UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain ADAM E. PITMAN
United States Air Force

ACM 37453

19 May 2011

Sentence adjudged 29 January 2009 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: Stephen R. Woody.

Approved sentence: Dismissal and confinement for 6 months.

Appellate Counsel for the Appellant: Captain Phillip T. Korman (argued), Lieutenant Colonel Gail E. Crawford, Major Shannon A. Bennett, Major Bryan A. Bonner, Major Anthony D. Ortiz.

Appellate Counsel for the United States: Lieutenant Colonel Nurit Anderson (argued), Colonel Don M. Christensen, Lieutenant Colonel Jeremy S. Weber, Major Naomi N. Porterfield, and Gerald R. Bruce, Esquire.

Before

BRAND, ORR, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

GREGORY, Senior Judge:

A general court-martial composed of officer members convicted the appellant contrary to his pleas of one specification of wrongful sexual contact as a lesser included offense of a charged specification of aggravated sexual contact and one specification of conduct unbecoming an officer and a gentleman in violation of Articles 120 and 133, UCMJ, 10 U.S.C. §§ 920, 933. He was acquitted of a second specification of indecent conduct also alleged as a violation of Article 120, UCMJ. The court-martial sentenced

the appellant to a dismissal and confinement for six months, and the convening authority approved the sentence adjudged. The appellant raises four issues: (1) whether the military judge erred by instructing that the court members could consider wrongful sexual contact as a lesser included offense of the charged aggravated sexual contact, (2) whether the military judge erred by excluding certain evidence of the victim's behavior, (3) whether the evidence is insufficient to support the conviction of wrongful sexual contact, and (4) whether the military judge erred by not instructing that mistake of fact as to consent is a defense to the charge of conduct unbecoming under Article 133, UCMJ. We heard oral argument on this case on 16 February 2011 at Seattle University School of Law in Seattle, Washington. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Background

The appellant and the victim, First Lieutenant (1st Lt) NH, were assigned to the 12th Missile Squadron, Malmstrom Air Force Base (AFB), Montana. The first sexually related encounter between them occurred in 2006 when, during a poker party at the appellant's home, the appellant made sexual advances toward 1st Lt NH to include consensual kissing and fondling. Only afterwards did 1st Lt NH learn that the appellant was married. The next reported contact came in May 2007 when the appellant telephoned 1st Lt NH while she was on duty to tell her they were scheduled as a two-person missile launch control crew and then proceeded to make sexual comments to her concerning what they would do during their upcoming duty. A similar call occurred in June 2007.

On 9 December 2007, the appellant and 1st Lt NH were ordered to serve together as a two-person missile launch control crew with the appellant as commander and 1st Lt NH as deputy commander. Launch control crews work in a launch control center, a small capsule located 60 feet underground behind an eight-ton blast door. Two officers serve on alert in the capsule at the same time, and, for security purposes, both officers are required to remain present at all times until a relief crew member arrives to permit one of the crew to leave the capsule for 12 hours of rest.

1st Lt NH testified that after they were secured in the capsule, the appellant began making sexual advances toward her by asking her to play strip poker and undress for him. She refused and tried to ignore him, but he swiveled her chair toward him and pulled her onto his lap. He picked her up and placed her on a sleeping bag that he had unrolled on the floor, telling her that he was "looking forward to the alert and that [she] shouldn't let him down." She did not reply, testifying that she was "in shock." The appellant proceeded to fondle and kiss 1st Lt NH's breasts, and also placed her hand on his penis. When asked why she did not fight back, 1st Lt NH testified that she feared physical retaliation if she did. When asked why she did not scream, 1st Lt NH replied "I was 60

feet underground." Several weeks later, after discussing what happened with an officer colleague, 1st Lt NH reported the incident to the Sexual Assault Response Coordinator.

The Lesser Included Offense

At government request and over defense objection, the military judge instructed the members that they could consider wrongful sexual contact as a lesser included offense of the charged aggravated sexual contact. He first instructed the members on the elements of the charged offense:

> One, that at or near the India-1 Missile Launch Control Facility, Montana, on or about 9 December 2007, the accused engaged in sexual contact, to wit: the fondling of First Lieutenant [NH's] breasts with his hands, the kissing of her breasts with his mouth, and the placing of her hand upon his penis, with the said First Lieutenant [NH].
>
> And two, that [the] accused did so by using force against First Lieutenant [NH], to wit: the use of physical strength sufficient that she could not avoid or escape the sexual contact.

He correctly defined the element of force as "action to compel submission of another or to overcome or prevent another's resistance by physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual contact."

The military judge then instructed the members on the elements of wrongful sexual contact as a lesser included offense:

> One, that, at or near the India-1 Missile Launch Control Facility, Montana, on or about 9 December 2007, the accused engaged in sexual contact, to wit: the fondling of First Lieutenant [NH's] breasts with his hands, the kissing of her breasts with his mouth, and the placing of her hand upon his penis, with the said First Lieutenant [NH].
>
> Two, that such sexual contact was without the permission of First Lieutenant [NH]; and
>
> Three, that such sexual contact was wrongful.

The military judge correctly defined "wrongful" as meaning without legal justification or lawful authorization. He explained the essential difference in the two offenses as the greater offense required force whereas the lesser required only lack of permission:

> The offense charged, that is aggravated sexual contact, and the lesser included offense of wrongful sexual contact differ primarily in that the offense charged requires, as an essential element, that you must be convinced beyond a reasonable doubt that the accused engaged in sexual contact by using force against First Lieutenant [NH], whereas the lesser included offense of wrongful sexual contact does not include such an element, but it does require that you be satisfied beyond a reasonable doubt that the accused engaged in sexual contact without the permission of First Lieutenant [NH] and that such sexual contact was wrongful.

Relying primarily on *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010), the appellant argues that this lesser included offense instruction was error because the elements of the greater offense do not include the elements of the lesser: "The charges failed to put Appellant on notice that he also needed to defend against wrongful sexual contact, with its *unique elements of lack of consent and wrongfulness*." (Emphasis added.)

As the appellant correctly notes, underlying this issue is the fundamental due process principle of fair notice to a criminal defendant of what he must defend against. To determine whether a charged offense provides sufficient notice of some other offense, both the United States Supreme Court and the Court of Appeals for the Armed Forces apply an elements test which analyzes whether the elements of the lesser offense are a subset of the charged offense:

> Under the elements test, one compares the elements of each offense. If all of the elements of offense X are also elements of offense Y, then X is an LIO of Y. Offense Y is called the greater offense because it contains all of the elements of offense X along with one or more additional elements.

Jones, 68 M.J. at 470 (citing *Schmuck v. United States*, 489 U.S. 705, 716 (1989)). Put another way, "'[T]o be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser.'" *Schmuck*, 489 U.S. at 719 (quoting *Giles v. United States*, 144 F.2d 860, 861 (9th Cir. 1944) (quoting *House v. State*, 117 N.E. 647, 648 (Ind. 1917))). The normal principles of statutory construction determine whether respective elements are the same; identical statutory language is not required. *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010) (citing *Carter v. United States*, 530 U.S. 255, 263 (2000)). Applying these principles to the present case, we find that the military judge did not err by instructing that wrongful sexual contact is a lesser included offense of the charged aggravated sexual contact.

Contrary to the argument made on appeal regarding lack of notice, trial defense counsel's argument in opposition to the lesser included offense instruction expressly

acknowledges that the charged offense puts the defense on notice that consent or lack of permission is an issue:

> Now, we have kind of more of a legal argument as well in terms of the new Article 120 and I think some of the problems it creates in this regard. He is charged with aggravated sexual contact, specifically by using force. As you know, there are five types – five manners in aggravated sexual contact whereby an accused can overcome an alleged victim's resistance – *overcome her lack of consent*.

(Emphasis added.) His theory focused on a perceived deficiency of proof rather than a lack of notice, arguing that failure to prove the requisite force would necessarily result in failure to prove lack of consent: "What I would like to clarify, Your Honor, is where that force is not sufficient – in other words, where she can prevent this conduct from continuing and fails to do so, does that not constitute consent? The defense's position is that it does."

The appellant does not renew his counsel's argument that lack of force equates to a victim's consent, but his counsel's view that consent or permission is relevant to a charge of forced sexual contact is correct. *See United States v. Neal*, 68 M.J. 289, 300-02 (C.A.A.F), *recons. denied*, 69 M.J. 42 (C.A.A.F.), *and cert. denied*, 131 S. Ct. 121 (2010). The Court in *Neal* expressly rejected the view that consent is not relevant to a charge of aggravated sexual contact simply because lack of consent is not listed as an element. "We do not interpret Article 120(r) as a prohibition against considering evidence of consent, if introduced, as a subsidiary fact pertinent to the prosecution's burden to prove the element of force beyond a reasonable doubt." *Id.* at 302. Just as the defense is free to introduce evidence of consent in an effort to create reasonable doubt, the prosecution may likewise introduce evidence of lack of consent, although not required, to prove the element of force beyond a reasonable doubt. Thus, while lack of consent is not an express element of aggravated sexual contact, the essential element of force includes as a relevant component lack of permission or consent.

Expanding the relevance rationale in *Neal* to a comparison of elements, normal principles of statutory construction determine whether words like "force" used in the elements of a charged offense may include other, though not expressly stated, words in the elements of a lesser included offense. *See Alston*. The Court in *Alston* held that the "force" required for a charged rape necessarily included the element of bodily harm "however slight" for a lesser included offense of aggravated sexual assault. Applying normal principles of statutory construction, the Court reasoned:

> Each circumstance set forth in Article 120(t)(5)(C) describes an act of force applied by one person against another person involving sufficient power to compel submission or overcome or prevent resistance. Applying the

> common and ordinary understanding of the words in the statute, each act of force described in Article 120(t)(5)(C), at a minimum, includes an offensive touching that satisfies the bodily harm element of Article 120(t)(8).

Alston, 69 M.J. at 216. The normal principles of statutory construction likewise apply to the facts and circumstances of this case to determine whether the military judge properly instructed on the lesser included offense.

Force is defined as "action to compel submission of another or to overcome or prevent another's resistance." Article 120(a)(t)(5), UCMJ. Applying the common and ordinary understanding of these words, an allegation that a victim is compelled to submit to sexual acts by force clearly includes as a subset that the victim is not consenting. Therefore, the element of force in the charged offense necessarily includes the element of lack of permission in the lesser offense of wrongful sexual contact. While not controlling on this issue, the *Manual* supports instructing on wrongful sexual contact as a lesser included offense of aggravated sexual contact depending on the facts and circumstances of the case. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 45.e.(5)(a) (2008 ed.).

The elements test provided by *Schmuck* affirms this interpretation since it would be impossible to prove the force required for the greater offense of aggravated sexual contact without also proving the wrongfulness and lack of permission required for the lesser offense of wrongful sexual contact. Contrary to trial defense counsel's argument, however, the converse is not necessarily true: a victim whose resistance does not require force to overcome is not thereby necessarily consenting to the attack. For example, in this case, the victim testified that she was in shock and feared that physical resistance would precipitate a greater attack.

Again, as trial defense counsel acknowledged in his argument on force and consent, the issue is not a matter of notice but a matter of proof. Whether by force or lack of permission, both the charged offense and the lesser included offense allege unwanted sexual contact and sufficiently notified the appellant that he must defend against both. Just as offensive touching is necessarily included in an allegation of force, so is nonconsensual touching. *See Alston*.

As found by the military judge, the evidence reasonably raised the issue of whether the victim's response to the appellant's actions required force to overcome or, to a lesser degree, only manifested her lack of consent:

> So, first of all, the court needs to determine whether, based on the testimony, the court members could reasonably conclude that there was not force that was sufficient to overcome [NH's] ability to avoid or escape the conduct – the sexual conduct – and the court concludes that there is at least

> evidence from which the court members potentially could conclude that there was not force sufficient to overcome her ability to avoid or escape the conduct. Given that, the question then becomes whether the lesser included offense of wrongful sexual contact is reasonably raised by the evidence in this case. The elements of that are just that the accused engaged in the conduct as alleged, that it was without her permission, and that it was wrongful. The court finds . . . the lesser included offense of wrongful sexual contact is reasonably raised by the evidence in the case . . . .

In response, trial defense counsel did not claim lack of notice of this lesser offense but argued that if the force is not sufficient to physically overcome resistance then by default the victim has consented: "I think the way the evidence has come out, this is an all or nothing scenario." The military judge disagreed with this defense position on what constitutes consent, but permitted the defense to argue their view of the facts. Under these circumstances, we find that the military judge properly instructed the members to consider wrongful sexual contact as a lesser included offense of the charged aggravated sexual contact. Rule for Courts-Martial (R.C.M.) 920(e)(2); *United States v. Miergrimado*, 66 M.J. 34, 36 (C.A.A.F. 2008) (military judge has *sua sponte* duty to instruct on lesser included offenses raised by the evidence even where the defense strategy is "all or nothing").

Evidence of Prior Sexual Conduct

The appellant offered certain matters regarding the victim's prior sexual conduct to show motive to fabricate. The matters at issue were the subject of a counseling session between the victim and her supervisor after the December 2007 crew duty with the appellant but before the victim formally reported the incident.[1] Following a closed hearing on the issue, the military judge admitted some but not all of the proffered conduct. Specifically, he found the following matters admissible: (1) Captain (Capt) DO, the victim's supervisor, counseled her in a "very pointed and harsh nature" immediately following her December 2007 crew duty with the appellant, (2) Capt DO counseled her about either agreeing or volunteering to be a crewmember with the appellant in December 2007 despite her earlier request not to be assigned with him, (3) Capt DO prohibited her from further crew duty with the appellant and advised her to "stay away" from the appellant, and (4) Capt DO expressed concern about 1st Lt NH's judgment, about appearances, and about her professionalism. The military judge also permitted testimony concerning the victim's responses and demeanor during the counseling session. Applying the standards of Mil. R. Evid. 412, the military judge determined that the probative value of these matters to show motive to fabricate outweighed the danger of unfair prejudice. During the trial he somewhat expanded the

[1] The government did not oppose admission of evidence that the victim and the appellant had a consensual sexual encounter at the appellant's home during a 2006 poker party.

scope of admissibility when, in response to a court member question, the military judge permitted Capt DO to testify that he counseled the victim concerning her judgment based on a pattern of behavior rather than a single incident.

However, the military judge excluded certain specific matters mentioned by Capt DO during the counseling, including: (1) his knowledge of rumors that the victim had inappropriate relationships with other married men in the squadron, (2) his directive based on those rumors that she no longer serve on a crew with a married man, and (3) his concerns about her behavior while drinking. The military judge explained in his ruling that the rumors of other relationships were unsubstantiated, that drinking had nothing to do with the charged offenses, and that neither matter was relevant to a motive to fabricate. The appellant argues that this evidence was constitutionally required.

We review a military judge's decision to admit or exclude evidence for an abuse of discretion, and have applied that standard to alleged constitutional violations. *See United States v. Weston*, 67 M.J. 390, 392 (C.A.A.F. 2009), *cert. denied*, 130 S. Ct. 1501 (2010); *United States v. Moss*, 63 M.J. 233, 236 (C.A.A.F. 2006); *United States v. Israel*, 60 M.J. 485, 488 (C.A.A.F. 2005). Generally, evidence of a victim's past sexual behavior is inadmissible in a sexual offense case under Mil. R. Evid. 412. The purpose of the rule is to "shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses." Drafter's Analysis, *Manual for Courts-Martial, United States* (*MCM*), A22-35 (2008 ed.). An exception to this general rule of exclusion permits the admission of evidence if its exclusion "would violate the constitutional rights of the accused." Mil. R. Evid. 412(b)(1)(C).

The appellant has the burden under Mil. R. Evid. 412 of establishing his entitlement to any exception to the prohibition on the admission of evidence "offered to prove that any alleged victim engaged in other sexual behavior." Mil. R. Evid. 412(a)(1); *United States v. Banker*, 60 M.J. 216, 223 (C.A.A.F. 2004). To establish that the excluded evidence "would violate the constitutional rights of the accused," an accused must demonstrate that "the evidence is relevant, material, and favorable to his defense, and thus whether it is 'necessary.'" *Id.* at 222 (quoting *United States v. Williams*, 37 M.J. 352, 361 (C.M.A. 1993)). The term "favorable" as used in both Supreme Court and military precedent is synonymous with "vital." *Id.* (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)); (citing *United States v. Dorsey*, 16 M.J. 1, 8 (C.M.A. 1983)). Testimony is material if it was "'of consequence to the determination of' appellant's guilt." *Dorsey*, 16 M.J. at 6 (quoting Mil. R. Evid. 401). In determining whether evidence is of consequence to the determination of the appellant's guilt, we "consider 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 other evidence in the case pertaining to this issue." *Id.* (citation omitted).

In this case the military judge admitted much of the evidence offered by the appellant under Mil. R. Evid. 412, but found that the appellant failed to meet his burden of establishing that the three excluded matters were constitutionally required. Specifically, he determined that Capt DO's counseling of the victim concerning unsubstantiated rumors of relationships with married men other than the appellant and his directive based on those rumors that she not post with married men were not relevant to a potential motive to fabricate. He also determined that Capt DO's counseling references to the victim's behavior while drinking were not relevant since drinking was not involved in the allegations regarding what happened in the launch control center. Applying the balancing test required by Mil. R. Evid. 412, he added that any minimal probative value this evidence might have did not outweigh the danger of unfair prejudice. We find that the military judge struck the right balance between the appellant's constitutional rights and the victim's privacy interests codified in Mil. R. Evid. 412.

The appellant argued at trial that the counseling session was relevant because it explains what triggered the victim's report and provided a motive to fabricate. The evidence admitted by the military judge described above permitted that argument and more, including that during the "very pointed and harsh" counseling session immediately following her December 2007 crew duty, the victim mentioned nothing about inappropriate behavior by the appellant. During closing argument, trial defense counsel used this evidence to highlight the defense theory of fabrication:

> [S]he gets called on the carpet for her off-duty and on-duty judgment and performance – that pattern. So what does she do? She calls Lieutenant [MH] and she said, "You know, something happened down there," and then the story goes from there. It kind of evolves one little thing after another. The bottom line in this case is, the government has not proven its case beyond any reasonable doubt.

In this context, we agree with the military judge's finding that the excluded evidence added nothing to the appellant's theory of admissibility and was certainly not vital or material. *See United States v. Smith*, 68 M.J. 445 (C.A.A.F.), *cert. denied*, 131 S. Ct. 639 (2010). Indeed, as government appellate counsel points out, testimony during the government's case in chief that the victim reported the incident to a fellow officer before the counseling session further diminishes the proffered theory that the later counseling session triggered a false report. Under these circumstances, we find that the military judge did not abuse his discretion in excluding the matters at issue.

Sufficiency of the Evidence

Citing "inconsistent statements, improbable claims, and motive to fabricate," the appellant argues that the testimony of the victim lacks sufficient credibility to legally and factually support his conviction of wrongful sexual contact. 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) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))). In resolving questions of legal sufficiency, "we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

We have considered the evidence produced at trial in a light most favorable to the government and find that a reasonable trier of fact could have found beyond a reasonable doubt that the appellant is guilty of wrongful sexual contact. As described above, the testimony of 1st Lt NH is legally sufficient to support the appellant's conviction. 1st Lt NH maintained that the appellant committed the alleged sexual contact without her consent. Although the appellant renews the attack made at trial on her credibility, the court members heard her testimony, considered her demeanor, and evaluated the matters relating to her credibility. Viewed in the light most favorable to the prosecution, we find the evidence legally sufficient to support the conviction of wrongful sexual contact.

Turning to factual sufficiency, we consider 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, 10 U.S.C. § 866(c); *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973). 1st Lt NH testified that the appellant sexually assaulted her. 1st Lt MH, a fellow officer in the squadron, testified that 1st Lt NH told her about the appellant's inappropriate sexual behavior before the counseling session that the defense argued had provided the motive to fabricate. Having considered the evidence with particular attention to the matters raised by the appellant, we are convinced beyond a reasonable doubt that the appellant is guilty of wrongful sexual contact.

Mistake of Fact as to Consent as a Defense to Conduct Unbecoming

The appellant requested that the military judge instruct that mistake of fact as to consent was a defense to the charge of conduct unbecoming in violation of Article 133, UCMJ. The elements of the offense are: (1) that the accused did or omitted to do certain acts, and (2) that, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman. *MCM*, Part IV, ¶ 59.b. In this case, the

specification of the Article 133, UCMJ, charge alleged that the appellant wrongfully and dishonorably made unwanted sexual comments to 1st Lt NH.

The appellant argued at trial that the use of the word "unwanted" in the allegation made lack of consent an element. The military judge disagreed that mistake of fact as to consent was a defense, but agreed that whether the comments were "wanted or unwanted is certainly a pertinent circumstance for the members to consider in determining whether or not the acts do, in fact, constitute conduct unbecoming." Consistent with the military judge's ruling, defense counsel argued that if 1st Lt NH did not voice her objection to the charged comments then the members should not criminalize those comments as conduct unbecoming an officer and a gentleman.

Conduct unbecoming an officer seriously compromises the person's standing as an officer:

> Not everyone is or can be expected to meet unrealistically high moral standards, but there is a limit of tolerance based on customs of the service and military necessity below which the personal standards of an officer . . . cannot fall without seriously compromising the person's standing as an officer . . . or the person's character as a gentleman. This article prohibits conduct by a commissioned officer . . . which, taking all the circumstances into consideration, is thus compromising.

MCM, Part IV, ¶ 59.c.(2). Conduct unbecoming disgraces the officer personally or "brings dishonor to the military profession such as to affect 'his fitness to command the obedience of his subordinates'" to accomplish the mission. *United States v. Schweitzer*, 68 M.J. 133, 137 (C.A.A.F. 2009) (quoting *United States v. Forney*, 67 M.J. 271, 275 (C.A.A.F. 2009)). Ignorance or mistake only applies when an accused holds an "incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. . . . If the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense." R.C.M. 916(j)(1).

Here, deletion of the word "unwanted" from the specification does not necessarily negate the criminality under Article 133, UCMJ, of the charged language; rather, as the military judge stated, consent to the comments is but one factor to consider in determining whether the appellant's actions constitute conduct unbecoming. The evidence showed not only that the appellant made the charged comments but that (1) he was a superior officer in the same squadron as the victim, (2) he made the comments using an official telephone while both he and the victim were on duty in separate launch control capsules, (3) the victim reported the calls to another lieutenant, (4) she asked for help in tying up the line so that the appellant could not call the capsule again, and (4) he called her a second time to ask for "phone sex" while she was in a launch control facility

and he was on duty in a separate capsule. The members properly considered all of this evidence to determine whether the appellant's conduct violated Article 133, UCMJ. A mistaken belief by the appellant that the victim consented to listen to his sexual phone calls does not require a finding of not guilty, and the military judge did not abuse his discretion when he refused to instruct that it did.

Post-Trial Delay

In this case, the overall delay of 716 days between the trial and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *See also United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances of this case as well as 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 the 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 the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court