UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant ATHOL F. STREETE
United States Air Force

ACM 36757

02 September 2009

Sentence adjudged 01 August 2005 by GCM convened at Aviano Air Base, Italy. Military Judge: William M. Burd.

Approved sentence: Bad-conduct discharge, confinement for 8 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Joseph W. Kastl, Esquire (civilian counsel) (argued), Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Captain Griffin S. Dunham, Captain Tiffany M. Wagner, and Frank J. Spinner, Esquire (civilian counsel).

Appellate Counsel for the United States: Captain John M. Simms (argued), Colonel Gerald R. Bruce, and Major Jeremy S. Weber.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

PER CURIAM:

Contrary to the appellant's pleas, a panel of officer and enlisted members sitting as a general court-martial convicted him of two charges and two specifications of rape, one charge and specification of failure to obey a lawful order, and one charge and specification of failure to go, in violation of Articles 120, 92, and 86, UCMJ, 10 U.S.C. §§ 920, 892, 886. The adjudged sentence consists of a bad-conduct discharge, confinement for eight years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged, but directed the appellant be credited with six months confinement for excessive post-trial delay.

The appellant asserts 11 errors: (1) the military judge and/or the trial defense counsel allowed spillover to unduly prejudice the appellant's right to a fair trial and the trial counsel's argument was improper; (2) the sentence is inappropriately severe;[1] (3) the conviction of the charge and specification for violation of the no-contact order is legally and factually insufficient; (4) the Air Force failed to follow established law and instructions to properly attach personal jurisdiction over the appellant;[2] (5) the government failed to prove beyond a reasonable doubt the appellant was guilty of the two charges and specifications of rape; (6) the government erred by conducting an unlawful investigation and unlawful Article 32, UCMJ, 10 U.S.C. § 832, investigation; (7) the government erred by allowing the findings and sentence of an unfair panel to stand; (8) numerous errors by the military judge resulted in an unfair court-martial and wrongful conviction of the appellant; (9) pretrial punishment resulted in an unfair court-martial and excessive punishment of the appellant; (10) ineffective assistance of counsel led to a court-martial result that is unreliable; and (11) fraud on the court, prosecutorial misconduct, and perjury of the primary witnesses led to an unjust court-martial result that is unreliable. We have reviewed the multiple briefs from both parties, including the substantial materials submitted by the appellant himself and the various post-trial declarations admitted before this Court, and each assignment of error raised therein. We address the most significant assertions of error below.[3] Finding no error, we affirm.

Background

The general court-martial of the appellant began on 10 March 2005, was continued until 25-26 April 2005, resumed on 25 July 2005, and was completed on 1 August 2005. The trial was intensely litigated and fiercely contested by the appellant and his civilian and military trial defense counsel. At trial, the appellant denied raping his wife, Mrs. SS, in 1998, stating the sex was consensual. Likewise, he denied raping his fiancée, Airman First Class (A1C) VS, in 2004, asserting he did not have sex with his fiancée when she told him to stop. Finally, the appellant asserted he did not fail to go and did not violate the no-contact order. He maintains the same positions on appeal.

[1] The appellant alleges his sentence of a "dishonorable discharge" and eight years confinement is inappropriately severe. We note the adjudged and approved sentence included a bad-conduct discharge, not a dishonorable discharge. We consider the allegation of "dishonorable" versus "bad-conduct" to be merely a typographical error.

[2] Issues (4) through (11) are raised by the appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[3] We thoroughly examined each issue raised by the appellant, including those addressed in his 235-page *Grostefon* submission. In considering the myriad of errors raised by the appellant regarding his claim of ineffective assistance of counsel, we reviewed the entire record including the post-trial affidavits filed with this Court. As discussed later in the opinion, we applied the factors set forth in *United States v. Ginn*, 47 M.J. 236, 238 (C.A.A.F. 1997). We find the record, as a whole, "compellingly demonstrates" the improbability of the appellant's claims of ineffective assistance of counsel. Regarding the remaining errors raised by the appellant, we find them to be without merit. *United States v. Straight*, 42 M.J. 244, 248 n.4 (C.A.A.F. 1995) (citing *United States v. Clifton*, 35 M.J. 79, 81-82 (C.M.A. 1992); *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987)).

We have considered the entire record of trial; weighed the evidence; judged the credibility of the witnesses, including the sworn testimony of the appellant; and determined controverted questions of fact, recognizing the trial court saw and heard the witnesses. Exercising our fact-finding authority under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we find the following facts.

1998 Rape of Mrs. SS[4]

The appellant and Mrs. SS were married from 1990 until their divorce in 1999. The relationship was stormy and included financial problems created by Mrs. SS and abusive, controlling, and violent behavior by the appellant toward his wife. During the eight-year marriage, the appellant verbally abused his wife. He claimed she was inferior, he demeaned her, he threatened her, and he made her fearful.

After roughly two years of marriage, the appellant was assigned to Kadena Air Base, Japan. Mrs. SS did not accompany him to Japan. During the two-year assignment, Mrs. SS incurred debts, including gambling debts. When he returned from Japan, the appellant took control of the finances. He blamed his wife for the debts and told her she owed him for paying off the debts. For more than three years, the appellant refused to allow Mrs. SS to have any money. The appellant searched her purse for money and took what he found. Mrs. SS was afraid to ask the appellant for money.

At some point in 1995, Mrs. SS used a credit card and removed some money from their joint account. She hid the money. When the appellant reviewed the bank statement, he was furious. He made his wife retrieve the money and told her he was going to punish her. The appellant told his wife to come up with a punishment. She testified she thought all day long, but was unable to come up with a punishment. That night, as they were going to bed, the appellant asked his wife if she had thought of a punishment. She had not. He told her to take off her clothes and to get down on all fours. The appellant sodomized his wife while she cried. When he finished, he told her he had been lenient and the punishment could have been a "lot more harsh." Mrs. SS testified her pain lasted nearly one week.

[4] For reasons unknown, the 1998 rape allegation was not handled by a court-martial process at the time the investigation was completed. Instead, the appellant was issued an order to have no contact with Mrs. SS. He received non-judicial punishment on 19 June 1998, for violating the no-contact order. This Court did not consider the non-judicial punishment for any purpose other than to review the appropriateness of the military judge's ruling on the defense's motion to dismiss. The special agent investigating the rape allegation of Airman First Class (A1C) VS discovered the 1998 investigation in the Air Force Office of Special Investigations (OSI) database and requested the file be pulled and sent to the detachment for review. Upon review, the convening authority determined the 1998 rape should be added to the charges against the appellant. The military judge denied the defense's motion to dismiss the charge of the 1998 rape based on statute of limitations, due process, and fairness grounds. The defense raised the issue several times during the course of the trial, but the military judge found the motion to be without merit. We concur. We also note the appellant has raised this issue in his *Grostefon* assignment of errors. As we find the military judge ruled appropriately, the issue will not be addressed further in this opinion.

The appellant's controlling behavior continued. Mrs. SS testified the appellant would say, "I'm your husband, I'm your husband, submit unto me, submit unto me, if you don't I will divorce you." She felt she had no choice but to comply. At some point, the appellant claimed Mrs. SS had no direction in life, no goals. He took a month off from work and made Mrs. SS get up at 0500 each day to write down her goals and prioritize them. He then made her stand before him and read her goals aloud. She said after that, the appellant controlled everything.

The appellant threatened his wife. He once told Mrs. SS he wished she were dead and he did not care how she died because he wanted her out of his life. Mrs. SS testified she felt very scared. Mrs. SS became so fearful she "had to sleep with one eye open and one eye closed--sleep at the edge of the bed." On another occasion, the appellant became jealous and accused his wife of having an affair. He pushed his wife, and she caught herself from falling down the stairs by grabbing the railing.

In 1997 the appellant obtained divorce paperwork and required Mrs. SS to sign the paperwork. He then placed the paperwork in a cabinet at home. He told his wife if she did not do what he said, he was going to divorce her.

On 12 April 1998, Mrs. SS was re-baptized at an Easter Sunday service, went to work, and then went out to dinner with a girlfriend. When she got home around midnight, she prepared to go to bed on the couch in the living room, which was where she was sleeping due to the pending divorce proceedings. The appellant was in another room and was upset. As Mrs. SS prepared to go to sleep on the couch, the appellant came into the living room and repeatedly asked Mrs. SS why she married him. When she responded that she married him because she loved him, the appellant said that was not the answer he was looking for. He repeated the question with her response being the same, and again he told her that was not the answer he was looking for. When she asked if she could go to the bathroom, the appellant told her if she got up to go, he would beat her. He told her she had to sit there and listen to what he had to say. The appellant quoted passages from the Bible and told Mrs. SS she was to forsake her family to become part of his family. This continued for three hours.

At some point around 0300, the appellant stated he was going to bed. He left the room; however, a few minutes later, the appellant came back into the living room. He was wearing only a shirt. The appellant accused Mrs. SS of lying about her feelings and her sexual feelings toward him. The appellant picked up Mrs. SS and put her on her knees on the couch. He then forcibly penetrated her vagina with his penis, holding her arms so she could not use them to defend herself. She testified, "I kept telling him to stop, repeatedly, and then he kept saying, 'You're lying, you're lying, you're lying.'" The appellant then noticed Mrs. SS's vibrator under the couch. With Mrs. SS still on her knees on the couch, the appellant took the vibrator and forcibly and repeatedly penetrated her vagina with it, while repeating "Is this what you want, is this what you want, this

what [sic] you want?" Mrs. SS repeatedly told him to stop. The appellant responded, "You're lying, you're lying, you're lying." He thrust the vibrator into Mrs. SS's vagina at least five times. When Mrs. SS managed to free one of her hands and knock the vibrator onto the floor, the appellant turned her around, pulled her on top of him as he lay down on the couch, and continued to rape her in that position. She kept telling him to stop and tried to fight him off, but he overpowered her. Finally, the appellant ejaculated, then got up and went to the bathroom. When the appellant returned, he told her, "Sorry, forgive me. I was trying to get an honest answer out of you." He left the room. Mrs. SS remained on the couch crying, bleeding, and hurting from the rape.

In the following days, Mrs. SS told two friends about the rape and then reported it to the Air Force Office of Special Investigations (OSI). When called in for questioning, the appellant, after proper rights advisement, made a written sworn statement in which he admitted he had sex with his wife on 13 April 1998 and "she was resistant in word and physically [sic]. A vibrator was used during this sex act." He also admitted she "may have said no 5 times or more during sex." The appellant made this written statement after verbally conveying the same information to the OSI agents.[5]

2004 Rape of A1C VS

The appellant and A1C VS met at Aviano Air Base, Italy in May 2004 and began dating in June 2004. Over the course of the next few months, they spent quite a bit of time together and on numerous occasions participated in consensual sexual intercourse. In August 2004, A1C VS's parents visited her for nearly two weeks. During the visit, A1C VS's mother talked to her about her relationship with the appellant. A1C VS promised her mother she would not have sex until she was married. She also told her mother she and the appellant were not living together. Her parents departed on 31 August 2004.

A1C VS agreed the appellant could move into her apartment when her parents left and stay until his departure on 15 September 2004. On 31 August 2004, the appellant moved into A1C VS's apartment while A1C VS was at work. A1C VS testified she had a good first impression of the appellant, but after he moved in with her, she noticed "he started really, really changing for the worse." When she came home the first night, she noticed the appellant had rearranged her apartment without her permission. When she confronted him, he replied he felt the new arrangement was better. A1C VS noticed the appellant was becoming more controlling and jealous. If she said hello to another man, the appellant became jealous and accused her of having sex with the man. The appellant was opening her unopened mail when she was not at home.

[5] He also discussed the sodomy with his wife several years before and referenced a conversation regarding punishment for her actions. He wrote that she suggested the punishment.

A1C VS told the appellant she did not want to have premarital sex anymore and he could continue to stay with her only as long as he slept in her living room. The appellant agreed to the living situation; however, the appellant clearly was not happy with the situation. The topic of premarital sex was the subject of conversation between the two on a daily basis. On Wednesday, 8 September 2004, A1C VS was asleep in her room. She awoke to find the appellant in her bedroom requesting to have sex with her. She agreed. The appellant used a condom. The next morning, A1C VS told the appellant they "definitely cannot have sex anymore." The appellant told her "he thought it was a shame because [A1C VS] had the wrong definition of the word fornication." A1C VS testified she locked her bedroom door that Thursday and Friday night. The appellant and A1C VS became engaged on Thursday, 9 September 2004.

On Saturday, 11 September 2004, after eating dinner and watching a movie together in the living room, A1C VS told the appellant she was going to bed. She explained she was going to shower, after which she would sleep in her bedroom and he would sleep in the living room. The appellant told A1C VS "he felt like we were worlds apart and he felt like it was a shame that we were engaged now, and we couldn't even sleep in the same bed together." A1C VS reminded him she did not want to engage in premarital sex. The appellant promised A1C VS he would not attempt to have sex with her. Having extracted that promise, A1C VS agreed to sleep with the appellant on the inflatable mattress that night.

When A1C VS finished her shower, she told the appellant she would join him after putting on her pajamas. The appellant told A1C VS she could come to bed without pajamas. A1C VS testified her gut instinct told her this was a bad idea, but she rationalized she should be able to trust him about something this important. She reminded him she would not have sex with him. He promised he would not try anything. He told her all he wanted to do was hold her. She said, "So that means I've got your word on that?" A1C VS testified the appellant responded, "Yes, you got my word, I mean, I totally understand it, I get the point. All I want to do is hold you." A1C VS joined the appellant on the inflatable mattress.

When they went to sleep, the appellant was wearing a t-shirt and shorts and A1C VS was nude. A1C VS awoke to find herself face down on the mattress. The appellant was nude and his thighs were straddling A1C VS. The appellant was wearing a condom and rubbing his erect penis on her thighs. A1C VS asked the appellant "what the heck he was doing?" The appellant did not respond. A1C VS stated, "[I]t was like I was talking to a wall." A1C VS told him to get off of her, but he did not. A1C tried to prevent the appellant from penetrating her by clinching her legs together. She tried to reach back and get his arms off of her. He took her wrists and threw them back in the opposite direction. A1C VS tried to move off the mattress, but the appellant's thighs prevented her from getting free. A1C VS told him to stop and get off of her several times over the course of the rape. The appellant did not respond to her. "It was like he was in some type of trance

or something. . . . like . . . talking to a robot, like he could not understand English or something." The appellant continued to rape A1C VS. She testified she was not getting anywhere and was unable to get up so she started crying until he finished the rape. For the remainder of the night, each time she tried to move, he pushed her back over on her side. A1C VS fell asleep. When she woke up the next morning, she noticed the appellant had loosened his grip on her and she was able to get off the mattress. She got up, put on a robe, and came back to the living room. A1C VS testified, "I told him I didn't appreciate what he did. And, I asked him what the heck was he thinking. I asked him why he didn't get off me every time I told him to. I asked him why he didn't respond to me as if I wasn't even saying anything." The appellant's only response was he had a lot of passion and desire for A1C VS and there was no justification for what he did.

A1C VS explained the appellant's conduct that morning as follows: "he acted like nothing had ever happened, like I was just overreacting." A1C VS told the appellant she needed some time to herself and she left the apartment. She was gone approximately 45 minutes. When she returned, the appellant repeatedly asked if she was going to report it. It was at that point she realized he knew all along what he did was wrong. A1C VS told the appellant to pack up his belongings and to leave her apartment.

Later that day, A1C VS told some friends at church that the appellant raped her. The OSI and the Italian police investigated. The OSI case agent, Special Agent HB, seized two used condoms from the trash can in A1C VS's bathroom. The appellant was interviewed by OSI and provided a typed written statement. He denied sex had occurred. He admitted A1C VS said "no" on three occasions. He wrote the following in his sworn statement: "[S]he said no for a third time and I stopped, at no time did she raise her voice, struggle or try to push me off, this was not necessary because I was not forcing myself on her and at no time did I enter her or did we have sex. . . . In the morning she said that I raped her, I did not argue because I wanted to maintain peace with her."[6]

Violation of the No-Contact Order

Upon conclusion of the interview by the OSI agent, the appellant's first sergeant, Master Sergeant (MSgt) DC, escorted the appellant from the law enforcement desk to the squadron, where she prepared a written no-contact order. After preparing the order, she read it to the appellant in its entirety. The relevant portions of the no-contact order are that the appellant was not to contact A1C VS "through a third party, directly or indirectly" and that if he had any doubts about a situation he was to contact MSgt DC for guidance. The appellant told MSgt DC he understood the order and did not have any questions. The appellant signed the order on 13 September 2004.

[6] The appellant was left alone in the interview room to prepare his sworn statement. It took him over two hours to write the one and one-half page statement.

In December 2004, the appellant approached his first sergeant regarding the no-contact order. The appellant told the first sergeant he wanted to make an appointment with the chaplain or to set something up so he could talk to A1C VS. The first sergeant responded, "Hey, don't you have a no-contact order?" She went to her files, pulled out the no-contact order, made a copy, and gave the copy to the appellant. She said, "I don't think that's a good idea." The appellant had no questions.

Despite the conversation with the first sergeant, at some point before Christmas, the appellant contacted the wing chaplain and asked if he would contact A1C VS to see if she would be willing to get together to talk and work through their problems and the situation. The chaplain contacted A1C VS and passed along the message. A1C VS called the chaplain back a couple of days later and refused to meet with the appellant. The appellant testified the reason he contacted the chaplain was to convince A1C VS to drop the charges. The chaplain did not know the no-contact order had a provision prohibiting contact through a third party.

Failure to Go

The appellant's commander, Lieutenant Colonel JS, set up a meeting with the appellant for Monday, 20 December 2004 at 1430 hours for the preferral of court-martial charges. On Friday, 17 December 2004, MSgt JH, the appellant's supervisor, contacted the appellant to notify him of the appointment with the commander. The appellant was not told of the purpose for the meeting, but he responded "okay, I'll be there." On Saturday, 18 December 2004, the appellant called his commander and asked questions about his investigation, indicating his understanding that he was scheduled to be in her office on Monday for the preferral of charges. On Sunday, 19 December 2004, the acting first sergeant, MSgt IM, talked to the appellant. The appellant told the acting first sergeant he was not feeling well, he had some stomach and neck problems, and he was going to make an appointment at the base clinic for Monday. MSgt IM asked the appellant to keep him informed.

On Monday, 20 December 2004, the appellant failed to show for his appointment with the commander. The acting first sergeant and his supervisor made numerous attempts to locate the appellant. He was not in his room and he did not answer any of the calls they made to his cell phone and room phone. They learned he had an appointment at the base clinic, but he had failed to show for that appointment too. On Tuesday, 21 December 2004, MSgt JH attempted to contact the appellant two or three times between 0715 and 0755 hours. Finally, at 0755 he made contact with the appellant. MSgt JH told the appellant he had an appointment that morning with the commander at 0830 hours. The appellant said he was on his way. MSgt IM also called the appellant around 0800 and told him to contact him as soon as the appellant entered the base. When the appellant did not immediately show up at the squadron, MSgt JH called again. The appellant said he was waiting for transportation and probably would not make the 0830 appointment.

MSgt JH told him to come directly to the commander's office when he got to base. MSgt JH contacted the appellant two or three more times. MSgt JH told the appellant they were waiting for him at the commander's office.

Around 0830, MSgt IM received a call from the military personnel flight (MPF) informing him the appellant was at the MPF building. MSgt IM and MSgt JH walked over to the MPF building and found the appellant. He told them he was trying to complete his retirement out processing.[7] The appellant was not in uniform and did not want to leave the MPF. They ordered the appellant to follow them to the commander's office. Once at the squadron, the commander preferred court-martial charges. After preferral, MSgt IM read the appellant his Article 31, UCMJ, 10 U.S.C. § 831, rights regarding the failure to go. The appellant agreed to talk. The appellant explained he had a terrible headache on Monday and fell asleep at a friend's house. He told MSgt IM he did not wake up until the next day when MSgt JH called his cell phone.

Spillover[8]

The appellant asserts: (1) the military judge failed to *sua sponte* order the severance of the two rape charges and allowed impermissible spillover to prejudice the trial; (2) trial counsel's argument was improper because it encouraged spillover; and (3) he suffered from ineffective assistance of counsel due to his trial defense counsel's failure to raise a motion to sever the two rape charges and by their failure to prevent impermissible spillover throughout the entire trial. The appellant requests that findings and sentence be set aside. We find no error.

Spillover – Background

Prior to the presentation of the government's case-in-chief, the government filed a motion pursuant to Mil. R. Evid. 404(b) to introduce certain evidence relevant to show the appellant's plan, motive, and intent to exercise control over Mrs. SS and A1C VS.[9]

[7] The appellant was in the process of retiring prior to the September 2004 rape, but was placed on administrative hold after the allegations came to light. However, the appellant believed he could retire. Although raised by the appellant during clemency and again in his *Grostefon* assignment of errors, this issue was thoroughly addressed during his court-martial. In fact, the appellant entered into a stipulation of fact indicating the court had jurisdiction over him. Upon review of the entire record, we find the issue concerning jurisdiction to be without merit.

[8] The errors raised by the appellant regarding spillover are limited to the two rape charges.

[9] The military judge reviewed the government's Mil. R. Evid. 404(b) notice memorandum provided to the defense in making his ruling. We note the items listed in the notice memorandum regarding A1C VS appear to be facts and circumstances surrounding the rape charge and would not have required a Mil. R. Evid. 404(b) ruling for admissibility. The military judge based his ruling, in part, upon *United States v. Jenkins*, 48 M.J. 594 (Army Ct. Crim. App. 1998), where the court held that previous acts of violence, dominance, and control by one spouse over another before and during the marriage were relevant to show motive, intent, and plan. *See also United States v. Sweeney*, 48 M.J. 117 (C.A.A.F. 1998) (military judge properly allowed evidence of the accused's threatening conduct towards his first wife for the limited purpose of showing his subsequent intent to harass or frighten his second wife per Mil. R. Evid. 404(b)).

After hearing arguments by counsel, the military judge conducted the Mil. R. Evid. 403 balancing test and granted the government's motion. The military judge indicated he would provide an appropriate limiting instruction to the members concerning such evidence.

The prosecution presented a solid case for each of the two rape charges. The presentation was compartmentalized and organized to clearly first present the 1998 rape charge and then present the 2004 rape charge. The evidence regarding the 1998 rape of Mrs. SS included the testimony of Mrs. SS, the testimony of the OSI agent who interviewed the appellant about the rape of Mrs. SS, and the sworn statement by the appellant. In response to this testimony the trial defense team attacked the credibility, mental/emotional/psychological state, and veracity of Mrs. SS. In fact, the military judge allowed the defense to introduce significant damaging Mil. R. Evid. 412 evidence regarding Mrs. SS. Likewise, the testimony of the OSI agent was challenged. The trial defense counsel also challenged the preparation of the sworn statements of Mrs. SS and of the appellant. Despite these attacks, we find the testimony of Mrs. SS and the OSI agent to be credible.

The evidence regarding the 2004 rape of A1C VS included the testimony of A1C VS, the testimony of the OSI agent who was the case agent, and the sworn statement by the appellant. In response, the trial defense team lodged a substantial attack on the credibility, mental state, and veracity of A1C VS. Not only did A1C VS testify during the prosecution's case, but the defense called her as a witness. With little exception, the military judge allowed the defense to introduce significant damaging Mil. R. Evid. 412 evidence regarding A1C VS. Likewise, the testimony of the OSI agent was challenged by the defense. Despite these attacks, we find the testimony of A1C VS and the OSI agent to be credible.

The appellant also provided sworn testimony. His testimony, including cross-examination, covered 163 pages of the record. In addition to a rigorous cross-examination exposing weaknesses in the appellant's testimony, the government presented rebuttal witnesses to challenge numerous aspects of the sworn testimony provided by the appellant. After review of the entire record, including the appellant's sworn testimony, we find the appellant's veracity and credibility to be highly questionable.

As for the presentation of the evidence, the appellant asserts his cross-examination resulted in impermissible spillover. We do not concur. The cross-examination was structured, organized, and methodical in its design. As the trial counsel changed topics, it was clear by either reference to a date, name, or event that the topic was changing to a different charged offense. There is no doubt the members were able to follow the trial counsel's questioning and apply the appropriate evidence to each charge. If there was any confusion during the cross-examination, it was caused by the appellant himself as he failed to answer questions and answered in a less than credible fashion. These responses

resulted in additional questions by the trial counsel, as she attempted to clarify the appellant's evasive testimony and test his veracity.

Following presentation of evidence by the prosecution and defense, the military judge provided counsel with his proposed findings instructions. In addition to others, he proposed the standard spillover instruction and two Mil. R. Evid. 404(b) limited purpose instructions, one dealing with the charged rape of Mrs. SS and one dealing with the charged rape of A1C VS. The military judge noted he tailored the limited purpose instructions based on the evidence actually presented by the trial counsel, not on what was initially put forth in the government's Mil. R. Evid. 404(b) motion. The trial defense counsel objected to the wording contained in the limited purpose instruction regarding the charged rape of Mrs. SS. There were no objections to the standard spillover instruction or to the limited purpose instruction regarding the charged rape of A1C VS.

The military judge gave the standard spillover instruction. He then provided the first Mil. R. Evid. 404(b) limited purpose instructions as follows:

> I've just instructed you that you may not infer the accused is guilty of one offense because his guilt may have been proven on another offense, and that you must keep the evidence, with respect to each offense separate. However, there has been evidence presented, on the alleged rape in Specification of Additional Charge I [charge regarding rape of Mrs. SS], that may also be considered for a limited purpose, with respect to the alleged rape in the Specification of the Charge [charge regarding rape of A1C VS]. Evidence that the accused raped [Mrs. SS], as alleged in the Specification of Additional Charge I, may be considered for the limited purpose of its tendency, if any, to prove the motive and intent of the accused to commit the rape of [A1C VS], as alleged in the Specification of the Charge. You may not consider this evidence for any other purpose,[10] and you may not conclude or infer, from this evidence, that the accused is a bad person or has criminal tendencies, and that, therefore, he committed the alleged offenses.[11]

[10] The military judge clarified this instruction by restating it and inserting the phrase "with respect to the Specification of the Charge."

[11] Although the initial Mil. R. Evid. 404(b) motion and ruling regarding the charged rape of A1C VS covered evidence showing the appellant's plan, motive, and intent to exercise control over his fiancée, the military judge determined at the conclusion of all the evidence that the limited purpose instruction should be modified as set forth above. *See United States v. Phillips*, 52 M.J. 268, 271, 272 n. 2 (C.A.A.F. 2000) (Mil. R. Evid. 404(b) evidence was offered and properly admitted to show motive and intent; however, when instructing the members, the military judge provided a limited purpose instruction which limited the evidence to rebutting other evidence of the character of the marriage, not as Mil. R. Evid. 404(b) motive and intent evidence. Our superior court limited its review of the case based on how the military judge actually instructed the members, not based on how he said he would consider the evidence earlier in the trial.); *see also United States v. Harrow*, 65 M.J. 190 (C.A.A.F. 2007) (The military judge properly allowed Mil. R. Evid. 404(b) evidence to prove pattern of abuse and intent; however, when instructing the

Next, the military judge provided the following limited purpose instruction:

> Additionally, there has been evidence presented, through the testimony of [Mrs. SS], about her perceptions of the accused, and certain acts he engaged in prior to 13 April 1998, that also may be considered for a limited purpose, with respect to the alleged rape in the Specification of Additional Charge I. Evidence of the accused's behavior toward, and with, [Mrs. SS] prior to 13 April 1998, and her fear of the accused, may be considered for the limited purpose of its tendency, if any, to prove the plan, motive, and intent of the accused to exercise control over his spouse, through intimidation and violence, and to prove that [Mrs. SS] did not consent to the act of sexual intercourse, as alleged in the Specification of Additional Charge I. Whether the evidence supports any of these inferences or conclusions is a matter for you members to decide. You may not consider this evidence for any other purpose, and you may not conclude, or infer, from this evidence, that the accused is a bad person or has criminal tendencies, and that, therefore, he committed the alleged offenses.

Finally, the military judge provided the standard instruction that the arguments of counsel are not evidence and that the members must base their determination on the evidence as they remember it and apply the law as the military judge instructs. He also instructed the members that if counsel made reference to any of the judge's instructions and if there were any inconsistencies between what counsel said and what the judge said, the members were required to accept the instructions provided by the military judge as correct.

Against this background of evidence and instruction, the trial counsel presented a clear, compartmentalized argument which was structured and began with the 1998 rape, continued next with the 2004 rape, and concluded with the failure to go and violation of the no-contact order. We note the trial counsel made some comments comparing the similarities between the two rapes; however, the overwhelming majority of the argument by the trial counsel was focused on each particular charge without reference to any similarities. Although the appellant asserted the argument was riddled with spillover, we note the trial counsel was making proper comments on the evidence of two charged offenses, which evidence was properly before the court.

The trial defense counsel's argument, and the government's response to it, further emphasized spillover was prohibited, and each offense must be considered separately. The defense argued the prosecution was trying to convict the appellant solely because of his criminal propensity, which was improper. The argument continued for 19 pages and

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members on use of Mil. R. Evid. 404(b) evidence, the members were instructed that it could only be used to show intent or absence of accident. Our superior court limited its review to the issue of intent or absence of accident.).

contained repeated references that his client was being unfairly prosecuted because he "is a bad person, who has criminal tendencies," but "[p]rofiling him as a bad person is wrong," that the spouse and fiancée were liars, and that the government was attempting to bolster a weak 2004 rape charge with the inclusion of the 1998 rape charge.

In rebuttal, the trial counsel countered with an introductory argument as to why the prosecution's case was not what the defense had asserted. She stated the government was not trying to portray A1C VS, Mrs. SS, or the appellant in any specific manner. She argued the goal of the government was to present the relevant evidence for the members to consider. "The evidence speaks for itself. If it portrays him in a light that his attorney doesn't like, so be it, because the evidence, not me, the evidence is what runs your decision in this case." The remainder of the trial counsel's rebuttal was presented in the same deliberate, compartmentalized manner as was done with the initial closing argument. The trial counsel concluded her rebuttal by highlighting seventeen different areas within the appellant's sworn testimony that conflicted with other evidence presented during the trial. The trial counsel did not use the word or theme of "propensity" in the entire argument. She did not assert the appellant should be found guilty because he is a bad person. The trial counsel argued that, contrary to the defense counsel's claim that the 1998 rape was charged to bolster the 2004 rape, "The United States charged a seven year old rape case, because this accused was not caught and punished the first time for rape, and he raped again." The trial counsel concluded by stating:

> If you look at the evidence, you follow the defense counsel's rules of engagement,[12] you look at your notes and remember the testimony, you look at the documents that have been presented, you have no choice. You will see, clearly, there is no other conclusion that you can come to. This accused has already raped twice in his life. He almost got away with it the first time. He tried to get away with it the second time. This is the day of accountability. Find him guilty.

Throughout the arguments, there were various objections raised by the government and the defense, none of which concerned spillover. The military judge overruled some and sustained others. Following each objection, the military judge provided instruction to the members on how to apply and understand his ruling.

Spillover - Military Judge's Actions

It is the well-established policy in the military justice system to join all possible charges into a single court-martial. *United States v. Burton*, 67 M.J. 150, 152 (C.A.A.F. 2009) (citing Rule for Courts-Martial (R.C.M.) 307(c)(4); *United States v. Weymouth*, 43

[12] The trial defense counsel used the term "rules of engagement" throughout his argument.

M.J. 329, 335 (C.A.A.F. 1995)). As in *Burton*, the convening authority referred all the charges against the appellant to one court-martial. The appellant did not move to have the charges severed. *See* R.C.M. 906(b)(10) (allowing a motion to sever offenses to prevent manifest injustice). Failure to make a motion to sever prior to pleas constitutes waiver. R.C.M. 905(b)(2), (b)(5), (e).

Thus, we review the failure by the military judge to *sua sponte* sever the charges for plain error under the test set forth in *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998).[13] Plain error is established when: (1) an error was committed; (2) the error was plain, clear, or obvious; and (3) the error resulted in material prejudice to the substantial rights of the appellant. *Powell*, 49 M.J. at 463-65. The appellant has the burden of persuading the Court that the three prongs of the plain error test are satisfied. *Id.* at 464-65. "An error is not 'plain and obvious' if, in the context of the entire trial, the accused fails to show the military judge should be 'faulted for taking no action' even without an objection." *Burton*, 67 M.J. at 153 (quoting *United States v. Maynard*, 66 M.J. 242, 245 (C.A.A.F. 2008)); *see also United States v. Young*, 470 U.S. 1, 16 (1985) ("[W]hen addressing plain error, a reviewing court cannot properly evaluate a case except by viewing such a claim against the entire record."). "The relevant context includes the evidence presented at trial and the instructions given by the military judge." *Burton*, 67 M.J. at 153 (citing *Darden v. Wainwright*, 477 U.S. 168, 182 (1986)).

In *Burton*, our superior court reemphasized the principle that "an accused may not be convicted of a crime based on a general criminal disposition. The [g]overnment may not introduce similarities between a charged offense and prior conduct, whether charged or uncharged, to show modus operandi or propensity without using a specific exception within our rules of evidence, such as [Mil. R. Evid.] 404 or 413." *Id.* at 152 (internal citations omitted); *see also United States v. Curry*, 31 M.J. 359, 375 (C.M.A. 1990) ("when such evidence would be admissible [i.e. Mil. R. Evid. 404(b)], it becomes more difficult to conclude there is 'manifest injustice,' or 'compelling,' 'clear,' or 'substantial prejudice'").

The propriety of instructions given by a military judge is reviewed de novo. *United States v. Quintanilla*, 56 M.J. 37, 83 (C.A.A.F. 2001). A failure to object to an instruction prior to commencement of deliberations waives the objection in absence of plain error. R.C.M. 920(f); *United States v. Simpson*, 56 M.J. 462, 465 (C.A.A.F. 2002); *United States v. Grier*, 53 M.J. 30, 34 (C.A.A.F. 2000). We note it has long been held that our panel members are presumed to follow a military judge's instructions. *United*

[13] The appellant asserts the three-part test announced by our superior court in *United States v. Curtis*, 44 M.J. 106 (C.A.A.F. 1996), is the standard by which this Court is to evaluate the spillover issues raised in the case at hand. *United States v. Curtis*, 44 M.J. 106, 128 (C.A.A.F. 1996), *cited in United States v. Southworth*, 50 M.J. 74, 76-78 (C.A.A.F. 1999). We do not agree. The *Curtis* test is used to determine whether the military judge abused his discretion in denying a motion to sever. By not raising the issue at trial, it was waived, thus the analysis is not one of abuse of discretion, but of whether there is plain error. R.C.M. 905(b)(2), (b)(5), (e).

States v. Jenkins, 54 M.J. 12, 20 (C.A.A.F. 2001), *cited in United States v. Thompson*, 67 M.J. 106 (C.A.A.F. 2009).

For the reasons discussed below, we find the appellant has not met his burden of proving plain error. The appellant failed to establish that in the context of the entire trial the military judge should be faulted for not *sua sponte* severing the charges. There was no manifest injustice in not severing the two rape charges.

The appellant further asserts the limited purpose instructions failed to cure the infection of spillover and were unclear and misleading. We do not agree. First, the military judge ruled before the government called its first witness that Mil. R. Evid. 404(b) evidence of appellant's plan, motive, and intent to use control and violence toward his wife, and of his plan, motive, and intent to use control toward his fiancée, was admissible. He conducted the Mil. R. Evid. 403 balancing test and allowed this evidence to be introduced by the government. We find no fault in that decision. Therefore, during the trial, evidence of the appellant's behavior toward his wife and his fiancée regarding the methods he used to control each victim was properly before the members. Second, at the conclusion of all the evidence, the military judge held he would instruct the members that the rape of Mrs. SS could be considered to establish the appellant's motive and intent to rape A1C VS pursuant to Mil. R. Evid. 404(b), and he would provide a limited purpose instruction. He also provided a limited purpose instruction regarding the 1998 rape charge of Mrs. SS. The trial defense counsel objected to a portion of the limited purpose instruction regarding the 1998 rape. In response to the objection, the military judge agreed to add the line: "Whether the evidence supports any of these inferences or conclusions is a matter for you members to decide." Other than this objection, there were no other objections to the instructions. Third, the military judge provided the standard spillover instruction. There were no objections by the trial defense counsel to this instruction. Fourth, he also provided instructions regarding arguments by counsel and how the members were to treat such arguments. Fifth, not only did he verbally instruct the members, but he also provided each member with a written copy of his instructions.[14]

In review of the entire record, we find these instructions to be clear and proper, and do not find them to be misleading. Thus, we find no error, let alone plain error, arising from the military judge's instructions. Even if the military judge erred in providing the limited purpose instruction regarding the rape charge of A1C VS, as asserted by the appellant during oral argument, we find such error did not result in material prejudice to the substantial rights of the appellant in that there was no impermissible spillover. Rather, each rape charge was independently supported by overwhelming evidence.

[14] The appellant asserts the verbal instructions were confusing in that the military judge stopped and repeated a section of one of the limited purpose instructions. We do not agree. It was clear on the record what his instructions were, and if there was any doubt by the members, they had the written instructions to refer to during deliberations.

In summary, this was not a case where one weak charge was joined with another stronger charge, or evidence was so merged it was difficult to distinguish between the charges, or evidence was piggy-backed.[15] In the case at hand, in the context of the entire trial, we therefore find no impermissible spillover. Our decision is based on the following: (1) the distinct and clearly defined evidence[16] against the appellant; (2) the compartmentalized presentation of the evidence;[17] (3) the fair argument on the evidence before the members regarding two charged offenses; (4) the very limited use of comparisons of the similarities between the two; (5) the fact that the military judge allowed evidence of the appellant's plan, motive and intent to control his wife through violence and evidence of his plan, motive and intent to control his fiancée pursuant to Mil. R. Evid. 404(b); (6) the fact that the military judge allowed the rape of the wife, Mrs. SS, to be used as Mil. R. Evid. 404(b) evidence of motive and intent to rape the fiancée, A1C VS; (7) the instructions provided by the military judge; (8) the fact that the arguments of the trial counsel and trial defense counsel in rebuttal reminded the members of the spillover instruction; and (9) the fact there was no objection throughout the entire trial regarding spillover.

Spillover - Trial Counsel Argument

Regarding the argument of counsel, when no objection is made during trial, we review for plain error. *See United States v. Schroder*, 65 M.J. 49, 57-58 (C.A.A.F. 2007); R.C.M. 919(c).

As set forth above, we find: (1) the trial counsel's argument was structured, compartmentalized, and clear; (2) evidence of each distinct offense was properly admitted and the fair subject of argument; (3) although there were some comments comparing the two rapes, the bulk of the argument was focused, clear, and distinct with respect to each charge, and the trial counsel did not conflate the evidence; (4) the argument did not contradict the military judge's Mil. R. Evid. 404(b) limited purpose instruction allowing the members to consider the 1998 rape as motive and intent evidence

[15] *United States v. Haye*, 29 M.J. 213, 215 (C.M.A. 1989) ("The evidence presented by the [g]overnment in its case-in-chief, its cross-examination of the accused, and its rebuttal was so merged into one that it is difficult to distinguish its intended purpose. Particularly in the cross-examination of the accused, the evidence of the adulterous conduct with [the technical sergeant] was piggy-backed to the evidence of the adulterous affair with the captain. On this record, we cannot conclude that [the] appellant received a fair hearing on the second specification . . . . [which evidence] was so close that there was a significant risk that the evidence of the adulterous affair with the captain was the deciding factor."); *see also United States v. Hogan*, 20 M.J. 71 (C.M.A. 1985) (the sole evidence of the first rape was a video deposition, and when the other rape was dismissed for inadmissible hearsay, the court was not convinced the appellant would have been convicted based on the video deposition alone).

[16] *Burton*, 67 M.J. at 154 (evidence of each distinct offense was properly admitted and the fair subject of argument, the similar conduct was charged and presented as two separate offenses, and the majority of the evidence introduced by the prosecution consisted of the testimony of two independent victims).

[17] *See Southworth*, 50 M.J. at 77 ("the [g]overnment presented its case in a manner likely to preserve the distinction between the proof offered on each of the charges. . . . [T]he presentation of evidence and arguments . . . [were] carefully compartmented . . . presenting . . . [each] rape separately."); *United States v. Simpson*, 56 M.J. 462, 465 (C.A.A.F. 2002) (compartmentalized presentation of the evidence relating to each of the victims).

of the 2004 rape; (5) despite making numerous objections throughout the trial counsel's argument, the comments of the trial counsel were not so egregious as to raise even one objection by trial defense counsel based on spillover or propensity; and (6) the military judge provided instructions regarding arguments of counsel not being evidence, a spillover instruction, Mil. R. Evid. 404(b) limited purpose instructions, and instructions on how to interpret his rulings on the objections during argument.

Our superior court wrote, citing the Supreme Court, "[A]s a threshold matter, the argument by a trial counsel must be viewed within the context of the entire court-martial. The focus of our inquiry should not be on words in isolation, but on the argument as 'viewed in context.'" *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000) (citing *United States v. Young*, 470 U.S. 1, 16 (1985)). Viewing the trial counsel's argument within the context of the entire court-martial, we find it was not improper. Thus, we find the appellant has not established error, let alone plain error.[18]

Spillover - Ineffective Assistance of Counsel

Ineffective assistance of counsel claims are reviewed de novo. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002) (citing *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997)). Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000) (additional citations omitted)). We analyze claims of ineffective assistance of counsel under the framework established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An appellant bears the burden on showing both deficient performance and prejudice. *Strickland*, 466 U.S. at 687. Counsel is presumed to be competent. *United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002) (citing *Strickland*, 466 U.S. at 689). Where there is a lapse in judgment or performance alleged, we ask first whether the conduct of the trial defense counsel was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Strickland*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991) (citations omitted). Because the appellant raised this issue within his assignment of error, including the *Grostefon* assignments of error, and the errors are presented to this Court by the appellant himself in a sworn affidavit format, we will resolve the issues in accordance with the principles established in *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997).

Applying the factors set forth in *Ginn*, we conclude we can resolve this assertion of ineffective assistance of counsel based upon the record and the appellate filings. *Ginn*,

[18] As we noted above regarding the military judge's instructions, even if it were error for the military judge to provide the limited purpose instruction regarding the rape of A1C VS, we find the error did not result in material prejudice to the substantial rights of the appellant. Each rape charge was independently supported by overwhelming evidence.

47 M.J. at 244. We note the trial defense counsel responded to the appellant's assertions of ineffective assistance of counsel with post-trial affidavits filed with this Court.

Here the appellant asks us to conclude his counsel were ineffective for failing to raise a motion to sever the two rape charges. The trial defense counsel responded in sworn affidavits that they did consider filing a motion to sever, but concluded it was unlikely they would be able to establish the "manifest injustice" element required by R.C.M. 906(b)(10). It was their assessment the motion would have failed on the first prong of the test requiring them to demonstrate the evidence of one offense would not be admissible proof of the other. The counsel believed the military judge would have ruled the evidence of the 1998 rape would have been admissible in the 2004 rape either under Mil. R. Evid. 413 or 404(b).

This was borne out by the military judge's ultimate decision, pursuant to Mil. R. Evid. 404(b), to allow the evidence of the 1998 rape to be considered in proof of the 2004 rape. The military defense counsel stated the decision not to file a motion to sever ultimately was founded on the potential consequences of winning such a motion. Had the military judge granted the motion, they would likely have had to defend against two rape cases, where evidence of one could potentially have been used in the other case pursuant to Mil. R. Evid. 404(b). Two separate trials would have given the government two bites at the apple and would have subjected the appellant to double the potential sentence.

The civilian trial defense counsel also wrote in his affidavit that in his investigation of the 1998 rape, he uncovered witnesses the government had not interviewed. He spoke to one witness who was a church friend of Mrs. SS. She had clear memory of the case, detailed information about other alleged incidents of verbal, emotional, and physical spousal abuse, and had a very vivid recollection of the abusive nature of the relationship between the appellant and Mrs. SS. This witness was willing to come to trial and testify. It was the civilian trial defense counsel's assessment that there was substantial aggravating evidence that potentially would be admissible in sentencing that the prosecution had missed. Both counsel also related they knew if the charges were severed, the government would further perfect the 1998 case. The civilian defense counsel stated all this was explained to the appellant.

We find the trial defense counsel made a tactical and strategic decision not to raise a motion to sever. It is clear from the record the decision was made to protect the appellant. When attacking trial tactics, "an appellant must show specific defects in counsel's performance that were unreasonable under prevailing professional norms." *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004) (quoting *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001)). In addition, the appellant must show prejudice. *Strickland*, 466 U.S. at 687. The appellant has neither shown his trial defense counsel's decision was unreasonable nor how he was prejudiced by the decision not to

raise a motion to sever. Accordingly, the appellant has failed to meet his burden of showing his trial defense counsel were ineffective.

In addition, the appellant asserts the trial defense counsel were ineffective for allowing impermissible spillover throughout the trial. He alleges this failure allowed spillover to prejudice the entire proceedings. We find the record compelling demonstrates to the contrary. This Court considered first and foremost the efforts of each of the two trial defense counsel. The defense team raised dozens of motions and objections in support of their client's cause. The final session of the court-martial was conducted over a seven-day period, breaking only on Sunday. The defense succeeded in introducing damaging Mil. R. Evid. 412 evidence regarding Mrs. SS and A1C VS. With very few exceptions, this evidence was allowed to be introduced by the defense, as it attempted to strike significant blows to the credibility, veracity, and mental/emotional/psychological state of the spouse and the fiancée.

Applying the law related to ineffective assistance of counsel, and applying the principles set forth in *Ginn*, we find the record as a whole, to include the defense counsel's post-trial affidavits, "compellingly demonstrates" the improbability of the appellant's claims of ineffective assistance. *Ginn*, 47 M.J. at 244 (quoting *United States v. Perez*, 39 C.M.R. 24, 26 (C.M.A. 1968)). Therefore, we deny the appellant any relief on his claim of ineffective assistance of counsel regarding spillover.

Sentence Severity

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. 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. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *Healy*, 26 M.J. at 395-96.

In making a sentence appropriateness determination, we are required to examine sentences in closely related cases and are permitted, but not required, to do so in other cases. *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001); *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006), *aff'd*, 66 M.J. 291 (C.A.A.F. 2008). This Court recently held the adjudged, not approved, sentences should be compared when examining sentence disparity. *United States v. Anderson*, 67 M.J. 703 (A.F. Ct. Crim. App. 2009). "[A]n appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly

disparate.' If the appellant meets that burden . . . then the [g]overnment must show that there is a rational basis for the disparity." *Lacy*, 50 M.J. at 288.

The appellant asserts a survey of 10 military cases, which involved two alleged rapes and other similar situations, indicates the sentence he received was inappropriately severe. Additionally, he argues the members were "rudderless" in their ability to assess a fair sentence, asserting there is no case law involving marital rape. He also alleges he is being penalized because of a change in society regarding sexuality and the crime of marital rape. Finally, he claims if he were court-martialed today under the new Article 120, UCMJ, he likely would have only been convicted of wrongful sexual contact, which carries a maximum sentence of one year confinement. During oral argument, the appellant noted he was not asserting his case qualifies as a closely related case.[19] Instead, he referenced these cases to further his basic argument that the sentence must be based on a standard of fairness. The appellant argued eight years is too great a price to pay given the particular facts and circumstances of his case and the analogous sentences found in the survey of cases cited in his assignment of errors. For reasons discussed below, we do not concur.

We reviewed the cases cited by the appellant. Additionally, we reviewed the appellant's arguments for finding the sentence inappropriately severe and conclude they are without merit. Looking to the appropriateness of the appellant's sentence on its own, we agree the sentence is significant, but appropriately so.[20] The appellant raped his wife and then, six years later, he raped his fiancée. He violated the trust expected in a marital or "engaged" relationship.[21] He continued with his rapes despite both women protesting and telling him "no," with each woman telling him "no" more than once. The appellant did not stop until he was finished with the rapes, despite his wife and his fiancée's pleas to stop. The appellant next violated a no-contact order in an attempt to get his fiancée to drop her charge of rape. Continuing with his criminal conduct, the appellant deliberately missed two scheduled appointments with his commander. It was not until senior noncommissioned officers tracked him down at the MPF, where the appellant told them he was trying to complete his retirement out processing, that the appellant finally appeared before his commander. The appellant was a noncommissioned officer with over 20 years in the Air Force. Not only did he commit two egregious acts of rape, this

[19] Had the appellant asserted his case qualified as a closely related case, we would not concur. Merely because a case involves similar charges brought under the same section of the UCMJ does not mean it is "closely related" within the meaning of this Court's mandate to determine sentence appropriateness. Rather, cases are "closely related" where, for example, they involve "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007) (quoting *Lacy*, 50 M.J. at 288), *aff'd*, 65 M.J. 310 (C.A.A.F. 2007). We have no basis for concluding that any such connection exists between the appellant's case and those provided in the survey of cases referenced in the appellate filings.

[20] We note the appellant faced a maximum confinement of life in prison without eligibility for parole.

[21] Contrary to the assertion by the appellant during oral argument that because the victims were the spouse and the fiancée we should consider the relationship factor as mitigating evidence, we find the appellant's violation of this special relationship of trust to be highly aggravating.

noncommissioned officer violated a direct no-contact order and failed to go to his commander's office twice. In short, his criminal misconduct is significant.

Considering the nature and seriousness of his offenses, the character of the appellant and his record of service, and all matters contained in the record of trial, we find the sentence to be appropriate in this case.

No-Contact Order Violation

The standard of review for factual sufficiency is de novo to determine "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." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The standard of review for legal sufficiency is whether a rational trier of fact could have found the essential elements of an offense beyond a reasonable doubt, when the evidence is viewed in the light most favorable to the government. *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995) (quoting *Jackson v. Virginia*, 433 U.S. 307, 319 (1979)). A reviewing court "is bound to draw every reasonable inference from the evidence of record in favor of the prosecution" on issues of legal sufficiency. *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993) (quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)).

The appellant asserts he did not violate an order and the record of trial is legally and factually insufficient to support a finding of guilt. For the reasons set forth below, we do not agree.

For an accused to be subject to punishment under Article 92, UCMJ, for violation of an order, the order must have been valid and the accused must be found "by legal and competent evidence beyond reasonable doubt" to have willfully disobeyed the order. Article 51(c)(1), UCMJ, 10 U.S.C. § 851(c)(1). An order is presumed to be lawful. *United States v. Deisher*, 61 M.J. 313, 317 (C.A.A.F. 2005).

An accused's subjective interpretation of the terms of an order does not affect his duty to obey that order. *See United States v. Jeffers*, 57 M.J. 13, 14-15 (C.A.A.F. 2002). Additionally, neither a superior's ability to recollect the exact terms of her prior order nor her failure to advise a subordinate on the nonconformity of his contemplated course of conduct is relevant to an accused's culpability in failing to obey that order. A military supervisor is not required to sift through every communication a subordinate may make to determine whether he has a nefarious purpose. *United States v. Thompkins*, 58 M.J. 43, 45 (C.A.A.F. 2003). A subordinate "who initiates contact contrary to the terms of such an order, is subject to punishment under [Article 92, UCMJ], without the necessity of proof that the contact was undertaken for an improper purpose." *Id.* It is sufficient that the subordinate has violated the terms of the order. *Id.*

On appeal, the appellant argues MSgt DC knowingly condoned the appellant's plans to have the chaplain mediate a meeting between him and A1C VS. Specifically, the appellant suggests when MSgt DC said, "I don't think that's a good idea," she in fact sought to suspend or rescind her original order. It is clear the appellant should have understood the meaning behind the statement made by MSgt DC. The appellant was not a junior airman, but a noncommissioned officer who had spent over two decades on active duty. The appellant both voiced and acknowledged his understanding of the no-contact order upon its issuance. That written order, two copies of which were provided to the appellant, contained a clear admonition that the appellant must not contact A1C VS until and unless MSgt DC expressly rescinded her order in writing. The record is clear MSgt DC never issued a written modification, and so the original no-contact order remained in effect. As such, MSgt DC's words to the appellant, "I don't think that's a good idea," cannot have constituted an express authorization for the appellant to arrange for a meeting with A1C VS through the chaplain.

The appellant also asserts the terms of MSgt DC's original order did not preclude him from seeking mediation through the chaplain in the first place. Specifically, the appellant asserts he "objectively" engaged in neither direct nor indirect contact with A1C VS.[22] However, case law refutes the appellant's characterization of what constitutes indirect contact. Our superior court has found indirect contact in similar factual circumstances. For example, in *Thompkins* the issue on appeal was whether the evidence presented at trial was legally sufficient to support a conviction under Article 90, UCMJ, 10 U.S.C. § 890, for willful disobedience of a superior officer arising from a no-contact order violation. *Thompkins*, 58 M.J. at 44. The accused in that case had received an order from his commander stating in part, "you will not have any contact (verbal, written, or physical) with [A1C DS]." *Id*. While under this order, the accused in *Thompkins* approached the girlfriend of A1C DS and requested the return of his compact disc, which was in the possession of A1C DS. *Id.* A1C DS's girlfriend relayed this request to A1C DS, and a court-martial returned a guilty verdict for knowingly violating a no-contact order. *Id.* Our superior court affirmed the conviction. *Id.* at 44-45.

The facts of *Thompkins* are analogous to those of the case at hand. Whereas in *Thompkins* the request relayed by a third party related to the return of property to its rightful owner, the appellant's request in the instant case related to a meeting, the purpose of which the appellant admitted was to entreat A1C VS to drop the rape charges against him. Moreover, the written order in the instant case was more specific than that in *Thompkins*. Since the admonition to avoid "any contact" in *Thompkins* sufficed for a conviction, MSgt DC's directive to avoid contact with A1C VS, including "through a third party directly or indirectly," certainly suffices to affirm the appellant's conviction.

[22] Despite his assertions upon appeal, we note during trial the appellant unmistakably admitted to engaging in indirect third-party contact with A1C VS.

Therefore, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this Court is convinced beyond a reasonable doubt of the appellant's guilt of the violation of the no-contact order.

Post-Trial Delay

We note this case has been with this Court in excess of 540 days. In this case, the overall delay 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. *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 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 and the entire record, we conclude any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and no relief is warranted.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). The approved findings and sentence are

AFFIRMED.

OFFICIAL

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