UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ADRIAN J. PALMA
United States Air Force

ACM 38638

19 October 2015

Sentence adjudged 15 February 2014 by GCM convened at Robins Air Force Base, Georgia. Military Judge: Shaun S. Speranza.

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

Appellate Counsel for the Appellant: Captain Michael A. Schrama and Frank Spinner (civilian counsel).

Appellate Counsel for the United States: Major Roberto Ramirez; Captain Richard J. Schrider; and Gerald R. Bruce, Esquire.

Before

ALLRED, TELLER, and ZIMMERAN
Appellate Military Judges

OPINION OF THE COURT

ZIMMERMAN, Judge:

At a general court-martial composed of officer members, Appellant was convicted, contrary to his pleas, of sexual assault, in violation of Article 120, UCMJ, 10 U.S.C. § 920. The court sentenced Appellant to a dishonorable discharge, confinement for 5 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal, Appellant makes six averments: (1) the finding of guilty is legally and factually insufficient; (2) the military judge committed prejudicial error in denying the defense motion to suppress Appellant's confession due to involuntariness; (3) the military judge abused his discretion in not granting a defense Mil. R. Evid. 412 motion; (4) apparent unlawful command influence so permeated the Air Force at the time of Appellant's trial that it was impossible for him to receive a fair trial and clemency consideration; (5) Appellant was denied due process under the Fifth Amendment[1] when he was tried by a court of five-members who were not required to be unanimous in their verdict; and (6) the Government violated the 120-day post-trial processing standard for convening authority action warranting some relief under *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002). We disagree with all contentions and affirm the finding and sentence.

Background

Appellant was convicted of sexually assaulting Senior Airman (SrA) KD by causing bodily harm when he penetrated her vulva with his penis. Appellant and SrA KD were friends, and one evening he invited SrA KD and two other friends to his apartment to drink and socialize. He told SrA KD to bring an overnight bag if she was planning on drinking because he said he did not want anyone driving while drunk. The two other friends arrived at Appellant's house first, and SrA KD arrived before midnight. The group listened to music, drank various mixed alcoholic drinks, and had shots of alcohol. Over the course of the next couple of hours, SrA KD drank a half bottle of vodka-based liquor,[2] two shots of Jagermeister, and tried some whisky and Coke. At approximately two in the morning, SrA KD felt sleepy. Appellant had very little furniture, having recently moved into the apartment. SrA KD asked where she could sleep, to which Appellant replied that she could sleep in his bed. SrA KD brushed her teeth, changed her clothes, put her dental retainer away, and then got into Appellant's bed. She testified Appellant "proceeded to tuck [her] in," said good night, and left the room.

SrA KD testified she woke up at 9:30 a.m. to Appellant shaking her awake, which struck her as odd because she is normally a light sleeper. She "felt extremely sore and uncomfortable and extremely tired like [she] hadn't slept at all." Her vaginal area was painful, throbbing, and "extremely irritated and not normal." When she checked herself in the bathroom, she knew something was wrong because she was bleeding and did not attribute the bleeding to her menstrual cycle. She thought something must have happened and had no memory of it. She wanted to leave but was still extremely tired and felt she would get into an accident if she drove, so she asked Appellant if she could rest for a couple more hours. She later woke around noon and drove herself to the hospital.

[1] U.S. CONST. amend. V.
[2] A full 750 milliliter bottle was admitted into evidence to demonstrate the amount of alcohol SrA KD drank.

A sexual assault nurse examiner examined SrA KD for potential sexual assault and completed a forensic evidence collection kit. Among other steps, the nurse viewed SrA KD's vaginal area, took photographs of injuries, collected bodily fluid and other swabs from inside and around her vagina, and kept SrA KD's underwear for testing. Pursuant to a search warrant, Appellant's apartment was searched and he was taken to the hospital by Air Force Office of Special Investigations (AFOSI) investigators for sexual assault evidence collection. Even though they did not intend to question him at the hospital, in an abundance of caution, the investigators advised Appellant of his rights under Article 31(b), UCMJ, 10 U.S.C. § 831(b). Both SrA KD and Appellant's sexual assault evidence kits were tested by the Army Criminal Investigation Laboratory, with findings that SrA KD's underwear and swabs from her inner labia contained semen matching Appellant's DNA.

A few days later, AFOSI investigators questioned Appellant in their office and re-advised him of his Article 31(b), UCMJ, rights. After acknowledging understanding of his rights, Appellant agreed to answer questions and was interrogated for several hours. Appellant initially repeatedly denied having any sexual contact with SrA KD. His account later changed to having had consensual sexual intercourse with SrA KD, then eventually culminated in his confession to having sexual intercourse with an unresponsive, passed-out SrA KD. Appellant reduced his confession to writing.

Legal and Factual Sufficiency

Appellant maintains on appeal that the Government failed to prove beyond a reasonable doubt that he sexually assaulted SrA KD. He makes a multi-faceted argument and claims that regardless of the incriminating statements Appellant made to investigators, SrA KD testified she had no memory of any sexual activity and was not a credible witness in her description of events. Moreover, Appellant claims his confession was coerced, so any confidence in his incriminating statements was undermined. He notes also that three witnesses who were present at Appellant's apartment on the night of the sexual assault testified they observed nothing out of the ordinary. We disagree with Appellant's contentions that the finding of guilt is legally and factually insufficient.

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 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, 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 [appellant's] guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Our appellate review "involves a fresh,

impartial look at the evidence," contained in the "entire record without regard to the findings reached by the trial court" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

We find the evidence legally and factually sufficient to support Appellant's conviction. The elements of the sexual assault offense are: (1) that the accused committed a sexual act upon SrA KD, and (2) that the accused did so by causing bodily harm to SrA KD, to wit: penetrating SrA KD's vulva with his penis. *Manual for Courts-Martial, United States*, pt. IV, ¶ 45.a.(b)(1)(B) (2012 ed.).

Evaluating the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt and the evidence is therefore legally sufficient. SrA KD's testimony about having vaginal pain and discomfort, combined with scientific and medical evidence, as well as Appellant's confession to having sexual intercourse with SrA KD after she had passed out, could all reasonably be considered credible and convincing. SrA KD consistently stated she had no memory of any sexual activity with Appellant; however, she also testified she had fallen asleep in Appellant's bed and woke up in the morning with vaginal soreness and a suspicion that something had happened while she slept. She did not consent to sexual intercourse with Appellant. Her testimony about not having any memory of sexual activity is consistent with Appellant's observations of SrA KD before and during his sexual assault of her. He stated SrA KD had passed-out while lying on Appellant's bed, she was not aware of what was happening when he started to have sex with her, SrA KD's eyes were closed while he had sex with her, and she did not reciprocate when he kissed her. Also, Appellant made efforts to hide the sexual assault from SrA KD by flushing the used condom and the wrapper down the toilet so she would not know he had sex with her.

Appellant urges this court to discount SrA KD's testimony as not credible when she stated she had no recollection of sexual activity with Appellant; however, Appellant's statements provided the majority of the evidence regarding SrA KD's physical and mental state during the sexual assault. We have evaluated the evidence in the light most favorable to the prosecution and find Appellant's and SrA KD's testimony prove she was already passed-out when Appellant sexually assaulted her. SrA KD consumed several alcoholic drinks which made her sleepy. When she fell asleep in Appellant's bed, Appellant observed her lack of movement, her eyes being closed, and her lack of response when he pulled her pants down, inserted his penis into her, moved her from her side to her back, and sexually assaulted her for approximately 15 minutes. Additionally, SrA KD awoke approximately seven and a half hours after falling asleep to Appellant shaking her. She was normally a light sleeper, so having to be shaken awake seemed odd to her and she was still extremely tired. Also, even after Appellant woke her up to talk to

the other friends before they departed, she still felt the sedating effects of the alcohol and needed to sleep a few more hours before she felt safe to drive.

DNA evidence and injuries observed on SrA KD's vaginal area indicated sexual contact occurred between SrA KD and Appellant. The Army criminal laboratory expert witness testified that semen consistent with Appellant's DNA profile was found on SrA KD's inner labia swabs and on her underwear. The sexual assault forensic nurse who examined SrA KD at the hospital found "obvious injury" in the form of multiple tears, an abraded area, and redness in and around SrA KD's vaginal area. Additionally, Appellant's confession to sexually assaulting SrA KD and his emotional written apologies for committing this crime provided evidence to support a finding of guilt. Contrary to Appellant's complaint of coercion and manipulation by his interrogators, we are unconvinced that Appellant's statements to investigators were involuntary and provide our analysis and conclusions in greater detail below.

Regarding the three witnesses who were not aware of any sexual assault occurring, we find their lack of knowledge does not establish reasonable doubt as to the elements of the offense. One witness testified that he remained in the roommate's bedroom for the majority of the night after the first two guests had arrived, and he had no interaction with SrA KD at all. The bedroom in which this witness slept was located on the other side of the apartment from Appellant's bedroom. The other two witnesses slept in the dining room after consuming several alcoholic drinks. The dining room in which they slept was also located on the other side of the apartment from Appellant's bedroom. Given the secretive nature in which Appellant committed the offense and the fact that the three witnesses were asleep in other rooms at the time of the sexual assault, their lack of awareness does not raise reasonable doubt.

Furthermore, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are personally convinced of Appellant's guilt. Appellant's conviction on the charge and specification is both legally and factually sufficient.

Voluntariness of Appellant's Confession

Appellant argued at trial that he was not properly informed of the nature of the crime suspected, and the statement he provided to investigators was coerced. On appeal, Appellant asserts the military judge committed prejudicial error by denying the motion to suppress. We disagree.

After AFOSI special agents received SrA KD's complaint of sexual assault on 3 March 2013, they obtained a search warrant for Appellant's clothing, bodily fluids, linens, and other items listed on the warrant as "evidence in a Sexual Assault Investigation case." In the early morning hours of 4 March 2013, investigators executed

the warrant by transporting Appellant to a local hospital for a sexual assault forensic examination and seizing evidence from his apartment. At the conclusion of their search, they left a copy of the search warrant on his bed, which Appellant later reviewed. While at the hospital, Appellant asked the investigators why he was there, to which they replied that they had received a sexual assault allegation and Appellant was there for a forensic examination. His examination included collection of a sample of his pubic hair, a penile swab and scrotal swab. During their time at the hospital, investigators also advised Appellant of his Article 31(b), UCMJ, rights in connection to his being a suspect in an Article 120, UCMJ, offense. Appellant acknowledged he understood his rights at that time.

The following day AFOSI investigators executed a second search warrant for digital media, specified on the warrant as "evidence in a Sexual Assault Investigation case." After seizing evidence from Appellant's apartment in his presence, investigators gave Appellant a copy of the warrant. Then on the morning of 6 March 2013, Appellant was interviewed by AFOSI investigators at their office and was advised that he was suspected of an "alleged offense of Article 120." Appellant said he understood his rights, was willing to answer questions and did not want a lawyer at that time. During the interview, Appellant initially denied having sexual intercourse with SrA KD, and then eventually admitted he had nonconsensual sex with her and provided a written statement.

At trial the defense filed a motion to suppress Appellant's statements to AFOSI. Appellant testified and provided an affidavit in support of the motion. Appellant wrote that he was advised of his Article 31, UCMJ, rights and told he was suspected of violating Article 120, UCMJ; however, he did not have any legal training and did not know at the time what Article 120, UCMJ, was. Appellant also testified that when he was at the hospital, investigators read him his rights and mentioned "120," but he had no idea what that meant. He further stated that given the DNA swabbing, he assumed it was related to "something of a sexual matter." On cross-examination, Appellant agreed that at the interview he knew he was called in for questioning because he was a suspect in a sexual assault investigation, and there was no doubt in his mind as to why he was there. Appellant also established through his testimony that regardless of whether he knew what "Article 120" meant, when the investigators said "Article 120 UCMJ" at the hospital, he knew that he was a suspect in a sexual assault investigation.

"A military judge's denial of a motion to suppress a confession is reviewed for an abuse of discretion." *United States v. Chatfield*, 67 M.J. 432, 437 (C.A.A.F. 2009) (citing *United States v. Pipkin*, 58 M.J. 358, 360 (C.A.A.F. 2003)). The military judge's findings of fact are upheld unless they are clearly erroneous or unsupported by the record; however, we review de novo any conclusions of law in a denial of a motion to suppress a confession. *Id.* "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles

to the facts is clearly unreasonable." *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010) (citing *United States v. Mackie*, 66 M.J. 198, 199 (C.A.A.F. 2008)).

Article 31(b), UCMJ, provides:

> No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

Involuntary statements are those "obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment to the [U.S.] Constitution, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement." Mil. R. Evid. 304(a).

In advising a suspect of his Article 31(b), UCMJ, rights, the "[a]dvice as to the nature of the charge need not be spelled out with the particularity of a legally sufficient specification; it is enough if, from what is said and done, the accused knows the general nature of the charge. . . . A partial advice, considered in light of the surrounding circumstances and the manifest knowledge of the accused, can be sufficient to satisfy this requirement of Article 31." *United States v. Simpson*, 54 M.J. 281, 284 (C.A.A.F. 2000) (quoting *United States v. Davis*, 24 C.M.R. 6, 8 (C.M.A. 1957)) (omission in original). Moreover, the accused must be informed of the general nature of the allegation, including the area of suspicion that focuses him toward the circumstances surrounding the event in which he is allegedly involved. *Id.*

In this case, Appellant understood that the reason investigators searched his home twice was to find evidence in connection to a sexual assault allegation. He also knew that samples and swabs were taken from his genitals and other areas of his body because he was suspected of committing sexual assault. There was no doubt in his mind that these investigative steps leading up to and including his interview on 6 March 2013 were related to an allegation against him for sexual assault. Given the circumstances, we find the rights warning to Appellant, advising that he was suspected of an Article 120 offense, without further clarification, was sufficient to focus him on the accusation against him. The rights advisement, considered in light of the surrounding circumstances and the manifest knowledge of the accused, was sufficient to satisfy Article 31, UCMJ, under the specific facts of this case.

Turning to whether AFOSI investigators coerced an involuntary confession from Appellant, we find Appellant's statements to investigators were voluntarily and freely

made. On two occasions prior to questioning, investigators advised Appellant of his right to remain silent and to have a lawyer. Also, before they finalized his statement in written form, investigators directed Appellant's attention to the rights advisement section of the form, and Appellant again acknowledged his rights and waived them.

When analyzing the voluntariness of Appellant's statements to investigators, we review the totality of the circumstances to determine whether his "will was overborne and his capacity for self-determination was critically impaired." *United States v. Chatfield*, 67 M.J. 432, 439 (C.A.A.F. 2009) (quoting *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996)) (internal quotation marks omitted). We evaluate "both the characteristics of the accused and the details of the interrogation." *Id.* (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)) (internal quotation marks omitted). Our superior court has previously considered an appellant's "age, education, experience, and intelligence as part of the circumstances bearing on the question whether a statement was voluntary." *Id.* at 439–40 (citing *United States v. Freeman*, 65 M.J. 451, 454 (C.A.A.F. 2008)).

In this case, Appellant was a twenty-two-year-old Airman with about three years of Air Force experience. He had attended technical training as well as Survival, Evasion, Resistance, and Escape (SERE) training to prepare him for duties as an intelligence, surveillance, and reconnaissance (ISR) operator. Appellant described SERE training as both physically and mentally demanding. He deployed two times in support of ISR operations. Besides SERE training, Appellant had never been in an interrogation situation. Prior to joining the Air Force, Appellant displayed leadership talent in the Junior Reserve Officer Training Corps program and maintained average grades. Also, the military judge made detailed findings and observations of Appellant's characteristics and demeanor at trial, including Appellant's apparent poise, confidence, and ability to articulate. There is no evidence in the record that Appellant was of low intelligence, had any mental disability affecting his ability to understand investigative procedures, or had any prior issues with duty performance in a technical and demanding field. Overall, Appellant's characteristics weigh in favor of his statement being found voluntary.

Turning to the subject interview on 6 March 2013, the military judge found the details of the interrogation weighed in favor of the statements being voluntary. The military judge found no overt threats or inducements, and no physical punishment or deprivation. The length of the interview was reasonable, and Appellant was allowed adequate time for restroom breaks, to eat, and to draft his written statement. Based on the circumstances surrounding the interrogation, the military judge determined "[t]his was hardly the case [where Appellant] was subjected to hours on end of incessant questioning."

Contrary to appellate defense counsel's complaint, the military judge also considered the defense's evidence, to include expert witness testimony on coerced or

false confessions. It is apparent from the military judge's written ruling that he considered, but found unpersuasive, the defense's supporting evidence, consisting of testimony on the length of the interview, alleged isolation, use of maximization and minimization, use of threats, and other "psychologically manipulative tactics." Under the same interrogation techniques used by investigators that day, Appellant admitted to nonconsensual sexual intercourse with SrA KD, yet steadfastly denied using any object to penetrate SrA KD, despite investigator's repeated questioning about a plunger. Appellant also denied having anal sex and denied participation by other people in SrA KD's assault. Thus, the military judge reasoned the interrogation techniques utilized in Appellant's interview did not critically impair his capacity for self-determination.

Based on our review of the totality of the circumstances, we agree with the military judge's conclusion that Appellant's statements were voluntary, in that his will was not overborne and his capacity for self-determination was not critically impaired.

Exclusion of Mil. R. Evid. 412 Evidence

Prior to trial, trial defense counsel provided notice of intent to offer evidence under Mil. R. Evid. 412 and specifying evidence they sought to introduce. However, after testimony and other evidence were presented at a closed hearing, trial defense counsel amended their motion to seek to introduce the following: (1) SrA KD allegedly lied to her instructor in regards to sending a text message of a sexual nature to another student during technical training, and (2) the relationship between SrA KD and A1C JJ was awkward.

Trial defense counsel argued the lie to the instructor was relevant to impeach SrA KD's credibility, and the description of SrA KD's relationship with A1C JJ was relevant to the interactions SrA KD had with the accused and other partygoers at the accused's apartment on the night of the sexual assault. The military judge granted the defense request to present evidence that SrA KD and A1C JJ's relationship was awkward. With regard to SrA KD's alleged lie to her instructor, the military judge analyzed the evidence under Mil. R. Evid. 412 and 403, then granted the defense request to cross-examine SrA KD about her denial to her instructor. The military judge reasoned the Mil. R. Evid. 412 exception for constitutionally required evidence included the right to confront witnesses and impeach them, thus permitting cross-examination bearing on SrA KD's truthfulness. However, the military judge ruled that the defense could not probe into details about the actual language of a sexually explicit text message and further limited the defense to "one additional follow-up question that does not involve any unprofessional relationship or involve any sexual innuendo[,] in order to draw out the facts and orient the members as to why defense initially asked whether . . . [SrA KD] lied or misrepresented facts to [the instructor]."

Trial defense counsel asserted the purpose for cross-examining SrA KD on the content of the sexually explicit nature of the text messages was to challenge her credibility, and they asked for clarification on the judge's ruling. In providing clarification, the military judge explained that mention of the sexually explicit content of the text messages or unprofessional relationship would infuse sexual innuendo in the factfinding process. The military judge explained that because the evidence did not show there was any actual relationship or sexual act, those matters were in dispute and would devolve into further litigation; therefore, such questions were not admissible when applying Mil. R. Evid. 403. The military judge expounded that the defense could cross-examine SrA KD about misrepresenting to her instructor that she had not engaged in "unprofessional communications," when in fact SrA KD had sent such text messages to another student. During SrA KD's testimony before the finders of fact, trial defense counsel conducted an extensive cross-examination of SrA KD, to include impeachment of her credibility and ability to perceive the events of 3 March 2013; however, the defense did not delve into evidence the military judge had ruled admissible under Mil. R. Evid. 412. That is, the defense did not attempt to impeach SrA KD's credibility based on any alleged lie she may have told her instructor about unprofessional communications with another student.

Without identifying specific evidence, Appellant now argues the military judge abused his discretion when he excluded evidence pursuant to Mil. R. Evid. 412, because "[t]he excluded evidence calls into question SrA KD's credibility and her ability to accurately perceive events that took place between her and Appellant." Appellant also claimed prejudice, without further explanation. Appellate defense counsel did not explain how any unspecified, excluded evidence impacted SrA KD's credibility and ability to accurately perceive events taking place between her and Appellant, when the alleged lie and text messaging took place approximately a year and a half prior to Appellant's sexual assault of SrA KD. Nonetheless, we reviewed the entire record with a view towards any issue of improper exclusion of Mil. R. Evid. 412 evidence, and we find the military judge did not err.

Because the military judge granted the defense's motion to present evidence that the relationship between SrA KD and A1C JJ was awkward and also granted the defense motion to impeach SrA KD regarding the alleged lie about unprofessional communications, we will limit our discussion to the military judge's denial of further cross-examination into the actual content of the sexually explicit text messages.

"We review the military judge's ruling on whether to exclude evidence pursuant to [Mil. R. Evid.] 412 for an abuse of discretion. Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed de novo." *United States v. Ellerbrock*, 70 M.J. 314, 317 (C.A.A.F. 2011) (citing *United States v. Roberts*, 69 M.J. 23, 26 (C.A.A.F. 2010)) (internal citations omitted).

An accused has a Sixth Amendment[3] right to be confronted with the witnesses against him, and that right necessarily includes the right to cross-examine those witnesses. *Id.* at 318 (citing *Davis v. Alaska*, 415 U.S. 308, 315 (1974)). "In particular, the right to cross-examination has traditionally included the right 'to impeach, i.e., discredit the witness.'" *Id.* (quoting *Olden v. Kentucky*, 488 U.S. 227, 231 (1988)). "Reasonable limits on cross-examination intended to attack a witness's credibility may be based on concerns such as harassment, prejudice, confusion of issues, witness safety, repetitiveness, or marginal relevancy." *United States v. Velez*, 48 M.J. 220, 226 (C.A.A.F. 1998) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

Evidence of SrA KD's alleged misrepresentation to her instructor was determined to be relevant to her credibility, material, and the probative value of the evidence outweighed the dangers of unfair prejudice. *See United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011). However, we do not see how the actual sexually explicit language used by SrA KD in her text message, which was sent approximately a year and a half before the sexual assault and unrelated to the charged offense, is relevant or admissible in Appellant's case. We further find no merit in any assertion that the text messages' content was somehow relevant to SrA KD's ability to accurately perceive events that took place between her and Appellant a year and a half later. The defense chose to forgo the admissible impeachment evidence and cross-examined SrA KD on a myriad of other areas bearing on SrA KD's credibility and ability to perceive events. In light of the defense's decision to not present evidence of the alleged lie to the instructor about engaging in unprofessional communications (i.e., the text messages), we are convinced that evidence of the actual language of the text messages was not relevant or material.

The military judge's findings of fact were not clearly erroneous. Also, we conclude that even if the content of the text messages was marginally relevant, the probative value of the excluded evidence did not outweigh the danger of unfair prejudice and confusion of the issues. The military judge did not abuse his discretion in ruling as he did regarding evidence involving Mil. R. Evid. 412.

Unlawful Command Influence

At trial, Appellant sought relief through a motion to dismiss the case with prejudice, claiming actual and apparent unlawful command influence. In support of this motion, Appellant attached 27 documents relating to sexual assault cases in the military and containing opinions and commentary from a wide range of military and nonmilitary persons. The military judge adopted as fact the matters contained in those documents, to include comments attributed to military and civilian leadership. The military judge also adopted an affidavit from the convening authority for this case, stating he was aware of comments made by senior civilian and military leaders, but those comments had no

[3] U.S. CONST. amend. VI.

impact on his decision-making. The military judge found no evidence suggesting any news report, sexual assault training, or comments made by any military or civilian leaders had prevented or discouraged any witness from assisting the defense or impacted Appellant's ability to defend against the charge.

In his ruling, the military judge further found the parties had conducted extensive voir dire "to explore the member's [sic] knowledge of, and any possible influence by, the matters raised by the Defense as bases for [unlawful command influence]." One member was excused based in part on her responses regarding Air Force priorities and training. Another member brought to the trial court's attention a comment made by the special court-martial convening authority to the effect of there was a "well-crafted confession" in this case and the comment about the confession "was not a big deal" to report to the court. Upon reporting the special court-martial convening authority's comments to the court, the member was subjected to voir dire, but neither party challenged him for cause or peremptorily.

On appeal, Appellant alleges that apparent unlawful command influence so permeated the Air Force at the time of his trial that it was impossible for him to receive a fair trial and fair clemency consideration, the military judge abused his discretion in finding Appellant did not meet his burden of showing apparent unlawful command influence, the Government failed to show beyond a reasonable doubt there was no unlawful influence, and Appellant's conviction should now be set aside. Appellant argues that the cumulative effect of the documents attached to the motion to dismiss was sufficient to meet the initial, low burden of showing an atmosphere and attitude in the Air Force toward alleged sexual assaults that made it impossible for Appellant to receive fairness in the processing of his case and for the public to believe in the fairness of the military justice system.

Article 37(a), UCMJ, 10 U.S.C. § 837(a), states: "No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts." The mere appearance of unlawful command influence may be "as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Ayers*, 54 M.J. 85, 94–95 (C.A.A.F. 2000) (quoting *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991)) (internal quotation marks omitted).

Allegations of unlawful command influence are reviewed de novo. *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013). "On appeal, the accused bears the initial burden of raising unlawful command influence. Appellant must show: (1) facts, which if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that the unlawful command influence was the cause of the unfairness." *Id.* (citing

United States v. Richter, 51 M.J. 213, 224 (C.A.A.F. 1999)). The initial burden of showing potential unlawful command influence is low, but is more than mere allegation or speculation. *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002). The quantum of evidence required to raise unlawful command influence is "some evidence." *Id.* (quoting *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)) (internal quotation marks omitted). Once an issue of unlawful command influence is raised by some evidence, the burden shifts to the Government to rebut an allegation of unlawful command influence by persuading the court beyond a reasonable doubt that: (1) the predicate facts do not exist; (2) the facts do not constitute unlawful command influence; or (3) the unlawful command influence will not affect the findings or sentence. *Biagase*, 50 M.J. at 150.

Upon our review of the entire record, including documents presented and statements made by the members during voir dire, we find the military judge's findings of fact are supported by the record. Further, we need not reach the question of whether the defense met its initial burden, as the military judge found beyond a reasonable doubt that the documents and statements presented had no impact on the proceedings at the accusatory or adjudicative stage. We agree with the military judge's conclusions that an impartial panel was seated, and an objective, disinterested, reasonable member of the public, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of Appellant's proceedings. *See United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006). We find beyond a reasonable doubt that the case was not infected by actual or apparent unlawful command influence.

Constitutionality of Five-Member Panel that is not Required to be Unanimous

Appellant urges us to set aside the finding and sentence, arguing he was denied due process of law under the Fifth Amendment when he was tried by a court consisting of five members who were not required to be unanimous in their verdict. We conclude Appellant has not suffered a due process violation.

Relying on *Ballew v. Georgia*, 435 U.S. 223 (1978), Appellant denounces small panel sizes and exalts empirical data in *Ballew* which indicate smaller juries would be "less likely to foster effective group deliberation" and would be more likely to engage in "inaccurate factfinding and incorrect application of the common sense of the community." *Id.* at 232. Further, Appellant cites *Burch v. Louisiana*, 441 U.S. 130 (1979), to posit that non-unanimous verdicts amplify the problem of small panels. Last, Appellant urges this court to question whether recent changes in the military justice system render "a five-member panel not required to be unanimous . . . no longer sustainable under our Constitution." We find the authorities cited by Appellant are unpersuasive in terms of any alleged due process violation and in terms of Congress' power to establish rules applicable to courts-martial.

Article I, § 8, Clause 14, of the United States Constitution empowers Congress "[t]o make Rules for the Government and Regulation of the Land and naval Forces . . . ." Pursuant to this express authority, Congress enacted the Uniform Code of Military Justice (UCMJ) as the body of law on military justice. "The result has been the establishment and development of a system of military justice with fundamental differences from the practices in the civilian courts." *O'Callahan v. Parker*, 395 U.S. 258, 261–62 (1969).

A long line of case precedence recognized that courts-martial are not subject to the same general constitutional requirements as civilian jurisdictions. *See Ex parte Quirin*, 317 U.S. 1 (1942); *Ex parte Milligin*, 71 U.S. 2 (1866); *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004) (citing *United States v. Kemp*, 46 C.M.R. 152, 154 (C.M.A. 1973)). Regarding military panels, Article 16, UCMJ, 10 U.S.C. § 816, allows for fluctuating panels of "not less than five members" in noncapital cases, unlike those in federal and state courts. Also, Article 52, UCMJ, 10 U.S.C. § 852, requires in non-capital cases the concurrence of two-thirds of the panel members for a conviction and sentence that includes confinement not in excess of 10 years. In the present case, Appellant was convicted and sentenced by a panel of five members in accordance with the UCMJ, and he does not cite any evidence in the record showing the Government failed to carry out the statutory requirements for panel size or voting.

Post-trial Processing Delay

Appellant argues he should be granted some "meaningful relief" because the convening authority took action on his case 150 days after the conclusion of trial. He asserts this post-trial delay is presumptively unreasonable, warranting appropriate remedy by this court.

We review de novo Appellant's claim that his due process rights were violated due to post-trial delay. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citing *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004)) (stating conclusions of law are reviewed under the de novo standard); *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003) (stating speedy trial issues, as conclusions of law, are reviewed de novo)). Where the convening authority's action is not taken within 120 days of the end of trial, we apply a presumption of unreasonable delay; however, "[t]he Government can rebut the presumption by showing the delay was not unreasonable." *Moreno*, 63 M.J. at 142.

In this case, trial ended on 15 February 2014, and the convening authority took action 150 days later on 15 July 2014; therefore, we presume unreasonable delay. We thus considered the remaining factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), including the reasons for the delay, Appellant's assertion of the right to timely review, and prejudice. *Moreno*, 63 M.J. at 135 (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)).

A brief chronology of post-trial events is as follows:

Date	Action	Days Elapsed
15 Feb 14	Completion of trial	0
28 Apr 14	Record of trial authenticated and assembled	72
9 May 14	Staff Judge Advocate's Recommendation (SJAR) signed	83
12 May 14	Appellant and counsel received SJAR, starting 10-day window to provide clemency matters and up to 20 additional days upon request	86
11 Jun 14	Appellant provided clemency matters to staff judge advocate's (SJA) office	116
13 Jun 14	Appellant requested extension of time to submit additional clemency matters	118
18 Jun 14	Appellant submitted additional clemency matters to SJA	123
30 Jun 14	Addendum and clemency matters submitted to convening authority	135
15 Jul 14	Convening authority's action	150

The 150-day processing time included 72 days for transcription and assembly of the record of trial. Not including 2 days of leave, 10 days on other cases, and weekends and holidays, the reporter worked almost daily to transcribe and assemble the 10-volume record. We find the reporter diligently transcribed and assembled the record. The next largest period was attributable to Appellant, entailing 37 days to provide clemency matters after extensions were granted. *See United States v. Lee*, 73 M.J. 166, 171 (C.A.A.F. 2014) (finding 20 of 141-days were result of appellant's request for additional time to submit clemency matters and overall delay was not a violation of due process right to speedy review).

The processing time attributable to the Government was accounted for, and the Government has overcome the presumption of unreasonableness. In reaching this determination, we considered the complexity of the record, the offense involved, the requirement for the SJA and convening authority to address four complex legal issues presented in clemency and to review the entire content of Appellant's 1458-page clemency submission, and the lack of evidence of malicious delay. The SJA spent 12 days reviewing the lengthy clemency package and legal errors alleged; then the convening authority took action in 15 days.

We also considered that Appellant did not demand speedy post-trial review during the 150 days. For the first time here, appellate defense counsel claims the delay was unreasonable and requires some appropriate relief, specifying the presumption of

unreasonableness as the sole reason for relief. While Appellant is not required to complain in order to receive timely convening authority action, when he raised his claim to this court, Appellant did not identify any "particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Moreno*, 63 M.J. at 140. Accordingly, after balancing all the factors, we find no violation of Appellant's due process right to speedy post-trial review for the 150 days between the completion of trial and convening authority's action.

Lastly, we review Appellant's request for relief pursuant to *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002). Under Article 66(c), UCMJ, 10 U.S.C. § 866, this court is empowered "to grant relief for excessive post-trial delay without a showing of actual prejudice within the meaning of Article 59(a), if it deems relief appropriate under the circumstances." *Id.* at 224 (quoting *United States v. Collazo*, 53 M.J. 721, 727 (A. Ct. Crim. App. 2000)) (internal quotation marks omitted). We do not find such relief necessary in this case for the reasons and factors addressed above.

Conclusion

The approved finding and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved finding and sentence are **AFFIRMED**.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court