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

BEFORE

Charles Wm. DORMAN **C.L. CARVER** **D.A. WAGNER**

UNITED STATES

v.

Derrick J. COSTON
Chief Warrant Officer 2 (W-2), U.S. Marine Corps

NMCCA 200001528 Decided 29 October 2004

Sentence adjudged 12 March 1999. Military Judge: J.F. Blanche. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Camp Pendleton, CA.

Capt E.V. TIPON, USMC, Appellate Defense Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel

WAGNER, Judge:

The appellant was convicted, contrary to his pleas, by a general court-martial composed of officer members, of three specifications of conduct unbecoming an officer in violation of Article 133, Uniform Code of Military Justice (UCMJ), 10 USC § 933. The court members sentenced the appellant to a dismissal, confinement for 5 years, and forfeiture of all pay and allowances. The convening authority approved the sentence as adjudged, except that the forfeitures were suspended for a period of six months from the date of the convening authority's action.

The appellant alleges that he was denied the effective assistance of counsel; that he was denied speedy post-trial review of his court-martial; that the military judge erred in failing to dismiss the charges or to order other appropriate relief due to the destruction of exculpatory evidence by the Government; that the military judge erred in failing to suppress the appellant's involuntary confession; that the evidence adduced at trial was factually and legally insufficient to prove his guilt beyond a reasonable doubt; and that he was prejudiced when

he lost "good day" credit when transferred to the United States Disciplinary Barracks (USDB).

We have carefully examined the record of trial, the appellant's assignments of error[1], the Government's response, the unsworn declaration submitted by the appellant, the affidavits submitted by both trial defense counsel, and all motions and attachments submitted to the court.

A thorough review of the record before this court establishes that these allegations are uniformly without merit and we decline to grant relief. We also conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

---

[1] All allegations of error were submitted in the appellant's brief under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). The following allegations of error are raised in the appellant's brief:

1. The appellant received ineffective assistance of counsel when his defense counsel (A) failed to conduct a reasonable investigation of appellant's case by not contacting witnesses for the defense, failing to visit appellant's home, failing to investigate and challenge the Naval Criminal Investigative Services's (NCIS) failure to test other shoes or request an order directing the testing of other shoes worn by the victims, and failing to interview a potential prosecution witness and impeach prosecution witnesses with this evidence; (B) failed to adequately prepare for trial by failing to adequately discuss with the appellant whether or not he would testify at his court-martial in his own defense and unreasonably urging him not to testify, spending an inadequate amount of time interviewing the appellant and preparing him for trial, failing to request an expert to challenge the victim's pretrial statements and trial testimony regarding the victim's descriptions of the appellant's body, and failing to request an expert to challenge the appellant's psychological evaluation pursuant to RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.); and (C) performed deficiently during and after trial by failing to effectively challenge the voluntariness of the appellant's statement to NCIS and failing to effectively address the issue during trial, failing to object to a deficient Article 32, UCMJ, Pretrial Investigation, failing to exercise a peremptory challenge on either Major Maples or Lieutenant Colonel Boland, conceding guilt during closing argument, and failing to adequately consult with the appellant regarding post-trial clemency matters.

2. The appellant has been denied speedy post-trial review of his court-martial in that one year and six months from the date of trial passed before the record of trial was docketed with the Navy-Marine Corps Court of Criminal Appeals for appellate review.

3. The military judge erred in failing to dismiss the charges or to order other appropriate relief based on the government's destruction of the appellant's previous admissions, which were exculpatory evidence.

4. The military judge erred in failing to suppress the appellant's involuntary confession.

5. The evidence adduced at trial was factually and legally insufficient to prove the appellant guilty of conduct unbecoming an officer and gentleman beyond a reasonable doubt.

6. The appellant was prejudiced when he lost "good days" and "extra good days" due to his transfer from the base brig, Camp Pendleton, California, to the United States Disciplinary Barracks, Fort Leavenworth, Kansas.

The allegations of error are renumbered here, as they are incorrectly numbered I, II, V, VI, VII, and VIII in appellant's brief. Allegations of error number 3 and 4 were presented without comment or argument in brief.

The appellant has also asked this court to consider a document entitled "Appellant's Declaration" purportedly signed by the appellant on 2 February 2003. Review of this 18 page document reveals that the appellant, in addition to the allegations of error stated in brief, also alleges that his trial defense counsel erred by failing to present sufficient evidence of his back injury; failing to present his timeline to refute the testimony of the alleged victims regarding when they had been at his residence; failing to adequately inform him of the nature and extent of the motions litigated in the absence of his civilian defense counsel; and failing to inform him he could testify for the limited purpose of the suppression motion.

Facts

The appellant stands convicted of three specifications of conduct unbecoming an officer by having three twelve-year-old babysitters, on different occasions, walk on the back and front of his nude or partially nude body, at times wearing his wife's shoes, and then rubbing the girls' feet against his penis. All three girls were friends and attended school together. Their testimony was the core of the government's case against the appellant.

The testimony of all three girls was strikingly similar. They testified that, while babysitting at the appellant's home at his request, they walked on the back and front of his body while he was clad only in a towel or completely nude. The girls stated that this occurred in the appellant's bedroom, with a blanket over the window, behind a locked door, and with no lights on. At times, they all testified, the appellant asked them to wear his wife's shoes. The appellant explained to them that they were helping him relieve stress, relieve the pain in his back and legs, and to stretch his muscles. The appellant told them not to tell anyone about the "exercises." They all testified that the appellant would end up holding the girls' feet and using them to masturbate until, on at least two occasions, he ejaculated. Two of the girls also testified that the appellant had let them drive his car and had discussed sexual matters with them.

The government also relied on a statement given to NCIS wherein the appellant acknowledged asking the girls to walk on his back and front in the manner they described, that he would ask the girls to wear flat, hard-soled shoes that his wife used to walk on his back and front, and that he held the girls' ankles to apply pressure to his thigh muscles. In the statement, the appellant also acknowledged that he obtained an erection during these sessions on approximately 16 occasions that may have exposed his penis to the girls. The appellant's statement admits that he ejaculated a small amount during one of these sessions. The appellant's statement to NCIS was the subject of a defense motion to suppress that was denied by the military judge.

Several pairs of shoes were seized from the appellant's residence and were identified by the girls and admitted into evidence at trial. Two pairs of shoes tested positive for the presence of semen that DNA testing confirmed had come from the appellant. The results of the testing of the shoes was stipulated to by both parties at trial.

The appellant did not testify at trial. The defense presented a witness as to the untruthfulness of one of the girls. The defense also presented five good military character witnesses regarding the appellant's outstanding military character, law abidingness, that the appellant was overly talkative, and that his weakest attribute was the inability to communicate well

verbally or in writing. The defense also presented one partial alibi witness.

The appellant's wife testified as to the appellant's medical problems, including chronic back pain. She testified that she would massage him and walk on his back in shoes to increase the pressure. She also testified that they never had any trouble with any of the other babysitters they used, but had to stop using one of the three victims because she was unreliable. The appellant's wife testified that, due to her medical condition at the time, she and the appellant had come up with innovative methods for sexual gratification, including massages and the use of her hands and feet to stimulate the appellant. She testified that she did wear the shoes admitted into evidence on those occasions.

Ineffective Assistance of Counsel

The appellant claims that he was inadequately represented by both defense counsel before, during, and after trial. We disagree. The military judge explained the appellant's rights to counsel in detail and the appellant indicated that he understood them and had no questions. The appellant elected to be represented by detailed defense counsel and his retained civilian defense counsel. Record at 6. Throughout the 600-page record of trial, there is no indication that the appellant was, in any way, unhappy with, or in disagreement with, his defense team. At no point did the appellant ask to be assigned new military defense counsel or to be granted a continuance to seek new civilian defense counsel.

The appellant bears a weighty burden to show ineffective assistance of counsel. *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997). This is because trial defense counsel are "strongly presumed" to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Strickland establishes a two-part test for the appellate courts to use in determining whether relief is required for ineffective assistance of counsel. First, the appellant must establish that the trial defense counsel's performance was somehow deficient, and then the appellant must show resulting prejudice. *Id*. The standard for reviewing attorney performance is whether the attorney was reasonably effective. *Id*. An appellant "must surmount a very high hurdle" to show ineffective assistance of counsel. *Moulton,* 47 M.J. at 229.

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. *United States v. Dewrell,* 55 M.J. 131, 136 (C.A.A.F. 2001)(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 order to show prejudice in a guilty plea case, the appellant must show that there is a reasonable probability that, but for his attorney's errors, he would not have pled guilty and would have insisted on going to trial. *United States v. Ginn,* 47 M.J. 236, 247 (C.A.A.F. 1997).

The appellant filed a declaration subject to perjury with this court detailing his allegations of error. *See* Appellant's Second Motion to Attach of 6 Feb 2004. In response to this court's order of 22 July 2004, the Government obtained affidavits from both the detailed trial defense counsel and the civilian defense counsel. *See* Government's Motions to Attach Documents of 22 and 23 Sep 2004. The two trial defense counsel disagreed with much of the appellant's declaration regarding ineffective assistance, but the two counsel substantially agreed as to the evidence that was available and the expected testimony of potential witnesses. The appellant and counsel differ mainly on the trial strategies employed in utilizing evidence and witnesses at trial.

This court is limited in its role as a fact-finder when considering the post-trial affidavits and declarations subject to perjury with regard to allegations of ineffective assistance of counsel. Where the statements received from counsel and the appellant differ, this court must normally order a fact-finding hearing at the trial level. *United States v. Ginn,* 47 M.J. 236, 248 (C.A.A.F. 1997). This court can then employ its Article 66, UCMJ, fact-finding power during appellate review of the *DuBay*[2] hearing and decide the legal issues.

We are not required to order a *DuBay* hearing, however, and may resolve the appellant's claim of ineffective assistance of counsel based on the record and appellate pleadings before us, under the following circumstances:

(1) If the facts provided in the appellant's affidavit or declaration allege an error that would not result in relief even if factual disputes were resolved in the appellant's favor, the claim may be rejected.

(2) If the appellant's affidavit or declaration does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected.

(3) If the affidavit is factually adequate on its face to

[2] *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967).

state a claim of legal error and the Government either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issue on the basis of those uncontroverted facts.

(4) If the 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.

(5) When an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal.

United States v. Fagan, 59 M.J. 238, 243 (C.A.A.F. 2004) (citing *Ginn,* 47 M.J. at 248).

Applying this framework, we conclude that no *DuBay* hearing is required in order to answer the legal issues presented in the appellant's filings before this court.

The appellant makes numerous claims regarding the investigation and preparation of his case by his defense counsel before trial, the performance of defense counsel during trial, and the quality of his post-trial representation in preparing clemency matters. These claims are presented in an effort to meet a threshold showing that his defense counsel were somehow deficient. We find that the appellant has not met his burden in this case and decline to grant relief.

(1) Investigation of the Case

The appellant states that there were 13 key witnesses who were never interviewed by the defense team who could have provided favorable testimony at trial. However, upon review we find no prejudicial error by trial defense counsel with regard to preparation of the case for trial.

One of the potential witnesses named by the appellant, Captain John Maloko, USMC, was called to testify at trial by the defense. The appellant states that Captain Maloko should have been used to document the extent of the appellant's back injury. The appellant also claims that Dr. James Farthing should have been called to testify regarding his back injury. The back injury, however, was documented for the court through the testimony of the appellant's wife and in the medical records admitted into evidence. It was not a disputed fact at trial. Whether the appellant had a legitimate back injury or faked the

injury as an excuse for his behavior is irrelevant under the circumstances of this case, as the conduct described in the witnesses' testimony and the appellant's own statement is sufficient to support his conviction for conduct unbecoming an officer.

Four of the potential witnesses (Megan Schaffer; Corporal Tony Bray, USMC; Kari Bray; Mike Wynn) were partial alibi witnesses that, based on the information provided by the appellant, could not, alone or as a group, eliminate the possibility that he had been alone with the girls at different times and on different dates. Additionally, the appellant's own pretrial statement establishes that he did, in fact, ask the girls to walk on his back and front in his bedroom when no other adults were present.

The appellant states that Ian Maxwell would have testified regarding his knowledge of the appellant's residence in an effort to show that the girls' testimony regarding blankets being hung over the windows was false, but the appellant fails to state any details regarding potential testimony that would, in fact, refute the girls' testimony. The appellant also states that trial defense counsel never visited the appellant's home, despite his requests, in order to refute the witnesses' testimony that the appellant covered the bedroom window with a blanket. Trial defense counsel had access to photographs and diagrams of the residence and, as stated above, the issue regarding the windows was not critical to the government's case in light of the appellant's pretrial statement to NCIS, the witnesses' testimony, and all other evidence presented by the Government.

The appellant includes in his list of potential witnesses two former babysitters, both minor children, who would testify that nothing untoward had ever occurred while they babysat for the appellant. The detailed defense counsel acknowledges that the NCIS summaries of interview of these babysitters indicated that they would have testified to that effect, but the summaries also disclosed that the appellant had asked one of them to walk on his back and that she was "weirded out" by his request. The summaries also disclosed that there were a number of other former babysitters who alleged odd and disconcerting behavior by the appellant. These witnesses would have been extraordinarily damaging on rebuttal had the defense opened the door to their testimony and would most certainly have cast the appellant in an even more predatory light.

The appellant states that one witness, Jim Ross, who had attended the Article 32, UCMJ, hearing could testify regarding inconsistencies in the testimony of the NCIS agents at the Article 32 hearing and their testimony at trial. Appellant fails to state how that testimony would have been admissible or what the inconsistencies were. The detailed defense counsel, in affidavit, states that he saw no inconsistency in the testimony.

The appellant claims that two of the potential witnesses, Major Thomas Quintero, USMC, and Amber Love, could have testified regarding the appellant's involvement volunteering, without incident, with youth organizations. Detailed defense counsel does not dispute their potential testimony, stating that the appellant's attraction to youth would have been a detriment, not an asset, given the charges and that presenting such evidence may have opened the door to the rebuttal evidence available to the Government through former babysitters.

One of the potential witnesses, Chief Warrant Officer 2 (CWO2) John Scherff, USMC, would have testified that he worked with the appellant on projects late into the night and that the appellant has significant difficulty proofreading a statement typed by someone else, especially when exhausted or distracted. The appellant contends that this would have buttressed his argument that his statement to NCIS was involuntary and inaccurate. The evidence presented on the motion to suppress and in support of the admission of the statement before the members was consistent and overwhelming. Three NCIS agents testified in detail regarding their procedures and the fact that appellant was an active, energetic, and fully aware participant in the drafting of his statement. In light of the evidence presented by the Government, the testimony of this additional witness, even had the appellant testified in his own behalf regarding the motion to suppress, would have been insufficient under the circumstances of this case to keep the statement out of evidence.

The appellant also contends that the trial defense counsel should have interviewed and called to the stand a government expert who appeared on the Government's witness list but who was not called at trial. Prior to trial, the Government indicated they would not be calling the expert, so there was no longer a reason to interview her. The fact that the appellant believes that the expert may have been a beneficial witness based on his discovery after trial of testimony the witness gave in another case is irrelevant to whether counsel adequately prepared for trial. Additionally, the appellant's proffer of the expected testimony of this witness does not establish that it would have been either relevant or necessary in the appellant's court-martial.

(2) Pretrial Preparation

The appellant avers that the trial defense counsel did not spend sufficient time consulting with the appellant before trial or preparing the appellant for trial. In support of this allegation, the appellant states that defense counsel spent just six hours with him the weekend before trial. Appellant makes no statement regarding case preparation completed earlier than the weekend before trial. The affidavits of both detailed defense counsel recount extensive time spent with the appellant before the weekend prior to trial. The record of trial, including motions, objections to testimony and evidence, and presentation

of evidence and witnesses for the defense bear out the pretrial preparation by both trial defense counsel and their intimate knowledge of the appellant's case.

The appellant states also that he provided a detailed written timeline that should have been used at trial to refute the testimony of the three girls. These written, unsworn statements of the appellant would not have been admissible at trial. Also, the reason advanced by the appellant for using the timeline is to refute the girls' testimony regarding being at his residence while no other adults were present. Again, as stated above, the appellant admitted in his sworn statement that was presented as evidence at trial, that he was present in his residence on numerous occasions with the girls when no other adults were present.

(3) Performance at Trial

The appellant avers that his trial defense counsel failed to object to the Article 32 Officer's decision not to reduce the testimony of the witnesses to writing, as required by RULE FOR COURTS-MARTIAL 405(j)(2)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), and was therefore not able to effectively cross examine the witnesses at trial about prior inconsistent testimony. There is, however, no evidence before the court that the testimony of the NCIS special agents at trial was, in any way, inconsistent with their prior testimony at the Article 32 hearing. The detailed defense counsel's affidavit bears out the fact that the NCIS special agents' testimony was not reduced to writing, but adds that the testimony of the three girls was transcribed for use at trial at the request of the defense and that the tape recorded testimony of the NCIS agents was available to the defense team. Detailed defense counsel listened to those tapes in preparing for trial and found no inconsistencies. The appellant has pointed to no inconsistencies.

The appellant claims exculpatory statements he made to investigators were destroyed and that his statement was involuntary. He also claims that he was not informed he could testify for the limited purpose of the motion to suppress and that his testimony would have influenced the military judge to suppress the statement. The appellant further claims that the detailed defense counsel misled him into believing that the pretrial motion session would be only 10 minutes long and would not involve the examination of witnesses. The appellant claims that he would not have waived his right to have individual civilian counsel present if he had known this.

Before hearing the motion to suppress, the military judge asked the appellant whether he wanted to have his civilian counsel present or waive his presence for the purpose of litigating the motions. The appellant stated that he would waive the presence of his civilian counsel. Record at 14. Immediately following that exchange, the

military judge stated that some of the motions would involve live witnesses. *Id*. After granting several defense motions for production of witnesses and evidence, the court directed counsel to ensure that upcoming witnesses were present and took a recess for that purpose. *Id*. at 19. The Article 39(a), UCMJ, session continued through several motions, including the motion to suppress, all involving the testimony of live witnesses. The session lasted over two hours. The appellant had abundant opportunity to state that he wished to have his civilian defense counsel present, but apparently remained content in his representation throughout the taking of evidence and argument on the motions. The appellant's desire to have his civilian defense counsel present during litigation of the motion to suppress is clearly based on the benefit of hindsight. The appellant's affirmative waiver of civilian counsel's presence on the record was clear and unambiguous. It was apparent to all in the courtroom that witnesses would testify during the Article 39(a) session.

The appellant also avers that the trial defense counsel should have used their peremptory challenge on either of the two members that the defense had unsuccessfully challenged for cause. The trial defense counsel state a reasonable and uncontroverted rationale for not exercising the challenge because they wanted to keep the number of members at 7, which then required 5 votes to convict.

Finally, the appellant contends that his defense counsel conceded guilt during closing argument. The trial defense counsel argument on findings centers on inconsistencies in the testimony of the Government witnesses and presents to the members the defense theory that the babysitters, all friends, exaggerated and invented key parts of their stories. His focus was on whether the members could rely on their testimony to find that there was any sexual connotation to the back walking that occurred in the appellant's bedroom. In concluding, trial defense counsel stated:

> This brings me to a conclusion. Chief Warrant Officer Coston did some things, made some terrible, terrible mistakes in this case. His judgment is just not observant. It's clear that these girls were walking on his back in his bedroom. That is not the right thing to do. Where this case fails, though, is on the sexual element. They do not meet that element in this case. They just can't meet it.

Record at 516. Given the fact that the members were presented with the testimony of the witnesses, corroborating physical evidence, and the appellant's confession, it was not only reasonable, but inevitable, that trial defense counsel acknowledged the fact that the appellant allowed these minor females to walk on his back in his bedroom. To

deny that fact in the face of overwhelming evidence would have likely resulted in the members rejecting any defense argument on the merits out of hand.

(4) Post-Trial Representation

The presumption of competence of counsel applies to post-trial representation, as well as representation during trial. *United States v. Lee,* 52 M.J. 51, 52 (C.A.A.F. 1999).

Following trial, trial defense counsel actively represented the accused, as evidenced by the 130-page clemency package filed with the convening authority. A thorough reading of the record of trial, combined with the additional matters provided in trial defense counsel affidavits bears out in full measure the quality and accuracy of the advice and representation the appellant received at trial and after trial.

Assuming, arguendo, that the detailed trial defense counsel failed to spend sufficient time with the appellant in preparing the clemency package, and assuming, arguendo, that his failure to do so constituted error, we are required to test to determine whether the appellant makes a "colorable showing" of any "possible prejudice." *Lee,* 52 M.J. at 53; *see also United States v. Wheelus,* 49 M.J. 283, 289 (C.A.A.F. 1998). Here, the appellant has failed to present any additional matters that may have been included in his clemency package that would demonstrate he was in any way prejudiced by the manner in which the clemency matters were submitted. In light of the foregoing, any error must be deemed harmless.

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 and has failed to establish any deficiency in the performance of his defense counsel in this case. The appellant had the benefit of an experienced military defense counsel, as well as an experienced civilian defense counsel. The trial defense team successfully prevented evidence of uncharged misconduct from being admitted in rebuttal, successfully moved to dismiss six specifications of indecent acts and indecent language with females under the age of 16 years charged under Article 134, UCMJ, and made a valiant effort to explain away admittedly bizarre and troubling behavior by the appellant in an effort to convince the members to focus instead on the circumstances surrounding the taking of the appellant's pretrial statement and why they should question its accuracy. On the other hand, the government's evidence of the appellant's guilt presented at trial was overwhelming.

Motion to Suppress

The appellant asserts that the military judge erred in failing to grant the motion to suppress his confession. We disagree.

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 (C.A.A.F. 2004)(citing *United States v. Monroe,* 52 M.J. 326, 330 (C.A.A.F. 2000). In conducting our review, the court reviews fact-finding by the trial judge under a clearly erroneous standard. *United States v. Ayala,* 43 M.J. 296, 298 (C.A.A.F. 1995). Specifically, when reviewing a military judge's ruling on a motion to suppress, we are directed to 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).

In this case, the appellant states that he was coerced into changing his statement by threats from the NCIS regarding the possible involvement of Child Protective Services. The appellant would have testified that he was exhausted, hungry, hot, and did not review the subsequent drafts of the statement in the interest of time. Further, that once a special agent told him that she had spoken with his wife and children and that the appellant was needed at home, his focus changed to getting out of there. He would have testified that he did not realize until the next day that what he had signed was not accurate.

The evidence adduced at trial from the NCIS agents participating in the interrogation disclosed that the appellant requested changes to each draft of his statement that led to several new drafts before the final statement was sworn and submitted. The agents testified both on the motion to suppress and during the Government's case-in-chief, that the previous drafts were destroyed because the appellant objected to the contents and claimed they did not accurately reflect what he wanted to say. The agents further testified that the portions changed or omitted at the request of the appellant were inculpatory, not exculpatory, as the appellant requested modifications to each draft of the statement that modified or eliminated words of criminality. The evidence that the appellant was energetic and fully participating in the taking of his statement is overwhelming, thus we find that the military judge did not abuse his discretion in denying the appellant's motion to suppress his pretrial statement.

Sufficiency of Evidence

The appellant avers that there was not sufficient evidence adduced at trial to convict him of conduct unbecoming an officer. 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, 318-19 (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.Crim.Ct.App. 1999); *see also* Art. 66(c), UCMJ.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

In this case, the sworn testimony of the victims is born out in all respects by the voluntary statement given by the appellant to law enforcement prior to trial and is supported by the physical evidence presented at trial. The evidence of guilt is overwhelming. We find that the evidence is both legally and factually sufficient. In particular, upon review of all the evidence, we are convinced of the appellant's guilt beyond a reasonable doubt.

Post-Trial Delay

The appellant contends that the delay from the date his court-martial concluded to the date that this case was docketed for review with this court was unreasonable and that he is entitled to relief. We disagree.

As stated by our superior Court in *United States v. Tardiff*, 57 M.J. 219, 224 (C.A.A.F. 2002), this Court "has authority under Article 66(c) to grant relief for excessive post-trial delay without a showing of 'actual prejudice' within the meaning of Article 59(a), if it deems relief appropriate under the circumstances." We are further "required to determine what findings and sentence 'should be approved,' based on all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay." *Id*.

The appellant was sentenced on 12 March 1999, and the resulting 600-page record of trial was authenticated five months later, on 9 August 1999. The convening authority took action on 29 December 1999. This court received the original record of trial more than 8 months later, on 10 September 2000, and docketed the case on 27 September 2000. In *United States v. Timmons*, 46 C.M.R. 226, 227 (C.M.A. 1973) the Court of Military Appeals found that size of the record and the complexity of the review were factors in determining whether delay was reasonable. The delay in this case of one year and five months from sentencing until receipt by this court cannot be held to be unreasonable given the length and complexity of the record of trial.

Even assuming the delay to be unreasonable, the appellant presents nothing to show that he has been in any way harmed or negatively impacted by the length of review in this case, or that there is any other basis for this court to award relief. In keeping with our mandate in *Tardiff*, we decline to grant relief for post-trial delay.

Good Time Credit for Post-trial Confinement

The appellant alleges that he lost 58 days good time credit toward his sentence when he was transferred from the brig in Camp Pendleton to the United States Disciplinary Barracks. The basis for the appellant's claim is due to the different computation of good time at the two confinement facilities. We conclude that this is an administrative issue, that the appellant has not exhausted administrative remedies available to him, and that this issue is not yet ripe for this court's consideration. *United States v. Richardson*, 8 M.J. 157 (C.M.A. 1980).

Conclusion

Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Chief Judge DORMAN and Senior Judge CARVER concur.

For the Court

R.H. TROIDL
Clerk of Court