the trunks of the two separate GOVs. A1C CB was the driver of one vehicle and the appellant was sitting in the front passenger seat of this vehicle. Airman Basic AW was sitting in the back seat along with Mr. DH. The other vehicle was driven by SSgt RS. After the cocaine was loaded in the vehicles, all participants proceeded to a resort in Phoenix. Frank's vehicle went first, followed by the two GOVs. A fourth vehicle driven by Special Agent HD followed the two GOVs. Once they arrived at the drop off location in Phoenix, the subjects exited their vehicles. A1C CB opened the trunk to his vehicle and retrieved the bags of cocaine. The cocaine was delivered to a room in the resort and given to Special Agent JA of the FBI who was playing the role of Frank's cousin, Primo. Also present was Special Agent GB.

The cocaine was placed on a table. The appellant and the other subjects then proceeded to another room in the resort. Eventually, each subject was called, one-by-one, to the room where the cocaine was located, so the undercover agents could verify that their involvement was voluntary and they weren't being coerced into trafficking drugs. During the undercover agents' meeting with the appellant, he reiterated that he had family connections in Kansas City, South Carolina, and Atlanta. The appellant wanted the undercover drug trafficking organization to provide the cocaine for him to

transport. He was willing to contact his family immediately because they were standing by, ready to participate. Prior to his departure, the appellant was paid $3,000 for transporting the cocaine to Phoenix. This meeting with the appellant was both audio and video recorded.

On 23 February 2003 and 1 April 2003, the appellant again contacted Frank to discuss opening new drug markets in Kansas City and other locations.

*Jurisdiction*

The offenses in this case occurred between January 2003 and February 2003. At the time, the appellant was an active duty member of the United States Air Force, assigned to the 355th Supply Squadron, Davis-Monthan Air Force Base.

On 30 September 2003, the appellant received an honorable discharge from the United States Air Force, having served on active duty for twenty years and one month. As a result, the appellant was entitled to receive retirement pay and became a member of the Air Force Inactive Reserve Service.

On 13 May 2005, the Commander, 12th Air Force (12 AF/CC), Davis-Monthan Air Force Base, requested the Secretary of the Air Force recall the appellant to active duty for purposes of trial by court-martial. On 12 July 2005, the Honorable Michael Dominguez, as acting Secretary of the Air Force, ordered the appellant to active duty.

Jurisdiction is a legal question to be reviewed de novo. *United States v. Tamez*, 63 M.J. 201, 202 (C.A.A.F. 2006) (quoting *United States v. Harmon*, 63 M.J. 98 (C.A.A.F. 2006)). The interpretations of statutes and regulations are questions of law to be reviewed de novo. *United States v. Falk*, 50 M.J. 385, 390 (C.A.A.F. 1999).

Article 2, UCMJ, 10 U.S.C. § 802, provides that retired members of a regular component of the armed forces who are entitled to pay are subject to the UCMJ. Article 2(a)(4), UCMJ. Additionally, Article 2(d), UCMJ, provides that a member of a reserve component, not on active duty, may be ordered to active duty involuntarily for the purpose of trial by court-martial. Further, Article 3(a), UCMJ, 10 U.S.C. § 803(a), provides that a person charged with having committed an offense while subject to the UCMJ is not relieved from amenability to trial by court-martial by reason of termination of that person's former status.

Department of Defense Directive (DoDD) 1352.1, *Management and Mobilization of Regular and Reserve Retired Military Members*, ¶ 6.3.3 (2 Mar 1990), provides that the Secretary of a Military Department may order any retired Regular member to active duty without the member's consent at any time to perform duties deemed necessary in the interests of national defense. This includes the authority to order a retired member

subject to the UCMJ to active duty to facilitate the exercise of court-martial jurisdiction. Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 2.9 (26 Nov 2003), provides for the court-martial of retired Regular Air Force personnel when their "conduct clearly links them with the military or is adverse to a significant military interest of the United States."

The appellant's position is that while he may be subject to court-martial jurisdiction as a retiree under Article 2(a)(4), UCMJ, he should not have been recalled to active duty. The appellant relies on the provision of DoDD 1352.1, ¶ 6.3.3, which states, "A retired member may not be involuntarily ordered to active duty solely for obtaining court-martial jurisdiction over the member." However, the appellant was not recalled to active duty to obtain jurisdiction as the Air Force already had jurisdiction over him due to the fact he committed the offenses while on active duty. The appellant was recalled to active duty simply to "facilitate" the exercise of court-martial jurisdiction, which was specifically authorized under DoDD 1352.1. Accordingly, the government had jurisdiction to court-martial the appellant after his recall to active duty from retirement.

*Severity of Sentence*

The next issue is whether the appellant's sentence is 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, 10 U.S.C. § 866(c). 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).

The appellant was one of 12 airmen prosecuted for their involvement in Operation Lively Green. Comparing the approved sentences of those courts-martial, the appellant asserts that his sentence is too severe and that we should disapprove the punitive discharge and reduce the period of confinement from five years to three years.

The appellant was convicted of conspiring to possess cocaine with the intent to distribute, possessing cocaine with the intent to distribute, two specifications of soliciting others to distribute cocaine, and soliciting another to purchase and possess marijuana, in violation of Articles 81, 112a, and 134, UCMJ. The maximum possible punishment in this case was a dishonorable discharge, confinement for 45 years, forfeiture of all pay and

allowances, and reduction to E-1. The appellant's approved sentence was a dishonorable discharge, confinement for five years, forfeiture of all pay and allowances, and reduction to E-1. Having reviewed the approved sentences for the other 11 airmen prosecuted as a result of Operation Lively Green, all but 1 received a punitive discharge. The period of confinement ranged from six months to eight years. Of the three airmen convicted of three or more charges, the period of confinement ranged from five to eight years.[3] Considering the offenses committed by the appellant in this case, his approved sentence was consistent with the other airmen similarly situated.

We have given individualized consideration to this particular appellant, the nature and seriousness of his offenses, his record of service, and all other matters contained in the record of trial. Approving the adjudged sentence was clearly within the discretion of the convening authority and was appropriate in this case. Accordingly, we hold that the approved sentence is not inappropriately severe.

*Legal and Factual Sufficiency*

The appellant asserts that the evidence is legally and factually insufficient to sustain findings of guilty to the Article 81, UCMJ, charge and Specifications 1 and 3 of the Article 134, UCMJ, charge. In accordance with Article 66(c), UCMJ, 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 factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)).

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).

The Specification of Charge I (alleging a violation of Article 81, UCMJ) states that on 13 February 2003, the appellant conspired with Mr. DH, A1C CB, and SSgt RS to wrongfully possess cocaine with the intent to distribute. The appellant asserts that there

[3] In *United States v. Scott*, ACM 36514 (A.F. Ct. Crim. App. 28 March 2007) (unpub. op.), cited in the appellant's brief, this Court reduced the approved period of confinement from five to four years. In *Scott*, the accused held the rank of senior airman. In *United Stares v. Dahl*, ACM 36582 (A.F. Ct. Crim. App. 30 January 2008) (unpub. op.), this Court affirmed the approved sentence that included six years confinement. In *Dahl*, the accused held the rank of technical sergeant.

is insufficient evidence in the record of trial to show an "agreement" existed between the alleged co-conspirators. As the military judge instructed, "The agreement in a conspiracy does not have to be in any particular form or expressed in formal words. It is sufficient if the minds of the parties reach a common understanding to accomplish the object of the conspiracy, and this may be proved by the conduct of the parties. The overt act required for this offense does not have to be a criminal act, but it must be a clear indication that the conspiracy is being carried out." This instruction is consistent with the discussion to Article 81, UCMJ. *Manual for Courts-Martial (MCM)*, part IV ¶ 5.c. (2005 ed.). To sustain a finding of guilty to a charge of conspiracy, the agreement need only be implied. *United States v. Phanphil*, 54 M.J. 911, 916 (A.F. Ct. Crim. App. 2001).

There is ample evidence in the record indicating a common understanding existed between the appellant and his three co-conspirators. They all met at the Eegee's restaurant in Tucson and drove together in two GOVs to the Cracker Barrel restaurant just outside Tucson and waited for the delivery of the cocaine. Once the cocaine arrived and was loaded into their vehicles, they transported the cocaine from Tucson to the drop off location in Phoenix and delivered it to the designated recipients. 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. Moreover, after carefully weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt.

Concerning Specification 1 of the Additional Charge (alleging a violation of Article 134, UCMJ), the specification states that the appellant, "Did, on divers occasions, at or near Tucson, Arizona, between on or about 23 January 2003 and on or about 13 February 2003, wrongfully solicit [Frank] to wrongfully distribute cocaine in Kansas City, Missouri, in violation of Article 112a, UCMJ, by requesting that [Frank] distribute some amount of cocaine in or near Kansas City, Missouri." The appellant asserts that there is insufficient evidence showing that the appellant wrongfully solicited Frank to distribute cocaine in Kansas City. Solicitation is "an express or 'implicit invitation to join in a criminal plan.'" *United States v. Williams*, 52 M.J. 218, 220 (C.A.A.F. 2000) (quoting *United States v. Oakley*, 23 C.M.R. 197 (C.M.A. 1957).

In this case, there is ample evidence that the appellant wrongfully solicited Frank to distribute cocaine in Kansas City. During the initial meeting with Frank on 23 January 2003 and again during their meeting on 5 February 2003, the appellant solicited Frank to distribute cocaine in Kansas City, which he described as the drug Mecca of the Midwest. The appellant indicated he could transport five to six kilograms of cocaine a week, at a minimum, and he estimated the price he could obtain per kilogram. The appellant also knew how long it took to drive from Tucson to Kansas City and the various law enforcement checkpoints. When Frank indicated that he first had to speak with Primo, the appellant responded by indicating his people were ready to go at a moment's notice

and that he had just distributed two kilograms of cocaine a couple of months prior. The appellant asserts these statements were merely "puffery" as he was trying to simply convince Frank that he was qualified to be a part of the operation on 13 February 2003. We disagree.

Accordingly, 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, and we are ourselves convinced of the appellant's guilt beyond a reasonable doubt.

Concerning Specification 3 of the Additional Charge, the appellant likewise asserts that the government failed to prove that the appellant wrongfully solicited FBI Special Agents JA and GB to distribute cocaine during their meeting at the resort in Phoenix. However, based upon our review of the record of trial, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt and we are ourselves convinced of the appellant's guilt beyond a reasonable doubt.

*Entrapment*

At trial, the appellant filed a motion to dismiss for violation of the Fifth Amendment due process clause. The appellant asserted that the government's "reverse undercover" operation was so outrageous that it violated his Fifth Amendment due process rights requiring dismissal of the charges and specifications. The military judge denied the motion.

We review this issue de novo. *United States v. Pedraza*, 27 F.3d 1515, 1521 (10th Cir. 1994). While the defense of entrapment pursuant to R.C.M. 916(g) looks at the state of mind of the accused, the defense of entrapment pursuant to outrageous government conduct in violation of appellant's due process rights looks at the government's actions. *United States v. Diggs*, 8 F.3d 1520, 1525 (10th Cir. 1993). That level of outrageous government conduct requiring action to overturn a conviction has been defined as "government enforcement procedures" that are "fundamentally unfair or shocking to a universal sense of conscience which generally includes: coercion, violence or brutality to the person." *United States v. Patterson*, 25 M.J. 650, 651 (A.F.C.M.R. 1987) (citing *United States v. Andrews*, 765 F.2d 1491 (11th Cir. 1985); *United States v. Jenrette*, 744 F.2d 817 (D.C. Cir. 1984)). Government agents are permitted to provide the opportunity to commit a crime using "[a]rtifice and stratagem." *Jacobson v. United States*, 503 U.S. 540, 548 (1992). Finally, our superior court has said, "The latitude given the [g]overnment in 'inducing' the criminal act is considerably greater in contraband cases (drugs, liquor) -- which are essentially 'victim-less' crimes -- than would be permissible as to other crimes, where commission of the acts would bring injury to members of the public. *United States v. Vanzandt*, 14 M.J. 332, 344 (C.M.A. 1982).

We have carefully reviewed the evidence of record and the military judge's extensive and detailed findings of fact and conclusions of law addressing this issue pursuant to pre-trial motion practice. The appellant voluntarily and willingly participated in the transportation of cocaine from Tucson to Phoenix. Additionally, he offered to sell marijuana to Frank, and in his conversations with Frank and other undercover agents, he tried to obtain their participation in transporting cocaine to Kansas City and other cities. He was never threatened or coerced by Frank and was not required to participate.

The FBI's "reverse undercover" operation merely provided the opportunity for the appellant to commit the crimes for which he was convicted. The scheme was not "fundamentally unfair or shocking to the conscience," was a permissible exercise of law enforcement authority, and did not violate the appellant's Fifth Amendment due process rights.

*Recusal*

At trial, the appellant filed a motion to disqualify the military judge primarily on the grounds she had presided over three previous "Lively Green" cases and two of the airmen previously court-martialed would be witnesses in the appellant's case. Also, the military judge had in one of those cases ruled on the entrapment defense which would be raised in the appellant's case.

In her findings of fact, the military judge stated, "I have received no information regarding the evidence to be presented by the parties in this case, absent information provided in motions previously submitted by both parties. I have not formed or expressed an opinion concerning the [a]ccused's guilt or innocence. In fact, I presume the [a]ccused to be innocent of all charges referred against him until his guilt is proven beyond a reasonable doubt." The military judge concluded by stating, "I am satisfied . . . that the [a]ccused can receive a fair and impartial trial with me presiding as the military judge."

"An accused has a constitutional right to an impartial judge." *United States v. McIlwain*, 66 M.J. 312, 313 (C.A.A.F. 2008) (quoting *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999)). Pursuant to R.C.M. 902(a), "a military judge must recuse herself 'in any proceeding in which [her] impartiality might reasonably be questioned.'" *Id.* at 313-14 (quoting R.C.M. 902(a)). Whether the military judge in any given case should disqualify herself is viewed objectively, from the standpoint of a reasonable person with knowledge of all the relevant facts. *Id.* at 314. "Military judges should 'broadly construe' possible reasons for disqualification, but also should not recuse themselves 'unnecessarily.'" *Id.* (quoting *Wright*, 52 M.J. at 141; R.C.M. 902(d)(1)). We review a military judge's decision on the issue of recusal for an abuse of discretion. *Id.* The matter of recusal "is best left to the independent judgment of the military judge."

*United States v. Winter*, 35 M.J. 93 (C.M.A. 1992) (quoting *United States v. Cockrell*, 49 C.M.R. 567 (C.M.A. 1974)).

We find no evidence in the record that the military judge failed to act impartially at any stage of the trial nor that she acted contrary to her stated intent. "Where the military judge makes full disclosure on the record and affirmatively disclaims any impact on [her], where the defense has full opportunity to voir dire the military judge and to present evidence on the question, and where such record demonstrates that [the] appellant obviously was not prejudiced by the military judge's not recusing [herself], the concerns of [R.C.M.] 902(a) are fully met." *United States v. Campos*, 42 M.J. 253, 262 (C.A.A.F. 1995). Such is the case here.

*Court-Martial Composition*

The appellant asserts that the court-martial lacked jurisdiction because the convening authority did not choose the members based on the criteria enumerated in R.C.M. 502(a)(1) and Article 25(d)(2), UCMJ. Specifically, the appellant claims that the convening authority ratified a list of potential nominees improperly selected by the Davis-Monthan AFB military justice paralegal whose only criteria was rank, age and availability. The result was that the appellant's court-martial panel had no African-Americans.

Whether a court-martial panel was selected free from systematic exclusion is a question of law which we review de novo. *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986). The defense shoulders the initial burden of establishing the improper exclusion of qualified personnel from the selection process. *United States v. Roland*, 50 M.J. 66, 69 (C.A.A.F. 1999). The convening authority may rely on his staff to nominate court members. *United States v. Marsh*, 21 M.J. 445, 449 (C.M.A. 1986). An accused "does not have a 'per se' right to have a person of his own race appointed as a member of his court-martial," and must establish that the government has a specific intent to discriminate against him. *United States v. Hodge*, 26 M.J. 596, 600 (A.C.M.R. 1988). We are bound by the military judge's findings of fact unless they are clearly erroneous. *United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1985) (quoting *United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981)).

According to the military judge's findings of fact, in each general court-martial at Davis-Monthan AFB, the military justice section assembles a list of potential court members which is then attached to the Staff Judge Advocate Pretrial Advice and forwarded through the commander of the 355th Wing (355 WG/CC), the special court-martial convening authority (SPCMCA), to the 12 AF/CC, the general court-martial convening authority (GCMCA) for the actual selection of members. The entire base population is used. The Davis-Monthan AFB justice section assembles the list considering a wide arrange of ranks, ages and availability on the potential date of trial.

They eliminate from consideration any member who was from the same unit as the accused or who may have had prior knowledge of the case or (in the appellant's case) another Lively Green case. The military judge found that this same process was used in selecting the court members for the appellant's court-martial.

Prior to selecting the court members, the GCMCA was advised both in writing and orally that he was free to select any member of his command and was not limited to the SPCMCA's proposed list of nominees. The GCMCA was also advised in writing that he was required by Article 25, UCMJ, to select those members who were, in his opinion, best qualified by reason of age, education, training, experience, length of time of service, and judicial temperament. Neither 355 WG/CC nor 12 AF/CC had a policy for inclusion of minority members in the event an accused was a member of a minority group. However, they also did not have a policy for exclusion of minorities in any court-martial. In fact, neither race nor sex was considered when assembling a court-martial panel.

Considering our review of the record of trial and the court member selection process, we are convinced that the convening authority personally selected the members of the court-martial panel using the required criteria under Article 25(d)(2), UCMJ. Accordingly, the court-martial was properly composed.

*Denial of Motion for Mistrial*

During the re-cross examination of Frank concerning the defense of entrapment, the following exchange occurred:

> Q. So what type of people ran on the 13th of February and the other drug runs?
>
> A. What type of people?
>
> Q. Yes. And what I'm referring to is – whether they were the ones that declined or were they the ones that were ready and willing?
>
> A. The people – the kind of people that ran – was the kind that was free-willing, wanted to do it, and *they were corrupted*, ma'am.

(emphasis added).

During a subsequent Article 39(a), UCMJ, session, the trial defense counsel moved for a mistrial on the grounds of prosecutorial misconduct. The military judge denied the motion for mistrial; however, she did give a curative instruction to the members informing them to disregard the witness' answer.

We review a military judge's denial of a motion for a mistrial for an abuse of discretion. *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003). Our superior court has recognized that a mistrial is an unusual and disfavored remedy and should be applied only as a last resort to protect the guarantee for a fair trial. *Id.* (citing *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993)). In many cases a military judge can avoid having to declare a mistrial by giving curative instructions and ensuring that the court members understand the instructions. *United States v. Evans*, 27 M.J. 34, 39 (C.M.A. 1988). Whether the court members were properly instructed is reviewed de novo. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002).

We find that the military judge properly instructed the members in this case, and that the instructions were sufficient to avoid any prejudice to the appellant. The comment by Frank was brief, isolated, not exploited by the trial counsel, and immediately addressed by the military judge. The military judge did not abuse her discretion in denying a mistrial, and we find that under the entire circumstances of this case the appellant received a fair trial.

*Suppression of Witness Testimony Concerning Alleged Misconduct by Frank and Other FBI Informants and Refusal to Order Production of FBI Inquiry*

In October 2002, during Operation Lively Green, Frank and several subjects transported cocaine from Tucson to Las Vegas. The appellant was not present as he did not become involved in the operation until January 2003. While in Las Vegas, there was an incident involving Frank, the subjects, and a prostitute. The FBI and the Assistant United States Attorney's office conducted an investigation into this incident. There was no criminal prosecution of anyone involved, including Frank. At trial, the government filed a motion to suppress any witness testimony concerning the Las Vegas incident. The military judge granted the government's motion, finding any testimony regarding the incident to be irrelevant and thus inadmissible. After the military judge's ruling, the trial defense counsel requested the military judge to order the government to produce a copy of the entire FBI inquiry for purposes of an in camera review, which was denied by the military judge.

We review rulings on motions to suppress for abuse of discretion. *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007) (citing *United States v. Khamsouk*, 57 M.J. 282 (C.A.A.F. 2002)). The trial judge's conclusions of law on such motions are reviewed de novo and her findings of fact will be upheld unless clearly erroneous. *Id.* (citing *United States v. Florence*, 64 M.J. 451 (C.A.A.F. 2007)). When conducting such a review, "we consider the evidence 'in the light most favorable to the' prevailing party." *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996).

We review a military judge's decision on a request for discovery for abuse of discretion. *United States v. Morris*, 52 M.J. 193, 198 (C.A.A.F. 1999). "The key

question when discovery is denied is whether the information or evidence that was not disclosed was 'material to the preparation of the defense.'" *Id.* at 197. Because the determination of materiality is a question of law, we review the military judge's ruling de novo. *Id.*

The alleged incident involving a prostitute occurred in October 2002, at least three months before the appellant was involved in Operation Lively Green and committed the offenses in this case. The military judge applied the balancing test of Mil. R. Evid. 403 and found that any testimony regarding the Las Vegas incident would not make a fact of consequence any more or less probable and would only tend to confuse the members. We hold that the military judge did not abuse her discretion. Likewise, the military judge did not abuse her discretion in denying the trial defense counsel's request for production of the FBI inquiry into the alleged Las Vegas incident as it was not material to the preparation of the defense.

*Curtailment of Trial Defense Counsel's Closing Argument*

During the trial defense counsel's closing argument, he made a reference to the terrorist attacks on 11 September 2001 in an apparent attempt to show that the FBI should have been fighting the war on terror instead of running Operation Lively Green. Additionally, concerning alleged misconduct by Frank,[4] trial defense counsel stated, "So, unlike Richard Hatch of Survivor fame, who recently went to jail for tax evasion, [Frank] got a walk from the FBI." The assistant trial counsel's objections to both of these comments were sustained by the military judge.

We review a military judge's ruling on an objection to argument for an abuse of discretion. *United States v. Macklin*, 104 F.3d 1046, 1049 (8th Cir. 1997). A court-martial must render its verdict solely on the basis of the evidence presented at trial. *United States v. Clifton,* 15 M.J. 26, 29 (C.M.A. 1983). It is also well established that arguments made by counsel are not evidence. *Id.* "When counsel argues facts not in evidence, or when he discusses the facts of other cases, he violates both of these principles." *Id.* at 29-30.

Considering our review of the case, both of the statements made by the trial defense counsel consisted of facts not in evidence. The appellant has not shown how he was prejudiced by the military judge's rulings. Accordingly, the military judge did not abuse her discretion in sustaining trial counsel's objections.

[4] Evidence was presented at trial that Frank engaged in tax evasion; however, Frank was never arrested or prosecuted for tax evasion.

*Cumulative Error Doctrine*

The appellant asserts that we must set aside the findings and sentence under the cumulative error doctrine. Under this doctrine, a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the reversal of a finding or sentence. *United States v. Gray,* 51 M.J. 1, 61 (C.A.A.F. 1999). However, finding no error with the other issues raised by the appellant, the cumulative error doctrine does not apply in this case.

*Post-Trial Delay*

Considering that our appellate review in this case was not completed within eighteen months of docketing before our Court on 11 October 2006, a presumption of unreasonable delay has occurred, requiring us to 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 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 and that no relief is warranted.

*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; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL


STEVEN LUCAS, YA-02, DAF
Clerk of the Court