UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman BRENT A. SNELL
United States Air Force

ACM 37792

07 May 2013

Sentence adjudged 28 May 2010 by GCM convened at Hill Air Force Base, Utah. Military Judge: David S. Castro.

Approved sentence: Dishonorable discharge, confinement for 15 years, and reduction to E-1.

Appellate Counsel for the appellant: Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; and Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Lauren N. DiDomenico; Major Scott C. Jansen; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MARKSTEINER, Judge:

The appellant was tried by a general court-martial comprised of officer and enlisted members at Hill Air Force Base, Utah. Contrary to his plea, the appellant was convicted of one specification of sexual assault, in violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] The members sentenced the appellant to be dishonorably discharged,

[1] The appellant was charged with "caus[ing] Staff Sergeant [(SSgt) R] to engage in . . . sexual intercourse, by using power sufficient that [SSgt R] could not avoid or escape the sexual conduct."

confined for 15 years, and reduced to the grade of E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant has assigned the following errors before this Court: (1) The military judge erred by failing to instruct the members in accordance with the statutory scheme of Article 120, UCMJ, after he failed to dismiss the charge and its specification based on an unconstitutional burden shift under Article 120, UCMJ; (2) The military judge erred when he failed to properly instruct the members on the affirmative defense of consent and mistake of fact; (3) The military judge erred in permitting the appellant's former wife to testify during findings concerning three incidents of uncharged misconduct; (4) The appellant's sentence is inappropriately severe; and (5) The trial defense attorneys were ineffective by failing to advise him about his ability to approach the convening authority with an offer of a pre-trial agreement and about the possibility of pleading guilty to lesser included offenses.[2]

Finding no error prejudicial to the substantial rights of the appellant, we affirm. Of the errors, only four warrant discussion.

Background

On 31 December 2008, the appellant attended a New Year's Eve gathering at an off base home in Ogden, Utah, belonging to the aunt of Staff Sergeant (SSgt) D. During the course of that evening and the early morning hours the following day, SSgt D, SSgt R, and the appellant consumed several alcoholic drinks. Later that evening, SSgt R began to feel sick, ultimately vomiting several times and then lying down on a bed in a basement room. The appellant and SSgt D went into another basement room and lay down on two separate couches. After the appellant joined SSgt D on her couch and kissed her, SSgt D told him, "I'm not going to have sex with you." At SSgt D's suggestion, the two went to check on SSgt R and eventually joined her on the same bed, with the appellant lying between both females.

Believing that SSgt R might be romantically interested in him based on a text she had sent earlier that evening, the appellant began rubbing her leg to see if she would respond. He alleged that SSgt R responded positively by moving closer to him. When SSgt D realized he was touching SSgt R, she told him, "[n]o, really, what are you doing?" and "I don't want you to have sex with [SSgt R] because she's drunk and passed out." SSgt D was called away to attend to her infant daughter, leaving the appellant and SSgt R alone in the room. Their renditions of what happened next differ.

At trial, the appellant testified that after he began rubbing her breast and crotch area, SSgt R helped him remove her pants, and he got on top of her and began "humping" her. At this point, there was no intercourse, but she was moaning and moving with him

[2] Assignments of error 2-5 were submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

in a manner he understood to indicate that she was participating willingly. The appellant said he stopped in order to put on a condom and then began engaging in intercourse with her. He testified she began "nibbling" on his shoulder, but when the nibbling became painful, he stopped and asked SSgt R, "is this OK?" When she responded "no," he stopped, flushed the condom down the toilet, and then helped her put her clothes back on. The appellant denied SSgt R's assertion that she told him she did not want to engage in sex.

SSgt R recalled events differently. According to her testimony, she awoke when the appellant rolled her onto her back. He then pulled up her shirt, pulled down her pants, and began touching her breasts and genitals as well as kissing her neck and breasts. The appellant asked SSgt R "if it was okay if he put it in" to which she responded "no." The appellant asked a second time, and SSgt R again said "no." The appellant then penetrated SSgt R with his penis. At one point, the appellant stopped to put on a condom, then resumed intercourse. SSgt R tried to resist by biting the appellant several times on the shoulders, but the appellant held her head down by her hair to prevent her from continuing to bite him. After he finished, he tried to re-dress SSgt R, and she fell asleep.

The next morning, SSgt R told SSgt D she thought the appellant had raped her. SSgt D contacted law enforcement. The appellant was subsequently questioned by civilian authorities and, thereafter, arrested and charged with unlawfully engaging in sexual intercourse with SSgt R.

Instructions to the Members

Whether a panel was properly instructed is a question of law we review de novo. *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011) (citing *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008)). "If instructional error is found, because there are constitutional dimensions at play, [the error] must be tested for prejudice" under a harmless beyond a reasonable doubt standard. *Id*. (alteration in original) (citation and internal quotation marks omitted).

At trial, the defense moved to dismiss the sexual assault charge, based on an unconstitutional burden shift found in Article 120, UCMJ, at the time he was charged.[3] The military judge denied that motion and then gave the members the standard instruction on Article 120, UCMJ, contained in Department of the Army Pamphlet 27–9, *Military Judges' Benchbook* [hereinafter Benchbook] (Interim Change 15 January 2008), which did not contain the burden shift language. The appellant now contends the military judge committed error when he failed to find the burden shift unconstitutional and again

[3] When this incident occurred, Article 120(r), UCMJ, 10 U.S.C. § 920(r), provided in pertinent part that "[c]onsent and mistake of fact as to consent . . . are an affirmative defense for the sexual conduct in issue in a prosecution [for rape]." The statute required the accused to prove the affirmative defense by a preponderance of the evidence, at which time the Government would have the burden of proving beyond a reasonable doubt that the defense did not exist. Article 120(t)(16), UCMJ.

when he instructed the members in a manner inconsistent with that version of Article 120, UCMJ, without providing a legally sufficient reason for doing so.

In *Medina*, our superior court ruled contrary to the appellant's position. The Court approved a burden scheme that was consistent with the instructions given by the military judge in this case. The Court found the military judge's failure to instruct in accordance with the existing statutory scheme of Article 120(t)(16), UCMJ, was error in the absence of a legally sufficient explanation, but the error was harmless beyond a reasonable doubt because the military judge instructed the members that the Government had the burden of disproving the defense beyond a reasonable doubt. *Medina*, 69 M.J. at 465-66. As in *Medina*, the military judge here properly instructed the members as to the Government's burden to prove the offense beyond a reasonable doubt and to disprove the affirmative defense of consent by the same standard. While the military judge did not provide a specific justification on the record as to why he deviated from the statutory scheme outlined in Article 120, UCMJ, we find the error harmless beyond a reasonable doubt.

The appellant also complains on appeal about the military judge's instruction on mistake of fact. Because the appellant's testimony at trial raised the possibility that SSgt R had consented to the sexual intercourse and, in the alternative, that the appellant had a mistake of fact defense regarding her consent to the activity, the military judge advised the parties he would be instructing the members on these affirmative defenses. His proposed instruction on mistake of fact added a sentence to the Benchbook's standard instruction: "Additionally, the ignorance or mistake of fact cannot be based on the negligent failure to discover the true facts. *Therefore, if a reasonable person would have taken further measures to ascertain the facts, the accused's mistake would be unreasonable and the defense of mistake does not exist*." (Emphasis added.). Overruling a defense objection, the military judge instructed the members in accordance with the above language. The appellant contends this was error. We disagree. As Judge Cox found in *United States v. True*, 41 M.J. 424 (C.A.A.F. 1995), an instruction that a mistake-of-fact defense cannot be predicated on the appellant's own negligence is a correct statement of the law. As such, we find no error.

Admission of Uncharged Misconduct

At trial, after submitting timely notice, Government counsel moved to pre-admit evidence of the appellant's similar crimes on three previous occasions, pursuant to Mil. R. Evid. 413. First, in approximately 2001, shortly after his marriage to JC (his now ex-wife) the appellant indicated a desire to engage in anal sex. When she refused, the appellant became angry, pushed her from the bed, and then held her up against the wall with his hands around her throat. Second, in early 2007, approximately one month before JC separated from the appellant, the couple began engaging in intercourse on a regular basis in a position that caused her physical pain. JC testified that they had intercourse approximately every day in that manner, that she cried on two occasions, and that the

appellant knew he caused her pain. There is no evidence in the record she ever withheld consent to have sex in that manner or that she told the appellant to stop.[4] Third, also in early 2007, while sleeping on the couch after she and the appellant had an argument, JC was awakened by the appellant having intercourse with her. He had cut a hole in her pajama pants and her underwear with scissors, applied lubricant to JC, then penetrated her vagina with his penis while she was sleeping. When she woke, she told him to stop, but he refused.

Trial defense counsel objected to the admission of all three proffered instances. With regard to the first and second instances, trial defense counsel argued that the appellant's prior actions did not constitute "sexual assaults" under the definition of Mil. R. Evid. 413(d). Trial defense counsel conceded that the third alleged instance met the requirements of Mil. R. Evid. 413, but contended that it should nevertheless be excluded because it was not relevant under Mil. R. Evid. 401 and because its probative value was substantially outweighed by the danger of unfair prejudice under Mil. R. Evid. 403. The military judge overruled the defense's objection and the Government presented evidence of all three incidents to the members.

We review a military judge's evidentiary rulings for an abuse of discretion. *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995); *United States v. Bailey*, 55 M.J. 38 (C.A.A.F. 2001). "'If the military judge makes findings of fact, we review the findings under a clearly erroneous standard of review. We review conclusions of law de novo.'" *United States v. Bare*, 63 M.J. 707, 710 (C.A.A.F. 2006) (quoting *United States v. Springer*, 58 M.J. 164, 167 (C.A.A.F. 2003)). When the military judge conducts a proper balancing test under Mil. R. Evid. 403, we will not overturn the ruling to admit the evidence unless there is a "clear abuse of discretion." *United States v. Ruppel*, 49 M.J. 247, 250 (C.A.A.F. 1998).

In cases involving alleged sexual assault, evidence of uncharged past sexual assaults by the same accused "is admissible and may be considered for its bearing on any matter to which it is relevant." Mil. R. Evid. 413(a). This includes admission for purposes of demonstrating the accused's propensity to commit the charged offenses. *United States v. Parker*, 59 M.J. 195, 198 (C.A.A.F. 2003); *United States v. Wright*, 53 M.J. 476, 480 (C.A.A.F. 2000). In order to admit evidence under Mil. R. Evid. 413, a military judge must make three threshold determinations: (1) the accused is charged with an offense of sexual assault within the meaning of Mil. R. Evid. 413(d), (2) the proffered evidence is evidence that the accused committed another offense of sexual assault within the meaning of Mil. R. Evid. 413(d), and (3) the proffered evidence is logically relevant under Mil. R. Evid. 401 and 402. *United States v. Berry*, 61 M.J. 91, 95 (C.A.A.F. 2005) (citing *Wright*, 53 M.J. at 482).

[4] The military judge made a clearly erroneous finding to the contrary, noting in his Findings of Fact and Conclusions of Law on the motion, "[d]uring sexual intercourse, [JC] *would tell him to stop, that the accused was hurting her* and she would cry." (Emphasis added.).

If these three threshold requirements are met, the military judge must then apply the Mil. R. Evid. 403 balancing test to determine whether the probative value of the proffered evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members." *Berry*, 61 M.J. at 95 (quoting Mil. R. Evid. 403) (internal quotation marks omitted). Some of the factors to be examined when conducting a balancing test include the strength of proof of the prior act, the probative weight of evidence, the potential for less prejudicial evidence, distraction of the factfinder, the time needed for proof of prior conduct, temporal proximity, frequency of the acts, presence or lack of intervening circumstances, and relationship between the parties. *Wright*, 53 M.J. at 482 (internal citations omitted).

In the case at bar, the military judge submitted detailed findings of fact and conclusions of law as part of his ruling on the Mil. R. Evid. 413 motion. The military judge ultimately concluded that all three prior instances met the requirements of Mil. R. Evid. 413. We agree with his determination that the third proffered instance of sexual assault (cutting a hole in JC's undergarments and initiating sex while she slept), is admissible under Mil. R. Evid. 413. However, we find error in the military judge's admission of the first and second proffered instances as the appellant's commission of prior sexual assaults (pushing and choking JC after she refused anal sex, and engaging in sex that was painful to JC), as discussed below.

1. Pushing and Choking Incident

JC testified that, around the 1999 – 2000 time frame, she and the appellant "were in bed and he was wanting anal sex and I didn't want to. He pushed me off the bed close to the wall and then ended up with his hands around my neck by the wall in the bedroom." In his ruling, the military judge noted "[b]y the proffered testimony of JC, the accused attempted to force her to have anal sexual intercourse against her will on one occasion." The evidence of record does not support the military judge's conclusion that the choking incident constituted evidence of another incident of sexual assault.

According to JC's testimony, the appellant wanted anal sex—with no specific description from JC of how the appellant manifested or otherwise acted upon that desire—and that JC refused. What followed was indisputably an assault consummated by a battery but not a sexual assault, which is required to invoke Mil. R. Evid. 413. The simple assault described by JC occurred not as *part of* any sexual contact between the appellant and JC, but *after* a vaguely described disagreement between the two of them. There is no evidence the appellant attempted to engage in anal sex against JC's wishes, and nothing in the record suggests the appellant pushed and choked her in order to induce her to stop resisting his sexual advance or that he returned to an assault with any sexual component after he choked her. Instead, according to the record, the appellant wanted JC to engage in anal sex, JC refused, the appellant became angry and committed an

assault consummated by a battery upon her. Because this does not meet the definition of "sexual assault" as required by Mil. R. Evid. 413, it is not admissible under that rule.

In *United States v. Schroder*, 65 M.J. 49, 52 (C.A.A.F. 2007), the Government sought to introduce several instances of the accused's previous interactions with a minor as previous offenses of child molestation under Mil. R. Evid. 414, including placing his hand upon a minor's leg and kissing her neck on another occasion. The Court found the definition section of Mil. R. Evid. 414 constituted the *exclusive list* of offenses that would qualify as "child molestation" for the purposes of the rule's applicability to the admission of prior offense evidence. As Mil. R. Evid. 413 and 414 are "essentially the same in substance, the analysis for proper admission of evidence under either should be the same." *United States v. Dewrell*, 55 M.J. 131, 138 n.4 (C.A.A.F. 2001), *as quoted in Schroder*, 65 M.J. at 52. Accordingly, in the case at bar, because the appellant's acts of pushing and choking JC are not encompassed within the definition of sexual assault, it was error for the military judge to admit JC's testimony about this incident as evidence of a similar crime under Mil. R. Evid. 413.

2. Painful Sex

In his Mil. R. Evid. 413 analysis, the military judge noted "the Accused . . . derived sexual pleasure or gratification from the infliction of physical pain on [JC] on multiple occasions. . . . Each of the aforementioned acts were either attempted or done *by force and without [JC's]consent*." (Emphasis added.). Later, when addressing the *Wright* factors, the military judge found that "[d]uring sexual intercourse, JC would *tell him to stop*, that the accused was hurting her and she would cry." (Emphasis added.). Although the evidence supports a finding that the appellant knew JC experienced pain during these encounters, the record is devoid of evidence or testimony suggesting the appellant used force to have sex with her in that fashion, or that she ever withheld consent or told him to stop. The military judge's factual findings in this regard were clearly erroneous. Therefore, we find it was an abuse of discretion – and error – to admit evidence of the appellant's history of engaging in sex with JC in a manner that JC found painful as evidence of a similar crime under Mil. R. Evid. 413.

Prejudice Analysis

The finding or sentence of a trial court will not be held incorrect based on an error of law unless the error materially prejudices a substantial right of the accused. Article 59(a), UCMJ, 10 U.S.C. § 859(a). Having found error, we must assess whether the erroneous evidentiary rulings resulted in prejudice to the appellant under the test set forth in *United States v. Kerr*, 51 M.J. 401 (C.A.A.F. 1999): "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Id*. at 405 (citing *United States v. Weeks*, 20 M.J. 22 (C.M.A. 1985). *See also Berry*, 61 M.J. at 91.

Strength of Government's Case

The Government's case was strong. Independent of the erroneously admitted testimony from JC and direct evidence from the alleged victim, evidence before the trier of fact established that: (1) the accused had a demanding sexual appetite;[5] (2) on the night of the alleged assault of SSgt R, his ex-wife declined to allow him to visit because she believed he wanted sex;[6] (3) he brought a condom to the gathering at the home of SSgt D's aunt, where the alleged assault occurred; (4) SSgt D turned down his sexual advances earlier that evening; (5) SSgt D told him to stop his sexual advance on SSgt R, noting specifically that she told him "[n]o, really, what are you doing?" and "I don't want you to have sex with [SSgt R] because she's drunk and passed out"; (6) after returning from tending to her infant daughter, SSgt D found SSgt R's pants partially pulled down; (7) SSgt R was very drunk and substantially nonresponsive at the time the appellant was left alone with her in the bed in the basement bedroom; and (8) the appellant had bite marks on his shoulders, where SSgt R testified she had bitten him and repeatedly told him "no" in her efforts to resist.

The appellant's sworn testimony contradicted that of several witnesses, and the Government offered the testimony of three rebuttal witnesses to establish that the accused had a reputation for untruthfulness. The appellant also equivocated on cross examination about whether SSgt R verbally told him "no" or whether she only shook her head to indicate "no," and he testified about how he helped SSgt R put her clothes back on—a statement that would appear to suggest she was sufficiently incapacitated as to be incapable of re-dressing herself.

Strength of Defense's Case

The defense's case was focused solely on the issue of mistake of fact as to consent. The appellant testified that SSgt R initially responded favorably to his advances and, after they started having sex, SSgt R's "nibbling" became painful, at which point the appellant asked, "is this OK?" When SSgt R responded "no," according to the appellant, he stopped. The defense also offered the testimony of an expert forensic psychologist who testified about the adverse impact alcohol consumption has on memory and on alcohol induced blackouts.

As to the biting, the defense called SSgt R's ex-husband, who testified that, during his approximately year-long marriage to SSgt R, she nibbled or bit him during consensual sex roughly 10-to-20 percent of the time, sometimes with sufficient intensity to cause pain, and that these acts would leave marks about the size of golf balls. He stated, "The

[5] JC testified that he wanted sex "almost every day" during their marriage.

[6] JC testified that she and the appellant had sexual relations after their divorce was final, and she believed he wanted to have sex with her that night.

teeth marks themselves would actually go away within a couple hours, but would leave pretty visible bruising anywhere from the waist to the upper torso area."

Materiality of the Evidence

The third prong of the *Kerr* test evaluates the materiality of the proferred evidence. This prong is "merely a test for relevancy and materiality." *United States v. Ediger*, 68 M.J. 243, 250 (C.A.A.F. 2010) (quoting *Weeks*, 20 M.J. at 25 n.3) (internal quotation marks omitted). Analyzing the materiality of the Mil. R. Evid. 413 evidence, we find the instance in which the appellant cut a hole in his ex-wife's pajamas and engaged in unwanted sex to be highly relevant, whereas the instances of choking and having sex in a manner JC found painful were marginally material at best.

Violence and/or force and non-consensual encounters are common elements in the appellant's act of cutting through garments to initiate sex while JC slept and the offense of which he was accused. In both instances, he was alleged to have used force to assault a victim who was asleep or in some fashion not fully able to resist. Accordingly, this evidence of a prior sexual assault was material, relevant, properly offered under Mil. R. Evid. 412, evaluated under Mil. R. Evid. 403, and admitted.

However, the appellant's act of responding violently when his wife refused anal sex was not material. Reacting violently on one occasion eight or nine years earlier when refused sex by his spouse in the manner he desired would not tend to make a fact in dispute in the case before the trial court – where he was alleged to continue with the sex act despite his victim's refusal – more or less likely. Accordingly, this offered instance was not material.

Additionally, the "propensity for inflicting pain" theme argued by the Government was fairly attenuated. With due regard for the fact that the military judge actually spoke directly with JC, observing her body language and facial expression, we note that JC's description of the painful sex she engaged in with the appellant does not – based on the record – describe a crime or establish a theme connecting the prior event to the offense with which the appellant was charged. The record is devoid of any indication that he engaged in such conduct by force or that JC was incapacitated or unable to refuse or resist.

Quality of the Evidence

We find the evidence of all three proffered instances of prior "sex assault" to be neither superior nor inferior in quality to other evidence admitted at trial. JC was the proponent of all three proffered instances of prior sexual assault. Trial defense counsel pointed out on cross examination that JC and the appellant had engaged in consensual sex the month prior and the month following the date of the alleged assault on SSgt R, and she never mentioned the assaults about which she testified at the appellant's trial in their

divorce proceedings or reported them to law enforcement. While these factors are by no means a precise barometer as to the quality or persuasive impact of JC's testimony, we find it conceivable that they could have impacted the weight of JC's testimony in the minds of the factfinders.

Prejudice

The central question in this case was whether SSgt R consented to have sex with the appellant or, in the alternative, whether the appellant was reasonably mistaken as to her consent. We have held it was error for the military judge to admit evidence about the choking incident and the roughly month-long period during which the appellant engaged in sex with his then-wife in a manner that caused her pain. However, we find, under the *Kerr* test, that the erroneously admitted evidence about these two instances was harmless error.

We base this finding in large part on the strength of the Government's case, independent of these two instances of prior uncharged misconduct – including, but not limited to, the appellant's demeanor when testifying, his implausible version of events, the testimony of SSgt R, and the corroborating testimony of SSgt D. These factors were sufficient to convict the appellant, even without the evidence provided by JC, regarding the bizarre incident wherein the appellant cut holes in her pajama bottoms and her underwear, applied sexual lubricant to her vagina, and initiated sex with her while she slept, followed by his refusal to stop after she woke up and protested. Accordingly, even though the military judge erred in admitting two of the three proffered instances of prior sexual assaults, the error was harmless. The additional evidence could not have tipped the scales in favor of the Government any more than the strengths of the Government's case already had.

Sentence Appropriateness

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). In reviewing sentence appropriateness, we "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we] find[] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). *See also United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988) ("Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves."). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate, but we are not authorized to engage in exercises of clemency. *United States*

v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999); *Healy*, 26 M.J. at 395-96. Applying these standards to the present case, we do not find the appellant's sentence to be inappropriate.

In his assignments of error, the appellant requested a review of his sentence, contending it was inappropriately severe in light of the mitigating evidence in the case, his difficult childhood, and the stress placed on his marriage by his deployments. However, in light of our holding that evidence of the two incidents of prior sexual assault were erroneously admitted, we must now also determine if the sentencing authority's knowledge of that erroneously admitted evidence resulted in material prejudice to a substantial right of the appellant.

An error of law regarding the sentence does not provide a basis for relief unless the error materially prejudiced the substantial rights of the accused. *See* Article 59(a), UCMJ, 10 U.S.C. § 859(a); *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005).

Though two of the three proffered instances of prior sexual assault were erroneously admitted, we conclude that the alleged error was not prejudicial under Article 59(a), UCMJ. At the beginning of the sentencing phase of the trial, the military judge instructed the members to "bear in mind that the accused is to be sentenced only for the offense of which he has been found guilty." Thereafter, though the trial counsel used the word "propensity" twice in the eight-page sentencing argument, the unmistakable focus of that argument addressed victim impact, the appellant's lack of remorse,[7] and his disciplinary history,[8] as those factors related to the principles of sentencing customarily recognized in court-martial practice. The trial counsel never mentioned JC or any of the uncharged prior incidents of sexual assault during sentencing. Rather, all the matters argued by the trial counsel focused on this offender and the crime of which he was convicted—sexually assaulting SSgt R. Finally, the appellant faced potential confinement for life without the possibility of parole; trial counsel struck hard blows, *see United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007), and argued for 25 years of confinement, but the members sentenced the appellant to 15 years— a substantially lesser term.

Under these circumstances, we are confident that the erroneous admission of evidence about two of the three proffered instances of alleged prior sexual assault during

[7] During sentencing argument, trial counsel noted the appellant's "flippancy on the stand and smiling as he was here in a court-martial testifying . . . ."

[8] The appellant's disciplinary history included: (1) a nonjudicial punishment action, dated only three months before the rape, for grabbing by the hair a female Airman with whom he was having an unprofessional relationship, yanking her to the ground, and attempting to drag her into his house, among other offenses; (2) an April 2009 conviction for disorderly conduct in Layton City, Utah; (3) an August 2008 Letter of Reprimand for assaulting his then-wife, striking her in the face, legs and stomach, failing to show up for duty at the appointed time and then showing up under the influence of alcohol; (4) an April 2008 Letter of Reprimand for sending vulgar and indecent text messages to his then wife in violation of a state court protective order; (5) an April 2008 Letter of Reprimand for being the senior ranking member in a vehicle driven by an alcohol-impaired Airman; and (6) a September 2007 Letter of Counseling for having an unprofessional relationship with a subordinate.

the findings portion of the trial did not substantially influence the adjudged sentence. *See Griggs*, 61 M.J. at 402. Accordingly, we are convinced the error resulted in no material prejudice to appellant's substantial rights. *See* Article 59(a), UCMJ.

We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all other matters contained in the record of trial. Considering these matters, we do not find his approved sentence to be inappropriately severe.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.[9] Articles 59(a) and 66(c), UCMJ. Accordingly, the findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[9] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).