UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant VINCENT L. WILLIAMS
United States Air Force

ACM 36996

15 July 2009

Sentence adjudged 23 January 2007 by GCM convened at Fort George G. Meade, Maryland. Military Judge: Gary M. Jackson.

Approved sentence: Dishonorable discharge, confinement for 15 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Major Lance J. Wood, Major Michael A. Burnat, and Captain Tiaundra Sorrell.

Appellate Counsel for the United States: Major Jeremy S. Weber, and Captain Coretta E. Gray, Gerald R. Bruce, Esquire.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

HEIMANN, Senior Judge:

The appellant was tried at Fort George G. Meade, Maryland, before a panel of officers. Consistent with his pleas, he was convicted of the lesser included offense of carnal knowledge with his stepdaughter who was between the ages of twelve and sixteen, on divers occasions, and by exceptions to indecent acts with the same stepdaughter

during the same period of time.[1] The charges were in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934. The adjudged sentence consisted of a dishonorable discharge, 18 years and four months of confinement, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged, except for reducing the period of confinement to 15 years pursuant to a pretrial agreement (PTA).

The appellant raises seven issues on appeal, five pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Generally, the appellant alleges that the military judge erred by failing to excuse a court member *sua sponte*, and by *sua sponte* giving the "unsworn statement" instruction to the panel. He also alleges his defense counsel have been ineffective throughout the handling of his case, to include his appellate defense counsel. He alleges that trial counsel committed error in the sentencing argument, and finally, that his PTA improperly required him to be tried by members. Although not raised by the appellant, the Court also examined whether the appellant is entitled to relief because of appellate processing delays. We have carefully reviewed each raised assignment of error and address, in detail, the most significant ones below.[2] Finding no prejudicial error, we affirm.

Background

The appellant was a technical sergeant with over twenty years of service. His duty performance was solid and he had no prior disciplinary record. He first met CH, the victim of his offenses, when she was seven years old. He married the victim's mother a few years later when CH was ten years old.

At trial, the appellant agreed to a stipulation of fact which provided that on divers occasions, for a charged period of just over four years, he had sexual intercourse with CH and committed indecent acts upon her by placing his hand on her private parts. He stipulated that these offenses occurred after CH had turned twelve years old but prior to her turning sixteen years old. Finally, he stipulated that CH gave birth to a child, whom he fathered.

During the course of the appellant's *Care* inquiry he admitted to the military judge that he first had sex with CH when she was thirteen years of age. He told the military

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[1] The appellant was charged with two rapes. Upon acceptance of the appellant's plea, and consistent with a pretrial agreement, the court dismissed a second charge of rape and two specifications and charge of sodomy, all related to the same victim. In addition, the prosecution elected not to proceed on the first rape charge or seek to prove the excepted language on the indecent acts specification.

[2] We thoroughly examined each issue raised by the appellant, including those included in his nearly 400 pages of *Grostefon* submissions. In considering the myriad of errors raised by the appellant regarding the ineffective assistance of counsel provided by his entire defense team, we reviewed the entire record including the post-trial affidavits filed with this Court. We have applied the factors set forth in *United States v. Ginn,* 47 M.J. 236 (C.A.A.F. 1997) in considering all of these documents.

judge that he only had sex with CH 15 to 20 times. He also admitted that he committed indecent acts upon CH during these same time periods. He asserted that the vast majority of the indecent acts were concomitant with the sexual intercourse. Finally, the appellant admitted that he was not under the influence of alcohol or drugs at the time of his offense and his conduct was indecent and service discrediting.

During the sentencing phase of trial, the prosecution presented a different version of the offenses to the sentencing panel via a stipulation of expected testimony by CH. In this stipulation, CH agreed that the two first met when she was seven years old, and the appellant married her mother when she was ten years old. It is here, however, that their stories differ.

In CH's stipulated testimony, she said the appellant first started touching her when she was twelve. She said that after several attempts to resist his advances, the appellant began having sexual intercourse with her. She further indicated that he had intercourse with her consistently, several times a week, from shortly after she turned twelve until shortly before she turned sixteen. In addition, she indicated intercourse did not occur during her menstrual periods or during a five month time period when her mother and the appellant were separated. She also said that the abuse came to light when she discovered she was pregnant.

Finally, it is important to provide some procedural background. The appellant's trial began on 10 October 2006, at which time he entered a plea of guilty to the greater charge of rape and indecent acts with exceptions. This plea was consistent with a PTA limiting confinement to 20 years and specifying trial by judge alone. During the *Care* inquiry, however, it became clear that the appellant was unwilling to admit to the element of force and lack of consent required for the rape charge to the degree necessary to enter a provident plea. As a result, the appellant's plea to rape was rejected, he entered a not guilty plea and a delay was granted. On 22 January 2007, the trial resumed, at which time the appellant had a new PTA requiring a plea to the lesser offense of carnal knowledge only, plus the indecent acts offense with exceptions. However, contrary to the initial PTA, the new PTA required the appellant to request trial by members. The initial PTA required the appellant to request trial by judge alone. The change in forum was at the government's request because the military judge who rejected the plea to the greater offense remained the same. Both PTAs required the appellant to agree to a stipulation of expected testimony of CH.

Ineffective Assistance[3]

We begin by addressing the appellant's claims that his trial defense counsel were ineffective during the sentencing phase of his trial.[4] While the appellant makes numerous

[3] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

allegations of ineffective assistance in sentencing, most fervent of appellant's claims is that his trial defense counsel were ineffective for failing to attack the victim's version of the offenses. He contends such an attack would have shown that she was a willing participant, that she was already a troubled child who performed poorly in school long before the appellant's actions, and that the number of sexual encounters was significantly less than the victim claimed. He also adamantly contends that his trial defense counsel should have attacked the victim's natural father's testimony that the appellant had either denied or limited his access to his daughter and that his daughter was depressed at times. The appellant contends that he did not prevent CH access to her natural father, and that CH, in fact, liked living with him. In evaluating the appellant's claims, we have considered all of the appellant's extensive submissions to this Court.

In response to the appellant's complaints, his multiple defense counsel have provided several affidavits.[5] The essence of these responses is that they agree that they did not attack either the victim or the natural father in sentencing because it was inconsistent with the defense's trial strategy. They contend their strategy was, first, to obtain a PTA to reduce the appellant's exposure to two rape charges which carried a life sentence; second, to portray the appellant as someone who accepted responsibility for his crimes; and, finally, avoid attacking the victim, directly or indirectly, to further aggravate the sentencing authority. They point out that attacking both the victim and the natural father was contrary to all of their strategy goals. They also believed that putting the appellant on the stand in sentencing was contrary to this strategy. They assert the appellant was well briefed on this strategy and while he did not agree with all aspects of the strategy, he ultimately gave it his endorsement. Finally, we note that trial defense counsel did put on a defense sentencing case, to include eight character statements and copies of numerous awards and decorations.

Ineffective assistance of counsel claims are reviewed de novo. *United States v. Cain*, 59 M.J. 285, 294 (C.A.A.F. 2004) (citing *United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002)). 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)). 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 must show deficient performance and prejudice. *Key*, 57 M.J. at 249 (citing *Strickland*, 466 U.S. at 687). Counsel are presumed to be competent. *Id.* (citing *Strickland*, 466 U.S. at 689). Where there is a lapse in judgment or performance alleged, we ask first

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[4] The appellant also claims his various defense counsel were ineffective post-trial in submitting clemency to the convening authority and in submitting briefs before this Court. In both cases, any prejudice was remedied by the fact that both the convening authority and this Court allowed the appellant to make additional submissions prior to taking action on his case. Thus, it is clear that there was no prejudice to the appellant in either case and we need not address it further.

[5] Through clemency the appellant had a total of five different military counsel.

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). The appellant bears the burden of establishing that his trial defense counsel were ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001). Finally, it is important to note that in guilty plea cases post-trial affidavits will not be used to contradict a guilty plea appearing to be regular on its face. *United States v. Wilson*, 44 M.J. 223, 225 (C.A.A.F. 1996).

When attacking trial tactics, an appellant must show that specific defects in counsel's tactical decisions 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 fails to show either. The appellant himself acknowledges that the primary means of attacking the victim would have been for him to take the stand to make his assertions. By testifying, the appellant ran the risk of raising a matter inconsistent with either his plea inquiry or the stipulation of fact. Such an inconsistency would have nullified the PTA. The loss of the PTA would have been profound. Without the PTA, the appellant was facing two charges of multiple rapes and a life sentence. The PTA eliminated both rape charges and reduced the maximum confinement to 27 years, with an agreement to only approve 15 years. Clearly, a decision by his counsel to avoid jeopardizing the PTA was not ineffective.

In addition to putting the PTA in jeopardy, having the appellant testify also ran the risk of the prosecution calling the victim to the stand to rebut his version of the facts. Inducing the prosecution into calling the victim would have been not only inconsistent with the trial strategy but also ran the real probability of further aggravating the sentencing authority by placing a real victim before them. Finally, even if we accept the appellant's assertions that his counsel would have been able to successfully show that the thirteen year old victim was the instigator of the sexual activities with her thirty-six year old stepfather and that the appellant's sex acts were limited to merely 15 times over three years, we are still hard pressed to figure out how this would have been a better strategy than the one chosen. As the father of a thirteen year old child, the appellant's duty was to teach, mentor, and discipline his child. It was not to exploit her alleged advances for his personal deviant sexual pleasure for three years. Considering all of the above, we are satisfied the appellant has failed to show any deficient performance on the part of his counsel. In addition, even if we accept some sort of deficiency, under either version of the facts we are satisfied that the appellant's punishment would have been well over 15 years and thus there is no showing of prejudice.

In the end, applying the law related to ineffective assistance of counsel and applying the principals set forth in *United States v. Ginn,* 47 M.J. 236, 248 (C.A.A.F. 1997), we find the record as a whole, to include the defense counsels' post-trial

affidavits, compellingly demonstrates the improbability of the appellant's claims of ineffective assistance. *Ginn*, 47 M.J. at 238, 248.

Court Members

The appellant alleges that the military judge should have *sua sponte* excused Major B from the panel because Major B "felt uncomfortable stating the identity of a person close to the member who was a victim of sexual abuse or assault" during voir dire.

The appellant was tried by a panel of officers. During the preliminary group voir dire of the nine members, seven indicated that they knew a victim of sexual abuse or assault. During the individual voir dire, each of these seven members was asked specifically about the extent of his knowledge or involvement with the victim of the abuse or assault. In each case, the trial defense counsel questioned the member on the impact of this knowledge or involvement and how it might affect his duties as a court member. After completion of the voir dire, the military judge *sua sponte* removed Major N and neither trial nor defense counsel made any additional challenges for cause. Trial defense counsel did remove a member peremptorily.

The appellant does not dispute that because he did not challenge Major B for cause he has waived his right to object on appeal unless we determine the military judge abused his discretion in not removing the member. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004); *United States v. Velez*, 48 M.J. 220, 222 (C.A.A.F. 1998). In considering this question, we must ask ourselves whether the military judge abused his discretion in concluding that Major B's service on the Court did not "raise a significant question of legality, fairness, impartiality, to the public observer pursuant to the doctrine of implied bias." *Strand*, 59 M.J. at 460. To answer this question, we must look to the entire voir dire of Major B.

However, before we look to the specifics of Major B's voir dire, we must address the status of the law regarding crime victims serving as court members and the impact of the voir dire of another member, Major N, on the above question. As for the status of the law, our superior court has been clear that the fact that a member or someone close to him or her had been a victim of a similar crime is not grounds for *per se* disqualification. *See United States v. Smart*, 21 M.J. 15, 19 (C.M.A. 1985) (member was not *per se* disqualified from sitting on a robbery case when he had been the victim of a similar crime); *United States v. Terry*, 64 M.J. 295, 297 (C.A.A.F. 2007) (member was not *per se* disqualified in rape case when member's wife had been the victim of sexual assault). In addition, our superior court has said, "regardless of a member's prior exposure to a crime, it is often possible for a member to rehabilitate himself before the military judge by honestly claiming that he would not be biased." *Terry*, 64 M.J. at 303.

Having established that being the victim of a crime is not a *per se* disqualifier, but a factor to consider in addressing the ultimate question, we next consider the impact of the voir dire and removal for cause of Major N. As the appellant correctly points out, the military judge removed Major N after he indicated that he had been abused as a child. The appellant argues that because of Major B's reluctance to tell the trial court the name of the victim he knew, it is possible that Major B himself was the victim, and thus, like Major N, Major B should have been removed. He claims that the *sua sponte* removal of Major N but not Major B, are legally inconsistent.

The appellant's argument fails for two reasons. First, Major N was not removed for cause solely because he was the victim of abuse. A closer look at his voir dire shows that he was questioned separately because he told the court he was aware of a matter which might raise a substantial question concerning his participation in the trial. When he was asked about this matter, he replied, "I was an abused child, sir." So in Major N's case, the trial court was confronted with a member who had not only been the victim of abuse, but even more significantly, told the court that he believed that fact would raise a substantial question as to his participation. Thus, the trial judge correctly found further questioning unnecessary and removed Major N *sua sponte*. It would have been imprudent for the court to have sought to rehabilitate such a member in light of the goal of seating a panel whose impartiality is beyond question.

Second, the appellant's argument that the removals are legally inconsistent fails because the issue is not whether Major B was the victim of abuse as a child, but whether his participation raises a "significant question of legality, fairness, impartiality, to the public observer pursuant to the doctrine of implied bias." *Strand*, 59 M.J. at 460. When we look at the full voir dire of Major B, we see that in the group voir dire he said that neither he nor a member of his family had been charged with an offense similar to the appellant's charges. He also indicated he had no inelastic "predisposition toward the imposition of a particular punishment, based solely on the nature of the crimes." He said he could be "open minded" in his consideration of an appropriate sentence, and that he was not "aware of any matter which might raise a question concerning his participation." Finally, in group voir dire, when questioned by defense counsel, he said he did not have any moral belief that was so strong that he could not be objective. Major B also told trial defense counsel that he did not know a victim of sexual abuse in which the abuse occurred when the victim was twelve to fifteen years old. Major N gave a contrary response to several of these questions.

Further, when we look at the individual voir dire of Major B we remain satisfied that the military judge did not abuse his discretion in concluding Major B's continued participation would not "raise a significant question of legality, fairness, impartiality, to the public observer." *Id.* In the first place, Major B demonstrated his impartiality by mentioning he may have known something about the case before the trial. It was quickly established that such matter was not a concern, but was merely a case of Major B

knowing that his duty as a panel member was delayed. However, his decision to raise the issue with the court demonstrated his sensitivity for full disclosure to issues about his service on the panel. In addition, Major B demonstrated his openness by telling the court that he tutored high school kids in trouble with the law. He assured the court that such experience would not cause him to identify more with the victim.

Finally, when we look at the specific colloquy between the trial defense counsel (TDC), Major (MAJ) B, the military judge (MJ), and the trial counsel (TC) that is highlighted as the basis for this allegation of error, we still do not find an abuse of discretion. The exchange in question is as follows:

> [TDC:] Sir, and the other question I wanted to ask you was that you mentioned that you knew a victim of sexual abuse or assault.
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> [MAJ B:] Yes.
>
> [TDC:] Can you tell us what their relationship is to you?
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> [MAJ B:] Can I tell it privately to you or the judge, or does it have to be in open court?
>
> [MJ:] You're going to have to state it in open court. Will you feel uncomfortable stating it in open court?
>
> [MAJ B:] Yes.
>
> [MJ:] Okay. All Right. We can move on then.
>
> [TDC:] Sir, I won't ask you who specifically, but is it a person that's close to you?
>
> [MAJ B:] Yes.
>
> [TDC:] Is there anything about that experience that may cause you to be unfair or harsher on Sergeant Williams?
>
> [MAJ B:] No.
>
> [TDC:] No further questions, thank you.
>
> [MJ:] Trial counsel, any additional questions?

[TC:] Just briefly. Sir, without getting into any of the specifics, was this event something that happened recently or sometime in the past?

[MAJ B:] The past.

[TC:] Approximately, how long ago. You can ballpark it.

[MAJ B:] 20 years.

[TC:] Okay. So, it's been -- you knew the person, I guess when it transpired?

[MAJ B:] Yes.

[TC:] Anything about that situation that that [sic] would keep you from being able to devote your attention to this and decide the sentence based solely upon the facts that are presented here in court and the instructions that the judge gives you?

[MAJ B:] I can be impartial.

[TC:] Nothing further, sir.

When we consider this final colloquy, in conjunction with the entire voir dire of Major B, we reach several conclusions. First, this is not a case where the military judge abused his discretion in limiting the scope of voir dire. While the better practice would have been to instruct the member that he must disclose the victim's name or relationship, when we consider the follow up questions the military judge did allow, it is clear trial defense counsel were permitted to continue to ask questions that centered on the member's ability to serve and be impartial.

Second, this is not a case of a member failing to be honest in responding to voir dire questions and thus requiring us to consider the impact of Major B's answers under the two-pronged test set out by the Supreme Court in *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 556 (1984) and adopted by the Court of Military Appeals in *United States v. Mack*, 41 M.J. 51, 55 (C.M.A. 1994). Major B was honest in his response. His hesitation to name the relationship provided the defense counsel with everything they needed to decide whether they should challenge Major B either for cause or peremptorily.

Third, we conclude that the military judge did not abuse his discretion in not *sua sponte* removing Major B for cause because of his reluctance to provide the relationship of the sex abuse victim. It is clear from Major B's answers that the incident occurred

about 20 years ago, and he demonstrated no hesitation in asserting that he could be impartial. His lack of hesitation is particularly persuasive in light of his overall candor regarding the questions about his prior knowledge of the case. Finally, in making this conclusion we have considered our superior court's conclusion that "a 'member's unequivocal statement of a lack of bias can . . . carry weight' when considering the application of implied bias." *Strand*, 59 M.J. at 460 (quoting *United States v. Youngblood*, 47 M.J. 338, 341 (C.A.A.F. 1997)).

Finally, we have also considered the appellant's claim of ineffective assistance of counsel as it relates to the voir dire of Major B. When we consider the entire voir dire, including that conducted by the trial counsel, we are satisfied that the court and counsel as a group conducted a complete voir dire sufficient to establish Major B possessed the requisite impartiality to serve. Considering all of the voir dire conducted of Major B, we are satisfied that the defense team had a complete opportunity to observe Major B and that they reached an informed decision in deciding not to challenge him from the panel. Having established this fact, we conclude that the appellant has failed to show his counsels' decision not to challenge Major B resulted in prejudice.

Pretrial Agreement Provision

For the first time, the appellant complains about various provisions of his PTA and the ultimate impact of those provisions on his right to a complete sentencing hearing. Specifically, he complains of the PTA terms that required him to be tried by a panel of officers, that prohibited him from requesting sentencing witnesses travel at government expense, and that required him to agree to a stipulation of expected testimony of the victim. The appellant, citing *United States v. Libecap*, 57 M.J. 611, 614 (C.G. Ct. Crim. App. 2002), argues that these provisions "substitute[] the agreement for the trial, and indeed, render[] the latter an empty ritual" in violation of public policy. He also contends, citing *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006) that the PTA violates Article 37(a) because the requirement to be tried by members is "unlawful command influence."[6] Finally, the appellant argues he did not freely and voluntarily agree to these provisions.

Rule for Courts-Martial (R.C.M.) 705(c) governs terms and conditions of PTAs. The rule begins by stating that a term or condition will not be enforced if the accused did not "freely and voluntarily agree to it." R.C.M. 705(c)(1)(A). R.C.M. 705 next specifies the prohibited and permissible terms of PTAs. R.C.M. 705(c)(1)(B) and (c)(2). In the appellant's case, both the requirement to be tried by members and the requirement to forego the personal appearance of witnesses at government expense during sentencing are expressly permitted terms of a PTA. While the requirement to agree to a stipulation of

[6] We have considered the appellant's claims of unlawful command influence and find his factual claims simply do not rise to the level necessary to suggest any "potential to cause unfairness in the proceedings" but are mere speculation on his part. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)

expected testimony is not an expressly permitted term, the very similar requirement to enter into a stipulation of fact concerning the offenses is an expressly permitted term. Taken as a whole we are satisfied that each of the PTA provisions are permitted under R.C.M. 705(c). Accepting that, the appellant's claim comes down to only a question of whether the appellant freely and voluntarily agreed to the PTA provisions, and if somehow the cumulative effect of these otherwise permissible provisions violates public policy.

The United States Supreme Court has held that criminal defendants may knowingly and voluntarily waive many of the most fundamental constitutional protections, and has held that "absent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995). In *United States v. McFadyen*, 51 M.J. 289, 290-91 (C.A.A.F. 1999), our superior court found that an accused may waive significant rights as part of a PTA. *See also United States v. Rivera*, 46 M.J. 52 (C.A.A.F. 1997) (an accused may waive evidentiary objections); *United States v. Weasler*, 43 M.J. 15 (C.A.A.F. 1995) (permissible for the accused to offer to waive an allegation of unlawful command influence).

We begin our consideration of the appellant's claims by holding that we are satisfied that the appellant freely and voluntarily agreed to these PTA provisions. When questioned by the military judge, he expressly agreed that he had read the PTA, understood it, and he also affirmed that no one had forced him to agree to it. In addition, the appellant expressly advised the military judge that he understood his forum choices and that he wished to be tried by a panel of officers. He also told the military judge it was a voluntary act on his own part to request trial by members. Finally, he told the military judge that he understood what a stipulation of expected testimony was, and that he understood he had an absolute right to refuse to stipulate to the contents of the document.

On the public policy contention, the appellant's argument is that he was denied the right to present his version of the story to the sentencing authority of his choosing. While superficially this argument has some appeal, it is completely without merit. Our case law has never required the prosecution to limit its presentation of the facts and circumstances surrounding an accused's crimes to the accused's version of his crimes. *See, e.g., United States v. Mullens*, 29 M.J. 398 (C.M.A. 1990) (evidence of uncharged indecent liberties with children admissible when convicted of sodomy and indecent acts with the same children); *United States v. Ross*, 34 M.J. 183, 187 (C.M.A. 1992) (evidence that accused altered test scores on occasions other than those for which he was convicted admissible to show "continuous nature of the charged conduct and its full impact on the military community").

Here, the appellant's guilt was undisputed. He simply wanted to minimize his crimes by limiting the panel to his version of events. But, even accepting his version of the facts, he had sexual intercourse with his step daughter close to 20 times while she was thirteen, fourteen, and fifteen years old. He also fathered a child with this stepdaughter. Confronted with these undisputed facts, his counsel was able to negotiate a PTA which reduced the maximum possible sentence from life in jail to essentially 15 years in jail. In exchange for this agreement, the appellant had to agree to each of the terms he now claims violates public policy. We are unable to understand how the government requiring these terms to be part of the PTA violates public policy, especially since they are expressly permitted under R.C.M. 705. In exchange for giving up these rights, the appellant was able to obtain the benefit of a highly favorable PTA. As such, we reject the appellant's claims that his PTA violates public policy.

Sentencing Argument

The appellant argues the trial counsel's sentencing argument was improper for several reasons. Most significant of the appellant's assertions are his contention that the argument improperly commented on his constitutional right to remain silent and improperly argued the appellant's sexual acts were done without the consent of CH, even though the PTA prohibited the prosecution from proceeding on the rape charge. Trial defense counsel did not object to trial counsel's argument at trial.

It is well established that a prosecutor "is at liberty to strike hard, but not foul, blows in argument." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000); *Berger v. United States*, 295 U.S. 78, 88 (1935). It is also appropriate for counsel to argue the evidence, as well as all reasonable inferences fairly derived from such evidence. *United States v. Nelson*, 1 M.J. 235, 239-40 (C.M.A. 1975). Whether or not the trial counsel's comments are fair must be viewed within the context of the entire court-martial. *United States v. Gilley*, 56 M.J. 113, 121 (C.A.A.F. 2001). Trial counsel is entitled to respond to matters raised by an accused or his counsel. *Id.* at 121-23.

"The standard of review for an improper argument depends on the content of the argument and whether the trial defense counsel objected to the argument." *United States v. Erickson*, 63 M.J. 504, 509 (A.F. Ct. Crim. App. 2006). "The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *Baer*, 53 M.J. at 237. Failure to object to improper sentencing argument waives the objection absent plain error. R.C.M. 1001(g). To find plain error, we must be convinced (1) that there was error, (2) that it was plain or obvious, and (3) that it materially prejudiced a substantial right of the appellant. *United States v. Powell*, 49 M.J. 460, 463-64 (C.A.A.F. 1998).

During rebuttal sentencing argument, trial counsel stated that the victim's stipulated testimony was uncontradicted. The trial counsel's lone comment that the

stipulated testimony was uncontradicted was made in response to trial defense counsel's argument that the members were not required to believe the stipulation. We are satisfied that this single comment was proper response argument to the trial defense counsel's argument. As for the contention that the trial counsel improperly argued the accused should be punished for rape, we find this argument without merit. The prosecutor's comments were limited to the evidence. He simply asked the members to consider the victim's stated lack of consent as aggravation evidence. This is permissible argument. Finally, even assuming, *arguendo*, trial counsel's comments were erroneous, we find the error was not plain and obvious, and that the comments were harmless beyond a reasonable doubt. *See United States v. Dennis*, 39 M.J. 623, 625 (N.M.C.M.R. 1993).

Post-trial Delay

We note that 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 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need 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, the lack of any objection by defense, and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and that no relief is warranted.

Final Matters

Regarding the remaining errors raised by the appellant, we find them to be without merit, and find them to be without worthiness of further discussion. *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).

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[7] Article 66(c), UCMJ, 10

[7] The Court notes that the Court-Martial Order (CMO), dated 27 April 2007, fails to include the prefatory language of the Action. We order the promulgation of a corrected CMO.

U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

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