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

BEFORE

Charles Wm. DORMAN **D.A. WAGNER** **R.W. REDCLIFF**

UNITED STATES

v.

Linwood E. SHANNON, Jr.
Private First Class (E-2), U.S. Marine Corps

NMCCA 9900729 Decided 31 March 2005

Sentence adjudged 20 February 1998. Military Judge: R.E. Hilton. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Aircraft Wing, Marine Corps Air Station, Cherry Point, NC.

CAPT CURTIS ALLEN, USMC, Appellate Defense Counsel
LT MARCUS N. FULTON, JAGC, USN, Appellate Defense Counsel
LT DEBORAH MAYER, JAGC, USN, Appellate Government Counsel

REDCLIFF, Judge:

Contrary to his pleas, the appellant was convicted at a general court-martial by officer and enlisted members of conspiracy to commit arson and arson, in violation of Articles 81 and 126, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 926. The appellant was sentenced to a dishonorable discharge (DD), forfeiture of all pay and allowances, reduction to pay grade E-1, and confinement for 3 years. The convening authority approved the sentence as adjudged, but suspended confinement in excess of 22 months as an act of clemency.

In his initial brief, the appellant claims that (1) he was denied his Fifth and Sixth Amendment rights to a speedy trial, (2) his incriminating statement to a Government investigator was involuntary, and (3) the Government failed to disclose the existence of two eyewitnesses. In a supplemental brief, the appellant extends the non-disclosure issue by contending that (4) the military judge applied the incorrect standard in rejecting the appellant's post-trial request to set aside the findings, (5) the military judge abused his discretion in rejecting the

appellant's post-trial motion for a new trial, and (6) the appellant's trial defense counsel was ineffective by failing to discover the existence of the two eyewitnesses.

After considering the record of trial, the appellant's assignments of error, and the Government's response, 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. *See* Arts. 59(a) and 66(c), UCMJ.

Speedy Trial

The appellant asserts that the military judge erred in failing to grant a defense motion to dismiss for denial of his right to a speedy trial, pursuant to the Fifth and Sixth Amendments. We agree with the military judge that the appellant was not denied his right to a speedy trial.

The United States Constitution guarantees all persons the right to a "speedy and public trial." U.S. CONST. amend. VI. Additionally, the Due Process Clause of the Fifth Amendment ensures accused servicemembers the right to a speedy trial. A military judge's conclusion of whether an accused received a speedy trial is a legal question that is reviewed *de novo. United States v. Cooper*, 58 M.J. 54, 57 (C.A.A.F. 2003); *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999). "The military judge's findings of fact are given 'substantial deference and will be reversed only for clear error.'" *Doty*, 51 M.J. at 465.

Having examined the record of trial, including the extensively litigated pretrial motion, we hold that the military judge's findings of fact are fully supported by the record. Appellate Exhibit XII. Key among these findings, we note that the appellant was not under any form of pretrial restraint and did not request a speedy resolution of the allegations against him. The appellant was identified as a suspect 8 days following the arson. The Article 32, UCMJ, investigation was completed less than 6 months after the arson, but charges were not preferred against the appellant for almost 6 months afterwards. This delay was due, in part, to the absence of the Government's chief investigator, Chief Warrant Officer 2 (CWO2) "P", who was deployed with an operational unit. The appellant was arraigned 92 days after the charges were preferred.

We specifically concur with the military judge's finding that Government personnel worked continuously to collect and analyze crime-scene evidence, to identify the person(s) responsible for the arson, and to commence prosecution against the appellant. We also concur with the finding by the military judge that the appellant failed to demonstrate any prejudice arising from the delay.

Sixth Amendment protections extend to courts-martial and are triggered upon preferral of charges or the imposition of pre-

trial restraint. *See United States v. Vogan,* 35 M.J. 32, 33 (C.M.A. 1992). In determining whether the speedy trial requirements of the Sixth Amendment are satisfied following the preferral of charge, we are required to consider: (1) the length of the delay; (2) the reasons for the delay; (3) the assertion of the right to speedy trial; and (4) the existence of prejudice. *See United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999) (quoting *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). We also consider such factors as: (1) did the appellant enter pleas of guilty, and if so, was it pursuant to a pretrial agreement; (2) was credit awarded for pretrial confinement on the sentence; (3) was the Government guilty of bad faith in creating the delay; and (4) did the appellant suffer any prejudice to the preparation of his case as a result of the delay. *Id*.

Here, the appellant was neither restrained nor charged during the 1-year period following the arson. He was arraigned promptly, 92 days after the preferral of charges, and the appellant does not contend, nor do we find, that the Government acted in bad faith or overreached in delaying the preferral of charges against him. Given the minimal delay between preferral and arraignment, the lack of demonstrated prejudice, and the absence of any request for speedy trial by the appellant, we find no violation of the Sixth Amendment in applying the *Barker v. Wingo* and *Birge* factors.

Turning to the appellant's Fifth Amendment claim regarding the 1-year long pre-preferral delay, we note that to prevail he must demonstrate "egregious or intentional tactical delay and actual prejudice." *United States v. Reed,* 41 M.J. 449, 452 (C.A.A.F. 1995). Here, the appellant has failed to meet either requirement. There has been no showing of egregious delay or bad faith on the Government's part. There is absolutely no evidence of record to suggest that the Government delayed in bringing charges against the appellant to gain some unspecified tactical advantage or to impair the appellant from presenting an effective defense. *See Vogan,* 35 M.J. at 34. In fact, about half of the pre-preferral delay was related to case investigation and preparation, with the remaining delay attributed to the unavailability of the Government's principal investigator who was deployed in support of operational forces overseas. We do not find such a delay to be unduly excessive.

Assuming *arguendo* that the delay in preferral of charges was excessive, we find no actual prejudice to the appellant. Simply put, there is no evidence of record to suggest that the defense was inhibited by the delay, and we reject as speculative the appellant's unsupported assertion on appeal that he was unable "to establish alibi witnesses" due to the delay and that he might have been able to independently discover two eye-witnesses that the government investigators failed to disclose, but for the complained of delay. Finding that the appellant has not demonstrated actual prejudice to the preparation of his case arising from the delay in preferring charges against him, we

reject his claim under the Fifth Amendment. Thus, we conclude that the appellant's constitutional rights to a speedy trial were not violated. *See Barker*, 407 U.S. 514; *Vogan,* 35 M.J. at 33-34; *United States v. McGraner,* 13 M.J. 408, 413-14 (C.M.A. 1982). Whether measured against the requirements of the Fifth or Sixth Amendments, this assigned error has no merit.

Suppression of Oral Admissions

In his second assignment of error, the appellant contends that the military judge erred in failing to suppress the appellant's oral admissions provided to the Government's lead investigator. The appellant asserts that his statements should have been suppressed because they were involuntary. More fully, the appellant contends that his admissions were the product of coercion because the Naval Criminal Investigative Service (NCIS) special agent, CWO2 P, implied that the appellant would be jailed immediately if he did not give a statement, thereby inducing him to confess against his will. We disagree.

The voluntariness of the appellant's pretrial admissions to CWO2 P was raised at trial and litigated fully before the military judge. Counsel then argued concerning the suppression motion and the military judge denied the motion after stating his findings of fact on the record. Record at 120-22; Appellate Exhibit XIII. Notably, the appellant does not attack the military judge’s application of the law.

“When an accused challenges the voluntariness of his pretrial statement, the Government bears the burden of proof.” *United States v. Evans*, 55 M.J. 732, 743 (N.M.Ct.Crim.App. 2001). “That burden requires proof by a preponderance of the evidence that the statement was made voluntarily.” *Id*. (citing *United States v. Cottrill,* 45 M.J. 485, 488 (C.A.A.F. 1997)). The question of whether a pretrial statement by an accused is voluntary is a question of law which we review *de novo*. *United States v. Bubonics,* 45 M.J. 93, 94 (C.A.A.F. 1996). This requires an assessment of the totality of all the circumstances surrounding the production of the appellant's statement. *Bubonics,* 45 M.J. at 95 (citing *Schneckloth v. Bustamonte,* 412 U.S. 218, 226 (1973)). However, the military judge's ruling in denying the appellant's motion to suppress his confession at trial is reviewed by this court for abuse of discretion. *United States v. Rodriguez,* 60 M.J. 239, 246 (C.A.A.F. 2004)(citing *United States v. Monroe,* 52 M.J. 326, 330 (C.A.A.F. 2000)).

In conducting our review, this court reviews factfinding by the trial judge under a clearly erroneous standard. *United States v. Ayala,* 43 M.J. 296, 298 (C.A.A.F. 1995). Additionally, when reviewing a military judge's ruling on a motion to suppress, we consider the evidence "in the light most favorable to" the prevailing party. *United States v. Reister,* 44 M.J. 409, 413 (C.A.A.F. 1996)(citations omitted).

In this case, the appellant asserts the special agent conducting his interview told him if he did not cooperate he would go to the brig. At trial, the court heard evidence on this motion from CWO2 P, the agent who took the appellant's statement, the appellant, as well as another Government agent, Master Sergeant (MSgt) "T", who was involved in transporting the appellant back to his barracks after the interview. CWO2 P testified that he did not make any threats and did not have any authority to determine pretrial restraint over, or the ultimate disposition of, the appellant.

The appellant testified that he signed and acknowledged his Article 31(b), UCMJ, rights, and that he did not ask for an attorney. Although the appellant believes CWO2 P made assertions to him concerning incarceration at the brig, he also testified that he read, corrected, and understood his rights waiver and that he made an oral statement to CWO2 P. The military judge made additional pertinent findings of fact, supported by the record, to include: (1) that CWO2 P did not threaten to confine the appellant, or make other threats before, during, or after the interview; (2) that the appellant waived his rights and made oral statements incriminating himself; (3) that the appellant did not invoke his right to remain silent, consult with an attorney, or terminate the interview; (4) that the appellant declined to make a written statement at the conclusion of the interview, asserting that he wanted to think about it further; and, (5) that the appellant was contacted at his barracks afterwards and declined CWO2 P's request to sign a written statement, and instead, the next day, orally recanted to CWO2 P portions of his initial incriminating statement. Record at 120-22.

The appellant has not shown the military judge's findings were clearly erroneous. To the contrary, we are convinced, as was the military judge, that the admissions made by the appellant were voluntary and were not obtained in violation of Article 31b, UCMJ. Although we are not bound by the findings of fact reached by the military judge, *see Bubonics,* 45 M.J. at 96 n.3, we find that in this case the military judge's findings of fact are right on the mark and adopt them as our own. We expressly find that the appellant's self-serving assertions of coercion by CWO2 P are not credible given the appellant's initial explanation for his recantation, namely, that he was fearful of his co-actor, Ms. "S", and an unknown male caller. This directly contradicts the appellant's assertion at the suppression hearing that he was scared during the interview with CWO2 P. Record at 58, 102. Even accepting the appellant's version of the facts as true, we would not find his statement was coerced or the product of an overborne will. Despite this unspecified fear, the appellant conceded under cross-examination that CWO2 P did not "force" him to say anything. Record at 102. Given the appellant's facially inconsistent explanations, coupled with his statement that CWO2 P did not force him to say anything during the interview, we specifically conclude that the evidence, as a whole, establishes that the appellant's statement was voluntary. Thus, we reject

this assignment of error and conclude that the military judge did not abuse his discretion in denying the appellant's motion to suppress his pretrial statement.

"Newly Discovered" Evidence

The appellant raises the issue of the Government's alleged failure to provide discovery of the existence of two potentially exculpatory witnesses as the basis for four interrelated assignments of error. At three post-trial Article 39(a), UCMJ, hearings, a substitute military judge explored this matter fully, receiving numerous appellate exhibits and taking extensive testimony from one of the purported witnesses and the Government's lead investigator. After considering the evidence and arguments of counsel, the military judge entered detailed findings and denied the appellant's motion to set aside the conviction or, alternately, to order a new trial. See Record at 434-532; Appellate Exhibits XLIII-XLIX. These findings are supported in the record and we adopt them as our own. As explained further below, we conclude that the appellant has not established a basis to afford him the relief requested.

Pertinent Facts

This case arose from the scorn of a jilted girlfriend. In October of 1996, Corporal (Cpl) "G" broke-off a dating relationship with Ms. S. Shortly afterwards, Ms. S discovered Cpl G with another woman, became enraged, and threatened Cpl G. She then falsely reported to military police that Cpl G had assaulted her, and he was taken into custody. On the following day, after Cpl G was released from custody, Ms. S falsely reported that he had stolen money from her. Shortly afterwards, Ms. S saw Cpl G's truck parked on base and broke its windshield. She then went to the barracks, called Cpl G and told him that she "got" his truck, that his car was next, and then his life. After making the call, Ms. S met the appellant and two other Marines. The appellant called a cab for her and gave Ms. S a piece of paper containing his nickname, "Big L," and his phone number. The next morning, Ms. S spoke to her cousin, who suggested she "bomb" Cpl G's car, using a gasoline-filled bottle and rag. On the following day, Cpl G's car was set afire and destroyed. Five days later, Ms. S was questioned by CWO2 P, confessed to destroying Cpl G's car, and implicated the appellant and his roommate (Private First Class (PFC) “R”), asserting that they actually set fire to the car while she watched from a location nearby.

After questioning Ms. S, CWO2 P interrogated the appellant. According to CWO2 P, the appellant admitted culpability and drew a diagram of the crime scene. The appellant also admitted culpability while being transported back to his unit by CWO2 P and MSgt T. Earlier, the appellant had boasted about the incident to his friend, PFC "B".

Testifying in his own defense, the appellant denied burning Cpl G's car and denied telling CWO2 P that he had done so. He did concede meeting Ms. S, calling a cab for her, and giving her his phone number in hopes of getting to know her better.

Aside from Ms. S, the appellant contends that there were no other eyewitnesses to the events immediately before or after Cpl G's car was set afire--except for Private (Pvt) "S" and Ms. "H," who were "discovered" by the defense following the appellant's trial. Both purported "eye-witnesses" assert that they spoke to CWO2 P at the scene of the arson, although CWO2 P testified that he interviewed only Ms. H. In a sworn statement taken by another investigator and later discovered by the appellant, Ms. H indicated that she saw a black woman at the scene immediately before the car was burned. Ms. S, the appellant's co-actor, was African-American. However, Ms. H's description of the female she observed did not match the description of Ms. S, who had confessed to taking part in the arson along with the appellant and another Marine. Notably, during inspection of the crime scene, a ring belonging to Ms. S was discovered under the burned car. Additionally, Ms. H's description of the "getaway" car, a black Mustang, was inconsistent with statements admitting culpability provided to CWO2 P by Ms. S and by the appellant. Ms. H's statement was recorded in CWO2 P's notes.

Testifying at an Article 39(a), UCMJ, post-trial hearing, Pvt S stated that he told CWO2 P that he saw a black woman bending over near the back of Cpl G's car immediately before it burned. However, CWO2 P testified that he never interviewed Pvt S and had no record of meeting him at the crime scene. Additionally, Pvt S conceded that he met the appellant while incarcerated following conviction at general court-martial for, among other offenses, obstruction of justice and larceny.

Purported Brady[1] Violation

Article 46, UCMJ, provides: "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." The President has promulgated RULES FOR COURTS-MARTIAL 701 and 703, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), to implement Article 46, UCMJ. *United States v. Morris*, 52 M.J. 193, 197 (C.A.A.F. 1999).

R.C.M. 701(a)(6) requires the trial counsel to disclose to the defense the existence of evidence known to the trial counsel which tends to negate the guilt of an offense charged, reduces the degree of guilt of the accused to an offense charged, or reduces potential punishment. In making determinations of this issue, our superior court provided that:

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

> In *United States v. Eshalomi*, 23 MJ 12 ([C.M.A.] 1986), this Court set out the standard for reviewing the prosecution's nondisclosure of evidence. Where the defense has submitted "a general request for exculpatory evidence or information" but no request for any "particular item" of evidence or information, failure to disclose evidence "is reversible error only 'if the omitted evidence creates a reasonable doubt that did not otherwise exist.'" *Id.* at 22, quoting [*United States v.*] *Agurs*, 427 U.S. [97,] 112 [1976].
>
> An appellate court reviews a military judge's decision on a request for discovery for abuse of discretion. Because the determination of materiality is a question of law, we review the military judge's ruling *de novo*. *United States v. Charles*, 40 MJ 414, 417 (CMA 1994).

Morris, 52 M.J. at 197-98. If this Court determines that the trial counsel's nondisclosure or suppression of evidence was in error, such error must be found to be harmless beyond a reasonable doubt before we may affirm the appellant's conviction and sentence. *United States v. Stone*, 40 M.J. 420, 421 (C.M.A 1994).

The two items of evidence that the appellant suggests in his brief that the Government failed to disclose are: 1) a statement made by Ms. H to CWO2 P and another investigator; and, 2) a statement of Pvt S.

With regard to these statements, we do not believe the trial counsel failed to provide mandated discovery. As noted in the findings of the military judge, the existence of Ms. H. as a prospective witness was recorded by CWO2 P and annotated in CWO2 P's case notes that were turned over to the trial defense counsel. And Ms. H's statement to the other NCIS investigator was readily available had the trial defense counsel followed-up on the case notes. Next, there was no record of any statement being provided by Pvt S to CWO2 P or any other investigator, and CWO2 P's direct testimony refutes the taking of such a statement. Based upon these facts, we do not believe that the prosecution failed to provide required disclosure to the defense in violation of the principles enunciated by the *Brady* Court or the requirements of Article 46, UCMJ, or R.C.M. 701. And for the reasons discussed below, we conclude that the proffered testimony of Ms. H and Pvt S fails to create a reasonable doubt that did not otherwise exist. Thus, we find that, even if there was error in failing to disclose the statements of these purported witnesses, any error was harmless beyond a reasonable doubt.

Petition for a New Trial

Article 73, UCMJ, authorizes a petition for a new trial "on the grounds of newly discovered evidence or fraud on the court." In addition to Article 73, UCMJ, R.C.M. 1210(f) provides further guidelines for when a new trial can be granted. Where a new trial is requested on the basis of newly discovered evidence, the rule provides that a new trial shall **not** be granted unless the petition for a new trial shows that:

> (A) The evidence was discovered after the trial;
>
> (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
>
> (C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

R.C.M. 1210(f)(2)(emphasis added); *United States v. Gray*, 51 M.J. 1, 12 (C.A.A.F. 1999). Considering these requirements, we decline to grant relief.

In *United States v. Humpherys*, 57 M.J. 83, 96 (C.A.A.F. 2002), our superior court stated that:

> Petitions for a new trial "are generally disfavored." *United States v. Williams*, 37 M.J. 352, 356 (CMA 1993). Granting a petition for a new trial rests "within the sound discretion of the authority considering . . . [that] petition." *United States v. Bacon*, 12 M.J. 489, 492 (CMA 1982)(quoting *United States v. Lebron*, 46 C.M.R. 1062, 1066 (AFCMR 1973)).

Thus, petitions for a new trial should be granted "`only if a manifest injustice would result absent a new trial . . . based on proffered newly discovered evidence.'" *United States v. Brooks*, 49 M.J. 64, 68 (C.A.A.F. 1998)(quoting *Williams*, 37 M.J. at 356). Additionally, this Court has the "`prerogative' of weighing `testimony at trial against the' post-trial evidence `to determine which is credible[,]'" and we are free to exercise our fact-finding powers; the only limit on these powers is that our broad discretion must not be abused. *See id*. When presented with a petition for a new trial, we must make a credibility determination, to determine whether the new evidence, if considered by a trial court, would produce a substantially more favorable result. *Id.* at 69. We need not decide whether the new

evidence is true, but merely if the evidence is sufficiently believable to make a more favorable result probable. *Id*.

We must also consider the prosecutorial-misconduct aspect of the appellant's claim, as it is intertwined with this issue. The appellant claims that the prosecutor failed to provide discovery of exculpatory evidence as required by *Brady* and Article 46, UCMJ. Hence, the appellant asserts that prosecutorial misconduct is the reason why the evidence was not easily discoverable. We disagree with this assertion. First, as discussed above, there is no credible evidence to believe that the prosecutor was aware of the identity of Pvt S. Second, CWO2 P's case notes identified Ms. H as a potential crime-scene witness. And third, nothing prevented the trial defense counsel from interviewing CWO2 P, the Government's case agent, to determine the existence of any other potential witnesses, including Ms. H, as well as any statement taken from her. But assuming *arguendo* that this evidence was not easily discoverable by the trial defense counsel, we do not find that a substantially more favorable result would be probable. *Brooks,* 49 M.J. at 69 (quoting R.C.M. 1210(f)(2)(C)). Making these factual determinations rests within our broad discretionary powers. *Id.* at 68.

We have closely examined the "newly discovered evidence" presented to us, and specifically find that the evidence would not produce a substantially more favorable result for the appellant on either the findings or the sentence in this case. We make this determination upon consideration of the testimony of Pvt S, Ms. S, and CWO2 P, as well as the statement of Ms. H, the admissions made by the appellant to CWO2 P, MSgt T, and Pvt B concerning his involvement with his co-actor, Ms. S. First, we find that the proffered new evidence is not "sufficiently believable to make a more favorable result probable." *Brooks*, 49 M.J. at 69. Second, the evidence presented to us lacks quality, namely, that the testimony of Ms. H's observations is inconsistent concerning the identity of the male and female participants in the arson, including one admitted participant, Ms. S. Additionally, Ms. H does not contradict the testimony of Ms. S and the appellant's confession because she did not witness any person actually set the car afire. Lastly, Ms. H's proffered testimony does not provide necessary corroborating detail concerning specific timeframes between the actors and their purported actions. Third, the evidence lacks reliability, given the questionable timing and motivation underlying Pvt S's testimony and the potential collusion between Pvt S and the appellant while both were incarcerated in the brig. The military judge concluded, and we agree, that Pvt S's purported observations are unworthy of belief and contradicted by other more credible witnesses.

Finally, in advancing his cause for a different result at trial, the appellant ignores the compelling evidence of his own admissions to: (1) CWO2 P and MSgt T (the other government agent assisting in the transport of the appellant back to his barracks)

concerning the appellant's own involvement in the conspiracy with Ms. S and his involvement in the acts leading up to and culminating in the arson, and, (2) Pvt B, a former Marine who was close friends with the appellant and testified as to admissions of culpability that the appellant made the day after the arson, namely, that the appellant wanted to show him "[a] car that had been previously blown up" the night before because of a girl he met during the weekend. Record at 279. The appellant also told Pvt B that the appellant's roommate (PFC R) had placed the gasoline-filled bottle under the car and that he (the appellant) had lit it. Record at 280.

We have also considered our authority to return this case to further develop the record and find no reason to do so. The military judge developed an extensive record during three post-trial Article 39(a), UCMJ, hearings comprising nearly 100 pages of text and Appellate Exhibits XLIII through XLVIII. Both the Government and the appellant were afforded the opportunity to introduce evidence bearing on the "newly" discovered evidence at these hearings, and upon appeal, neither party suggests that further fact-finding is necessary to the disposition of this issue. In that petitions for new trial are disfavored, it is clear to us that the appellant has the burden of production in this case, a burden he has failed to carry pursuant to the requirements clearly set forth in R.C.M 1210(c). *See Bacon,* 12 M.J. at 491.

Assuming *arguendo* that the appellant met his burden of production, we have considered the new "evidence" he has presented and find it sufficient for us to make the credibility determinations we are required to make under *Brooks*. *See United States v. Evans*, 55 M.J. 732, 752 (N.M.Ct.Crim.App. 2001). Having done so, we find no basis to direct a new trial in this case and find no merit in this assignment of error.

Mistrial Request

Although the trial defense counsel did not move for a mistrial at trial or at any of the post-trial Article 39(a), UCMJ, hearings, the appellant now argues that his request to set aside the findings post-trial was tantamount to a request for mistrial pursuant to R.C.M. 915. Thus, he claims that the military judge improperly applied the standards governing a request for new trial rather than those concerning mistrial. Appellant's Supplemental Brief of 16 Oct 2001 at 2. In our view, the appellant cannot now claim that his failure to specifically request a mistrial at the Article 39(a) post-hearing entitles him to relief on appeal because the military judge applied the incorrect standard of review. Moreover, even if the trial defense counsel had moved for a mistrial at the appropriate time, or if the military judge had raised the issue *sua sponte*, we do not believe that it would have been an abuse of discretion for the military judge to deny such a request. Under R.C.M. 915(a), the military judge may declare a mistrial "when such action is

manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings."

We are mindful that a mistrial should only be considered under extreme circumstances. *See United States v. Barron*, 52 M.J. 1, 4 (C.A.A.F. 1999); *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993); *United States v. Waldron,* 36 C.M.R. 126, 129 (C.M.A. 1966). Such a remedy is appropriate "`whenever circumstances arise that cast substantial doubt upon the fairness or impartiality of the trial.'" *Dancy*, 38 M.J. at 6 (quoting *Waldron*, 36 C.M.R. at 129*).*

We have considered the appellant's contention that the military judge applied the incorrect standard in rejecting the appellant's post-trial request to set aside the findings. For all the reasons outlined above, we conclude that the proffered testimony of Pvt S and Ms. H does not cast substantial doubt on the fairness of these proceedings. Applying the mistrial standard urged by the appellant, we further conclude that his claims fail to rise to the level of manifest injustice required by R.C.M. 915(a) and that he was not entitled to a mistrial under the circumstances of this case. Thus, we find no merit in this assignment of error and no basis to afford the appellant the relief he has requested.

Ineffective Assistance of Counsel

In his final assignment of error, the appellant asserts that he was denied effective assistance of counsel. Specifically, he argues that his trial defense counsel failed to discover the two "eye witnesses" that undermined the claims of his co-actor, Ms. S. As relief, the appellant asks this Court to set aside his conviction. We find no basis for doing so.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court set forth the standard for reviewing claims of ineffective assistance of counsel on appeal. The *Strickland* court stated:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction. . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687. These same standards are equally applicable before military courts. *See United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). It is strongly presumed that counsel are competent in the performance of their duties. *United States v. Cronic*, 466 U.S. 648, 658 (1984). "Acts or omissions that fall within a broad range of reasonable approaches do not constitute a deficiency." *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001). Moreover, we will "strongly presume that counsel has provided 'adequate assistance.'" *United States v. Russell*, 48 M.J. 139, 140 (C.A.A.F. 1998)(quoting *Strickland*, 466 U.S. at 690). Thus, in order to demonstrate ineffective assistance of counsel, an appellant "`must surmount a very high hurdle.'" *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998)(quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)). Similar standards are set forth in *United States v. Polk*, 32 M.J. 150 (C.M.A. 1991). *Polk*, however, makes clear that the appellant cannot overcome the presumption of competence unless he can show that absent the ineffective assistance, "the factfinder would have had a reasonable doubt respecting guilt." *Id*. at 153 (citing *Scott*, 24 M.J. at 189 (quoting *Strickland*, 466 U.S. at 695)).

On the other hand, trial defense counsel "have a duty to perform a reasonable investigation or make a determination that an avenue of investigation is unnecessary." *United States v. Sales,* 56 M.J. 255, 258 (C.A.A.F. 2002)(citing *United States v. Brownfield,* 52 M.J. 40, 42 (C.A.A.F. 1999). Counsel's performance of this duty is reviewed not on its success, but on whether counsel made reasonable choices in trial strategy from the alternatives available at trial. *Dewrell,* 55 M.J. at 136 (quoting *United States v. Hughes*, 48 M.J. 700, 718 (A.F.Ct.Crim.App. 1998). If there is a showing that counsel's performance at trial fell below this standard, the appellant must then articulate how that failure prejudiced him at trial.

In *Sales*, our superior court found that the Army Court of Criminal Appeals had erred when it failed to return a case for a factfinding hearing to resolve a factual conflict between affidavits concerning allegations of ineffective assistance of counsel. In so holding, our superior court referred to it's decision in *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997), which set forth six principles for determining when a factfinding hearing is required. The fourth principle provides that if an appellant's "affidavit is factually adequate on its face but the appellate filings and the record as a whole `compellingly demonstrate' the improbability of those facts, the Court may discount those factual assertions and decide the legal issue." *Id*. at 248.

The record before us demonstrates that the prospective testimony of Pvt S was wholly improbable and that the statement of Ms. H was of minimal value as to the identity of the persons involved in the arson. Simply put, we are convinced, beyond any

reasonable doubt, that even if the trial defense counsel had discovered these prospective "witnesses" and presented their testimony to the factfinder, such testimony would have had no effect on the factfinders' determination of guilt. *See Polk,* 32 M.J. at 153.

In conclusion, we do not find deficient representation under the *Strickland* standard. To the contrary, the appellant received competent representation before, during, and after trial. He has failed to establish any deficiency in the performance of his trial defense counsel in this case. We find that the trial defense counsel aggressively challenged the admissibility of the appellant's incriminating pretrial admissions, vigorously attacked the veracity of the prosecution's key witness, and ably presented the appellant's testimony recanting his multiple inculpatory admissions. We also find that the Government's evidence of the appellant's guilt presented at trial was overwhelming and compelling. Based upon our review of the entire record, we are convinced that the appellant was afforded a trial in which the adversary system produced a reliable result.

Having fully considered the record of trial and all of the appellant's assignments of error, we find no error meriting relief.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Chief Judge DORMAN and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court