UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class KOREY J. TALKINGTON
United States Air Force

ACM 37785

26 April 2013

Sentence adjudged 7 October 2010 by GCM convened at Aviano Air Base, Italy. Military Judge: Jefferson B. Brown.

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

Appellate Counsel for the appellant: Captain Travis K. Ausland (argued); Lieutenant Colonel Jane E. Boomer; and Major Michael S. Kerr.

Appellate Counsel for the United States: Major Tyson D. Kindness (argued); Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; and Gerald R. Bruce, Esquire.

Before

STONE, ROAN, and CHERRY
Appellate Military Judges

OPINION OF THE COURT

ROAN, Senior Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of two specifications of attempted aggravated sexual assault and one specification of attempted abusive sexual contact, in violation of Article 80, UCMJ, 10 U.S.C. § 880.[1] The adjudged and approved sentence consisted of a bad-

[1] The appellant was found not guilty of sodomy, in violation of Article 125, UCMJ, 10 U.S.C. § 925.

conduct discharge, confinement for 8 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. As part of our Project Outreach Program, we heard arguments in this case at Willamette University College of Law in Salem, Oregon, on 25 September 2012.

The appellant raises several assignments of error for our consideration, arguing factual and legal insufficiency of the evidence, admission of improper character evidence, abuse of discretion by the military judge, and prosecutorial misconduct. Finding no error that materially prejudiced the appellant's substantial rights, we affirm.

Background

The appellant and CLG developed a platonic friendship while the appellant was stationed at Aviano Air Base, Italy. On 5 April 2010, CLG agreed to go to the appellant's dorm room to watch movies. She subsequently fell asleep on the appellant's bed. Later that evening, CLG awoke when the appellant began touching her breasts. CLG testified that she pretended to be asleep, hoping that the appellant would stop. The appellant proceeded to put his hands down CLG's pants and digitally penetrate her vagina. The appellant also removed CLG's clothes, performed oral sex on her, and engaged in sexual intercourse. After he finished, the appellant put CLG's underwear and pants back on her and put a comforter over her before walking out of the room. CLG testified that she did not consent to any of the above activity and further stated that she pretended to be asleep the entire time.

After the appellant left the room, CLG went to the bathroom to clean up. As she started to leave, the appellant reentered the room. CLG went outside and smoked a cigarette and the appellant joined her. While they smoked, the appellant did not acknowledge what had just happened but did tell CLG that she had tried to take her clothes off while she was sleeping. He said he tried to stop her and threw the comforter over her. CLG went to her boyfriend's house and told him that she believed she had been raped. CLG's boyfriend sought the assistance of a friend, who took CLG to the hospital where a rape examination was performed.

CLG reported the incident to the local Air Force Office of Special Investigations (AFOSI). She told the agents she had been raped and that she had pretended to be asleep throughout the entire sexual encounter. AFOSI agents interviewed the appellant. Under rights advisement, the appellant made both oral and written statements. The oral interview was recorded and subsequently played for the members at trial.

During the interview, the appellant initially denied having sex with CLG. However, when AFOSI told him they had evidence to the contrary, he stated, "I don't know, I think maybe I was just being a dumb ass and screwed up, but it just happened. I took her pants off and had intercourse with her and put her clothes back on her and went

out and smoked." He further stated that CLG "didn't move or nothing" when he pulled her pants off to have sex with her, she did not touch him during the sexual encounter, her eyes were closed, they did not make eye contact during the encounter, and she did not make any sudden movements. He said that, when she woke up, CLG asked him how long she had been sleeping, and he responded that he did not know because he had been dozing in-and-out of sleep. He also admitted to the agents that he did not tell CLG he had sex with her. He agreed that he took advantage of the situation and admitted that he felt uncomfortable because he thought CLG was sleeping.

AFOSI agents asked him, "You dressed her Korey. What does that tell you? What does that tell you right now? Try to figure out what your state of mind was." The appellant replied, "That she was sleeping. That's what that tells me." Indeed, AFOSI questioned him about his state of mind at the time of the offense:

> A[gent] 2: I think you knew all along that she was sleeping and I think that's true because you put her clothes back on and you tried to initiate conversation trying to justify why her clothes were off as you guys were leaving. I mean that sounds pretty precalculated.
>
> ACC: It's just one of those things. I saw an opportunity and I took it and then I realized I had f*cked up.

The appellant further stated, "the best way to simplify it was I had sex with her while she was sleeping . . . that's the best way to simplify it." The appellant also provided a written statement, including the following relevant portions:

> Q: Was [CLG] sleeping when you started to arouse her?
> A: Yes.
> . . . .
> Q: Was she sleeping while you had intercourse?
> A: Yes she was sleeping.
> Q: Did you stop when she woke up?
> A: I stopped when she opened her eyes and looked at me.
> Q: Why did you stop?
> A: Because that is the time I realized I made a big mistake.
> Q: What mistake?
> A: That I had intercourse with her while she was sleeping.

The appellant testified at trial. He admitted that CLG was asleep when he first started touching her. He also admitted that he had sexual intercourse with her; inserted his finger inside her vagina; and rubbed her breasts and her body, including running his hand down below her waist underneath her pants. However, he said he believed that CLG was awake and consenting to each act. He stated that CLG's breathing pattern and

moaning led him to believe she was awake until a moment after the intercourse, when she glanced or looked up at him in a way that seemed abnormal to him and that he had not experienced before. He also testified that his previous sexual encounters with at least two other women were different than his encounter with CLG in that they were more actively engaged. The appellant also testified that CLG kissed him with a peck or smooch before they engaged in sexual intercourse, she helped him remove her pants, and CLG was "moaning" during the sexual encounter. He also acknowledged that he did not disclose this information during his pretrial interview with AFOSI.

A1C QK, the appellant's roommate, testified at trial. He stated that on the Monday following the sexual assault, the appellant told A1C QK that he had "f*cked" CLG and that she "was asleep." On cross-examination at trial, the appellant admitted to making the statement to his roommate.

Factual Sufficiency

The appellant was charged with two specifications of attempted aggravated sexual assault and one specification of attempted abusive sexual contact, in violation of Article 80, UCMJ. The specifications are as follows:

> Specification 1: [The appellant] did, at or near Aviano Air Base, Italy, between on or about 5 April 2010 and on or about 6 April 2010, attempt to engage in a sexual act, to wit: penetration of the vagina by his penis with [CLG], who was substantially incapable of declining participation in the sexual act.
>
> Specification 2: [The appellant] did, at or near Aviano Air Base, Italy, between on or about 5 April 2010 and on or about 6 April 2010, attempt to engage in a sexual act, to wit: penetration of the vagina by his finger with [CLG], who was substantially incapable of declining participation in the sexual act.
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> Specification 3: [The appellant] did, at or near Aviano Air Base, Italy, between on or about 5 April 2010 and on or about 6 April 2010, attempt to engage in sexual contact, to wit: touching the breasts and inner thigh with [CLG], who was substantially incapable of declining participation in the sexual act.

On appeal, the appellant makes two arguments contesting the factual sufficiency of his attempt convictions. First, relying on the specific language of the specifications, he contends that the offenses as stated require proof that CLG was *actually incapable* of declining participation in the sexual act, and no such proof was adduced. Second, the

appellant argues that the evidence does not support a finding that the appellant subjectively believed that CLG was incapacitated. We disagree with both assertions.[2]

We review de novo whether findings of guilty are sufficiently supported by the facts of the case. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). This Court "may affirm a conviction only if it concludes, as a matter of factual sufficiency, that the evidence proves appellant's guilt beyond a reasonable doubt." *Id.* (citations omitted); Article 66(c), UCMJ, 10 U.S.C. § 866(c). "The test for factual sufficiency is 'whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses,' the court is 'convinced of the [appellant]'s guilt beyond a reasonable doubt.'" *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). In conducting our review, we apply "neither a presumption of innocence nor a presumption of guilt." *Washington*, 57 M.J. at 399.

The appellant was charged with *attempting* to commit various sexual acts or contacts with CLG while she was substantially incapable of declining participation. To be guilty of an attempt, the Government was required to prove the following elements: (1) That the accused did a certain overt act, (2) That the act was done with the specific intent to commit a certain offense under the code, (3) That the act amounted to more than mere preparation, and (4) That the act apparently tended to effect the commission of the intended offense. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 4.b. (2008 ed.).

Put differently, to constitute an attempt, the Government must prove the appellant had a specific intent to commit an offense accompanied by an overt act which directly tends to accomplish the unlawful purpose. The preparation required consists of devising or arranging the means or measures necessary for the commission of the offense. The overt act must go beyond preparatory steps and be a direct movement toward the commission of the offense. *See United States v. King*, 71 M.J. 50 (C.A.A.F. 2012). Completion of the predicate offense however is not required.

Factual impossibility is not a defense to an attempt. *United States v. Roeseler*, 55 M.J. 286, 291 (C.A.A.F. 2001); *United States v. Anzalone*, 43 M.J. 322 (C.A.A.F. 1995). *See, e.g.*, *United States v. Thomas*, 32 C.M.R. 278 (C.M.A. 1962) (conviction upheld for attempted rape when accused engaged in sexual intercourse of a deceased woman whom he believed was merely unconscious); *United States v. Church*, 29 M.J. 679 (A.F.C.M.R. 1989) (conviction upheld for attempted premeditated murder where

[2] The appellant does not challenge the legal sufficiency of his convictions. Nevertheless, we also conclude that the evidence is legally sufficient because, when viewing the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the elements beyond a reasonable doubt. *See United States v. Turner*, 25 M.J. 324, 324–25 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

accused hired undercover agent to kill his wife); *United States v. Longtin*, 7 M.J. 784 (A.C.M.R. 1979) (accused was convicted of attempted sale of opium because he believed that is what it was even though there was no proof that it was opium). "A person who purposely engages in conduct which would constitute the offense if the attendant circumstances were as that person *believed them to be* is guilty of an attempt." *MCM*, Part IV, ¶ 4c(3) (emphasis added). Thus, the fact that CLG was only pretending to be asleep does not render the appellant's convictions infirm. The Government was not required to prove CLG was *actually* unable to decline participation. The Government was only required to prove that, when the appellant committed the acts, *he believed* CLG was unable to decline participation. Therefore, the appellant's first argument fails.

The appellant further argues that the evidence is factually insufficient to support a finding that he believed CLG was substantially incapable of declining participation at the time of the acts. His claim is without merit. Our review of the record reveals ample evidence to support the finding that the appellant in fact held such a belief. Although the appellant testified that CLG moaned "a little bit," breathed "heavier than normal" and saw her eyes were open, that testimony stands in stark contrast to his prior admissions. The appellant's pretrial oral and written statements clearly show he thought CLG was sleeping during the sexual assault. Additionally, the appellant's best friend and roommate testified that, shortly after the incident, the appellant told him that he "f*cked" CLG while "she was asleep." Moreover, there was ample evidence undermining the appellant's credibility. The appellant lied to CLG and AFOSI agents, by stating that CLG began to remove her clothes in her sleep. The appellant initially lied to AFOSI about having sex with CLG, and, moreover, the appellant's trial testimony about CLG's breathing and moaning was disclosed for the first time at trial.

Both CLG and the appellant candidly described what did and, perhaps more importantly, did not happen in the appellant's room. CLG did not actively touch the appellant, did not speak to him, did not kiss him, and did not actively participate in foreplay. Further, the appellant admitted to AFOSI that he indeed believed CLG was asleep. After weighing the evidence produced at trial, we are convinced beyond a reasonable doubt that the appellant is guilty of the charge and specifications of which he was convicted. CLG's testimony and the appellant's own admissions to both AFOSI and his roommate were sufficient to conclude that the appellant believed CLG was asleep, and thus substantially incapable of consenting at the time of the sexual assaults.

Character Evidence

We will consider the appellant's next two assignments of error together, as they both allege an abuse of discretion by the trial judge in his decision to admit or exclude evidence in the form of character testimony. First, the appellant argues that the military judge abused his discretion by allowing, over his objection, "CLG's testimony that the appellant was violent especially after drinking Jack Daniels." Second, the appellant

argues the military judge abused his discretion when he did not allow defense counsel "to elicit testimony about CLG's character for 'manipulativeness.'" Having reviewed these issues in light of the record of trial, we find no error.

The admissibility of character evidence is governed by Mil. R. Evid. 404(a), which prohibits admission of "[e]vidence of a person's character or a trait of character [offered] for the purpose of proving action in conformity therewith on a particular occasion." Character evidence is admissible for purposes other than proving action in conformity therewith, to include proving state of mind. Mil. R. Evid. 404(b). However, in any case where character evidence would be admissible, the evidence may nonetheless be excluded if the military judge concludes its probative value is outweighed by other concerns. Mil. R. Evid. 403.

We review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010) (citing *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000)); *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010). An abuse of discretion occurs when the military judge makes clearly erroneous findings of fact or when the military judge's legal conclusions are influenced by an erroneous view of the law. *United States v. Hollis*, 57 M.J. 74, 79 (C.A.A.F. 2002). The abuse of discretion standard is a "strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *White*, 69 M.J. at 239.

The appellant maintains that the military judge abused his discretion by admitting evidence that the appellant had a violent character. At trial, CLG testified she did not try to stop the appellant from having sex with her because she was scared: "I know he can be a violent person, especially when he's been drinking Jack Daniels which he did [that night]." The military judge overruled trial defense counsel's objection to this response but did not state the rule of evidence he was relying on to admit this testimony, nor did he conduct a Mil. R. Evid. 403 balancing test on the record. The appellant argues that CLG's testimony about the appellant's propensity for violence was uncorroborated, improper character evidence that should have been excluded, if not under Mil. R. Evid. 404, then under Mil. R. Evid. 403.

We conclude that CLG's testimony about the appellant's tendency to become violent when drinking was properly admitted into evidence, as it was relevant and admissible for a non-propensity purpose under Mil. R. Evid. 404(b), namely to explain CLG's state of mind as to why she did not object or complain to the appellant about what he was doing. CLG testified that she was actually awake during the entire sexual assault and only pretended to be asleep. Her testimony about the appellant's violent character was relevant to answering the lingering question about why she did not resist the appellant. In this respect, her testimony explained her resulting behavior that evening.

Furthermore, we conclude that the probative value of CLG's testimony outweighs possible prejudicial effects. Because the military judge did not conduct a Mil. R. Evid. 403 balancing test on record, we afford his ruling no deference and conduct our own analysis of the proffered evidence. *See United States v. Collier*, 67 M.J. 347, 353 (C.A.A.F. 2009); *United States v. Hursey*, 55 M.J. 34, 36 (C.A.A.F. 2001); *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000).[3] The record is clear that the testimony was not elicited or made to show the appellant's propensity for violence or to imply that he acted in conformity with that character during the sexual encounter. Instead, it explained the peculiarity of CLG's decision to pretend that she was asleep rather than manifest her objection to the appellant's actions. Moreover, the testimony was not unfairly prejudicial, especially when considered in light of the trial defense counsel's successful impeachment of CLG on the violence issue. On cross-examination, defense counsel challenged CLG's opinion regarding the appellant's tendency towards violence. Trial defense counsel also recalled CLG during the appellant's case and confirmed that, in making her report to AFOSI, she hadn't told AFOSI that she was afraid of the appellant. In light of the foregoing, we conclude that the military judge did not abuse his discretion by admitting CLG's testimony about the appellant's drinking and resulting violent tendencies.[4]

The appellant also argues the military judge abused his discretion by excluding evidence of CLG's character for "manipulativeness" that was offered under Mil. R. Evid. 404(a)(2) and 405(a). He argues that "[t]he trait of 'manipulativeness' was pertinent to the case because CLG was the accuser and this trait went directly to her motives and her intent in making accusations against the appellant. Further, the appellant argues it was admissible because CLG testified at trial and, in doing so, her character was placed at issue. We disagree and find the military judge did not abuse his discretion when he excluded this evidence on the basis of its potential for unfair prejudice.

During its case, the defense recalled A1C QK and attempted to elicit his opinion regarding CLG's character for manipulativeness. The Government objected. In the

[3] In *United States v. Wright*, 53 M.J. 476 (C.A.A.F. 2000), our superior court set forth some factors to consider when conducting the balancing test. They include the following: (1) strength of proof of the prior act, (2) probative weight of the evidence, (3) potential for less prejudicial evidence, (4) distraction of the fact finder, (5) time needed for proof of prior conduct, (6) temporal proximity, (7) frequency of the acts, (8) presence or lack of intervening circumstances, and (9) relationship between the parties. *Id*. at 482. *See also United States v. Ediger*, 68 M.J. 243, 248-49 (C.A.A.F. 2010); *United States v. Henley*, 53 M.J. 488, 490 (C.A.A.F. 2000). This list is neither "exclusive nor exhaustive." *United States v. Dewrell*, 55 M.J. 131, 138 (C.A.A.F. 2001).

[4] Even if the military judge did err, we find any error to be harmless. The evidence of the appellant's guilt of the offenses in question was overwhelming. It includes testimony from the appellant himself that he initiated the sex knowing CLG was asleep in addition to pretrial statements he made which also state he believed she was asleep. Additionally, the testimony did not materially add to trial counsel's argument. Indeed, trial counsel did not even reference this evidence during argument. Given this and the trial defense counsel's successful challenge to CLG's veracity on this characterization, we are confident that its admission, erroneous or not, did not substantially influence the members' judgment on the appellant's guilt. Under all the circumstances, we have no doubt that the testimony did not materially prejudice the appellant.

attendant Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, trial defense counsel proffered the following as a basis for the relevance and admissibility of the evidence:

> DC: Your Honor, it's the defense's position that [CLG] is manipulating the people around her. Specifically, [CLG's boyfriend]. Her anger towards [her boyfriend] was palpable the night of the alleged incident. She said that she went over to his house in order to try and get a reaction from him, to try to essentially manipulate him. If her character is that of a manipulative person, that certainly is pertinent to this case.
>
> . . . .
>
> DC: Your Honor, once in the direct examination she said specifically in regards to text messages to [her boyfriend], "I was trying to make him feel like crap. They weren't nice." In cross examination, she said in regard to the messages as well as going over to the house, "I wanted to make him feel bad because I felt bad."

The military judge ruled:

> I will sustain the [prosecution's] objection however, I will note that it's not based on a belief that the only character trait that can be offered is the limited list that the government recited.[5] However, in applying 401 and 403 to this particular case, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members. Based on that, I will exclude it as defense counsel pointed out there are other areas that you already have that you can make this argument.

Whether or not the proffered evidence of CLG's character for manipulativeness was relevant and material to her credibility, as the military judge apparently found was true in this case, even relevant and material evidence may be barred when the evidence's probative value is outweighed by the dangers of unfair prejudice it presents. *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011). As the military judge articulated, any prejudice resulting from the testimony could be avoided altogether since "there [were] other areas that [trial defense counsel] already ha[d] . . . to make this argument."

[5] In articulating the basis for his objection, trial counsel asserted that character evidence is limited to character for "truthfulness or untruthfulness . . . peacefulness . . . violence, or a relevant or pertinent character trait." Evidence of a pertinent trait of character of the alleged victim of the crime may be offered by an accused, and evidence of the character trait of a witness may be offered under Mil. R. Evid. 607, 608, and 609. Mil. R. Evid. 404(a)(2). Further, "[i]n all cases in which evidence of character or trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion." Mil. R. Evid. 405(a). Mil. R. Evid. 608 provides that: "The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise."

The military judge's articulated basis for his ruling is not clearly erroneous and is reasonably supported by the record, as the Government points out in its brief: "the military judge recognized trial defense counsel was equipped with the evidentiary tools necessary to effectively argue this point before the members . . . [which] is exactly what trial defense counsel did."

When a military judge conducts a proper Mil. R. Evid. 403 balancing test, his ruling will not be overturned unless there is a "clear abuse of discretion." *Manns*, 54 M.J. at 166. Indeed, the military judge normally has "enormous leeway" in balancing the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, or undue waste of time. *United States v. Baldwin*, 54 M.J. 551, 557 (A.F. Ct. Crim. App. 2000) (Young, C.J., concurring) (citing Stephen A. Saltzburg et al., *Military Rules of Evidence Manual* 490 (4th ed. 1984)). Because his ruling is not clearly erroneous and is supported by the record, we find that the military judge did not abuse his discretion when he excluded this evidence on the basis that its probative value was outweighed by its potential for unfair prejudice.

Reopening of Government's Case

The appellant argues that the military judge abused his discretion by permitting the Government to reopen the case after it rested to discuss the paternity of CLG's child. Prior to resting, trial counsel and trial defense counsel discussed the possibility of entering into a stipulation of fact that the appellant was not the father of CLG's child. The two parties reached an apparent agreement as to the nature of the stipulation, but they did not agree to specific language prior to the Government closing its case. After the Government rested, trial defense counsel stated that the defense was no longer willing to stipulate to the paternity of CLG's child. The military judge permitted the Government to reopen its case over defense objection. CLG testified that the appellant was not, in fact, the father.

Rule for Courts-Martial 913(c)(5) permits a military judge to allow a party to reopen its case once it has rested as a matter of discretion. We review the military judge's decision on the issue for an abuse of discretion. *United States v. Satterly*, 55 M.J. 168, 169 (C.A.A.F. 2001); *United States v. Martinsmith*, 41 M.J. 343, 348 (C.A.A.F. 1995); *United States v. Ray*, 26 M.J. 468, 471 (C.M.A. 1988) (military judge has discretion to allow a party to reopen their case and the moving party should proffer some reasonable excuse for its request). The military judge determined that both sides had mistakenly believed they had come to a meeting of the minds with respect to the stipulation of fact prior to the Government resting its case. He further found that neither side acted in bad faith during the discussion. It was only after the Government completed its findings case that the defense counsel stated the appellant would not agree to the stipulation. Given that the appellant was charged with sexually assaulting CLG, to include having sexual intercourse while he thought CLG was asleep, the issue of

paternity was a legitimate question for the members to consider. Having reviewed the facts of the case, we find the military judge did not abuse his discretion to permit the Government to reopen its case in order to rule out the possibility that the appellant was the father of CLG's child. Moreover, we find, even if the military judge erred, the appellant has suffered no prejudice to a substantial right. The fact CLG testified the appellant was not the father of the child did not adversely impact his defense that the sexual assault did not take place.

Trial Counsel's Sentencing Comments

The appellant argues that certain comments made by the trial counsel during sentencing materially prejudiced a substantial right. First, trial counsel incorrectly referenced the appellant's acts as an actual sexual assault rather than an attempted sexual assault; second, trial counsel improperly made reference to the victim's status as a dependent of a military member; and third, the trial counsel mischaracterized sex offender registration as non-punitive in nature.

"The standard of review for an improper argument depends on the content of the argument and whether the defense counsel objected to the argument." *United States v. Erickson*, 63 M.J. 504, 509 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 221 (C.A.A.F. 2007). "The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the [appellant]." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) (citations omitted). The question of whether the comments are fair must be resolved by viewing them within the entire context of the court-martial. *United States v. Gilley*, 56 M.J. 113, 121 (C.A.A.F. 2001). Having reviewed the trial counsel's argument in its entirety, the trial defense counsel's objections, and the military judge's responses thereto, we find that the appellant has not suffered any material prejudice to a substantial right and the appellant's arguments on this issue are without merit.

Prosecutorial Misconduct

The appellant lastly asserts that the trial counsel committed prosecutorial misconduct by "eliciting a response from CLG that she knew the appellant believed she was asleep." The appellant offers no evidence of misconduct beyond the simple fact that the trial counsel questioned CLG about her belief as to the appellant's knowledge concerning her state of awareness. The military judge immediately sustained the defense counsel's objection and instructed the members to disregard CLG's answer. Based on the overwhelming evidence produced at trial, and even assuming any error occurred, it was harmless beyond a reasonable doubt and did not impact a substantial right of the appellant.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[6] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are

AFFIRMED.[7]

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[6] 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).

[7] Judge Cherry participated in the opinion prior to his retirement and concurs in the judgment.