IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

J.W. ROLPH **J.F. FELTHAM** **J.D. HARTY**

UNITED STATES

v.

Ryan J. SCAMAHORN
Corporal (E-4), U. S. Marine Corps

NMCCA 200201583 Decided 27 March 2006

Sentence adjudged 21 August 2001. Military Judge: C.H. Wesely. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st MARDIV (Rein), Camp Pendleton, CA.

CAPT JEFFREY STEPHENS, USMC, Appellate Defense Counsel
LT JENNIE GOLDSMITH, JAGC, USNR, Appellate Defense Counsel
LT CRAIG POULSON, JAGC, USNR, Appellate Government Counsel

HARTY, Judge:

A general court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of violating a lawful order, four specifications of larceny, and obtaining services under false pretenses, in violation of Articles 92, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 921, and 934. The members sentenced the appellant to a dishonorable discharge, confinement for 36 months, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered the sentence executed.

We have considered the record of trial, the appellant's 10 assignments of error,[1] the appellant's sworn declaration, and the

[1] I. THE APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

II. THE DENIAL OF APPELLANT'S CHALLENGE FOR CAUSE AGAINST MAJOR L CONSTITUTED AN ABUSE OF DISCRETION.

Government's Answer. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant frequented an indoor shooting range in Oceanside, California, where he rented handguns for use at that range. The range used Range Waiver forms to record the names of individuals who shot on a particular date, and lane tickets to record who rented a particular firearm and whether that person was military or civilian. Three firearms were discovered missing from the range: a Sig Sauer P220 .45 caliber on 14 August 1999; a Desert Eagle .50 caliber on 5 September 1999; and another Sig Sauer P220 .45 caliber on 20 November 1999. Based on Range Waiver forms and lane tickets, it was determined that the appellant was at the range on the above dates and on each occasion was in the group of shooters who rented the missing firearms.

The appellant gave separate statements to the Naval Criminal Investigative Service (NCIS) and the shooting range manager stating that he took the Sig Sauer in August 1999 by mistake, but later decided to keep the firearm after discovering it in his possession. He tried to return the Sig Sauer in November 1999 by

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III. APPELLANT WAS DENIED HIS RIGHT TO A SPEEDY TRIAL WHEN HE WAS NOT BROUGHT TO TRIAL WITHIN 120 DAYS OF THE FIRST PREFERRAL OF CHARGES.

IV. THE MILITARY JUDGE ERRED TO THE PREJUDICE OF APPELLANT BY ALLOWING EVIDENCE TO BE ADMITTED OF HIS PRIOR NON-JUDICIAL [SIC] PUNISHMENT WITHOUT COMPLYING WITH UNITED STATES v. BOOKER, 5 M.J. 238 ([C.M.A.] 1977).

V. TRIAL COUNSEL IMPROPERLY ARGUED DURING PRESENTENCING THAT THE MEMBERS SHOULD AWARD SPECIFIC TERMS OF YEARS FOR INDIVIDUAL OFFENSES.

VI. THE MILITARY JUDGE ABUSED HER DISCRETION BY DENYING APPELLANT'S MOTION FOR A MISTRIAL.

VII. BASED ON THE CUMULATIVE EFFECT OF ASSIGNMENTS OF ERROR I-VI, APPELLANT WAS DENIED A FAIR TRIAL.

VIII. THE EVIDENCE WAS FACTUALLY AND LEGALLY INSUFFICIENT TO SUSTAIN A CONVICTION OF LARCENY OF AUTO PARTS AT PEP BOYS OR OBTAINING SERVICES UNDER FALSE PRETENSES SINCE THERE WAS NO EVIDENCE OF CRIMINAL INTENT.

IX. A DISHONORABLE DISCHARGE AND SENTENCE OF THREE YEARS CONFINEMENT IS AN INAPPROPRIATELY SEVERE PUNISHMENT FOR APPELLANT'S OFFENSES WHEN ALL THE ITEMS ALLEGEDLY TAKEN WERE RETURNED OR PAID FOR PRIOR TO PREFERRAL OF CHARGES.

X. APPELLANT HAS BEEN DENIED SPEEDY POSTTRIAL REVIEW OF HIS COURT-MARTIAL IN THAT 1,030 DAYS HAVE PASSED FROM THE DOCKETING OF THIS CASE WITHOUT ALL PLEADINGS BEING FILED. (SUPPLEMENTAL ASSIGNMENT OF ERROR).

renting another Sig Sauer, leaving the rented firearm in a gun case at the shooting lane, and returning the stolen Sig Sauer as if it was the rented firearm. This plan was interrupted by a range employee who asked the appellant about the gun case left at the shooting lane. The appellant then retrieved the gun case containing the second Sig Sauer.

The appellant admitted to NCIS that he took the Desert Eagle .50 caliber firearm, but told the range manager that he was only with the person who took that weapon. The second Sig Sauer firearm was retrieved from the appellant's barracks room, and the Desert Eagle .50 caliber firearm was retrieved from an individual living at an off-base address provided by the appellant. Prior to NCIS investigating the firearm thefts, the agency was aware that the appellant was already under investigation by the Oceanside, California, Police Department for taking cars to a Pep Boys retail store for repairs, and then driving off without paying for parts and services.

On 24 February 2000, two specifications of larceny were preferred concerning the Sig Sauer .45 caliber handgun stolen in August 1999 and the Desert Eagle .50 caliber handgun stolen in September 1999. On 5 April 2000, a single specification of dishonorably failing to pay a just debt to a Pep Boys was preferred and referred to the same special court-martial to be tried with the larcenies. Without explanation, the larceny charge and both specifications were withdrawn from a special court-martial and dismissed on 25 April 2000. Appellate Exhibit I. The remaining charge of dishonorable failure to pay a just debt was withdrawn and dismissed, without explanation, on 13 July 2000. Appellate Exhibit I. As of 13 July 2000, there were no charges pending against the appellant.

On 24 July 2000, charges were preferred alleging the larceny of all three handguns, two larcenies of car parts from Pep Boys, and two specifications of obtaining services from Pep Boys by false pretense.[2] These charges were referred to a general court-martial on 20 October 2000, along with additional charges preferred on 11 August 2000 and second additional charges preferred on 11 October 2000. The appellant was arraigned on these charges on 1 November 2000. Additional facts will be included with our resolution of the appellant's assignments of error.

Effective Assistance of Counsel

In his first assignment of error, the appellant avers that he was denied effective assistance of counsel, because: (1) he

[2] The four specifications concerning Pep Boys were withdrawn at an unknown date and repreferred as part of the Second Additional Charges preferred on 11 October 2000. A single specification of disobeying a general order, by possessing a firearm in the barracks, was also preferred.

requested his defense team to file a speedy trial motion and it did not; (2) the defense team failed to conduct an adequate investigation into the facts, causing the civilian counsel to withdraw from the case in the middle of the defense case in chief, resulting in a two-month delay in restarting the trial; (3) the defense team displayed a general failure to prepare as evidenced by unexplained absences of defense counsel at hearings, ignoring deadlines, not filing written motions, not requesting immunity for defense witnesses, and not challenging the denial of a witness request; and, (4) the defense team failed to present any evidence other than the appellant's unsworn statement during pre-sentencing. The Government contends that some of the appellant's assertions are not supported by the record, those that are supported by the record do not overcome the presumption of attorney competence, and, even if they did overcome the presumption, that there is no prejudice.

1. The law.

All service members are guaranteed the right to effective assistance of counsel at courts-martial. *United States v. Gonzalez,* No. 03-0394, 2006 CAAF LEXIS 113, at *13 (C.A.A.F. Feb. 1, 2006)(citing *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005)). We apply a presumption that counsel provided effective assistance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984);*United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004). This presumption is rebutted only by "a showing of specific errors made by defense counsel that were unreasonable under prevailing professional norms." *Davis*, 60 M.J. at 473 (citing *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001)). "[S]econd-guessing, sweeping generalizations, and hindsight will not suffice." *Id*.

Even if there is error, that error must be so prejudicial "as to indicate a denial of a fair trial or a trial whose result is unreliable." *Id.* (citing *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001)). An appellant alleging ineffective assistance of counsel "'must surmount a very high hurdle.'" *United States v. Saintaude*, 61 M.J. 175, 179 (C.A.A.F. 2005) (quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)).

Ineffective assistance of counsel involves a mixed question of law and fact. *Davis*, 60 M.J. at 473 (citing *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001)). Whether an appellant received ineffective assistance of counsel and whether the error was prejudicial are determined by a *de novo* review. *Id*. (citing *Anderson,* 55 M.J. at 201*; United States v. Cain*, 59 M.J. 285, 294 (C.A.A.F. 2004); and *United States v. McClain*, 50 M.J. 483, 487 (C.A.A.F. 1999)).

This court applies a three-prong test to determine if the presumption of competence has been overcome:

(1) Are the allegations true; if so, "is there a reasonable explanation for counsel's actions?";

(2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers?"; and

(3) If defense counsel was ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result?

Garcia, 59 M.J. at 450 (quoting *United States v. Grigoruk*, 56 M.J. 304, 307 (C.A.A.F. 2002)). If the issue can be resolved by addressing the third prong, we need not determine whether counsel's performance was deficient. *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004)(citing *Strickland*, 466 U.S. at 697).

2. Effectiveness in regard to speedy trial.

Relying on *United States v. Robinson*, 47 M.J. 506 (N.M.Ct.Crim.App. 1997), the appellant alleges that the convening authority's dismissal of the charges on 25 April 2000 and 13 July 2000, and repreferral of the same or similar charges on 24 July 2000, was a subterfuge to avoid the running of the RULE FOR COURTS-MARTIAL 707, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) 120-day speedy trial clock. The appellant asserts that his speedy trial clock began on 24 February 2000, the date the first set of charges were preferred. Counsel for the appellant did not raise this issue at trial, giving rise to part of the appellant's ineffective assistance claim.

If the speedy trial issue was waived by not being raised at trial, the defense team may have provided ineffective assistance if that issue had merit. If the speedy trial issue is without merit, failing to raise it at trial would not result in prejudice, and, therefore, no relief would be warranted based on a claim of ineffective assistance of counsel. Our analysis of this speedy trial issue will partially resolve the issue of ineffective assistance of counsel and also resolve the appellant's third assignment of error, alleging a denial of his R.C.M. 707 speedy trial rights.

R.C.M. 707(a)(1) allows the Government 120 days to bring an accused to trial from the date charges are preferred.[3] When there are multiple charges preferred on different dates, each charge has a separate 120-day clock based on its date of preferral. *Id*. at (b)(2). Dismissal of the charges terminates

[3] The clock begins upon the earlier of preferral of charges or the institution of pretrial restraint. The appellant was not placed into pretrial restriction until 7 August 2000. Charge Sheet.

the 120-day clock unless the dismissal is a subterfuge to allow the Government to proceed without exceeding the time allowed by R.C.M. 707. *Robinson*, 47 M.J. at 510. R.C.M. 707(b)(3)(A)(i) provides a new 120-day clock from the date charges are repreferred after a proper dismissal. The clock is tolled by the appellant's arraignment. *Id*. at (b)(1). The original larceny charge and its two specifications of larceny were withdrawn and dismissed on the 60th chargeable day. The single specification of dishonorably failing to pay a just debt was withdrawn and dismissed on the 99th chargeable day. New charges were preferred on 24 July 2000, including the two original larceny charges, plus an orders violation, three additional larcenies, and two specifications of obtaining services under false pretenses, one of which was based on what was originally preferred on 5 April 2000 as a dishonorable failure to pay just debt.

Applying the R.C.M. 707 120-day clock, the Government had until 21 November 2000 to bring the appellant to trial on the charges preferred on 24 July 2000, and longer for the additional charges preferred on 11 August 2000 and 11 October 2000. The appellant was arraigned on the new charges on 1 November 2000, well within the 120 days allowed, unless the earlier dismissals were improper.

a. Subterfuge dismissals.

This court, in *Robinson*, although ultimately agreeing that a convening authority has unfettered discretion to dismiss charges, held that under the unique circumstances of that case, the dismissal of charges was a subterfuge and that the speedy trial clock was not reset. *Robinson*, 47 M.J. at 510. We noted that the conditions and constraints initially placed on the appellant in that case never changed during the period between the dismissal action and repreferral. Those conditions included being kept on legal hold, suspension of transfer orders, inability to work in his assigned area of expertise, and restrictions on his ability to take leave. *Id*. (citing *United States v. Britton*, 26 M.J. 24, 26 (C.M.A. 1988)). Specifically limiting our holding to the facts before us, we found subterfuge where: (1) dismissal on day 120 (115th chargeable day) of preferred, but unreferred, charges was for the sole purpose of avoiding the 120-day rule; (2) repreferral of essentially identical specifications occurred 5 days later; (3) there was no practical interruption in the pending charge and specifications; and (4) there was no real change in the legal status of the appellant during that 5-day period. *Id*. at 511.

We find the facts of the appellant's case distinguishable from *Robinson*. First, the *Robinson* holding addressed the dismissal of preferred, but unreferred, charges on the 115th chargeable day. Here, the appellant's case was farther along in the military justice process, as evidenced by the referral of charges, indicating a more diligent attempt to proceed than was the case in *Robinson*. Second, dismissal of charges on the 60th

and 99th chargeable days is far short of the time allowed to bring the appellant to trial. Third, although the three dismissed specifications carried over to the final charge sheet in the same or similar form, additional charges were also included in the final charges. Fourth, the two larcenies dismissed on 25 April 2000 were not preferred anew until three months later. There was, therefore, a practical interruption in the larceny charge and its two specifications.

The appellant's pretrial status did not change when the original larceny charges were dismissed, because a completely unrelated additional charge had been preferred and referred to the same special court-martial on 5 April 2000. There was, however, a significant and practical interruption in the appellant's pretrial status as to the dismissed larcenies. While a lack of change in pretrial status can be circumstantial evidence of a subterfuge dismissal involving same or similar charges, that evidentiary nexus is far less compelling when unrelated charges are involved. Here, the dishonorable failure to pay a just debt charge was unrelated to the dismissed larcenies. We find, therefore, absolutely no indication that the two larceny charges, originally preferred on 24 February 2000, were dismissed as a subterfuge to avoid the R.C.M. 707 speedy trial rule.

Eleven days after the charge alleging a dishonorable failure to pay a just debt to Pep Boys was withdrawn and dismissed, multiple charges were preferred, including two specifications of stealing car parts from Pep Boys and two specifications of obtaining services from Pep Boys under false pretenses. Those four specifications were then withdrawn and dismissed at an unknown date, leaving four referred specifications to proceed to trial by general court-martial. On 11 October 2000, five specifications of stealing auto parts from two Pep Boys locations in Oceanside, California, were preferred along with five specifications of obtaining services under false pretenses from the same Pep Boys locations at the same time as the larcenies of parts.

Applying a *Robinson* analysis to these facts we find the following:(1) the dishonorable failure to pay a just debt concerning Pep Boys was already referred to trial by special court-martial; (2) its withdrawal and dismissal occurred on the 99th chargeable day; (3) preferral of related but more specific charges occurred 11 days later showing in greater detail the scope and seriousness of the appellant's potential misconduct;[4] (4) there was a practical interruption in the dishonorable failure to pay a just debt charge during those 11 days; and,

[4] See R.C.M. 401(c)(1), Discussion (dismissal and repreferral may be appropriate when the charge does not adequately reflect the nature or seriousness of the offense.) .

(5) there is no indication appellant suffered under the weight of charges during the 11-day period during which no charges were pending.

The appellant does not tell us what his pretrial status was. According to the Charge Sheet, he was in pretrial restriction beginning 7 August 2000; however, that was after the dismissal of the dishonorable failure to pay a just debt charge and the preferral of the related larceny and obtaining services under false pretenses charges. He does not assert that he was on legal hold, had transfer orders suspended, was unable to work in his assigned area of expertise, suffered restrictions on his ability to take leave, or was in any way treated differently than any other service member during the relevant period. This distinguishes the appellant from Robinson, who suffered all of these burdens.

The record does not suggest, and we do not find, that the charge of dishonorable failure to pay a just debt was dismissed on 13 July 2000 in order to avoid the speedy trial clock. Absent a subterfuge dismissal, the appellant was brought to trial within the time allowed for the charges preferred on 24 July 2000.

Because we find that the appellant was brought to trial on all charges within the time allowed, we also find that he was not prejudiced by his defense team not raising this issue at trial. Absent prejudice, the appellant has failed to establish that he received ineffective assistance of counsel based on this claimed deficiency.

3. Failure to conduct an adequate investigation.

The appellant asserts that his defense team's failure to conduct an adequate investigation into the facts resulted in the defense team moving to withdraw from the case during the trial, which further resulted in a two-month delay when the civilian counsel's motion to withdraw was granted. The appellant speculates that the defense team's failure to interview Specialist (Spc) W, U.S. Army, and failure to review prior written statements of Mr. H, a potential Government rebuttal witness to Spc W's testimony, was the root cause of the withdrawal.

On 20 July 2001, the defense called Spc W as a witness in its case-in-chief. Spc W. testified that he, rather than the appellant, was the person who stole the Desert Eagle .50 caliber firearm referred to in Additional Charge II, Specification 2. Spc W testified that he had participated in a videotaped interview with civilian counsel in January 2001. After Spc W testified, the military judge put the court-martial in an overnight recess. On the morning of 21 July 2001, the parties reviewed proposed instructions and then recessed again. At 1335, 21 July 2001, the parties returned to court, and civilian counsel moved to withdraw from further representation of the appellant.

The civilian counsel explained that there were irreconcilable differences between himself and the appellant that:

> prohibits my involvement in certain aspects that are still pending which will follow in this case . . . I am speaking about continued evidence which is to be presented and closing arguments made to the jury and conflicts resulting from that -- potential conflicts resulting from that . . . I have considered not commenting on evidence as the trial goes on; however, that was -- I believe that will prejudice my client given the attention that I believe has been drawn to that particular fact at this point. But further, there is also some evidence that my client and I cannot agree as to whether it should be called or not, and that is part of the conflict that is now on-going . . . If I'm ordered to stay on the case, and I am told to represent my client, then I will be making motions regarding certain testimony that I have come to find out that I do not believe it [sic] warrants this court's consideration . . . .

Record at 670-73. The trial defense counsel also requested to be removed from the case for the same reasons. *Id*. at 671. The military judge denied both motions, but agreed to a defense continuance request to determine how to proceed. *Id*. at 675.

On 6 August 2001, during an Article 39(a), UCMJ, session, the appellant stated that he was retaining a different civilian counsel to replace his prior civilian counsel. The military judge scheduled the court-martial to resume on 20 August 2001. *Id*. at 685. The court-martial did resume on 20 August 2001, at which time the new civilian counsel presented the remaining defense witnesses. *Id*. at 687.

Following the defense case-in-chief, the Government requested to put on a rebuttal witness, Mr. H, to contradict the testimony of Spc W concerning who was with the appellant at the time the Desert Eagle .50 caliber handgun was stolen. The military judge denied the Government's request to call the rebuttal witness. *Id*. at 733.

The record contradicts the appellant's assertion regarding the issue of failure to investigate. First, the civilian counsel videotaped his interview of Spc W in January 2001, contradicting the appellant's claim that witness interviews did not occur. Second, the appellant's elongated theory asserts that: (1) if the defense team had interviewed all possible witnesses, they would have discovered that the Mr. H listed on the Range Waiver form for 5 September 1999, and not Spc W, was with the appellant when the Desert Eagle .50 caliber firearm was stolen; (2) had the defense team discovered Spc W was not with the appellant on 5 September 1999, they would not have called Spc W to testify that he was with the appellant that day;

(3) had the defense team not called Spc W, it would not have had to withdraw from representing the appellant; and, (4) if the defense team had not withdrawn as counsel, there would not have been a two-month delay in the trial.

This reasoning is contradicted by the record. First, even if the defense had discovered that the Mr. H listed in the Range Waiver form for 5 September 1999 had given prior statements indicating he was with the appellant when one of the firearms was stolen, those statements are not necessarily inconsistent with SPC W's testimony that he was with the appellant at the same time. Second, the military judge did not grant the defense motions to withdraw. Rather, the appellant replaced civilian counsel by hiring a different counsel. Third, the continuance granted on 21 July 2001 delayed the trial for 30 days, not two months as alleged by the appellant.

Even if the appellant's factual assertions were correct, he has not shown any prejudice. We do not believe the outcome of this trial would have been any different even if the facts were as the appellant has submitted them.[5] Absent prejudice, we do not find that the appellant received ineffective assistance of counsel based on a failure to investigate.

4. General failure to prepare.

The appellant asserts that his defense team was deficient based on a general failure to prepare, as evidenced by counsel not appearing for hearings, not meeting filing deadlines, not filing written motions, and not requesting immunity for defense witnesses.

The record reflects that appellant's first civilian counsel was not present at early Article 39(a), UCMJ, sessions that dealt with administrative matters, such as setting trial milestones. Trial defense counsel, however, was present for each Article 39(a), UCMJ, session, and represented civilian counsel's availability for each milestone. There is nothing unusual about a member of the defense team being absent from an Article 39(a), UCMJ, session, particularly civilian counsel. We do not find this practice to constitute ineffective assistance of counsel. Again, the appellant does not assert what prejudice he suffered as a result of civilian counsel not being at these sessions.

Regarding the appellant's assertion that the defense team failed to meet deadlines, the record makes clear that the motion and witness request deadlines were abandoned by both parties due to pretrial agreement negotiations. The parties, in good faith, believed that a pretrial agreement would result from those negotiations. It is not deficient practice for the defense team

[5] We encourage all appellate counsel to carefully review the records of trial to ensure the facts counsel present are supported by that record.

to not file motions or witness requests by prescribed deadlines under these circumstances.[6] With regard to written motions, the appellant does not suggest what written motions should have been filed, except the speedy trial motion discussed previously, or how not filing motions has prejudiced him.

We are not aware of any witness that was denied as a result of not filing a written witness request. One defense witness testified by telephone as a result of his not being called when he was physically present. While the appellant is correct that the members were denied an opportunity to judge that witness' credibility in the courtroom, that is a two-edged sword, and, by itself, does not support a finding of prejudice. With regard to witness immunity, we note that all defense witnesses testified without grants of immunity. Therefore, we do not see how not requesting immunity under these circumstances could have prejudiced the appellant. Again, absent prejudice, there cannot be ineffective assistance of counsel.

5. Failing to present evidence during presentencing.

The appellant asserts that the defense team's failure to present character witnesses, documents concerning the appellant's military career, his awards, information about his family, and the fact that he was a cooperating informant for the NCIS was ineffective assistance. We disagree.

The appellant called Mr. S, who testified that the appellant was a good Marine who followed orders. Record at 715. Prosecution Exhibit 26, containing 13 pages from the appellant's service record, shows that the appellant's family consists of a mother and step-father, and a daughter who lives with someone other than the appellant. We can tell the appellant's history of assignments, that he participated in Operation Southern Watch, that he received a Meritorious Mast, and we are informed of his proficiency and conduct marks and composite scores. The appellant wore his awards in court, and the military judge reminded the members of those awards in her sentencing instructions. Record at 828. The appellant provided additional details about his military career and family during his unsworn statement, in which he asserted: "My defense team here did an excellent job. I want to thank them." *Id*. at 814.

Other than wanting his NCIS cooperation revealed, the appellant does not tell us what he would have submitted in extenuation and mitigation in addition to what was already presented. A great deal of information about the appellant was provided to the members. We will not speculate what else might have been presented. We do not find any prejudice resulting from

[6] We do not hold that counsel are relieved from meeting these deadlines, only that not meeting them under these conditions was not ineffective assistance.

the defense team's handling of the sentencing phase of this case. Without prejudice, we do not find ineffective assistance of counsel.

4. Cumulative effect of error.

"The implied premise of the cumulative-error doctrine is the existence of errors, 'no one perhaps sufficient to merit reversal, [yet] in combination [they all] necessitate the disapproval of a finding' or sentence. *United States v. Banks*, 36 M.J. 150, 170-71 (C.M.A. 1992). Assertions of error without merit are not sufficient to invoke this doctrine." *United States v. Gray*, 51 M.J. 1, 175 (C.A.A.F. 1999). We do not find merit in any of the individual allegations of deficient performance. We note that as a result of the legal representation the appellant received, the Government withdrew multiple specifications and the members found the appellant not guilty of five remaining specifications. Under these circumstances, we determine the appellant's first assignment of error is without merit.

Member Challenge

In his second assignment of error, the appellant claims that the military judge erred by denying his challenge for cause against Major (Maj) L, claiming the member demonstrated a rigid sentencing attitude and difficulty with the concept of reasonable doubt. The appellant preserved this issue for appellate review by using his peremptory challenge on Maj L, stating that he would otherwise have used the peremptory challenge on another identified member.

A court member must be excused for cause whenever it appears that the member should not sit as a member in the interest of having the court-martial "free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(n). Military judges are enjoined to be liberal in granting challenges for cause. *See United States v. Miles*, 58 M.J. 192, 194 (C.A.A.F. 2003). This rule includes challenges for actual bias as well as implied bias. *United States v. Schlamer*, 52 M.J. 80, 92 (C.A.A.F. 1999)(citing *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997).

Actual bias and implied bias are separate tests, but not separate grounds for a challenge. *Miles*, 58 M.J. at 194. There is implied bias "'when most people in the same position would be prejudiced.'" *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996)(quoting *United States v. Smart*, 21 M.J. 15, 20 (C.M.A. 1985). The focus for implied bias is on the perception or appearance of fairness of the military justice system. *See United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995). When there is no actual bias, implied bias should be invoked rarely. *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998).

We review rulings on challenges for abuse of discretion. *United States v. Lavender*, 46 M.J. 485, 488 (C.A.A.F. 1997). On questions of actual bias, we give the military judge great deference, because we recognize that the military judge observed the demeanor of the participants in the *voir dire* and challenge process. *United States v. Napolitano*, 53 M.J. 162, 166 (C.A.A.F. 2000)(citing *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999)). This is because a challenge for cause for actual bias is essentially one of credibility. *Miles*, 58 M.J. at 194-95. This court, however, gives less deference to the military judge when reviewing a finding on implied bias because it is objectively viewed through the eyes of the public. *Napolitano*, 53 M.J. at 166. We, therefore, apply an objective standard when reviewing the judge's decision regarding implied bias. *Miles*, 58 M.J. at 195.

During general *voir dire*, the members were instructed that they could not have any "preconceived idea or formula as to either the type or amount of punishment that should be adjudged," and that they must first hear all the evidence and be in closed session deliberations on sentencing before they determine an appropriate sentence, and then only after "considering all the alternate punishments." Record at 68-69. During general *voir dire* by the military judge, Maj L, by way of negative responses, agreed that: (1) he would follow the law and the military judge's instructions in arriving at an appropriate sentence; (2) he would keep an open mind regarding sentence until all the evidence was presented and he had been instructed on the law; (3) his decision on an appropriate sentence would be based on the matters properly presented during the trial; (4) he would not have a set sentence in mind until the trial is over; (5) he would not have a fixed, preconceived, inelastic, or inflexible attitude concerning a particular type of punishment that he felt must or should be imposed simply because of the nature or number of the offenses; and (6) he had not formed an opinion as to the sentence that should be imposed. *Id*. at 76-77.

The civilian counsel conducted individual *voir dire* of Maj L, covering 16 pages of transcript. From the answers to those questions, we know the following: (1) Maj L recommended charges be brought against another Marine once in 13 years; (2) he was the Executive Officer of 1st Combat Engineer Battalion; (3) he believes that a Marine should be discharged if convicted of theft; (4) he does not draw any conclusions from someone being charged; (5) he believes it is important that people not be falsely accused; (6) he had no opinion on whether the charges in the instant case are legitimate, because he had not heard any evidence; (7) he would not draw any conclusions from the charges alone; (8) he had not drawn any conclusions; (9) he believes the burden is on the Government to prove its case in order to prevent an innocent person from being convicted; (10) he does not believe the defense has to put on any evidence; (11) he would draw his own conclusions, and those conclusions would be drawn from the evidence only; and, (12) the Government does not have the burden

to disprove other possible conclusions that may be drawn from the same evidence. Record at 132-46.

The appellant challenged Maj L for cause, claiming the member showed an inelastic sentencing attitude as evidenced by his stated belief that there is no room in the Marine Corps for a thief, and because the member would not require the Government to disprove all possible conclusions that can be drawn from the same facts. *Id*. at 252-53. The military judge denied the challenge, stating in part:

> I found [Maj L] to be rather philosophical in his answers. He was pretty thorough in his explanations of why he believed the things he believed. And he did have some opinions and he stated those opinions openly, but he did not demonstrate at any time an inflexibility. To me, he demonstrated an openness to new ideas to learning the standards and learning what the rules are.

Id. at 259.

We agree with the military judge. Although Maj L held the personal opinion that thieves, in general, should not be in the Marine Corps, he would not form an opinion *in this case* until all the evidence was presented and he was instructed on the law. The record does not show actual bias on Maj L's part. Nor, based on all the circumstances, does the record establish that Maj L's participation in the appellant's court-martial raises a significant question of legality, fairness, or impartiality, to the public observer. We, therefore, find no implied bias. The military judge did not abuse her discretion by denying the appellant's challenge of Maj L.

Record of Nonjudicial Punishment

In his fourth assignment of error, the appellant avers that the military judge erred by admitting over defense objection a record of nonjudicial punishment that was irregular on its face. The record of nonjudicial punishment indicated the appellant invoked his right to refuse nonjudicial punishment. However, nonjudicial punishment was imposed the same day.[7] The Government concedes it was error to admit the entry over defense objection, however, it asserts there was no prejudice.

A military judge's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)(citing *United States v. Tanksley*, 54 M.J. 169, 175 (C.A.A.F. 2000)). We will not overturn a military judge's evidentiary decision unless that decision was arbitrary, fanciful, clearly unreasonable, or

[7] Prosecution Exhibit 26 at page 9.

clearly erroneous. *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)(citing United *States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)).

Established precedent, when read together, convinces us that the following guidelines should be followed when dealing with the admissibility of records of nonjudicial punishment.[8]

1. The admissibility of records of nonjudicial punishment, including the procedural requirements for determining admissibility, is dependent on whether the document is regular or irregular on its face.

2. When an objection is based on an irregularity on the face of the document, the Government must disprove that irregularity. For example, if an accused objects to a record of nonjudicial punishment based on a failure to show the accused was afforded the opportunity to consult with counsel, the Government may prove, through other evidence, that the accused was afforded the opportunity to consult with counsel.[9] *United States v. Kahmann*, 59 M.J. 309, 314 (C.A.A.F. 2004).

3. The burden to overcome the defense objection through additional evidence is on the Government, and must be accomplished without compelling the accused to provide that evidence. *Id.*; *see United States v. Cowles*, 16 M.J. 467, 468 (C.M.A. 1983).

4. If, however, the record of nonjudicial punishment is regular on its face, that document is entitled to the presumption of regularity and the inferences that naturally flow from that presumption. *See United States v. Wheaton*, 18 M.J. 159, 160 (C.M.A. 1984)(If the record of nonjudicial punishment shows that an accused has been notified of his right to counsel, it can be presumed either that he consulted counsel or waived his right to counsel.) In that case, the burden is on the accused to object and present credible evidence to overcome that presumption. For example, if the record of nonjudicial punishment contains entries that reflect the accused was informed of his right to consult counsel and to refuse nonjudicial punishment, and that the accused did not invoke those rights, the accused may present evidence that he did not make those entries prior to punishment

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[8] These guidelines are equally applicable to the admissibility of records of summary court-martial. *See United States v. Wheaton*, 18 M.J. 159, 160 (C.M.A. 1984).

[9] If an accused objects to a record of summary court-martial based on a failure to show the review required under Article 64, UCMJ, was conducted, the Government may prove, through other evidence, that the required review was completed. *Kahmann*, 59 M.J. at 314.

being imposed. *United States v. Mack*, 9 M.J. 300, 324 (C.M.A. 1980).

5. The record would then be inadmissible unless the Government establishes, by independent evidence, that the accused had been advised of his rights and had not refused nonjudicial punishment. *Id*.

Here, the record of nonjudicial punishment, on its face, shows the appellant was informed of his right to consult counsel and his right to refuse nonjudicial punishment for a violation of Article 86, UCMJ. The record of nonjudicial punishment provided for the affirmative acceptance or refusal of nonjudicial punishment, and shows that an affirmative election was made refusing nonjudicial punishment. The next entry on that record, however, reflects the imposition of nonjudicial punishment for a violation of Article 86, UCMJ, on the same date the appellant refused nonjudicial punishment. This inconsistency makes the document irregular on its face, and, therefore, not entitled to the presumption of regularity. The appellant objected to the document's admissibility, thereby requiring the Government to produce other evidence to show that the appellant changed his mind and accepted nonjudicial punishment.[10] The appellant could not be compelled to provide that information for the Government.

The military judge overruled the appellant's objection stating:

> It seems on the face of the document that the accused was given his rights, and possibly even exercised his rights. What's missing is some documentation that he's changing his mind and accepting. I don't think that undermines the entry sufficiently to make it invalid for the members. Certainly we have a good faith basis for believing that NJP didn't happen or that it happened over his objection.[11] I imagine that would be in the paperwork that's back at the unit. You could certainly present that.

Record at 806. The military judge, by the above language, gave the exhibit the presumption of regularity, drew an inference based on that presumption, and placed the burden on the appellant to show that the inference she drew from the document was incorrect.

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[10] Absent objection by the defense, the prosecution is under no obligation to introduce such evidence. *Kahmann*, 59 M.J. at 313.

[11] We believe the military judge meant the court DID NOT have a good faith belief that the nonjudicial punishment did not occur or was imposed over the appellant's objection.

In *Wheaton*, 18 M.J. at 161, our superior court held that it may be properly inferred that the right to refuse nonjudicial punishment was waived when: (1) the record of nonjudicial punishment shows the accused was made aware of his right to refuse nonjudicial punishment; (2) *the absence of any indication of the exercise of that right*; and, (3) the imposition of nonjudicial punishment. No such inference can be made when there is an affirmative assertion of the right to refuse nonjudicial punishment, as we have here, followed by the imposition of that punishment. Here, the burden was properly on the Government to present evidence that the appellant changed his mind and accepted the nonjudicial punishment. The military judge's drawing an inference of nonjudicial punishment waiver, placing the burden on the appellant to rebut that inference, and admitting the record of nonjudicial punishment over defense objection, was clearly erroneous. *See Miller*, 46 M.J. at 65.

Having determined that the military judge erred, we must determine whether the error had a substantial influence on the sentence adjudged. *United States v. Sowell*, 62 M.J. 150, 153 (C.A.A.F. 2005); *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005)(citing *United States v. Boyd*, 55 M.J. 217, 221 (C.A.A.F. 2001)). If it did, the error is materially prejudicial to the appellant's substantial rights. Art. 59(a), UCMJ.

Prosecution Exhibit 26 consisted of 13 pages from the appellant's service record, including two records of nonjudicial punishment. The first nonjudicial punishment was imposed on the appellant on 30 December 1999 for absenting himself from his appointed place of duty so he could sleep, as both an orders violation and an unauthorized absence. The nonjudicial punishment record, to which the appellant objected, was for an unauthorized absence from 2 April 2001 to 5 April 2001. This was after the acts for which the appellant was convicted, and three months before the members were selected.[12] The charge sheet in this case did not contain any offense charged under Article 86, UCMJ.

The trial counsel referred to both nonjudicial punishments in his sentencing argument stating:

> I ask you to take a look at the prosecution exhibit. This is not a Marine that has never been in trouble before. This is a Marine whose record shows that he's gone to NJP. And if you look at the nature of the offenses, they're not earth shattering. But what they do tell us on the Article 92 and 86s is that this Marine does what he wants to do when he wants to do it.

[12] The appellant's charges covered the period May 1998 to September 1999, and the members were selected on 18 July 2001.

> He takes himself off duty when he feels like and *goes UA for a couple of days*. If you notice, the first NJP was in front of a Captain.
>
> *The second one, he was in front of a Major.* I'm sure he had an excuse for why he left or why he did what he did just like today. Telling us he's trying to take the hit for his friends.

Record at 817-18 (emphasis added). The military judge, however, did not directly refer to either nonjudicial punishment in describing matters to be considered in selecting a sentence. *Id*. at 828.

The trial counsel devoted 17 words in his sentencing argument to this nonjudicial punishment. The point of his argument would have been the same if only referring to the first record of nonjudicial punishment, which was properly admitted. There was no similarity between the Article 86, UCMJ, offense for which the second nonjudicial punishment was imposed and the charges before the court-martial, and the nonjudicial punishment was not emphasized by the trial counsel or military judge. The appellant was sentenced to 36 months of confinement out of a possible 20 years and 6 months. Under these circumstances, we do not believe the erroneous admission of the nonjudicial punishment had any effect on the sentence imposed. Therefore, the military judge's error was not materially prejudicial to the appellant's substantial rights. Article 59(a), UCMJ.

Although not raised as an error, we note that the nonjudicial punishment in question was listed in the staff judge advocate's recommendation (SJAR). The appellant submitted clemency matters pursuant to R.C.M. 1105, including the assertion of trial errors, prior to receiving the SJAR. The appellant did not list the admission of the record of nonjudicial punishment as one of those errors, and did not submit a response to the SJAR pursuant to R.C.M. 1106. Where, as in this case, the SJAR is served on the defense counsel in accordance with R.C.M. 1106(f)(1), and the defense fails to comment on any matter in the recommendation, R.C.M. 1106(f)(6) provides that any error is waived unless it rises to the level of plain error. *United States v. Wellington*, 58 M.J. 420, 427 (C.A.A.F. 2003). We do not find plain error.

Sentence Argument

In his fifth assignment of error, the appellant asserts that the trial counsel committed plain error by arguing for a specific term of confinement for each individual offense. We disagree.

We note that the appellant did not object to trial counsel's argument during trial. As our superior court has noted, "the lack of defense objection is relevant to a determination of prejudice because the lack of a defense objection is some measure

of the minimal impact of a prosecutor's improper comment." *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001)(quoting *United States v. Carpenter*, 51 M.J. 393, 397 (C.A.A.F. 1999)(internal quotation marks omitted)). Thus, absent an objection at trial, the appellant is not entitled to relief under this assignment of error unless there is plain error. *United States v. Barrazamartinez*, 58 M.J. 173, 175 (C.A.A.F. 2003); *Carpenter*, 51 M.J. at 396.

The appellant has the initial burden of persuasion under the plain error analysis, and must make a showing that the error was plain or obvious and materially prejudicial to a substantial right. *Carpenter*, 51 M.J. at 396 (citing *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998)); *United States v. Harvey*, 60 M.J. 611, 615 (N.M.Ct.Crim.App. 2004), *rev. granted*, 61 M.J. 50 (C.A.A.F. 2005). Here, the appellant fails.

There is nothing in the record to indicate that the members were overly swayed to adjudge a harsh sentence because of the trial counsel's argument. The sentence appears to be more a function of the appellant's serious crimes than of the trial counsel's argument. The appellant's counsel was in the best position to determine the prejudicial effect of the argument, yet made no objection. Further, the military judge correctly instructed the members concerning the maximum authorized confinement, that the confinement must be stated in whole terms, and that a single sentence shall be adjudged for all offenses. Record at 824, 826. Even if it was error to argue for individual terms of confinement for each offense, doing so was not plain error, as we discern no prejudice to the appellant. We find this assignment of error to be without merit.

Mistrial

In his sixth assignment of error, the appellant claims the military judge abused her discretion by denying his motion for mistrial. The motion resulted from the Government's withdrawal of four specifications prior to resting its case-in-chief. We do not find error.

We will not grant relief for a military judge's failure to grant a mistrial unless there is clear evidence of abuse of discretion. *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000)(citing *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993)). A mistrial is a drastic remedy to be used sparingly to prevent manifest injustice only. *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003)(citing *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990)). A mistrial is appropriate only when "circumstances arise that cast substantial doubt upon the fairness or impartiality of the trial." *United States v. Barron*, 52 M.J. 1, 4 (C.A.A.F. 1999)(quoting *United States v. Waldron*, 36 C.M.R. 126, 129 (C.M.A. 1966))(internal quotation marks omitted).

Here, the trial counsel moved to withdraw four specifications after the members received their cleansed charge sheet and before resting its case-in-chief. The appellant moved for a mistrial, claiming he had been prejudiced by having extra charges in front of the members that the Government knew it could not prove. The military judge denied the motion for mistrial, and instructed the members to cross out the withdrawn specifications on their cleansed charge sheets and told them they could not consider those specifications for any reason. Record at 548.

The Government's withdrawal of specifications did not create a manifest injustice. The Government may, at any time and for any reason, withdraw charges prior to findings. R.C.M. 604. We find that the military judge's instructions to the members secured the fairness and impartiality of the trial. Absent evidence to the contrary, court members are presumed to comply with the military judge's instructions. *Thompkins*, 58 M.J. at 47 (citing *Tennessee v. Street*, 471 U.S. 409, 415 (1985); *Lakeside v. Oregon*, 435 U.S. 333, 340 n.11 (1978); *United States v. Holt*, 33 M.J. 400, 403 (C.M.A. 1991). "In the clear absence of manifest injustice," the military judge did not abuse her discretion by denying the appellant's motion for mistrial. *Id*. at 47-48. We do not see any practical difference between the Government withdrawing and dismissing specifications before resting and those same specifications being dismissed by the military judge in response to a defense motion for a finding of not guilty at the end of the Government's case. *See* R.C.M. 917. In either event, the specifications appear on the cleansed charge sheet, but are subsequently removed from the members' consideration. This issue is without merit.

Factual and Legal Sufficiency

In his eighth assignment of error,[13] the appellant asserts the evidence is factually and legally insufficient to establish the criminal intent required for the charges of larceny of car parts and obtaining car repair services to install those car parts under false pretenses.

The tests for legal and factual sufficiency are well-known. For legal sufficiency, we consider the evidence in the light most favorable to the Government, and determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A.

[13] We have reviewed the appellant's seventh assignment of error alleging cumulative error based on assignments of error I through VI, and also find it without merit. *See Gray*, 51 M.J. at 175 (Individual assertions of error without merit are not sufficient to invoke the doctrine of cumulative error).

1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct. Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. For factual sufficiency, we weigh all the evidence in the record of trial, recognizing that we did not see or hear the witnesses, and determine whether we are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ. Reasonable doubt does not mean, however, that the evidence contained in the record must be free from any and all conflict. *Reed*, 51 M.J. at 562.

The evidence shows that the appellant took his car to Pep Boys on 4 September 1999, at which time a work order was prepared for the sale and installation of two tires and a pinion seal on the appellant's car. Prosecution Exhibit 24. By signing the work order, the person who brought the car in expressly authorized Pep Boys to perform the contracted services and to provide the contracted materials, and granted an express mechanic's lien "to secure amount of repairs for work performed . . . ." *Id*. The work order contains the appellant's name (misspelled as "Scanran"), an incomplete base address, and the appellant's home phone number was the Camp Pendleton Base Locater phone number.

Pep Boys' procedure is to give the original work order to the service department. Once the work is done, the customer receives the original invoice in order to pay the customer service department for the parts and labor. If the customer drives off without paying, the original invoice will be missing from the company files and a duplicate invoice will have to be reprinted for the files. Pep Boys did not have the original invoice for the 4 September 1999 work performed on the appellant's car, indicating that his car had been driven off without anyone paying for the parts and service. Pep Boys reported the failure to pay to the police approximately three weeks later. When the appellant learned the police were involved, he returned to Pep Boys, acknowledged that he owed the debt, paid the debt, and apologized to the store owner.

The appellant asserts that this evidence is not factually or legally sufficient to show that he possessed the necessary criminal intent for the charge of larceny or for obtaining services under false pretenses, because he eventually paid for the parts and service. We disagree.

1. Larceny of car parts from Pep Boys.

The appellant was charged with larceny of the car parts installed on his car by Pep Boys. The specification itself does not state whether this was a wrongful taking, withholding or obtaining under false pretenses larceny.[14] This court, however,

[14] The Government is under no obligation to allege or even elect a specific theory of larceny to prosecute an offense under Article 121, UCMJ. Rather,

cannot affirm a finding of guilty on a theory not presented by the Government and not instructed upon by the military judge. *See United States v. Pacheco*, 56 M.J. 1, 11 (C.A.A.F. 2001) (citing *United States v. Standifer*, 40 M.J. 440, 445 (C.M.A. 1994); *United States v. Riley*, 50 M.J. 410, 415 (C.A.A.F. 1999); *Dunn v. United States*, 442 U.S. 100 (1979); and *Rewis v. United States*, 401 U.S. 808, 814 (1991)). The military judge instructed the members on the larceny theories of wrongful taking and wrongful withholding, but not on wrongful obtaining under false pretenses. Record at 784. We cannot, therefore, affirm the finding of guilty as to Additional Charge II, Specification 3, under any theory other than a wrongful taking or wrongful withholding. Under the circumstances of this case, however, we find there was a wrongful taking larceny of the car parts. This requires a specific intent to permanently deprive Pep Boys of the use and benefit of the tires and pinion seal installed on the appellant's car. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 46b(1)(d). The appellant's driving his car away from Pep Boys without paying for those parts is strong circumstantial evidence of his specific intent. *Id.*, ¶ 46c(1)(e).

We find this evidence is legally sufficient to convince a rational trier of fact beyond a reasonable doubt that the appellant committed a wrongful taking larceny of the car parts. After weighing all the evidence in the record of trial on this issue, and recognizing that we did not see or hear the witnesses, as did the trial court, we ourselves are convinced beyond a reasonable doubt of the appellant's guilt of this offense. The evidence is, therefore, factually sufficient as well.

2. Obtain services under false pretenses from Pep Boys.

The appellant was also charged with obtaining, under false pretenses, the mechanical services provided to install the same car parts. The criminal intent required for an Article 134, UCMJ, violation (obtaining services under false pretenses) is similar to larceny by false pretense under Article 121, UCMJ. M.C.M., Part IV, ¶ 78c; *see United States v. Caver*, 41 M.J. 556, 565 (N.M.Ct.Crim.App. 1994); *United States v. Flowerday*, 28 M.J. 705, 707 (A.F.C.M.R. 1989). A false pretense with respect to larceny is a false representation of a past or existing fact by means of any act, word, symbol, or token, including a representation that the person "presently intends to perform a certain act in the future." M.C.M., Part IV, ¶ 46c(1)(e). Thus, a false representation that he or she presently intends to pay for parts (for Article 121, UCMJ) and services (for Article 134, UCMJ) is a false representation of an existing fact--the present intention--and thus a false pretense if there was no intent to pay. "A false pretense may also exist by silence or failure to

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the Government need only allege that an accused did "steal" the property of another. *United States v. O'Hara*, 33 C.M.R. 379, 381 (C.M.A. 1963).

correct a known misrepresentation." *United States v. Johnson*, 39 M.J. 707, 710 (N.M.C.M.R. 1993), *aff'd*, 40 M.J. 318 (C.M.A. 1994); *see also United States v. Dean*, 33 M.J. 505, 510 (A.F.C.M.R. 1991). A false pretense "must be in fact false when made and when the property is obtained, and it must be knowingly false in the sense that it is made without a belief in its truth." M.C.M., ¶ 46c(1)(e); *United States v. Hecker*, 42 M.J. 640, 645 (A.F.Ct.Crim.App. 1995). Additionally, obtaining services under false pretenses requires the specific intent to permanently deprive or defraud another of the use and benefit of the service. M.C.M., Part IV, ¶ 78b(4) and ¶ 49c(14).

In this case, the services required to install the parts on the appellant's car were contracted for and obtained through the signing of the work order. Prosecution Exhibit 24. That document created a mechanic's lien on the appellant's car in an amount equal to the services provided. By entering into this contract, the appellant represented a present intent to pay for the services when they were complete. That is the false pretense upon which he obtained the services. The appellant's driving away without paying for the services is circumstantial evidence that he did not intend to pay for the services at the time he entered into the contract. The appellant's actions are also consistent with the specific intent to permanently deprive or defraud. The fact that he eventually did pay, after legal action had been instituted, does not convince us otherwise.

We find this evidence is legally sufficient to convince a rational trier of fact beyond a reasonable doubt that the appellant wrongfully obtained services from Pep Boys under false pretenses. After weighing all the evidence in the record of trial on this issue, and recognizing that we did not see or hear the witnesses, as did the trial court, we ourselves are convinced beyond a reasonable doubt of the appellant's guilt of these offenses. The evidence is, therefore, factually sufficient as well.

Sentence Severity

In his ninth assignment of error, the appellant asserts that a sentence including a dishonorable discharge and 36 months of confinement is inappropriately severe for the offenses and the person. We disagree. Taking into account all the facts and circumstances, and mindful of our responsibility to maintain general sentence uniformity among cases under our cognizance, *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999), we believe the sentence is appropriate.

Our mandate under Article 66(c), UCMJ, requires that we affirm only such part or amount of the sentence as we determine, on the basis of the entire record, "should be approved." We do not enter the realm of clemency, an area reserved for the convening authority. However, we are compelled to act when we find inappropriate severity within an adjudged and approved

sentence. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); R.C.M. 1107(b). *See generally United States v. Spurlin*, 33 M.J. 443, 444 (C.M.A. 1991).

The appellant's crimes are certainly dishonorable and warrant a substantial period of confinement. We are mindful of the approved sentences of similar cases in the field as we discharge our statutory mandate. After careful review and consideration of the record, we find the imposition of 36 months of confinement and a dishonorable discharge to be appropriate for this offender and these offenses. Accordingly, we approve the sentence as adjudged and approved below.

Post-Trial Appellate Delay

In his tenth assignment of error, the appellant claims that he has been denied due process and suffered presumptive prejudice as a result of the time that has elapsed since his case was docketed with this court. Although the period of delay complained of begins with docketing with this court, we analyze the appellant’s due process right to speedy appellate review under the same standards as his right to speedy post-trial review. *See United States v. Oestmann*, 61 M.J. 103, 104 (C.A.A.F. 2005).

We analyze an appellant's due process right to speedy appellate review by looking to four factors: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal, and (4) prejudice to the appellant. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)).

If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id*. Moreover, in extreme cases, the delay itself may "'give rise to a strong presumption of evidentiary prejudice.'" *Id*. (quoting *Toohey*, 60 M.J. at 102).

The appellant’s case was docketed with this court on 19 August 2002. The Government filed its Answer on 29 July 2005. Total delay from docketing to the last pleading filed is approximately one month short of three years. We do not find this facially unreasonable.

Even if this period of delay is facially unreasonable, we would not find a due process violation. Following 20 enlargements of time citing “other case-load commitments,” the appellate defense counsel filed the appellant’s Brief, asserting

nine assignments of error, on 30 September 2004.[15] A different appellate defense counsel filed a supplemental assignment of error on 21 June 2005, asserting for the first time a denial of speedy appellate review. Following seven enlargements of time, the first four of which were uncontested, the Government filed its Answer. The record of trial consists of five volumes, including 835 pages of transcript plus exhibits.

We find no assertion of the right to a timely appeal until the appellant's counsel filed his supplemental assignment of error with this court. Moreover, the appellant has failed to demonstrate any prejudice from the delay. Finally, we find no "extreme circumstances" that give rise to a strong presumption of evidentiary prejudice. We conclude that the appellant's due process rights have not been violated as a result of the appellate processing of this case.

We are also aware of our authority to grant relief under Article 66, UCMJ, in the absence of any showing of actual prejudice. *Id.*; *Toohey*, 60 M.J. at 100; *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). Applying the factors we recently enumerated in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc), we do not believe that the period of appellate review alone, or the total period of post-trial review, affects the findings and sentence that should be approved in this case and therefore, decline to grant relief.

Conclusion

The findings and sentence, as approved by the convening authority, are affirmed.

Chief Judge ROLPH and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court

[15] We note the amount of time this case was in appellate defense counsel's hands for factual information only and not to insinuate the appellate review delay is invited error.