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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **C.L. SCOVEL**

UNITED STATES

v.

Donald D. BRAMLETT
Machinist's Mate Third Class (E-4), U.S. Navy

NMCCA 200101150 Decided 15 November 2005

Sentence adjudged 14 February 2000. Military Judge: G.T. Hatch. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, U.S. Naval Forces Central Command, Bahrain.

Maj ANTHONY WILLIAMS, USMC, Appellate Defense Counsel
LT JANELLE LOKEY, JAGC, USNR, Appellate Defense Counsel
WILLIAM E. CASSARA, Civilian Defense Counsel
Maj WILBUR LEE, USMC, Appellate Government Counsel

DORMAN, Chief Judge:

The appellant was tried before a general court-martial composed of officer and enlisted members. Contrary to his pleas, the appellant was convicted of rape and unlawful entry, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The adjudged and approved sentence consists of a dishonorable discharge and confinement for 9 years.

The appellant, through counsel, has assigned eight errors for our consideration. He asserts that he was subjected to an illegal line-up. The appellant raises three challenges concerning the statements he made after his apprehension, claiming that statements he made immediately after the victim, Ms. A., identified him, as well as a statement he made to Bahraini authorities should have been suppressed, and that the Government then used these statements to secure his conviction. The appellant also asserts instructional error on the issue of his guilt or innocence and that the evidence is factually

insufficient to support his conviction. In his final two assignments of error, the appellant argues for sentencing credit due to the conditions of his pretrial restriction and liberty risk status, and that he was denied a fair trial due to cumulative errors. In addition, the appellant filed a supplemental assignment of error alleging that the military judge erred when he failed to suppress evidence in light of international agreements. This supplemental assignment of error concerns classified materials.

The appellant has also raised an additional 8 issues under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Concerning his statement to the Bahraini authorities, he asserts the statement was involuntary, and that the military judge failed to properly instruct the members concerning this issue. He next argues that the military judge committed error when he withheld evidence from the members of a classified nature, and that he should not have been turned over to the Bahraini authorities in the first place. The appellant asserts that the arguments of both the trial counsel and the trial defense counsel were improper, and that the military judge erred in accepting a witness as an expert in forensic medicine. The appellant also asserts that one of the members of the court should have been dismissed because he left the deliberation room without permission. Finally, the appellant argues that he has been subjected to cruel and unusual punishment during his post-trial confinement.

We have reviewed the appellant's record of trial, and have considered the issues raised by his appellate counsel, as well as those raised by the appellant himself. In conducting our review, we have reviewed the classified portions of the record, both the testimony and the exhibits. We have considered the Government's answer. On 16 September 2005 oral argument was presented in this case, with Major Wilbur Lee, USMC, arguing for the Government and Mr. William E. Cassara, of Evans, Georgia, arguing for the appellant. In deciding the case, we have given consideration to the excellent oral arguments of counsel, and have considered the post-argument filing by the appellant. Following our review of all these issues and all these materials, we conclude that the findings and sentence are correct in law and fact and that no error was committed that materially prejudiced the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ. We do find, however, that the appellant is entitled to sentencing credit for a violation of Article 13, UCMJ.

Facts

Ms. A is from Lebanon. In March 1999, she was living in a one-bedroom studio apartment in an apartment complex in Bahrain. She did not keep her door locked because she considered the

apartment complex to be safe. The complex had an electronic door at the front gate that prevented anyone from getting in unless they knew the combination. But on the morning of 20 March 1999 she awoke after sunrise to find a man in her bedroom. She asked the person who he was but he only said, "ssh." Record at 719. She asked him to turn on the light but he did not do so. He kept trying to keep her quiet, saying, "No talk." *Id*. at 720. When she told him she was going to call the police, he leaned over and said, "you are my habibi," which means "love" in Arabic. *Id*. at 721-22. When she screamed, he quickly covered her mouth. Ms. A detected a strong smell of alcohol on him. He jumped on top of her, and they fell off the bed onto the floor, where he pulled her t-shirt half way off.

As the assailant continued to assault Ms. A, he bit her ear and her right breast. He was breathing heavily and perspiring profusely. Eventually he entered her vagina with his penis. He was inside her for about 5 minutes before he ejaculated. By this time there was some light coming through the windows, but the assailant was holding her on the floor. Ms. A was able to see that he had blond hair, and that he was wearing dark or black jeans and a blue shirt. He then asked her to get under the bed so that he could leave. She told him that she was not going to get under the bed and that she would not look as he left. He then put his hand on the wall for a few seconds, to "take a break--breath." Id. at 744. As he opened the door to leave, Ms. A looked at the doorway and was able to see her assailant as he left. She identified the appellant as her assailant in court. DNA evidence suggests that the appellant was the source of the semen obtained from the victim's vagina. Ms. A immediately called Petty Officer (PO) Alger after the assailant left. She testified that she had earlier had a sexual relationship with PO Alger, but she was not dating him at the time of this incident. When PO Alger arrived, Ms. A told him she had been "raped." *Id*. at 753.

Around 0500 on 20 March 1999, PO Alger arrived home at his off base apartment in Bahrain. He had just gotten off duty from the Naval Support Activity Southwest Asia where he worked as a patrolman with base security. Shortly after arriving home, he received a phone call from Ms. A and she asked him to come to her apartment. Ms. A, PO Alger, and the appellant all lived in the same off base apartment complex. When he arrived he found Ms. A lying on the floor by the foot of her bed. He noticed that her lip was bleeding and that her underwear was ripped and laying between the bed and the kitchen. Ms. A was crying and shaking. She told him that she had been raped by, "the fat guy, the blonde guy upstairs." Record at 927. Previously PO Alger had shown Ms. A the apartment of an individual who lived upstairs, and he asked her if it was the person whose apartment they had visited. Ms. A indicated that it was. *Id*. at 929. PO Alger sought clarification that it was the bigger guy of the two men who lived in the apartment they had visited, and she confirmed that it was the bigger one with blonde hair. The other individual was

shorter and had dark hair. Ms. A confirmed it was "the fat guy, the blonde guy." *Id*. At that point PO Alger left Ms. A's apartment.

The appellant lived on the fourth floor, but PO Alger saw him trying to enter the apartment that would have corresponded with the appellant's apartment, but on the third floor. When PO Alger caught up with the appellant he was "sweating [and h]is hair was messed up, . . . and he seemed a little dazed." *Id*. at 930. PO Alger pushed the appellant into the doors of the closed elevator and told the appellant that he needed to come with him. PO Alger walked the appellant back down to Ms. A's apartment. PO Alger then opened her door wide enough so that both his head and the appellant's head were sticking through the door, and he asked her "is this the guy who was in your room." *Id*. at 931. Ms. A began to shake and pointed, saying, "Yes that's him." Upon further questioning by PO Alger, Ms. A again identified the appellant and became more "ecstatic" and "nervous," and began "yelling out to him." *Id*. at 932. Ms. A testified that when PO Alger brought the appellant to her room she had no doubt at all that the appellant was the person who had attacked her. *Id*. at 756. When PO Alger's and the appellant's heads were no longer in the doorway, the appellant said to PO Alger, "What is she talking about? What does she mean? I just got here." *Id*. at 932.

PO Alger also testified as a Government witness during the motion phase of the trial concerning a motion to suppress. He testified that at the time he detained the appellant he was not on duty and not acting under any military orders. It is apparent from the evidence that PO Alger and Ms. A were close friends. He did testify, however, that he felt it was his duty to detain the appellant because both he and the appellant were security personnel. *Id*. at 233. After Ms. A identified the appellant, PO Alger took him to PO Alger's apartment on the 5th floor of the apartment complex. PO Alger then called PO Vose, at base security, who dispatched two patrolmen to the scene. PO Vose also instructed PO Alger to contact the Bahrain Public Security (BPS), the local police. While waiting for the BPS to arrive, PO Alger reminded the appellant that the Bahraini police had roughed up a Marine who had been picked up for breaking into a house, so the appellant needed "to be cool" with the Bahraini police. *Id*. at 239.

Once the officers from the BPS arrived at the apartment they controlled the investigation. When Special Agent (SA) Kenworthy from the Naval Criminal Investigative Service (NCIS) arrived, the BPS would not allow him to enter Ms. A's apartment. When he saw the appellant in PO Alger's apartment, a BPS officer was already there. SA Kenworthy testified that he did not have custody of the accused and did not feel like he was involved in the investigation at that point. He knew he had no jurisdiction off base. He did not try to stop BPS from taking the accused to the Al-Hoora police station. When SA Kenworthy got to the police station, two base investigators were standing in the hallway

waiting until the accused was processed by the BPS. SA Kenworthy did not think the U.S. was involved in any way in the investigation at that point. It is standard procedure to wait until BPS is done with their investigation.

While the appellant was detained by the BPS, they took two statements from him. Prior to taking the statements, BPS authorities did not advise the appellant of his Article 31, UCMJ, rights. The statements were admitted as Prosecution Exhibits 4 and 5. In those statements the appellant denied having been to Ms. A's apartment or having done anything to her. He did admit that he had returned to the apartment around 0330 that morning and to having drank a bottle of rum the night before. The BPS took a sample of the appellant's blood. The BPS considered the appellant their prisoner until they released him to U.S. authorities. Ms. A was also interviewed at the BPS station. During her interview a U.S Navy female petty officer took her statement.

Motion to Suppress

At trial the appellant litigated a motion to suppress. Appellate Exhibit III. By this motion he sought to suppress "all evidence derived from [the appellant's] illegal apprehension. This includes all statements made by the accused to [PO] Alger . . . and Colonel V. B. Walmsley, Bahrain Public Security. . . ." AE III at 1. Litigation of this motion also included the question of whether the appellant had been subjected to "an unduly suggestive lineup. . . ." *Id*. at 6. The military judge's decision is central to the appellant's Assignment's of Error I, II, III, and IV, and Supplemental Assignments of Error I, III, and IV.

When the military judge ruled on the motion, he decided that most of the challenged evidence was admissible. The military judge ruled that appellant's apprehension was not unlawful. He also ruled that the identification of the accused by the victim, the accused’s statement to the Bahraini officials, the blood samples and clothing and items seized from the accused’s apartment were not derivative of the apprehension. The military judge made extensive findings of fact with respect to the suppression motion. Those findings are set forth in Appellate Exhibit CXXIII. Additionally, the military judge explained his decision on the record. Record at 542-48.

The military judge found that the appellant's apprehension by PO Alger did not violate RULE FOR COURTS-MARTIAL 302(e)(2)(C)(i), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). Even if the apprehension was illegal, the military judge found, by a preponderance of the evidence, that the evidence subsequently obtained would have been inevitably obtained lawfully. In making this ruling, the military judge considered Ms. A's certainty as to the identity of the perpetrator.

The military judge found the circumstances surrounding PO Alger's bringing the appellant to the Ms. A's room to be unnecessarily suggestive. He then properly applied MILITARY RULE OF EVIDENCE 321(b)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.) and found that the circumstances were not so suggestive as to create a substantial likelihood of misidentification. *See United States v. Rhodes*, 42 M.J. 287, 290 (C.A.A.F. 1995). The military judge noted that Ms. A had seen the accused several times before and that she distinguished the accused's physical characteristics from that of his roommate. Thus, the military judge found that it was clear that Ms. A was identifying the appellant.

Concerning statements that the appellant made to PO Alger, the military judge held that because PO Alger was subject to the UCMJ, he was required to provide the appellant with his Article 31(b), UCMJ, rights before asking the appellant questions which could have reasonably elicited an incriminating response. Accordingly, the military judge excluded some statements that the appellant made to PO Alger. The military judge found that other statements made by the appellant to PO Alger, however, were not the product of coercion, unlawful command influence, or unlawful inducement, and were admissible under MIL.R.EVID. 304(b)(1).

Concerning the appellant's detention and investigation by the BPS, the military judge found that U.S. military authorities did not instigate or materially participate in the Bahraini investigation. He also found that the Bahraini investigation was independent and their investigations routinely required taking a statement from the suspect and the victim. Under their procedures, the BPS routinely take evidence from a suspect, including breath samples, blood samples, and clothing. The military judge found that the appellant's statement made to the Bahraini authorities was voluntary and that the appellant had voluntarily provided a blood sample to them. The military judge found no evidence suggesting that the appellant was coerced, unlawfully induced, or subjected to unlawful influence. Rights warnings were not required.

The military judge found no evidence that the appellant was turned over to the BPS in bad faith or in knowing contravention of any regulation, memorandum or understanding, treaty, or convention, or that it was done as a quest for evidence by the U.S. Navy. The military judge also found that the appellant's detention by the BPS was consistent with Bahraini procedures and they did so with the tacit permission of U.S. Navy law enforcement authorities. Further, the military judge properly found that the appellant had no standing to invoke any international conventions, as a means of suppressing evidence. *See United States v. Singh*, 59 M.J. 724 (N.M.Ct.Crim.App. 2004). Even if the accused had standing, the military judge found that the evidence later obtained by NCIS, based on a search authorization, was not derivative and would have been inevitably and lawfully obtained.

> We review a military judge's evidentiary ruling for abuse of discretion. The military judge's "findings of fact will not be overturned unless they are clearly erroneous or unsupported by the record." We review conclusions of law *de novo*. *United States v. Reister*, 44 M.J. 409, 413 ([C.A.A.F.] 1996). As [our superior court] said in *United States v. Sullivan*, 42 M.J. 360, 363 ([C.A.A.F] 1995), "We will reverse for an abuse of discretion if the military judge's findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law."

United States v. Owens, 51 M.J. 204, 209 (C.A.A.F. 1999). This is a strict standard requiring more than a mere difference of opinion. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). In short a military judge's admission of evidence will be reversed only when his actions are "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)(quoting *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)). Additionally, in conducting our review, we are required to consider the evidence "in the light most favorable" to the "prevailing party." *Reister*, 44 M.J.at 413. This same standard of review applies to virtually all evidentiary rulings, and certainly all those at issue in this case. For example, abuse of discretion is applied when reviewing a military judge's decision to allow evidence of pretrial identification. Furthermore, "[a]n appellate court reviews the denial of a motion to suppress a confession under an abuse of discretion standard." *United States v. Simpson*, 54 M.J. 281, 283 (C.A.A.F. 2000)(citing *United States v. Young*, 49 M.J. 265, 266-67 (C.A.A.F. 1998)).

Based upon our review of the record, we conclude that the essential findings of fact made by the military judge are not clearly erroneous and are supported by the record. Accordingly, we adopt them as our own. Additionally, we conclude that the military judge did not abuse his discretion when he denied, with minor exceptions, the appellant's motion to suppress.

We specifically hold that the military judge did not err in admitting evidence of Ms. A's identification of the appellant when PO Alger brought the appellant to her on the morning of the incident. *Rhodes*, 42 M.J. at 287. The military judge did not err in admitting the appellant's statement made to PO Alger immediately after Ms. A had identified him as her assailant because his statement was not made in response to any question posed to him by PO Alger. *See United States v. Ruiz*, 54 M.J. 138 (C.A.A.F. 2000). Applying a de novo review, we have concluded that PO Alger was not required to provide the appellant with Article 31, UCMJ, warnings at that time.

The evidence developed by the BPS was admissible against the appellant because the BPS was conducting an independent

investigation of a crime that occurred in Bahrain and they were not acting as agents for the United States. *See United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992); *United States v. Swift*, 38 C.M.R. 25 (C.M.A. 1967). Finally, the appellant has no standing to raise international conventions or agreements as a bar to either his prosecution or as an independent basis upon which to suppress evidence. *Singh*, 59 M.J. at 724; *see also*, *Sorto v. State*, No. AP-74,836, 2005 Tex. Crim. App. LEXIS 1622 (Tex. Crim. App. October 5, 2005).

Even if we were to conclude that the military judge erred in his evidentiary rulings, we would subject that error to an analysis for prejudice. The test for prejudice is whether the findings of guilt were substantially swayed by the error. The appellant has the initial burden of showing the error is of such a nature that its "natural effect" is prejudicial, and the Government then must show that the error was harmless. *United States v. Rhodes*, 61 M.J. 445, slip op. at 21 (C.A.A.F. 2005).

"We evaluate prejudice from an erroneous evidentiary ruling by weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kerr,* 51 M.J. 401, 405 (C.A.A.F. 1999); *United States v. Weeks*, 20 M.J. 22, 25 (C.M.A. 1985). Applying this four-prong test to the facts of this case, even if any of the challenged evidentiary rulings were erroneous, we are convinced that the error would have been harmless.

Sufficiency of the Evidence

In his sixth assignment of error the appellant argues that the evidence is factually insufficient to support his conviction. The thrust of his argument is that if the appellant engaged in sexual relations with Ms. A, the evidence of record does not establish beyond a reasonable doubt that the relations were accomplished by the appellant's force and without Ms. A's consent. In making his argument the appellant points to inconsistencies in Ms. A's testimony, her physical condition after the incident, and the physical condition of the room. Appellant's Brief of 30 Apr 2003 at 21-25. Although the assignment of error is limited to the issue of factual sufficiency, we are also required to review for legal sufficiency.

The test for legal sufficiency is well-known. It requires this court to review the evidence in the light most favorable to the Government. In doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). That standard is met in this case.

The test for factual sufficiency is more favorable to the appellant. It requires this court to be convinced of the appellant's guilt beyond a reasonable doubt, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses. *Turner*, 25 M.J. at 325. Proof beyond a 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)(citing *United States v. Steward*, 18 M.J. 506 (A.F.C.M.R. 1984)). "[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). So too may we. In resolving the question of factual sufficiency, we have carefully reviewed the record of trial, but have given no deference to the factual determinations made at the trial level. *See United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Applying these tests, we conclude that the Government presented credible evidence that established beyond a reasonable doubt that the appellant raped Ms. A in her apartment during the early morning hours of 20 March 1999. We find the evidence compelling. The victim made a fresh complaint and described her assailant within minutes after she was raped. She then identified the appellant when he was brought to her apartment shortly thereafter. Ms. A testified in detail concerning what the appellant had done to her. DNA testing essentially corroborated the fact that the appellant had engaged in sexual intercourse with Ms. A. While recognizing some inconsistencies in Ms. A's testimony when compared to some of the physical conditions in her room after the attack, and her minor injuries, we find those inconsistencies to be insignificant. We find no merit in this assignment of error.

Conditions of Pretrial Restriction and Post-Trial Confinement

At trial the appellant sought sentencing credit due to the conditions of his pretrial restriction and for illegal pretrial punishment. He again raises that issue. Additionally, he seeks credit due to the alleged conditions of his post-trial confinement. The circumstances concerning the conditions of the appellant's pretrial restriction were litigated at trial. Following testimony on this issue, the military judge denied the appellant's motion for credit. Record at 1464. Prior to authentication, the military judge attached his findings of fact concerning this issue. Appellate Exhibit CXXIV. Those factual findings are not to be disturbed unless they are clearly erroneous. *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000). We, however, apply a *de novo* standard of review concerning the question of whether the conditions of the pretrial restriction were so severe as to have equated to pretrial confinement or whether it constituted pretrial punishment. *Id.*

We have reviewed the findings of fact by the military judge and find that the record supports them. Since they are not clearly erroneous, we adopt them as our own. The question of whether the conditions of restriction are severe enough to make the restriction tantamount to confinement is determined by the totality of the circumstances. *Washington v. Greenwald*, 20 M.J. 699, 700 (A.C.M.R. 1985); *United States v. Smith*, 20 M.J. 528, 530 (A.C.M.R. 1985). The totality of the circumstances includes consideration of factors such as the nature of the restraint (physical or moral), the area of the restraint (limited to a room, a barracks, a base), type of duties performed, extent of muster requirements, presence and nature of escorts, telephone and visitation privileges, access and use of civilian clothing, and access to religious, recreational, educational, or other support services. *Smith,* 20 M.J. at 531-32. If the restriction actually imposed was equivalent to pretrial confinement, the same day-for-day administrative sentencing credit required for pretrial confinement by *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984), is required. *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985).

Following the appellant's apprehension, he was placed on pretrial restriction on 20 March 1999 and remained in that status until 26 April 1999. When he was removed from pretrial restriction he was placed on the liberty risk program, where he remained until his court-martial. While on pretrial restriction, the appellant was required to muster five times a day. Although he was restricted to the base, the appellant was not allowed to go to: the base theater, the Desert Dome patio, the video suite, the recreation center--except the library, the bowling alley, or the Internet Café. Once placed on the liberty risk program, the appellant was free to go anywhere on base and only had to muster twice a day -- normal musters for all personnel.

While on restriction, the appellant was moved to a special barracks for restricted personnel, including those serving a punitive restriction, and he was required to be in his room from 2200 until 0500. He also received extra duties after normal working hours. After the appellant was placed on the liberty risk program, he continued to reside at the same barracks, and was also required to perform extra duties. Those duties included "[p]ainting, sweeping, policing the grounds, pretty much whatever they wanted me to do." Record at 1406. The appellant performed these extra duties along with others who were serving restriction as punishment imposed at an Article 15, UCMJ, proceeding. He was also required to wear the same type dungaree uniform as those individuals were required to wear. Only individuals on a restricted status were required to wear the dungaree uniform. During this entire period of time, the appellant was escorted when he left the base.

Additionally, the appellant identified an e-mail sent by the Security Officer on 20 March 99. Appellate Exhibit CXVIII. The email states that the appellant had been accused of the "violent

rape of a Lebanese woman." It also requested anyone with information about the appellant's activities on the night of the rape to provide that information to the Command Investigations Office. Finally, while the appellant was on the liberty risk program, he was allowed to return to the United States on two occasions. The appellant was not placed on any restrictions while back in the United States.

The Government presented evidence explaining that the purpose of the liberty risk program is to promote and maintain good relations with the host nation. It also presented an affidavit from the officer who placed the appellant on restriction and the liberty risk program. Appellate Exhibit CXXI. In that affidavit the officer explained that she placed the appellant on restriction due to the violent nature of the offense, the safety of the accused and others, and the uncertainty of whether he was a flight risk. The appellant was removed from restriction and placed on the liberty risk program on 26 April 1999 because it did not appear he was a danger to himself or others or that he was a flight risk. The appellant was placed on liberty risk to minimize the accused's interaction with the host nation.

In reviewing the totality of the circumstances concerning the appellant's pretrial restriction and then his assignment to the liberty risk program, we concur with the conclusion of the military judge that the conditions were not tantamount to confinement. We next consider *de novo* whether the nature of the pretrial restriction resulted in pretrial punishment prohibited by Article 13, UCMJ. Applying the four considerations outlined in *Smith*, 53 M.J. at 168 to the facts and circumstances of this case, we find no intent on the part of the command to punish the appellant with respect to the e-mail sent by the Security Officer. We however do find a violation of Article 13, UCMJ, with respect to requiring the appellant to perform extra duties for the 282 days the appellant was on pretrial restriction and the liberty risk program.

It is incumbent on an appellant to present evidence of illegal pretrial punishment. *See United States v. Jungbluth*, 48 M.J. 953, 958 (N.M.Ct.Crim.App. 1998). The appellant presented evidence that was not rebutted that he was required to perform extra duties while restricted and while on the liberty risk program and that he performed these duties alongside individuals who were performing such duties as punishment meted out at an Article 15, UCMJ, proceeding. Article 13, UCMJ, prohibits pretrial punishment or conditions that are "more rigorous" than necessary to ensure an accused's presence for trial. We need not determine whether the appellant's command intended to punish the appellant by assigning him extra duties. Such duties clearly were not required to ensure the appellant's presence for trial. As such we will grant the appellant 1 day sentencing credit for every 5 days he was either on pretrial restriction or the liberty risk program, deducting the period 4 October - 11 November 1999

and 10 days[1] over the Christmas holidays, periods of time the appellant was back in the United States and not under any form of restriction.

With respect to the appellant's allegations of cruel and unusual punishment following his conviction, we decline to grant relief. We have considered his extensive submission to this court concerning his allegations. We also note that the appellant claims to have addressed some of these same issues by using the Inmate Request Form, DD Form 510, and apparently by writing to the "Inspector General." The appellant has not, however, provided us copies of what he sent to the Inspector General. While the appellant has raised some serious allegations, such as sexual assault by members of the corrections staff at the U.S. Army Disciplinary Barracks, he has failed to demonstrate that he has addressed that issue to the Inspector General or that he has exhausted administrative remedies. Before being entitled to relief based on a claim of cruel and unusual punishment, an appellant must demonstrate, absent some unusual or egregious circumstance, that he has exhausted all administrative remedies available, including the prisoner grievance system and the complaint process under Article 138, UCMJ. *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001). *See United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997). The appellant has failed to make such a showing in this case.

Conclusion

We have considered all of the remaining assignments of error, as well as all issues raised by the appellant pursuant to *Grostefon*, 12 M.J. at 431. We find no merit in those remaining issues. The findings and the sentence, as approved by the convening authority, are affirmed. The appellant is credited with 57 days of confinement credit for the extra duties he was required to perform while awaiting trial.

Senior Judge PRICE and Judge SCOVEL concur.

For the Court

R.H. TROIDL
Clerk of Court

[1] Ten days is an approximation on our part, because the record does not specifically state how long the appellant was home on Christmas leave.