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

BEFORE

C.L. CARVER **R.C. HARRIS** **R.W. REDCLIFF**

UNITED STATES

v.

James H. FINCH
Staff Sergeant (E-6), U.S. Marine Corps

NMCCA 200000056 Decided 10 March 2005

Sentence adjudged 21 July 1998. Military Judge: S.F. Day. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Recruit Depot/Western Recruiting Region, San Diego, CA.

LT MARCUS FULTON, JAGC, USN, Appellate Defense Counsel
LT BRIAN MIZER, JAGC, USNR, Appellate Defense Counsel
LT FRANK GATTO, JAGC, USNR, Appellate Government Counsel
Maj JOHN F. KENNEDY, USMCR, Appellate Government Counsel

HARRIS, Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of conspiracy, failure to obey a general order, failure to obey a lawful order, making a false official statement, and being drunk on duty, in violation of Articles 81, 92, 107, and 112, Uniform Code Of Military Justice, §§ 881, 892, 907, and 912. The appellant was acquitted of involuntary manslaughter arising from the vehicle accident involving Jennifer Keely, a person enrolled in the Delayed Entry Program (DEP). The appellant was sentenced to five months of confinement, a reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the bad conduct discharge, ordered it executed.

We have carefully considered the record of trial, the appellant's eight assignments of error, the Government's response, and the appellant's reply. We conclude that the findings and sentence are correct in law and in fact and that no

error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant was a recruiter in the United States Marine Corps. He and Staff Sergeant (SSgt) James Teffeau were both assigned recruiting duties at the Recruiting Substation in Wichita, Kansas. The duties of a Marine recruiter included making weekly contact with recruits awaiting entry on active duty under the DEP. Jennifer Keely and Jennifer Toner were two such recruits. They enlisted in the United States Marine Corps and both women had dealings with the appellant as a recruiter at some point in their respective enlistment processes. At the time of the offenses in this case, Jennifer Keely was attending a local community college outside of the appellant's recruiting area and had enlisted through the recruiting office responsible for that area. When Jennifer Keely's recruiter, SSgt Sutton, complained about the appellant's continued contact with Jennifer Keely, the appellant's noncommissioned officer-in-charge (NCOIC) at the time, Gunnery Sergeant (GySgt) Bilyew, ordered the appellant to have no further contact with her.

Subsequently, on the morning of 3 January 1997, the appellant and SSgt Teffeau were in Arkansas City, Kansas interviewing potential recruits. SSgt Teffeau advised his current NCOIC, GySgt Terrence Quilty, that he and the appellant were going to meet with recruits in Winfield, Kansas. The appellant and SSgt Teffeau proceeded to drive to Winfield, Kansas to meet Jennifer Keely and Jennifer Toner at the Toner home. On the way, the appellant and SSgt Teffeau stopped at a Phillips 66 gas station, purchased a case of beer, and placed it in their government vehicle. The two recruiters then drove to Jennifer Toner's house.

Jennifer Keely arrived at the Toner home after the appellant and SSgt Teffeau. The appellant and SSgt Teffeau each drank a quantity of Jack Daniels whiskey. Jennifer Keely drank schnapps that was in the freezer. The drinking continued for almost three hours. When Jennifer Toner requested that they leave because she had to go to work, the appellant, SSgt Teffeau and Jennifer Keely decided to go to Winfield Lake. Before they left, Jennifer Toner heard the appellant tell SSgt Teffeau to "grab the beer and let's go." Record at 648. The two recruiters and Jennifer Keely then departed for Winfield Lake. The appellant and Jennifer Keely were in her car, while SSgt Teffeau drove the government vehicle. At Winfield Lake, Jennifer Keely and the appellant each took at least one beer out of the government vehicle. Upon returning from Winfield Lake, Jennifer Keely's car hit a tree. Jennifer Keely was killed instantly and the appellant was injured. Jennifer Keely's blood-alcohol content (BAC) was determined to be .07 grams of alcohol per 100 milliliters of blood and the appellant had a BAC of .15 grams of alcohol per 100 milliliters of blood.

On 21 May 1997, charges of conspiracy, orders violations, false official statement, involuntary manslaughter, and negligent homicide were preferred against the appellant. The last two charges were based on the belief that the appellant provided alcohol to Jennifer Keely and allowed her to drive while intoxicated. On 30 July 1997, additional charges of unauthorized absence, dereliction of duty, orders violation, false statements, and drunk on duty were preferred. On 3 September 1997, the original and additional charges were referred to trial by general court-martial. On 11 September 1997, the appellant was arraigned on those charges. Based on the belief that the appellant was actually driving the car that killed Jennifer Keely, the convening authority dismissed the original charges on 20 October 1997. On 27 January 1998, new charges similar to the old ones were preferred, with the addition of a specification alleging that the appellant was actually driving the car that killed Jennifer Keely. These new charges were referred to a general court-martial on 8 April 1998. The appellant was arraigned on the new charges on 17 April 1998.

R.C.M. 707 Speedy Trial Violation

In the appellant's first assignment of error, he contends that the military judge erred in failing to grant a motion to dismiss for denial of his right to a speedy trial pursuant to RULE FOR COURTS-MARTIAL 707(a)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). The appellant avers that this court should dismiss all charges and specifications. We disagree.

Relying on *United States v. Robinson*, 47 M.J. 506, 510 (N.M.Ct.Crim.App. 1997), the appellant alleges that the convening authority's dismissal of the charges on 20 October 1997 and repreferral of similar charges on 27 January 1998 was a subterfuge or "sham" to toll the running of the 120-day speedy trial clock. The military judge found that the convening authority's decision to dismiss the charges was not done to manipulate the speedy trial clock, but rather to allow time for further investigation into whether the appellant was actually the driver of the vehicle that killed Jennifer Keely. Record at 307.

Whether the appellant received a speedy trial is an issue of law, which we review *de novo*. *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999). We give substantial deference to the military judge's findings of fact, however, and will reverse them only for clear error. *United States v. Taylor*, 487 U.S. 326, 337 (1988); *United States v. Edmond*, 41 M.J. 419, 420 (C.A.A.F. 1995).

"In the military justice system, an accused's right to a speedy trial flows from various sources, including the Sixth Amendment, Article 10 of the Uniform Code of Military Justice, and R.C.M. 707 of the Manual for Courts-Martial." *United States*

v. Cooper, 58 M.J. 54, 57 (C.A.A.F. 2003). R.C.M. 707(a)(1) provides that an accused shall be brought to trial within 120 days after the preferral of charges. Failure to comply with R.C.M. 707 results in dismissal of the affected charges. R.C.M. 707(d). This dismissal may be with or without prejudice to the Government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date. *Id.* An accused is "brought to trial" within the meaning of this rule at the time of arraignment. R.C.M. 707(b)(1). If charges are dismissed, however, a new 120-day time period begins on the day of dismissal if the accused is in pretrial restraint, and in other cases, on the date of repreferral. R.C.M. 707(b)(3)(A)(i). Notably, nothing in the Rules for Courts-Martial purports to limit the discretion of a convening authority to dismiss charges.[1] *See United States v. Hayes,* 37 M.J. 769, 772 (A.C.M.R. 1993); *United States v. Bolado*, 34 M.J. 732, 738 (N.M.C.M.R. 1991), *aff'd*, 36 M.J. 2 (C.M.A. 1992)(summary disposition).

The *Robinson* court*,* although ultimately agreeing that a convening authority has unfettered discretion under the Rules for Courts-Martial to dismiss charges, held that "under the unique circumstances of th[at] case," the dismissal action was a subterfuge and that the speedy trial clock was not reset. *Robinson,* 47 M.J. at 510. The court, citing *United States v. Britton*, 26 M.J. 24, 26 (C.M.A. 1988), noted that "when there is truly an effective dismissal of charges, all conditions or constraints on liberty are removed, charges are no longer pending, all pretrial restraint is lifted, the accused is returned to full duty, and the accused is provided with all rights and privileges of other uncharged servicemembers." *Id.* The court found that the conditions and constraints initially placed on the appellant in that case never changed during the period between the dismissal action and repreferral. *Id.* These conditions included legal hold, suspension of transfer orders, inability to work in his assigned area of expertise, and restrictions on his ability to take leave. *Id.* The court also found the Government's "vague assertions" concerning the availability of evidence and lack of due diligence in determining the true nature of the charges insufficient. *Id.* at 508. Specifically limiting its holding to the facts before it, the court 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

[1] Indeed, the Discussion to R.C.M. 401(c)(1) only states that "[a] charge should be dismissed when it fails to state an offense, when it is unsupported by available evidence, or when there are other sound reasons why trial by court-martial is not appropriate." R.C.M. 401(c)(1), Discussion. The Discussion to R.C.M. 401(c)(1) further states that "[i]t is appropriate to dismiss a charge and prefer another charge anew when, for example, the original charge failed to state an offense, or was so defective that a major amendment was required (*see* R.C.M. 603(d)), or did not adequately reflect the nature or seriousness of the offense."

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 the facts in *Robinson*. The *Robinson* holding was specifically limited to the dismissal of preferred but unreferred charges. *Id.* Here, by the time the original charges were dismissed, the charges had already been referred and, in fact, the first arraignment had already occurred. Further, we see no evidence of subterfuge on the part of the convening authority in the record before us. Unlike in *Robinson,* substantial evidence was presented in this case that the charges were dismissed to allow the Government to further investigate. Additionally, the Government introduced detailed evidence regarding the nature, extent and results of their subsequent investigation. We find no evidence that suggested that manipulating the speedy trial clock was the "sole purpose" for the dismissal as was the case in *Robinson*. Accordingly, we decline to accept the appellant's contention that his status on legal hold, reassignment to other duties, and denial of discharge, standing alone amount to subterfuge. We also note that although the appellant remained on "legal hold," he continued to receive his regular pay and went on leave and permissive TAD several times. Further, "an accused may be reassigned to other normal military duties as an administrative decision, based on his alleged misconduct, and nonetheless be returned to full-time military duties as that status is contemplated in *Britton* following dismissal of charges." *Bolado*, 34 M.J. at 739 n.6. Under the circumstances of this case, we find the military judge's findings of fact amply supported by the evidence, and not clear error. Consequently, we find no violation of the appellant's right to a speedy trial under R.C.M. 707(a)(1). Accordingly, we decline to grant relief.

Unlawful Command Influence

In the appellant's second assignment of error, he contends that a meeting between detailed defense counsel, Captain (Capt) Smith, and the convening authority's deputy staff judge advocate, Major (Maj) Eaheart, amounted to unlawful command influence. The appellant avers that this court should set aside the findings and sentence and remand this case to the Judge Advocate General of the Navy for appointment of a new convening authority. We disagree.

We review issues involving unlawful command influence *de novo*. *United States v. Argo*, 46 M.J. 454, 457 (C.A.A.F. 1997). Unlawful command influence is an error of constitutional dimension; we may not affirm the findings or the sentence in the appellant's case unless we are persuaded beyond a reasonable doubt that each has not been affected by unlawful command influence. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999); *Argo*, 46 M.J. at

457. Procedurally, the appellant bears the burden of raising the issue of unlawful command influence. *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002)(citing *Biagase*, 50 M.J. at 150). The burden of proof is low, but more than mere allegation or speculation. "The quantum of evidence required to raise unlawful command influence is 'some evidence.'" *Id*. To raise the issue, the defense must: (1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that unlawful command influence was the cause of the unfairness. *Biagase*, 50 M.J. at 150. Once the issue of unlawful command influence is raised, the Government must prove beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings or did not affect the findings and sentence. *Stoneman*, 57 M.J. at 41 (citing *Biagase*, 50 M.J. at 151).

In the appellant's case, the military judge found no unlawful command influence relating to the meeting between Capt Smith and Maj Eaheart. He concluded that while Maj Eaheart's actions were "ill advised," his actions were independent of the staff judge advocate and were not intended to interfere with Captain Smith's representation of the appellant. He also found that the meeting did not interfere with Capt Smith's participation in the appellant's court martial as he continued to be a vital and important member of the defense team who zealously represented his client. We find the military judge's findings fully in accord with the evidence in the record before us. We are satisfied that no unlawful command influence existed in this case. Further, even assuming unlawful command influence was present, we are convinced beyond a reasonable doubt that it did not affect the appellant's court martial. Accordingly, we decline to grant relief.

Variance Between Pleading and Proof

In the appellant's third assignment of error, he contends that the military judge's exceptions and substitutions to the overt acts of the conspiracy charge constituted a material variance which substantially prejudiced his ability to defend against that charge.[2] The appellant avers that this court should

[2] The military judge excepted, "Staff Sergeant Finch planned with Staff Sergeant Teffeau to meet and consume alcohol with Jennifer Keely and Jennifer Toner, persons enrolled in the Delay Entry Program"; and "Staff Sergeant Finch and Staff Sergeant Teffeau purchased Bud Light beer at the Phillips 66 service station in Winfield, Kansas and transported that beer to the Toner residence," and substituted, "Staff Sergeant Finch and Staff Sergeant Teffeau agreed to accompany Jennifer Keely, a person enrolled in the delayed-entry program, to the Winfield City Lake for the purpose of talking and consuming Bud Light Beer that Staff Sergeant Finch had recently purchased at the Phillips 66 service station in Winfield, Kansas and Staff Sergeant Finch, Staff Sergeant Teffeau, and Jennifer Keely did thereafter drive in two separate vehicles to the Winfield City Lake where Staff Sergeant Finch and Jennifer Keely did consume some of the aforesaid Bud Light beer." Record at 2771-72.

set aside his conviction under Charge I, dismiss Charge I, and reassess the sentence. We disagree.

A variance between pleadings and proof exists when evidence at trial establishes the commission of a criminal offense by the accused, but the proof does not conform strictly with the offense alleged in the charge." *United States v. Teffeau*, 58 M.J. 62, 66 (C.A.A.F. 2003)(citing *United States v. Allen*, 50 M.J. 84, 86 (C.A.A.F. 1999)). "Findings by 'exceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it.'" *Teffeau,* 58 M.J. at 66 (quoting R.C.M. 918(a)(1)); *United States v. Wray*, 17 M.J. 375, 376 (C.M.A. 1984). Minor variances, such as the location of the offense, do not necessarily change the nature of the offense and in turn are not necessarily fatal. *Teffeau,* 58 M.J. at 66. Where an appellant can demonstrate that a variance is material, however, and that he or she was prejudiced, the variance is fatal and the findings thereon cannot stand. *Id.* An appellant may show prejudice by demonstrating that the variance puts him at risk of another prosecution for the same conduct, *id.* at 67 (quoting *United States v. Lee*, 1 M.J. 15, 16 (C.M.A. 1975)); by demonstrating that his due process protections have been violated where he was "misled to the extent that he has been unable adequately to prepare for trial"; or by demonstrating that the variance changes the nature or identity of the offense and he has been denied the opportunity to defend against the charge. *Id*. (citing *Wray*, 17 M.J. at 376).

Under Article 81(b), UCMJ, a conspiracy requires, first, an agreement between the accused and another person and second, an overt "act to effect the object of the conspiracy." MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 5b. Even though a specification alleges a specific overt act, any overt act done by the accused or any of the co-conspirators will satisfy the second element of Article 81(b), provided the act is substantially similar to the act alleged. *United States v. Moreno*, 46 M.J. 216, 219 (C.A.A.F. 1997)(citing *United States v. Collier*, 14 M.J. 377, 380 (C.M.A. 1983)). Further, when the basic facts of a conspiracy remain unchanged, other overt acts may be substituted or amended. *Id.* at 219.

We find that the appellant has not shown either materiality or prejudice. With the exception of the change in the location of the drinking from Jennifer Toner's house to Winfield Lake, the subject matter of the conspiracy offense remained the same and did not change the basic agreement between the appellant and SSgt Teffeau to provide alcohol to a person enrolled in the delayed entry program in violation of a general order prohibiting such conduct by recruiters. Additionally, the appellant was not surprised or misled by the variance. Throughout the trial, the defense vigorously challenged every fact bearing on the question of whether the appellant and SSgt Teffeau agreed to provide beer to Jennifer Keely, either at Jennifer Toner's house or at

Winfield Lake. Indeed, several witnesses were extensively cross-examined about the events at Winfield Lake. For example, SSgt Teffeau stated on cross-examination that he and the appellant never had an agreement to go to Winfield Lake and drink with Jennifer Keely. Record at 2024. SSgt Teffeau also denied seeing any of them drink at Winfield Lake. *Id.* at 2049. Jennifer Toner's testimony that she heard the appellant tell SSgt Teffeau before going to Winfield Lake to "get the beer and let's go" was also vigorously challenged by the defense. *Id.* at 667-74. In addition, we find the evidence going to the purchase of the beer at the Phillips 66 service station just as relevant to the excepted and substituted overt acts as to the original ones. As we find the excepted and substituted overt acts were substantially similar and the appellant suffered no prejudice, we decline to grant relief.

Factual and Legal Sufficiency of the Conspiracy Conviction

In the appellant's fourth assignment of error, he contends that his conspiracy conviction is legally and factually insufficient as the Government failed to prove an overt act in furtherance of the conspiracy. The appellant avers that this court should set aside his conviction to Charge I, dismiss Charge I, and reassess the sentence. We disagree.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-319 (1979); *United States v. Turner,* 25 M.J. 324, 325 (C.M.A. 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. The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41; *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ. Reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). "[T]he factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979).

The appellant contends that the military judge identified three distinct overt acts in furtherance of the conspiracy to provide alcohol to a person enrolled in the DEP: (1) that the appellant agreed to accompany Jennifer Keely, a person enrolled in the DEP, to Winfield City Lake for the purpose of talking and consuming Bud Light Beer that the appellant had recently purchased at the Phillips 66 service station in Winfield, Kansas; (2) that the appellant, SSgt Teffeau, and Jennifer Keely did thereafter drive in two separate vehicles to the Winfield City Lake where; (3) the appellant and Jennifer Keely did consume some

of the aforesaid Bud Light beer. Appellant's Brief of 31 May 2002 at 20-21. The appellant challenges the legal sufficiency of the "first overt act" and the "third overt act." Specifically, the appellant contends that the "first overt act" was not independent of the original criminal agreement and that by the time the object offense represented by the "third overt act" had occurred, the agreement to provide alcohol had "self-evidently ceased." *Id.* at 21. The appellant also contends that there is not enough direct factual evidence to prove an agreement existed at the time the "second overt act" of driving to Winfield Lake occurred. *Id.* at 22.

We note that even assuming the military judge identified three distinct overt acts, the Government need only prove one overt act to sustain a conspiracy conviction. *United States v. Perez*, 36 M.J. 583, 586 (A.F.C.M.R. 1992), *aff'd,* 40 M.J. 373 (C.M.A. 1994). Nevertheless, we find all three overt acts identified by the appellant legally and factually sufficient to sustain the appellant's conviction to the conspiracy charge.

Regarding the "first overt act" identified by the appellant, we agree that an overt act necessary to sustain a conviction for conspiracy must be an act independent of the agreement to commit the offense. MCM, Part IV, ¶ 5c(4)(a); *see also Collier*, 14 M.J. at 378. Further, it must be an act done by one or more of the conspirators either at the time of or following the agreement to commit the offense, and done to carry into effect the object of the agreement. MCM, Part IV, ¶ 5c(4)(a); *Collier*, 14 M.J. at 378. In this case, however, we find that the appellant's agreement with Jennifer Keely to travel with her to Winfield Lake was independent of the original criminal agreement between the appellant and SSgt Teffeau and sufficiently indicated that the original conspiracy was "alive and in motion." *Collier*, 14 M.J. at 380.

We also reject the appellant's contention that the "third overt act" of consuming alcohol at Winfield Lake is legally insufficient to sustain a conviction for conspiracy. We note that committing the intended offense may indeed constitute the overt act as long as it is a manifestation that the agreement is being executed. MCM, Part IV, ¶ 5c(4)(b); *see also United States v. Nagle,* 30 M.J. 1229, 1230 (A.C.M.R. 1990). We find that the "third overt act" identified by the appellant meets this standard.

We also disagree with the appellant's contention that no direct evidence exists that the appellant was a party to a criminal agreement at the time the "second overt act" occurred. We note that the agreement in a conspiracy need not be in any particular form or manifested in any formal words. MCM, Part IV, ¶ 5c(2); *see also United States v. Whitten*, 56 M.J. 234, 236 (C.A.A.F. 2002); *United States v. Cobb*, 45 M.J. 82, 84 (C.A.A.F. 1996). In fact the meeting of the minds "can be silent" or simply a "mutual understanding between the parties." *Whitten,* 56

M.J. at 236 (quoting *United States v. Barnes*, 38 M.J. 72, 75 (C.M.A. 1993)). It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy, and this may be shown by the conduct of the parties. MCM, Part IV, ¶ 5c(2); *see also Whitten,* 56 M.J. at 236; *United States v. Layne*, 29 M.J. 48, 51 (C.M.A. 1989). Here, witness testimony and telephone records establish that, while the appellant and SSgt Teffeau were together on the morning of the accident, SSgt Teffeau called Jennifer Keely and arranged to meet with her and provide her with beer. Further, evidence establishes that the appellant subsequently purchased beer at the Phillips 66 service station and took it to Jennifer Toner's house. Prior to leaving Jennifer Toner's house for Winfield Lake, Jennifer Toner heard the appellant tell SSgt Teffeau to "grab the beer and let's go." At Winfield Lake, SSgt Teffeau opened the trunk of his vehicle and the appellant and Jennifer Keely each took at least one beer out. Taken together, the evidence of an agreement adduced at trial and the conduct of the appellant and SSgt Teffeau overwhelmingly demonstrate an agreement to provide alcohol to a person enrolled in the delayed entry program in violation of a general order.

We find that the evidence is both legally and factually sufficient for the charged offense of conspiracy. We also have no doubt that a reasonable factfinder could have found all the essential elements of the charge beyond a reasonable doubt. In addition, we are convinced of the appellant's guilt beyond a reasonable doubt. As such, we decline to grant relief.

Suppression of Appellant's Statements

In the appellant's fifth assignment of error, he contends that the military judge erred in failing to suppress involuntary statements made by the appellant in violation of his right to counsel. The appellant avers that this court should disapprove his conviction of Charge IV, dismiss Charge IV, and reassess the sentence. We disagree.

On 12 March 1997, the appellant was interviewed by Capt Montgomery, investigating officer at Recruiting Station, Oklahoma City, Oklahoma. At the suppression hearing, Capt Montgomery testified that the appellant never told him he had an attorney. Record at 423. Prior to the interview, however, Capt Montgomery was advised by Detective R.L. Shaw of the Winfield Police Department that the appellant had retained a "hot shot lawyer." *Id*. at 422. Capt Montgomery also received a litigation report prior to the interview which contained a notation that appellant was represented by civilian defense counsel. *Id.* at 427. All parties agree that the appellant's civilian defense counsel was not notified about the 12 March 1997 interview. The appellant contends Capt Montgomery's failure to notify his civilian defense counsel renders his statements involuntary by the rule set forth in *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976). The *McOmber* court held that "once an investigator is on notice that

an attorney has undertaken to represent an individual in a military criminal investigation, further questioning of the accused without affording counsel reasonable opportunity to be present renders any statement obtained involuntary under Article 31(d) of the Uniform Code." *Id.* at 383.

We note that "there is some question as to whether *McOmber* continues to properly state the law owing to subsequent case law developments and changes to Mil. R. Evid. 305(e)." *United States v. Allen*, 54 M.J. 854, 857 (A.F.Ct.Crim.App. 2001). The *McOmber* requirement was codified in a former version of MILITARY RULE OF EVIDENCE 305(e), but was eliminated in a 1994 amendment to the rules which responded to the Supreme Court's decisions in *McNeil v. Wisconsin*, 501 U.S. 171 (1991) and *Minnick v. Mississippi*, 498 U.S. 146 (1990). *United States v. Aaron,* 54 M.J. 538, 546 (A.F.Ct.Crim.App. 2000); *see also* MCM, App. 22 at 15. The former MIL. R. EVID. 305(e) was subsequently renamed "Presence of Counsel" and the notice to counsel requirements were replaced with rules for presence of counsel during custodial interrogations and post-profferal interrogations. MIL. R. EVID. 305(e)(1) and (2). Thus, at the time Capt Montgomery interviewed the appellant, there was no requirement under the Military Rule of Evidence that counsel be notified. Nevertheless, *McOmber* has never been specifically overruled. *Aaron*, 54 M.J. at 545 (noting that while it is unclear whether *McOmber* continues to properly state the law, it presumes it does).

The military judge denied the appellant's motion to suppress and found that although Capt Montgomery knew the appellant was represented by civilian counsel at the time of the 12 March 1997 interview, the appellant voluntarily waived his right to have his attorney present. The military judge also found that the appellant was not in a custodial environment during the interview. Even assuming the continuing validity of *McOmber*, we find that military judge could have properly concluded that the appellant knowingly and voluntarily waived his right to have counsel present. *See United States v. Payne*, 47 M.J. 37, 44 (C.A.A.F. 1997)(finding a waiver under *McOmber* when an appellant "knowingly, intelligently, and freely waived his rights"); *United States v. LeMasters*, 39 M.J. 490, 492 (C.M.A. 1994)(concluding that if the prosecution can show that the accused was aware of his right to have counsel notified and present at the interrogation but affirmatively waived those rights, then a valid waiver under *McOmber* can be found); *United States v. Courney*, 11 M.J. 594, 596 (A.F.C.M.R. 1981)(finding that the right to notice of counsel under *McOmber* may be given up voluntarily especially where there is a lack of custodial environment and the appellant repudiates previous advice of counsel).

A military judge's rulings on the admission or exclusion of evidence, including rulings on motions to suppress, are reviewed for an abuse of discretion. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). We review a military judge's findings of fact under a clearly erroneous standard and his conclusions of

law *de novo*. *Id.* The ultimate question of the voluntariness of a confession is also an issue of law that we also review *de novo*. *Payne*, 47 M.J. at 44; *United States v. Bubonics*, 45 M.J. 93, 94 (C.A.A.F. 1996)(citing *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991)); *United States v. Martinez*, 38 M.J. 82, 86 (C.M.A. 1993). This requires an assessment of the "totality of the circumstances" surrounding the production of the accused's statement. *Bubonics,* 45 M.J. at 95 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). Additionally, we review *de novo* the question of whether or not an interrogation occurred. *United States v. Young,* 49 M.J. 265, 267 (C.A.A.F. 1998)(citing *United States v. Kosek*, 41 M.J. 60, 63 (C.M.A. 1994)).

In this case, the record reflects that the appellant was an intelligent and experienced staff noncommissioned officer. Record at 468. Further, Capt Montgomery advised the appellant both orally and in writing of his right to have counsel present, and the appellant understood his rights and voluntarily waived them. *Id.* at 469, 473-74. Although the appellant was ordered to meet with Capt Montgomery on 12 March 1997, the appellant acknowledged that once there, he ignored his civilian attorney's advice not to speak to investigators without him. *Id.* at 471. The appellant also admitted he knew he had a right to have his attorney present at the interview and understood that he could have stopped the interview at anytime. *Id*. The appellant also never told Capt Montgomery he wouldn't speak to him unless counsel was provided. *Id*. Considering "the totality of all the surrounding circumstances," we agree with the military judge that the appellant's statements to Capt Montgomery were voluntary. We also find that the appellant was neither in custody nor subjected to any deprivation of his freedom. The absence of custody dictates that the appellant's right to counsel under Mil. R. Evid. 305(e)(1)[3] was not violated. Accordingly, we find no abuse of discretion and decline to grant relief.

[3] MIL. R. EVID. 305(e), titled "Presence of Counsel", subsection (1) states: *Custodial interrogation*: Absent a valid waiver of counsel under subdivision (g)(2)(B), when an accused or person suspected of an offense is subjected to custodial interrogation under circumstances described under subdivision (d)(1)(A) of this rule, and the accused or suspect requests counsel, counsel must be present before any subsequent custodial interrogation may proceed. MIL. R. EVID. 305(d), titled "Counsel rights and warnings", subsection (1)(A) provides that when evidence of a testimonial or communicative nature within the meaning of the Fifth Amendment to the Constitution of the United States either is sought or is a reasonable consequence of an interrogation, an accused or a person suspected of an offense is entitled to consult with counsel as provided by paragraph (2) of this subdivision, to have such counsel present at the interrogation, and to be warned of these rights prior to the interrogation if the interrogation is conducted by a person subject to the code who is required to give warnings under Article 31 and the accused or suspect is in custody, could reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way.

Factual and Legal Sufficiency of Drunk on Duty Conviction

In the appellant's sixth assignment of error, he contends that his conviction for being drunk on duty is both legally and factually insufficient. The appellant avers that this court should set aside the findings of guilty to Charge V, dismiss Charge V, and reassess the sentence. We disagree.

The elements of drunk on duty under Article 112, UCMJ, are:

(1) That the accused was on a certain duty; and

(2) That the accused was found drunk while on this duty.

MCM, Part IV, ¶ 36b. "Drunk" means any intoxication which is sufficient to impair the rational and full exercise of the mental or physical faculties. *Id.*, Part IV, ¶¶ 36c(1) and 35c(6). "Duty" means military duty. *Id.*, Part IV, ¶ 36c(2). Every duty which an officer or enlisted person may legally be required by superior authority to execute is necessarily a military duty. *Id.* An individual may not be found guilty of this offense, however, who "does not undertake the responsibility or enter upon the duty at all." *Id.*, Part IV, ¶ 36c(3); *see also United States v. Gonzalez*, 60 M.J. 572, 578 (C.A.A.F. 2004).

We reject the appellant's first contention that the evidence presented at trial is factually insufficient to prove that he was "drunk." Several witnesses at the accident scene and the hospital noted the appellant's confusion regarding SSgt Teffeau and testified to the "strong smell" of alcohol and/or beer on the appellant. In fact, the doctor who treated the appellant at the hospital noted that the appellant smelled of alcohol and in his report noted that he "appeared to be intoxicated." Prosecution Exhibit 27. The doctor ordered a blood alcohol content test be performed to confirm his suspicion. Record at 959. The doctor subsequently concluded that the appellant was "neurologically intact." Prosecution Exhibit 27 at 1-2. The appellant's BAC was later determined to be .15 grams of alcohol per 100 milliliters of blood based on Prosecution Exhibits 42 and 43. The appellant also told Jennifer Toner that he was, in fact, drunk on the day of the accident. Record at 650-51. This statement was corroborated by the results of the blood alcohol test and the testimony regarding the amount of alcohol the appellant consumed that day. We find the evidence presented at trial was sufficient to prove that the appellant's intoxication impaired the rational and full exercise of his mental faculties. *See United States v. Roberts*, 9 C.M.R. 278, 280-82 (A.B.R. 1953)(witness testimony stating that the appellant smelled of alcohol and describing his conduct, together with evidence of the amount of alcohol consumed was held sufficient to prove intoxication which impaired the rational and full exercise of the mental or physical faculties); *United States v. Sills*, 3 C.M.R. 354, 355-56 (A.B.R. 1952)(accused's admission that he was drunk, witness testimony stating that the accused's smelled of liquor and a blood alcohol

test all sufficient to prove intoxication which impaired the rational and full exercise of the mental or physical faculties).

We also disagree with the appellant's contention that his conviction is legally insufficient because he was not "on duty" after he left the Toner residence. The appellant was working in the field on the day of the accident and the record clearly shows that he was considered "on duty" until he was "secured" by his NCOIC, which never occurred. Further, the appellant and SSgt Teffeau were in Arkansas City, Kansas, on the morning of the accident interviewing potential recruits. According to standard procedure, SSgt Teffeau called their current NCOIC, GySgt Terrence Quilty, and advised him that they were going to Winfield, Kansas, to meet with another recruit. GySgt Quilty authorized this action. The appellant and SSgt Teffeau subsequently went to Winfield and met with both Jennifer Toner and Jennifer Keely. Notwithstanding the appellant's previous NCOIC's order not have any contact with Jennifer Keely, substantial evidence was introduced that the appellant went to Winfield Lake with Jennifer Keely to discuss issues related to her impending entry into the Marine Corps. Under these circumstances, we find that the appellant "had undertaken the responsibilities and entered on certain duties" after he left the Toner residence and was "on duty" as that term is defined under Article 112, UCMJ. *See Gonzalez*, 60 M.J. at 578 (appellant not "on duty" under Article 112, UCMJ, when record failed to establish that he ever reported for duty at all); *United States v. Hoskins*, 29 M.J. 402, 405 (C.M.A. 1990)(merely "showing up" for duty is not sufficient under Article 112, UCMJ, accused must actually undertake certain duties).

We find that the evidence is both legally and factually sufficient for the charged offense of drunk on duty. We also have no doubt that a reasonable factfinder could have found all the essential elements of the charge beyond a reasonable doubt. In addition, we are convinced of the appellant's guilt beyond a reasonable doubt. Thus, we decline to grant relief.

Conclusion

We have considered the appellant's remaining two summary assignments of error[4] and find them lacking in merit. *See United States v. Moore*, 58 M.J. 466, 468 (C.A.A.F. 2003)(affirming lower court's finding that an order without a specific duration

[4] VII. The military judge erred by finding that the order given by GySgt Bilyew was a lawful order where the order was without any limitation as to the duration of the order.

VIII. The military judge erred by finding that the appellant had a continuing duty to obey the order of GySgt Bilyew given in his capacity as the appellants' NCOIC after GySgt Bilyew turned over NCOIC duties to GySgt Quilty.

not overbroad or vague provided it has a valid military purpose and is a clear, specific, narrowly drawn mandate); *United States v. New*, 55 M.J. 95, 106-07 (C.A.A.F. 2001)(a properly issued general order is presumed to be lawful and the burden is upon the appellant to establish that the order is unlawful). Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Senior Judge CARVER and Judge REDCLIFF concur.

For the Court

R.H. TROIDL
Clerk of Court