UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic SHEFIU O. OGUNLANA
United States Air Force

ACM 36848

21 March 2008

Sentence adjudged 22 April 2006 by GCM convened at Eglin Air Force Base, Florida. Military Judge: Donald Plude.

Approved sentence: Bad-conduct discharge, confinement for 7 years, and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel John P. Taitt, Major Matthew S. Ward, Major Donna S. Rueppell, and Major Brendon K. Tukey.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

OPINION OF THE COURT

HEIMANN, Judge:

The appellant was charged with rape and indecent assault in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920 and 934. Contrary to his pleas, he was convicted of attempted rape and the indecent assault, in violation of Articles 80 and 134, UCMJ, 10 U.S.C. §§ 880 and 934, subject to some excepted language. A panel of officers sentenced the appellant to a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for seven years. The General Court Martial Convening Authority (CA) approved the sentence as adjudged.

On appeal, the appellant makes eight assertions of error. We review each of the assertions of error in greater detail below. Having reviewed each of the assertions, including briefs from both parties, we find no prejudicial error, and affirm the findings and the sentence as adjudged.

Member Selection

Approximately four months prior to trial, the CA referred the appellant's case to a panel of officers. Applying Article 25, UCMJ, 10 U.S.C. § 825, criteria, the CA chose nine of these members from a pool of 15 nominees sent to him by the Special Court-Martial Convening Authority. He also personally added two names (a First Lieutenant and a Lieutenant Colonel) to comprise a panel of eleven officers. This original panel consisted of one Colonel, two Lieutenant Colonels, four Majors, three Captains and one First Lieutenant. The appellant does not contest the selection of the original panel. However, in the days leading up to the trial, four members – the two Lieutenant Colonels and two Majors - needed to be replaced on the panel because of deployments. It is the replacement of these members that the appellant now contests.

The appellant's assertion, at trial and on appeal, is that when seeking to replace the four field grade officers, the legal office systematically excluded replacement members based upon rank in violation of Article 25, UCMJ. In support of the motion, a paralegal testified that she only contacted field grade officers in an effort to replace the members needing to be released. Unable to find sufficient candidates, she obtained assistance from the Staff Judge Advocate and the wing executive officer. With their aid, the names of four field grade officers were forwarded to the CA as potential replacement members. No company grade officers were sought or forwarded to the CA for consideration. The CA selected two Lieutenant Colonels and a Colonel for the panel to replace the four excused members. The new panel now consisted of two Colonels, two Lieutenant Colonels, two Majors, three Captains, and a First Lieutenant.

The military judge, ruling against the defense, found that the process of limiting replacement members to members of equivalent rank did not constitute an "improper exclusion" of junior members. The military judge noted he was "not aware of anything that prohibits submitting replacement nominees of the same general rank as the officers to be replaced for the convening authority's consideration **provided** the convening authority thereafter applies Article 25(d)(2) criteria." The military judge concluded the CA properly applied Article 25, UCMJ, in selecting the members.

We review the trial judge's ruling on the systematic exclusion of members de novo. *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986). The defense has the burden of establishing an improper exclusion of qualified members. *United States v. Roland*, 50 M.J. 66, 69 (C.A.A.F. 1999). Once established, the government must show no

impropriety occurred in the member selection. *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000) (citation omitted). In this case the judge found the defense had not met their burden of showing an improper exclusion of members. We agree.

While it is clear that the process of forwarding potential "replacement members" to the CA did systematically exclude company grade officers, this process was not improper in light of the greater circumstances surrounding this panel. Panel selection cannot be viewed in individual segments but must be evaluated holistically with particular attention towards the ultimate resulting panel. As our superior court stated, a key factor in evaluating the process of selecting members is whether there was a "good faith [attempt] to be inclusive and to require representativeness so that court-martial service is open to all segments of the military community." *United States v. Dowty*, 60 M.J. 163, 171 (C.A.A.F. 2004). That is exactly what this CA did in selecting this panel. He initially chose a panel of officers of five different grades ranging from First Lieutenant to Colonel. In selecting only field grade officers to replace lost field grade members, the objective was to preserve the "representative" nature of the original panel, not to exclude junior officers. Junior officers were already represented on this panel. We find no error. In addition, like the trial judge, we find no indication of an "improper motive to pack the member pool." *Dowty*, 60 M.J. at 173 (citations omitted).

Legal and Factual Sufficiency

The appellant has argued throughout this process that the evidence was insufficient to establish his guilt of either rape or attempted rape. At trial, his defense counsel argued that the alleged victim, BLO, had no credibility. He based this argument on her prior inconsistent statements and on an alleged motive to lie to protect her job.[1] In addition, trial defense contended that the forensic evidence at the scene suggested that one of the other occupants of the room could have been the assailant. In his post trial matters to the convening authority he renewed this claim of factual and legal insufficiency of the evidence. He again argued the prior inconsistent statements of BLO, her motive to lie, and the fact that the forensic evidence suggested another possible assailant as creating doubt as to guilt.

Before this Court, the appellant renews his claim of factual and legal insufficiency of the evidence. While he again points out the prior inconsistent statements of BLO, her alleged motive to lie, and the inconclusive nature of the forensic evidence, he also argues that the evidence supports either a conviction of rape or an acquittal of rape, but not a conviction of attempted rape.

[1] BLO called in sick the morning after the incident and was informed that if she did not come to work she would be fired.

We review each court-martial record de novo to consider its legal and factual sufficiency. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). With regard to legal sufficiency, we ask "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found [proof of] all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). For factual sufficiency, we weigh the evidence in the record of trial and, after making allowances for not having personally observed the witnesses, determine whether we ourselves are convinced beyond a reasonable doubt of the appellant's guilt. *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002); *Turner*, 25 M.J. at 325.

We find certain undisputed facts significant in our finding that the conviction is legally and factually sufficient. BLO joined a friend in going to a small party in which the appellant was in attendance. They had never met before that night. BLO was only 20 years old and was a virgin. Within a short time of arriving BLO got significantly intoxicated. Her friend testified that she was "really, really, intoxicated." She danced for a short time with the appellant while intoxicated. During the dance she touched the appellant and ground her body against him. At some point during the dancing she became ill, and went to the bathroom, where she vomited and passed out. When her friend checked on her some 30 to 90 minutes later she found that "[s]he was still really, really incoherent, pretty much passed out lying on the floor." Shortly after being checked on, BLO was physically moved into one of the dorm rooms, covered up and left to sleep it off.

From the point BLO vomited and passed out the appellant took advantage of the situation. After agreeing to remain with her while the others went to the beach, he removed her pants and, by his own admission, digitally penetrated BLO. After she was moved to the other room he retrieved a blanket from his room so that he could lay down with her. The appellant remained on the floor within inches of BLO while she remained "passed out." She was still "passed out" several hours after she was moved out of the bathroom. Finally, it is uncontested that when the true occupant of the room awoke during the night he noticed BLO and the appellant both completely covered. When he called the appellant's name the appellant appeared from under the covers smiling, BLO's breasts were showing, and there was no indication that BLO was fully awake or conscious. Nevertheless, the appellant continued to behave in the fashion of a person engaging in sexual activities, and continued to do so after the room's true occupant called out the appellant's name.

Taken as a whole these facts convince us, beyond a reasonable doubt, that the appellant intended to sexually assault and rape BLO while she remained passed out during the evening. We find the appellant's arguments of consent to be totally unfounded and incredible. Once BLO passed out, all of her conduct prior to that point became

irrelevant. No one could conclude that BLO was or would be consenting to any sexual activity based upon the testimony presented. As for the indecent assault, the appellant admitted doing exactly what he was charged with doing while BLO was unconsicious. The issue of penetration is the first point at which BLO's testimony is needed to establish guilt to any element of the crimes. It is here we believe the members gave the appellant the benefit of the doubt. They were unable to reconcile BLO's inconsistent testimony on this issue. But contrary to the appellant's assertion before this court, we do not believe that we have to resolve that testimony to affirm the finding. BLO testified at trial that she was penetrated. The treating physician indicated that the vaginal tearing could have been consistent with either "vigorous digital penetration" or intercourse. And finally, the room's true occupant acknowledged, at trial, that in his prior sworn statement he said the movements under the covers "looked like they were having sex."

Whether or not we accept BLO's prior sworn testimony for the truth of the matter asserted, when we review the various pieces of the circumstantial evidence we ourselves are convinced beyond a reasonable doubt of the appellant's guilt to attempted rape.

Mil. R. Evid. 412 Issue

At trial, the appellant sought to introduce evidence that the alleged victim, BLO, had engaged in other sexual behavior on the night in question. Trial defense counsel asserted that the evidence was constitutionally required because it: "impeaches [BLO's] memory of the events and thus her believability as a witness; shows she wasn't too intoxicated to consent; and provides evidence of a possible motive to fabricate." In addition, the military judge found that the defense sought admissibility under Mil. R. Evid. 412(b)(1)(A) to prove that the appellant was not the source of semen found at the scene and under Mil. R. Evid. 412(b)(1)(B) to show consent as to the charged offenses. After reviewing a stipulation of fact between the parties and hearing arguments on the issue, the military judge found all the sexual contact between the appellant and BLO was admissible, but evidence that BLO had consented to touching and foundling of her breasts on the evening in question by another airman was inadmissible. The appellant contends this exclusion was error requiring reversal.

In sexual offense cases, Mil. R. Evid. 412(a), bars the admission of evidence offered "to prove that any alleged victim engaged in other sexual behavior" and evidence offered "to prove any alleged victim's sexual predisposition." Mil. R. Evid. 412(a)(1)-(2). In *United States v. Banker*, 60 M.J. 216 (C.A.A.F. 2004), our superior court found that, in order to defeat the exclusionary function of Mil. R. Evid. 412, the appellant must "demonstrat[e] why the general prohibition in [Mil. R. Evid.] 412 should be lifted to admit evidence of the sexual behavior of the victim[.]" *Banker*, 60 M.J. at 222 (quoting *United States v. Moulton*, 47 M.J. 227, 228 (C.A.A.F. 1997)). The Court further stated that the burden is on the proponent of the evidence to show that the evidence fits one of the three enumerated exceptions of Mil. R. Evid. 412(b). *Id.*

The three enumerated exceptions of Mil. R. Evid. 412(a) allow evidence of other sexual behavior if the evidence is necessary to "prove that a person other than the accused was the source of semen," Mil. R. Evid 412(b)(1)(A), to prove "consent" of the victim, Mil. R. Evid. 412(b)(1)(B), or because exclusion of the evidence "would violate the constitutional rights of the accused," Mil. R. Evid. 412(b)(1)(C). In excluding evidence of the alleged sexual contact between BLO and another airman, the military judge found that the appellant had not met his burden warranting any exception of the general exclusionary rule. We agree. We address each of the exceptions below.

As for the argument that the evidence was admissible to show that the appellant was not the source of the semen under Mil. R. Evid. 412(b)(1)(A), the military judge permitted evidence that semen was found in the dorm room where the crimes occurred and that it was *not* attributable to the appellant. He also permitted testimony that no semen was found on BLO or on her clothes.

Turning to the argument that the evidence was admissible to prove consent under Mil. R. Evid. 412(b)(1)(B), the military judge concluded that evidence of consent by BLO to touching by one airman does not equate to evidence of consent to touching by another airman. This is precisely the type of evidence and argument that Mil. R. Evid. 412 is designed to prevent. *See* Drafter's Analysis, *Manual for Courts-Martial, United States* (*MCM*), A22-35-6 (2002 ed.). We agree with the military judge that evidence of the other touching was not relevant and thus not admissible under this exception to Mil. R. Evid. 412. We also agree with the military judge's admission of testimony related to acts between BLO and the appellant on the night in question based upon this exception. *See United States v Sanchez*, 44 MJ 174 (C.A.A.F. 1996)

Finally, the appellant argues that exclusion of the evidence "would violate the constitutional rights of the accused." Mil. R. Evid. 412(b)(1)(C); *United States v. Dorsey*, 16 M.J. 1 (C.M.A. 1983). When the Sixth Amendment's right to confrontation is allegedly violated by a military judge's exclusion of evidence, the ruling is reviewed for an abuse of discretion. *See United States v. Israel*, 60 M.J. 485, 488 (C.A.A.F. 2005) (citations omitted).

In support of this argument, the appellant argues, as he did at trial, that exclusion of the evidence was constitutionally significant because it undermined his ability to impeach BLO, to show that she was not too intoxicated to consent, and to show that she had a motive to fabricate. When considering the admissibility of evidence under a Mil. R. Evid. 412(b) exception, the military judge must conclude that the evidence is relevant and that the "the probative value of such evidence outweighs the danger of unfair prejudice." Mil. R. Evid. 412(c)(3). This probative value analysis requires the military judge to consider not only the "[Mil. R. Evid. 403] factors such as confusion of the issues, misleading the members, undue delay, waste of time, needless presentation of

cumulative evidence, but also prejudice to the victim's legitimate privacy interests." *Banker*, 60 M.J. at 223. Finally, for evidence offered under the constitutionally required exception, the military judge must decide if the evidence offered is material and favorable to the accused's defense, and thus whether it is "necessary." *United States v. Williams*, 37 M.J. 352, 361 (C.M.A. 1993) (Gierke, J., concurring).

In denying the admissibility of the other sexual acts under the constitutionally required exception, the military judge found that the proffered evidence of other sexual conduct was not relevant to a claim of fabrication of the allegation, and not material to BLO's level of intoxication. Evidence is relevant if it has "any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence." Mil. R. Evid. 401. Here the motive to fabricate all centered on the claim of rape as an explanation for why BLO failed to go to her job the day after the alleged assault. The fact that BLO, hours before the alleged rape, engaged in limited consensual sexual contact with another person does not tend to make a motive to allege rape more likely than not. On the materiality issue, the military judge looks at "the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which this issue is in dispute; and the nature of the other evidence in the case pertaining to this issue." *United States v. Colon-Angueira*, 16 M.J. 20, 26 (C.M.A. 1983) (quoting *Dorsey*, 16 M.J. at 6). While the level of intoxication is relevant, the other sexual acts do not bear on that fact materially. In addition, the defense had numerous other options available to them to prove the existence of BLO's intoxication without admitting the other sexual contact. We agree with the military judge on both conclusions of law.

Even if we assume the military judge abused his discretion in excluding evidence of the other sexual acts, we find that the appellant was not materially prejudiced by the error. Trial defense counsel very effectively attacked the credibility of BLO by highlighting her many prior inconsistent statements. They explored her degree of intoxication both through BLO's testimony and testimony from several witnesses they called who were present that evening. They also presented evidence that BLO was dancing with the other airman prior to the assaults. Finally, they were able to explore the theory of fabrication to save her job by cross-examining BLO. Thus, we are convinced that had the excluded evidence been admitted, the result would not have been different.

Furthermore, despite the appellant's contention that the military judge's evidentiary rulings deprived him of his right to confrontation under the Sixth Amendment, we are satisfied beyond a reasonable doubt that, even if there was error in those rulings, it was harmless. *See Delaware v. Van Arsdall*, 475 U.S. 673, 681 ("[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.").

Instruction error

For the first time on appeal, the appellant objects to the members being instructed on the lesser included offenses (LIO) of rape.[2] Citing *United States v. Waldron*, 11 M.J. 36 (C.M.A. 1981) and *United States v. Curtis*, 44 M.J. 106 (C.A.A.F. 1996), the appellant contends that the inclusion of an unnecessary instruction requires this Court to set the attempted rape conviction aside. They assert that the evidence did not raise the possibility of attempt but only the consummated act of rape. In response, the appellee asserts that while BLO's direct testimony at trial was that penetration occurred, she also acknowledged, on cross examination, that her prior sworn Article 32 testimony was that the appellant only attempted penetration. The appellee contends that by adopting the prior sworn testimony, that testimony was admissible to prove the truth of the matter asserted under Mil. R. Evid. 801(d)(1)(A), making attempted rape possible.

Rule for Courts-Martial (R.C.M.) 920(e)(2) imposes on military judges a duty to give instructions on LIOs reasonably raised by the evidence. Our superior court has noted "[i]t is not necessary that the evidence which raises an issue be compelling or convincing beyond a reasonable doubt. Instead, the instructional duty arises whenever 'some evidence' is presented to which the fact finders might 'attach credit if' they so desire." *United States v. Jackson*, 12 M.J. 163, 166-67 (C.M.A. 1981)(citations omitted). Furthermore, our superior court has stated that any doubts as to whether the evidence raises an LIO should be resolved in favor of the accused. *United States v. Steinruck*, 11 M.J. 322, 324 (C.M.A. 1981).

As the Supreme Court stated it in *Sansone v. United States,* 380 U.S. 343, 350 (1965), "[a] lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense." In this case, we find mere attempted penetration was raised by the evidence, thus a factual dispute existed on the issue of penetration. In addition to the fact that BLO adopted her prior inconsistent statement, other facts raised the possibility that the appellant never consummated the penetration required for rape. BLO's physician testified the vaginal injuries could have been consistent with either digital penetration or vaginal intercourse. The forensic findings that none of the appellant's semen was found at the scene could also have raised doubt in the panel's mind that he consummated the intent to rape BLO. Lastly there was testimony that the appellant admitted to a friend that he digitally penetrated her but "never did have sex with her." Based upon each of these factors we believe a factual dispute existed on the issue of penetration and thus the military judge appropriately instructed the members on the LIO. Finally, we would note that our superior Court in

---

[2] We do not address the issue of waiver in this case because we find the instruction properly given. *See United States v. Gutierrez*, 64 M.J. 374, 375 (C.A.A.F. 2007)

Jackson, 12 M.J. 163, found error in virtually identical facts when the military judge failed to instruct on the LIO of attempt.

Sentence Appropriateness

The appellant asserts that seven years of confinement is excessive in light of the appellant's conviction "of a one-time attempted rape and indecent assault by digital penetration . . . [occurring] over a relatively short period of time." In addition, the appellant highlights that the government made a Pretrial Agreement offer prior to trial that included a confinement cap of 9 months.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005); *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006), *pet. granted on other grounds*, 65 M.J. 320 (C.A.A.F. 2007). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire 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). 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); *United States v. Dodge*, 59 M.J. 821, 829 (A.F. Ct. Crim. App. 2004).

In making a sentence appropriateness determination we are required to examine sentences in closely related cases and permitted—but not required—to do so in other cases. *Christian*, 63 M.J. at 717 (citing *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001)). "[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." *Lacy*, 50 M.J. at 288.

The appellant cites to the Court a seven page automated database report, previously admitted to this court, showing sentences in other cases involving a conviction for rape or indecent assault. The appellant asks the Court to use this report as a "point of comparison between Appellant's case and other cases." While the report does reflect lighter sentences were given in the majority of the cases included in the report, it also includes several cases in which a greater sentence was given. More significantly, the report contains no factual information regarding the circumstances surrounding the convictions. Therefore, we find the appellant has not met his burden of showing the report is evidence of closely related cases. As this Court noted recently in *United States v. Rangel*, 64 M.J. 678 (A.F. Ct. Crim. App. 2007) "merely because a case involves similar charges brought under the same section of the UCMJ does not mean it is 'closely related' within the meaning of this Court's mandate to determine sentence

appropriateness. Rather, 'closely related' cases are those which include, for example, 'coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared.'" *Rangel*, 64 M.J. at 686 (quoting *Lacy*, 50 M.J. at 288). We have no basis for concluding that any such connection exists between the appellant's case and those in the provided report.

Looking to the appropriateness of the appellant's sentence on its own, we agree the sentence is significant, but we believe appropriately so. BLO, a 20 year old virgin, was violated by the appellant, a virtual stranger, while she lay passed out in a dorm room on an Air Force installation. While admittedly BLO showed poor judgment in drinking heavily with strangers, that in no way mitigates the appellant's conduct. On the contrary, we find this opportunism aggravating. Particularly so in light of the appellant's two prior reprimands and one nonjudicial punishment action for inappropriate conduct involving other women. Finally, as for the suggestion that the government offered a sentence limitation of nine months if the appellant would plead to the offenses, we do not find such an offer persuasive on the issue. It is clear that this victim was significantly impacted by the need for her to testify. The government's efforts to spare BLO this trauma, even at the expense of a sentence limitation to the appellant, are commendable. He refused that offer at the time and we decline to now give him any benefit from his decision that he does not like today. In light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial we find the sentence appropriate in this case.

Staff Judge Advocate's Recommendation

The appellant makes two assertions of error regarding the addendum to the Staff Judge Advocate's Recommendation (SJAR). He contends that the addendum "gave short shrift to the issues raised [by] the [a]ppellant," thus failing to adequately address the "legal merits" of the errors raised by the defense in their submission and this 'short analysis' contained new matters that were required to be served on defense prior to the convening authority's action in the case. We will address both issues together. The standards for addendums are well established.

R.C.M. 1106(d)(4) requires a staff judge advocate to comment on whether "corrective action on the findings or sentence should be taken when allegation of legal error is raised in matters submitted." R.C.M. 1106(d)(4) also provides that the comments may consist of "a statement of agreement or disagreement with the matter raised by the accused [and an] analysis or rationale for the staff judge advocate's statement, if any, concerning legal errors is *not* required." (*emphasis added*)

When making these comments in an addendum, the staff judge advocate cannot introduce "new matter" without triggering a requirement for service of the addendum on

the accused and his counsel (R.C.M. 1106(f)(7)). Finally, on appeal, when asserting a claim that new matters were not properly served, an appellant is required to demonstrate prejudice arising from the failure of the SJA to serve the new matters "by stating what, if anything, would have been submitted to 'deny, counter, or explain' the new matter." *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997) (citation omitted).

After receiving the SJAR, the defense submitted a response that included claims of legal error. In his response to these claims, the SJAR addendum correctly advised the convening authority, using standardized language, of his options regarding both the findings and the sentence as required by R.C.M. 1107(c) & (d). The addendum then advised the convening authority of the defense's claims of "legal and factual errors along with excessive confinement" warranting a new trial or a reduction in the "period of confinement." Finally the SJAR addendum provided:

> 4. I am satisfied the evidence upon which the conviction is based is legally sufficient. *The accused was represented by an experienced reservist circuit defense counsel and an experienced area defense counsel. An experienced military judge heard the motion on member selection, spent time deliberating and researching, but ultimately denied the defense's motion. An officer panel heard the evidence and judge's instructions and they made their decision on findings and sentencing.* Finally, the sentence to 7 years confinement was below the maximum authorized: 25 years. I recommend that you approve the findings and sentence as adjudged.

Addendum to the Staff Judge Advocate's Recommendation at ¶ 4 (*emphasis added*).

In reviewing the above comments, we first conclude that we find nothing objectionable in the conclusory nature of the SJA's comments. R.C.M. 1106(d)(4) does not require the SJA to provide his analysis or rationale for his conclusory comment. The rules require no more from the SJA. Thus, we find no merit to the appellant's argument that he is entitled to a new SJAR because the SJA failed to "address" the legal issues raised in his clemency submission to the convening authority. He did address them. *United States v. Hill*, 27 M.J. 293 (C.M.A. 1988). The real issue is: did his comments contained in the three italicized sentences constitute new matters in the addendum?[3]

In answering this question we first turn to our superior court's recent decision in *United States v. Del Carmen Scott*, 66 M.J. 1 (C.A.A.F. 2008). In *Del Carmen Scott* the Court clarified the scope of *United States v. Catalini*, 46 M.J. 325, 328 (C.A.A.F. 1997) and *United States v. Gilbreath*, 57 M.J. 57 (C.A.A.F. 2002), upon which the appellant primarily relies. In *Del Carmen Scott*, the Court was again confronted with an SJAR

[3] Appellant does not complain of the un-italicized sentences in paragraph 4, therefore we do not address them.

addendum that was not served on the appellant, and advised the convening authority that the members had heard all of the evidence and decided the sentence. Finding that this fact was not "news," the court concluded it was not "new matter." *Del Carmen Scott*, 66 M.J. at 6-7. The Court also expressly rejected the argument that it was "new" because it "invites the convening authority to shirk his duty to take action" on the clemency request. *Id.* at 7. Therefore, consistent with *Del Carmen Scott*, we find the references to the panel actions is not a new matter. This leaves us with the remaining issue of the SJA bolstering his opinion by referencing the experience of the judge and the defense counsel.

In *Catalini*, 46 M.J. at 328, our superior court found it both new matter and problematic when the SJA sought to "rationalize and bolster his own recommendation as to the period of confinement by expressly invoking the persuasive weight of the judgment of the military judge" when responding to defense's claim for clemency in their submissions to the convening authority.[4] *Id.* Like our superior court, we too have concerns when the SJA relies upon the judge or counsel to support his conclusion that there was no error at trial. While an SJA does not have to explain the basis for his conclusion, it still must be a personal assessment of the issue.[5] The SJA's duty is to advise the convening authority of his/her opinion, not the opinion of others. In doing so, the SJA introduces matters from outside the record of trial. While we acknowledge the appellee's argument that the experience of the judge and the defense counsel can be reasonably deduced from the record, that is not the point. The bolstering without giving the defense counsel the opportunity to comment is the concern, particularly when the bolstering is in response to claims of legal error. But we leave for another day the question whether bolstering alone constitutes new matters because we find no prejudice.

On the issue of prejudice, we begin by disagreeing with the appellant's assertion that there was "erroneous" or "faulty" statements in the addendum warranting a finding of prejudice based upon *Gilbreath*. The new matters being factually correct, *Gilbreath* can be distinguished. *See Scott*, 66 M.J. at 8-9. Thus we look to see whether the appellant can show prejudice by not having an opportunity to comment. To prevail, the appellant must first show "what, if anything, would have been submitted to 'deny, counter, or explain' the new matter." *Chatman*, 46 M.J. at 323 (citing Article 59(a), UCMJ, 10 U.S.C. § 859(a)). Second, in some manner, the appellant must make a colorable showing of possible prejudice by proffering a "possible response to the unserved addendum '*that could have produced a different result.*'" *Gilbreath*, 57 M.J. at

---

[4] In *Catalini* the SJAR addendum also incorrectly advised the convening authority that the judge had considered all of the same extenuation and mitigation evidence in reaching his sentence. *Catalini*, 46 M.J. at 328.

[5] *Catalini* centered on a question of the judge's status in relation to a clemency issue before the convening authority vice a claim of legal error presented to the convening authority. While we believe this distinction is legally significant, we do not need to resolve that issue for purposes of this case.

61 (emphasis in original) (quoting *United States v. Brown*, 54 M.J. 289, 293 (C.A.A.F. 2000).

The appellant fails to meet either prong. The appellant's representations of possible responses to the addendum and his arguments of prejudice all go the role of the convening authority in clemency, citing *Catalini* as authority. This argument has been found to be without merit in *Scott*, 66 M.J. at 7-8. Finding that the appellant has failed to show "what, if anything, would have been submitted to 'deny, counter, or explain' the new matter" and how his possible response "could have produced a different result" we find a new action is not required.

Denial of Post-Trial Due Process

In his final assignment of error, the appellant alleges, for the first time on appeal, he was denied due process in the post-trial processing of his case. Specifically, the appellant alleges that he was subjected to unreasonable post-trial delay when 150 days elapsed between the conclusion of his court-martial and the date of the convening authority's action. He asks this Court to apply a presumption of prejudice in this case, citing *United States v Moreno*, 63 M.J. 129 (C.A.A.F. 2006), because action was not taken within 120 days of the trial. While we agree the action was not taken for 150 days, we do not presume prejudice and we do not find prejudice.[6]

The length of post-trial review in the case is evaluated under the four part test enunciated in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *See United States v. Dearing*, 63 M.J. 478, 485 (C.A.A.F. 2006); *Moreno*, 63 M.J. at 135. Those four factors are: (1) length of the delay; (2) the reasons for the delay; (3) any assertion by the appellant of his right to speedy post-trial review; and (4) prejudice to the appellant. The standard for review is de novo. *Moreno*, 63 M.J. at 135.

Applying the *Barker* standards to this case, we find no violation of the appellant's right to speedy post-trial review. While it took 150 days before action was taken, most of that time was taken up by the preparation and authentication of the record of trial. The appellant's trial lasted five full days and produced an eight volume Record of Trial with 786 pages of transcript and a total of 79 exhibits. A review of the court reporter's chronology shows that transcription of this record took 87 of the 150 days. More importantly, we see in that time the court reporter devoted the majority of those days to this record of trial. The remaining time was devoted to record authentication, then completion of the SJA recommendation, and finally the clemency submissions by the appellant. Clearly, the government exercised diligence in the processing of this case.

---

[6] This case was tried before the *Moreno* decision and thus no presumptions of prejudice apply to the period between trial and action. The *Moreno* presumption of prejudice applies to delays in review by this Court only.

Prior to this appeal, the appellant did not assert his right to speedy post-trial review or complain about the length of time it was taking to complete post-trial processing of case. Other than his claim of lack of institutional vigilance, the appellant cites to no specific prejudice he has suffered. Applying the *Barker* test we do not find that the appellant's right to speedy post-trial review was violated. *See United States v. Othuru*, 65 M.J. 375, 380 (C.A.A.F. 2007).

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); *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, GS-11, DAF
Clerk of the Court