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

BEFORE

C.A. PRICE **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

William E. CARMICHAEL
Engineman Second Class (E-5), U.S. Navy

NMCCA 9901271 Decided 22 March 2004

Sentence adjudged 30 October 1998. Military Judge: K.A. Krantz. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Base, Jacksonville, FL.

LCDR F.J. BUSTAMANTE, JAGC, USN, Appellate Defense Counsel
LT DEBORAH S. MAYER, JAGC, USNR, Appellate Government Counsel

PRICE, Senior Judge:

Pursuant to mixed pleas, the appellant was convicted of violation of a general regulation (two specifications), false official statement, forcible sodomy, indecent assault, and solicitation to commit sodomy, in violation of Articles 92, 107, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, 925, and 934. The appellant pleaded guilty to: (1) violation of Chief of Naval Operations Instruction (OPNAVINST) 5370.2A (14 Mar 1994)(Fraternization Policy); (2) consensual sodomy; (3) indecent acts; and (4) solicitation to commit sodomy. The appellant pleaded not guilty to: (1) violation of Secretary of the Navy Instruction (SECNAVINST) 5300.26B (6 Jan 1993)(Fraternization Policy); (2) false official statement regarding his sexual misconduct; (3) committing the aforementioned acts of sodomy by force and without consent; and (4) indecent assault, the greater offense of the aforementioned indecent acts. There was no pretrial agreement.

A general court-martial consisting of officer and enlisted members sentenced the appellant to confinement for three years and a bad-conduct discharge. The convening authority approved the sentence as adjudged, but in an act of clemency, deferred and

waived automatic forfeitures in favor of the appellant's children.

The appellant has asserted the following assignments of error: (1) factual and legal insufficiency of evidence of forcible sodomy; (2) factual and legal insufficiency of evidence of indecent assault; (3) the military judge abused his discretion by denying three motions for mistrial made during the trial counsel's arguments on findings; and (4) the convening authority denied the appellant due process by failing to detail a single member of the same race as the appellant to the court-martial panel.

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

Background

The appellant was an enlisted supervisor in "A" Division of the Engineering Department on board USS JOHN HANCOCK (DD 981). The victim of his offenses was Fireman (FN) R, U.S. Navy. At the time of the offenses, she was 19 years old. She reported to the ship straight from basic and intermediate training. After serving in other divisions of the ship for a short time, FN R was assigned to work in "A" Division.

According to FN R, the appellant was responsible for teaching and training her about division equipment and functions, and for helping her qualify for various duties and watch stations. She was very interested in learning her new duties and eagerly accepted the appellant's instruction. Of note, she trusted the appellant as a superior petty officer, felt safe with him, and considered him to be a friend, as she did all of her shipmates on the HANCOCK.

The record does not indicate that she ever suggested to the appellant that they might have a more intimate relationship. On the contrary, FN R clearly did not want to be more than friends and shipmates. The appellant obviously had different ideas.

According to his cryptic admissions during the providence inquiry, the appellant asked FN R to perform oral sex upon him on board the ship. She did so. This happened on three or four different occasions. The appellant also fondled her breasts and groin. FN R was clothed at the time of this fondling.

After the military judge accepted the appellant's guilty pleas to solicitation to commit sodomy, consensual sodomy, indecent acts, and violation of the Chief of Naval Operations Instruction on fraternization policy, FN R testified as to most

of the remaining charged offenses.[1] She testified that the first hint of trouble came when the appellant told her to go down to AUX 1, a space below decks normally frequented only by division personnel and the sound and security watch. The appellant was on watch at the time. FN R interpreted his statement as an order, so she went to the space. When she arrived, the appellant was waiting for her. Nobody else was present. The appellant then touched FN R in the groin area. She said "No" and pushed his hand away. FN R described it this way: "He would - - would keep touching me until I - - I was wet, sir, and then he would stop." Record at 469. FN R did not try to leave the space because the appellant stood between her and the only exit from the space. Moreover, when she said "No," the appellant would look angry. Based on her family experience with domestic violence, FN R stated that she was afraid that he would hit her.

A few days later, the same thing happened again, except that this incident occurred in aft steering, a small, isolated space below decks. The appellant followed up by giving FN R a hand-written letter, admitted as Prosecution Exhibit 2.

In this letter, the appellant said he had been interested in FN R for a while and suggested that he could teach her about sex. Based on this and subsequent letters from the appellant, and the testimony of FN R, it is obvious that FN R was innocent, inexperienced and naïve in such intimate matters and that the appellant believed he could take advantage of her. At one point, FN R testified that she wanted to wait until she was married and have her husband teach her about sex.

The appellant fondled FN R in similar fashion on four or five more occasions, then gave her another letter. In this letter, the appellant refers to FN R having "turned [him] down," and complained that she wouldn't even give him a "simple kiss." Prosecution Exhibit 3. Throughout her testimony, FN R emphasized that she never wanted any intimate relations with the appellant, told him so repeatedly, and continually pushed him away when he fondled her.

FN R then went to another petty officer, Mess Management Specialist Second Class Lindsay O. Brown, U.S. Navy, and showed him the letters. Petty Officer Brown, a first class petty officer and FN R then confronted the appellant. In this meeting, FN R told the appellant she just wanted to be friends.

Notwithstanding this meeting, the appellant continued to order FN R to meet him in aft steering. FN R complied because she hoped each time would be different and that the appellant would actually teach her something about her duties in the

[1] A special agent of the Naval Criminal Investigative Service (NCIS) testified on the false official statement charge. There is no assignment of error related to this charge.

division. Whenever possible, FN R tried to avoid seeing the appellant.

The appellant gave FN R a third letter that clearly implies that, on at least one occasion, FN R did not meet with him. The letter also states that the appellant wanted to "make love" with FN R, and complained that FN R would not do anything sexual for him. Finally, the appellant warns FN R not to show the letter to anyone. Prosecution Exhibit 4.

By this point, the appellant had become quite impatient. He had fondled FN R on 15-20 occasions and she had not reciprocated in kind. He then told her that she "owed" him something since he had sexually stimulated her. Record at 502.

In yet another incident, he grabbed her hand and forced her to rub his penis. He wanted sexual intercourse. FN R refused. He wanted anal intercourse. FN R refused. He wanted to digitally penetrate FN R's vagina. She again refused. Finally, the appellant told her to "give him head." *Id.* at 503. FN R didn't want to do that either. The appellant then asked her what was wrong with her, and said that she owed him. She didn't think that she owed him, but testified that "since he was over me in rank then I thought he must be right and that I was wrong." *Id.* at 504. Reluctantly she put the appellant's penis in her mouth. The appellant then grabbed her hair and forced her to move her head up and down until he ejaculated in her mouth. We note that the court reporter alertly recorded FN R's in-court demeanor during this critical phase of her testimony:

> [*Witness extremely nervous, continuing to pull on her neckerchief, right leg shaking erratically, and hitting arm of chair with her hand as she describes sodomy.*]

Id. at 505. FN R testified that, after the first incident of sodomy, it happened again four more times. She explained that she kept going back because she thought they had been friends before and that each time would be different than the last. Eventually, FN R told a first class petty officer what was happening. The record indicates that FN R was soon transferred off the ship.

In cross-examination, FN R acknowledged that she had been given a grant of immunity, although there is nothing in the record that leads us to believe FN R asked for that immunity. The defense then highlighted some differences between her testimony at the Article 32, UCMJ, hearing and her trial testimony. Among the differences was her prior testimony that she was afraid of losing a friend, and that he would get mad at her for refusing him. Further, she previously testified that she couldn't stand someone getting mad at her, so she just did it to make him happy. She also admitted that in her statement to NCIS she said that on one occasion the appellant performed oral sex on her.

In redirect examination, FN R said that she was testifying truthfully. She also explained that the appellant insisted on performing oral sex on her even though she didn't want him to do that.

After offering SECNAVINST 5300.26B, the Government rested its case-in-chief. The defense called two witnesses to testify of the appellant's good military character, offered the Enlisted Performance Record – NAVPERS 1070/609 from the appellant's service record, then rested. The Government offered no rebuttal.

Factual and Legal Sufficiency of the Evidence

This court's standard of review for sufficiency of the evidence is set forth in Article 66(c), UCMJ:

> (c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

Further, this standard and its application have been recognized and defined by the Court of Appeals for the Armed Forces:

> under Article 66(c) of the Uniform Code, 10 U.S.C. § 866(c), the Court of [Criminal Appeals] has the duty of determining not only the legal sufficiency of the evidence but also its factual sufficiency. The test for the former is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). For factual sufficiency, the test is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the Court of [Criminal Appeals] are themselves convinced of the accused's guilt beyond a reasonable doubt.

United States v. Turner, 25 M.J. 324, 324-25 (C.M.A. 1987).

"Reasonable doubt" does not mean that the evidence must be free from all conflict. *United States v. Roberts*, 55 M.J. 724, 731 (N.M.Ct.Crim.App. 2001).

The appellant contends that the evidence shows that FN R consented to his groping and to oral sodomy, consistent with his guilty pleas. According to this line of reasoning, FN R knew what she was getting into when the appellant summoned her to secluded spaces in the ship, yet she went anyway. Also, FN R had been trained about sexual harassment policy and reporting procedure and presumably could have applied that knowledge to file a complaint against the appellant if she felt she was a victim of unwanted assaults.

Our scrutiny and careful consideration of the record leads us to the conclusion that this was not an ordinary young woman experienced in the ways of the world. The evidence clearly shows that FN R was a teenager fresh out of entry-level training, not far removed from the safety and security of her home and family. She had been indoctrinated in the importance of doing what petty officers told her to do, without questioning the content of those orders. She was also eager to fit into her new division and learn all that she could about ships' engineering systems and her duties as a fireman in the Navy.

Thus, when a petty officer in her division told her to go to AUX 1 or aft steering, we find that she felt constrained to do so because of his superior rate and his position of authority in the division. She also did so because she hoped that the appellant would teach her about her duties as a fireman. Once trapped in the isolated space, we conclude that FN R was the victim of actual and constructive force on each occasion of indecent assault and forcible sodomy. *See generally United States v. Simpson*, 55 M.J. 674, 700-03 (Army Ct.Crim.App. 2001)(finding that evidence of multiple convictions of rape by E-6 drill sergeant against E-2 trainee was sufficient despite defense of consent).

We also conclude that FN R did not consent to any of the appellant's assaults and that the prosecution successfully disproved the defense of consent beyond a reasonable doubt. FN R plainly testified that she did not want to participate in any sexual activity with the appellant. This testimony was corroborated by statements in the letters written to her by the appellant.

The credibility of FN R was critical to the Government's case. Her demeanor during her testimony was an important factor in evaluating her credibility. While we must judge the credibility of witnesses in executing our statutory duties, we must do so "recognizing that the trial court saw and heard the witnesses." Art. 66(c), UCMJ. With that in mind, we conclude that a reasonable factfinder could properly have found, beyond a reasonable doubt, that the appellant committed each of the

offenses of which he stands convicted. Moreover, after careful consideration, we are convinced beyond a reasonable doubt that the appellant committed each of those same offenses.

Trial Counsel's Argument on Findings and Mistrial

In his opening argument on findings, the trial counsel argued that FN R had talked with the appellant about her home life with her family and implied that from that conversation, the appellant knew he could manipulate FN R by having an angry look on his face. The trial counsel also said that the defense counsel might bring up the issue of consent in his argument.

Based on these arguments, the trial defense counsel, without citing any authority, moved for a mistrial. The first basis asserted for the motion was that the reference to the appellant's knowledge of FN R's experience with domestic violence was improper because the military judge had ruled that evidence inadmissible. The second basis asserted for the motion was that by saying the defense might argue this or that, the Government was trying to shift the burden to the defense.

The military judge ruled that the trial counsel's argument regarding possible defense arguments was not improper. As to the argument regarding FN R's experience with domestic violence, the military judge concluded that limited testimony on that point had been ruled admissible, but that such testimony was never heard. In other words, the trial counsel had argued facts not in evidence. The military judge denied the motion based on that error, but offered a curative instruction. The trial defense counsel declined the offer, fearing it would highlight the issue in the minds of the members.

After the defense argument on findings by Lieutenant Ruiz, the trial counsel offered a closing argument. We now quote pertinent extracts from the record:

> Lieutenant Ruiz stood up here and said, hey, you're seeing what I [trial counsel] want you to see because I'm doing hocus-pocus and lawyering. First, I submit to you that I'm a naval officer first. I just happen to be a lawyer. And second, no amount of lawyering is going to change the facts that are in this case.
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> . . .
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> No amount of lawyering changes *the amount of indignation that I feel for what this man has done*. No amount of lawyering changes that. The fact that he took advantage of someone who's weak, less intelligent, less strong, *on one of my ships, in my Navy*. How dare he!?

Record at 693-94 (emphasis added). A few moments later, the trial counsel made the following comments:

> They mentioned that at a - - at an Article 32 investigation they're going into details as to all the things she didn't say, when [FN R] said that, you know, lots of things about orders. Did [FN R] mentioned things about orders? Did [FN R} mention this? Did [FN R] mention that? [FN R] answered the questions she was asked. You saw her do it with me. You saw her do it with Lieutenant Ruiz. You saw it. That's no lawyer trick, that's no lawyer hocus-pocus. You saw it for yourselves. *And you can hear them whispering over here. They know you saw it. They know you saw it.*

Id. at 695 (emphasis added). The military judge promptly interrupted the trial counsel *sua sponte* and said it was improper to draw any inference from the comments that counsel make in consultation with each other. The assistant defense counsel (ADC) then requested an Article 39a, UCMJ, session.

In the Article 39a, UCMJ, session, the ADC made a second motion for a mistrial based on the trial counsel's improper references to personal indignation and his reference to counsel consultations. The ADC argued that an instruction could not cure the harm caused by the improper arguments. The military judge denied the motion and said he would attempt to cure any harm by an instruction.

When the members returned to the courtroom, the military judge gave the curative instruction, specifically directing the members to disregard the improper arguments and instructed the trial counsel not to make such references during the remainder of his argument. The trial counsel apologized to the members and admitted that it was improper to express the personal indignation that he felt.

During the remainder of his closing argument, the trial counsel made the following comments:

> The defense counsel made a point to say that character is an enduring trait. That if you act one way -– if you're acting this way today, then more than likely you're acting this way at the inception of your career. If he was a good worker today, then he must have been a good worker 12 years ago when he first started his career.
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> Well, number one, his work ethic is not in issue, but if we take defense's argument and to it's [sic] logical conclusion that *if he was sexual predator today, then more than likely he was also one 12 years ago* as well,

> since character is an enduring trait. So you think about that.

Id. at 700-01 (emphasis added). After referring to a defense argument about the defense of mistake of fact, and asking the members if they really thought it was an honest and reasonable mistake, the trial counsel said:

> We know all about the accused's honesty, don't we? He told Special Agent Mike Griffin, I never touched her. We got the letters that say opposite, *we have his plea of guilty to sodomy that says the opposite*. Most importantly, we have [FN R] who says the opposite.

Id. at 701 (emphasis added). In an Article 39a, UCMJ, session that followed, the trial defense counsel moved for a mistrial for the third time, citing the foregoing comments by the trial counsel.

The military judge concluded that the trial counsel's indirect second reference to his personal indignation did not warrant relief. As to the comments about the appellant's honesty, the trial counsel argued that he was only trying to state that, for purposes of evaluating a potential defense of mistake of fact, the appellant's honesty was in question because he lied to NCIS based on the letters and his guilty plea. The military judge responded:

> All right, all right, since that's evidence which is fair comment on the issue which is charged of the --- and is before the court of a false official statement and the pleas were not argued as reflecting on the honesty of the mistake of fact, but on honesty in general in the context of a pending charge for false official statement.

Id. at 706. Apparently, the military judge concluded that the trial counsel's reference to the appellant's guilty pleas was not improper. Regarding the third ground for the motion, the military judge agreed with the defense that the predator comment and argument was improper, but denied the motion. Instead, he gave this curative instruction:

> The characterization of the accused in argument by the term "sexual predator," and in particular the assertion that assuming that that characterization was appropriate, that there was any basis at all to attribute that to a long range period through to the period of his career. The use of the term itself, an undefined term which is not an element of any offense,

> is an outrageously improper argument. Members are directed to disregard all such references. Trial counsel is reprimanded for making that argument to the members.

Id. at 713. The military judge then gave the members standard and case-specific instructions on findings. There is no indication in the record that the members disregarded any of the instructions of the military judge, including the two curative instructions previously cited. On the contrary, given subsequent questions raised by the members about instructions on findings and the evidence, it is apparent that the members paid careful attention to the military judge's instructions.

Principles of law regarding the permissible scope of argument on findings are well-established. Counsel may comment on those matters admitted in evidence and argue reasonable inferences flowing from the evidence. RULE FOR COURTS-MARTIAL 919(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). However, counsel may not express a personal belief or opinion as to the truth or falsity of evidence, or the guilt or innocence of the accused. *United States v. Cox*, 45 M.J. 153, 156 (C.A.A.F. 1996); R.C.M. 919(b), Discussion. Moreover, counsel may not comment on whispered conversation between members of the opposing team of counsel, as such conversation is, generally speaking, not relevant to argument and tends to impinge upon the accused's Fifth and Sixth Amendment rights to due process, trial by jury and to the assistance of counsel. *United States v. Cook*, 48 M.J. 64, 66 (C.A.A.F. 1998); *see* R.C.M. 919(b), Discussion.

We now summarize the law regarding mistrial. In the Manual for Courts-Martial, we read:

> The military judge may, as a matter of discretion, 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.

R.C.M. 915(a). Further, "The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons . . . a mistrial may be appropriate when inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members . . ." R.C.M. 915(a), Discussion.

"Declaration of a mistrial is a drastic remedy, and such relief will be granted only to prevent a manifest injustice against the accused . . . The decision to grant a mistrial rests within the military judge's discretion, and we will not reverse his determination absent clear evidence of abuse of discretion." *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990). When the members have heard inadmissible evidence, the preferred remedy is a curative instruction, rather than a mistrial, so long as the instruction avoids prejudice to the accused. *Id.* We conclude that these principles of law enunciated by our superior court apply with equal force and effect to improper argument by the prosecution.

We now turn to analysis of the trial counsel's arguments and the contention that comments in these arguments necessitated a mistrial. Based on our reading of the record, the defense cited a total of seven objectionable comments during the trial counsel's opening and closing arguments on findings. We conclude that the military judge found merit as to four of the seven objections:

(1) Reference to facts not in evidence as to the appellant's knowledge that FN R had witnessed anger and related domestic violence in her home;

(2) Expression of personal indignation as to the appellant's behavior;

(3) Comment on whispered conversation between DC and ADC during trial counsel's argument; and

(4) Assertion that the appellant was a "predator" and likely had been a predator over the course of his 12-year career in the Navy.

Having found merit in these objections, the military judge offered a curative instruction, or gave one *sua sponte*, on each occasion. In the first instance, the defense declined the offer. As to the second and third instances, the military judge gave curative instructions. Upon the fourth, the military judge not only gave a very strongly worded instruction, but reprimanded the trial counsel personally in the presence of all gathered in the courtroom.

At this point, we pause to add our strong affirmation for that reprimand. One might argue that the trial counsel's various improper comments were "reflective of an excess of

adversarial zeal rather than purposeful misstatement." *United States v. Goodyear*, 14 M.J. 567, 573 (N.M.C.M.R. 1982). The record is not totally clear on that point, however, and the series of unfortunate statements casts some doubt on the trial counsel's intentions. In addition, the appellant has not assigned prosecutorial misconduct as one of the errors occurring at trial, and we decline to specify the issue.[2]

Taken one by one, we conclude that the four errors cited by the military judge did not warrant the drastic remedy of a mistrial. None of the four comments directly and substantially called into question the accused's constitutional rights. Moreover, the Government's evidence, primarily in the form of FN R's testimony, was comprehensive and compelling. The curative instructions of the military judge were correct and appropriately tailored to the specific errors. Finally, the record indicates that the members heard and followed all instructions given by the military judge in this trial, including the critical curative instructions at issue here.

We think the appellant is really arguing a case for cumulative error during the trial counsel's arguments, and specifically that the curative instructions were useless in curing that cumulative error. *See United States v. Banks*, 36 M.J. 150, 170-71 (C.M.A. 1992). Thus, the appellant argues that, even if the military judge did not commit reversible error in denying the first two motions for mistrial, by the time the third motion for mistrial had been made, the cumulative effect of all the errors in argument required a declaration of mistrial. We disagree.

The legal doctrine of cumulative error has been summarized by our superior court:

> It is well-established that an appellate court can order a rehearing based on the accumulation of errors not reversible individually. In this regard, the First Circuit has delineated the scope of the cumulative-error doctrine. It requires
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> > consider[ing] each such claim against the background of the case as a whole, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any, and combined

[2] We remind trial counsel that "The duty of the prosecutor is to seek justice, not merely to convict." ABA Standards of Criminal Justice, the Prosecution Function, 3-1.1(c).

> effect; how the [trial] court dealt with the errors as they arose (including the efficacy- or lack of efficacy--of any remedial efforts); and the strength of the government's case. The run of the trial may also be important; a handful of miscues, in combination, may often pack a greater punch in a short trial than in a much longer trial.
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> *United States v. Sepulveda*, 15 F.3d 1161, 1196 (1993)(citation omitted)(alterations in original); *see United States v. Banks, supra.* Moreover, when assessing the record under the cumulative-error doctrine, courts "must review all errors preserved for appeal and all plain errors." *United States v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993). Courts are far less likely to find cumulative error "[w]here evidentiary errors are followed by curative instructions" or when a record contains overwhelming evidence of a defendant's guilt. *United States v. Thornton*, 1 F.3d 149, 157 (3d Cir. 1993).

United States v. Dollente, 45 M.J. 234, 242 (C.A.A.F. 1996).

In applying these principles, we note that this case is an example of the “handful of miscues, in combination” referred to in the *Sepulveda* case cited above. However, we conclude that this handful of errors did not pack so great a punch that a mistrial was warranted. Each of the four errors occurred during closing arguments; none occurred during the presentation of evidence. The members were properly instructed that arguments of counsel were not evidence and could not be considered as evidence. Moreover, the military judge took prompt and forceful remedial action at each incident of improper argument. Finally, as indicated previously, the Government presented a strong and compelling evidentiary case, particularly when compared with evidence adduced by the defense.

We conclude that the military judge did not abuse his discretion in denying the appellant’s repeated motions for mistrial. We hold that the drastic remedy of mistrial was unnecessary in this case.

Conclusion

We have considered the remaining assignment of error regarding the composition of the panel of members and find it without merit. *United States v. Santiago-Davila*, 26 M.J. 380,

389 (C.M.A. 1988); *United States v. Kemp*, 22 C.M.A. 152, 154, 46 C.M.R. 152, 154 (1973).

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

Judge SUSZAN and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court