UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CRAIG S. BALDWIN
United States Air Force

ACM 36949

30 May 2008

Sentence adjudged 22 July 2006 by GCM convened at Minot Air Force Base, North Dakota. Military Judge: Eric Dillow.

Approved sentence: Dishonorable discharge, confinement for 7 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Timothy M. Cox (argued), Lieutenant Colonel Mark R. Strickland, and Captain Matthew C. Hoyer.

Appellate Counsel for the United States: Captain Jason M. Kellhofer (argued), Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Donna S. Rueppell, Captain Jefferson E. McBride, and Captain Brendon K. Tukey.

Before

WISE, BRAND, and THOMPSON
Appellate Military Judges

PER CURIAM:

Contrary to his plea, the appellant was convicted of rape, in violation of Article 120, UCMJ, 10 U.S.C. § 920. The approved sentence consists of a dishonorable discharge, confinement for 7 years, total forfeitures, and reduction to E-1.

There are six issues on appeal. The first issue, whether the military judge erred when he denied a defense challenge for cause of a court member for implied bias without applying the appropriate analysis, was argued before this Court as part of the Project Outreach Program at Lackland Air Force Base, Texas.

Background

AKL and the appellant met on the internet and started dating in October 2004. The appellant stayed at AKL's house for two weeks, and they slept in the same bed but did not engage in sexual intercourse. The appellant believed in waiting 30 days into the relationship before sex occurred. At the conclusion of the 30-day waiting period, they exchanged gifts (she gave him a baseball cap and he gave her lingerie), but still didn't have sex. They broke up around 7 November 2004. They continued to have contact.

AKL's 21st birthday was 26 November 2004. The appellant had previously agreed to be her designated driver. He remained sober throughout the night. AKL did not. Later in the evening, AKL went out to the parking lot to throw up. She was accompanied by the appellant and one other friend. When she attempted to re-enter the bar, the bartender would not let her in. So the designated driver, the appellant, drove her home.

AKL remembers bits and pieces of the rest of the evening. She woke up to find the appellant having intercourse with her. He pulled up his pants and left. AKL called her friend, Jonathan, who was still at the bar, and asked him to come over. Jonathan had been drinking, so he looked around for a designated driver. He saw the appellant who had returned. He asked the appellant for a ride to AKL's residence, telling the appellant that AKL was sick, and the appellant agreed to drive him over there. On the way, the appellant was pulled over by the local police. Jonathan asked the police officer if he had to stay because he needed to get to his sick friend's house. The police officer let Jonathan leave the scene.

When Jonathan got to AKL's, she was very upset and hard to understand. Jonathan called Erika, who was a nurse and was still at the bar, to come over and help. Eventually, they called the police. After going through the interview and rape kit examination, AKL was asked to make a pre-text call on 6 December 2004 which she did. The appellant denied having sex with AKL. He said he went to a friend's house after he dropped AKL off. The DNA came back matching the appellant's.

When the appellant was interviewed by local authorities, he vehemently denied having sex with AKL. In another statement to a friend, he said he stayed on the couch all night. And the appellant even volunteered that maybe it was the "pretty boy"[1] who had sex with AKL.

I. Challenge for Cause

[1] It appears from the record, "pretty boy" was referencing Jonathan.

The first issue is whether the military judge erred when he denied a defense challenge for cause of a court member for implied bias without applying the appropriate analysis.

The trial defense counsel made five challenges for cause, four were granted. The challenge against Lt G, based upon implied bias, was denied. The challenge was premised upon the facts that Lt G knew a female officer who was the victim of a similar allegation; knew three of the potential witnesses; was deploying with another court member who would be her supervisor during the deployment[2]; and had taken two classes in criminal interrogations and sexual assault investigations.

A military judge's denial of a challenge for cause is reviewed for abuse of discretion. *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005) (citing *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000)). Any member whose presence on the court conflicts with the "interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality" must be removed for cause. Rule for Courts-Martial (R.C.M.) 912(f)(1)(N). This rule encompasses both actual and implied bias. *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007). Determinations of member bias, whether actual or implied, must be based on the totality of the surrounding circumstances, with due recognition that "challenges for cause are to be liberally granted." *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007). Implied bias should be seldom used as the sole basis for granting a challenge. *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996).

"Challenges based on implied bias and the liberal grant mandate address historic concerns about the real and perceived potential for command influence on members' deliberations." *Clay*, 64 M.J. at 276-77. Whether implied bias exists is determined by objectively viewing the issue "through the eyes of the public, focusing on the appearance of fairness." *United States v. Briggs*, 64 M.J. 285, 286 (C.A.A.F. 2007); *Clay*, 64 M.J. at 276. "Accordingly, a military judge's ruling on implied bias, while not reviewed de novo, is afforded less deference than a ruling on actual bias." *Clay*, 64 M.J. at 276.

Moreover, we accord the military judge no deference at all when he fails to indicate on the record the basis for his ruling, either as to the legal standard applied or the relevant facts upon which he relied. *Briggs*, 64 M.J. at 287. In this regard, "[w]e do not expect record dissertations but, rather, a clear signal that the military judge applied the right law." *Terry*, 64 M.J. at 305 (quoting *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)).

In this case, the military judge explained the basis for his ruling by addressing each of the reasons for implied bias. He clearly applied the correct legal standard.

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[2] Neither counsel addressed this issue with Lt G. The trial defense counsel only questioned Capt S, the other deploying court member, about the future supervisory relationship.

Throughout voir dire, the military judge discussed the standard for granting a challenge based upon implied bias. He explained that implied bias was not an option for the government, that the liberal grant rule protects the perception of the appearance of fairness in the military justice system, and how it [implied bias] looks to the public is the issue. Finally, the military judge specifically stated when addressing the challenge to Lt G, "[A]nd even though there may be a liberal grant there has to be some basis and there is no basis for implied bias here." The military judge did not abuse his discretion, and applied the correct law.

II. Admission of a Photograph of the Victim

The second issue is whether the military judge erred by admitting a photograph of the alleged victim in violation of Military Rule of Evidence (Mil. R. Evid.) 608.

We review a military judge's decision to admit or exclude evidence under an abuse of discretion standard. *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006) (citing *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)). "[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *Barnett*, 63 M.J. at 394 (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). When dealing with the question of admission of a photograph, military judges have broad discretion in weighing the probative value of such evidence against its possible inflammatory or other unduly prejudicial impact on the trier of fact. *United States v. Combs*, 35 M.J. 820, 823 (A.F.C.M.R. 1992) *rev'd in part on other grounds*, 47 M.J. 330 (C.A.A.F. 1997). The military judge did not abuse his discretion when he admitted the photograph of AKL lying in the hospital bed during the examination conducted following her report of the rape.

III. Trial Counsel's Sentencing Argument

Whether the military judge committed plain error by failing, sua sponte, to instruct the members that the trial counsel's argument grossly mischaracterized the military judge's instruction regarding a dishonorable discharge is the third issue.

The standard of review for an improper argument depends on the content of the argument and whether the defense counsel objected to the argument. *United States v. Erickson*, 63 M.J. 504, 509 (A.F. Ct. Crim. App. 2006). The legal test for improper argument is "whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). Whether or not the comments are fair must be resolved when viewed within the entire court-martial. *United States v. Gilley,* 56 M.J. 113, 121 (C.A.A.F. 2001). It is appropriate for counsel to argue the evidence, as well as all reasonable inferences fairly derived from such evidence. *United States v. Nelson*, 1 M.J. 235, 239 (C.M.A. 1975). The lack of defense objection is some measure of the minimal impact of the trial

counsel's improper argument. *Gilley,* 56 M.J. at 123. Failure to object to improper sentencing argument waives the objection absent plain error. R.C.M. 1001(g). To find plain error, we must be convinced (1) that there was error, (2) that it was plain or obvious, and (3) that it materially prejudiced a substantial right of the appellant. *United States v. Powell*, 49 M.J. 460, 463-64 (C.A.A.F. 1998).

The argument of trial counsel was not improper and was fair when viewed within the entire court-martial. Trial counsel argued an appropriate punishment for the appellant, and focused on the dishonorable discharge. The military judge had no duty to interrupt a fair argument. There was no error, plain or otherwise.

IV. Sentence is Inappropriately Severe

The next issue is whether the approved sentence of seven (7) years confinement and a dishonorable discharge is inappropriately severe.

We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine, on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). After reviewing the entire record, we conclude that appellant's sentence, including the dishonorable discharge and confinement for 7 years, is not inappropriately severe.

V. Plain Error – Admission of Evidence

The fifth issue is whether the military judge committed plain error when he admitted evidence of an interrogation of the appellant by civilian authorities where the appellant was advised he was suspected of "sexual assault" under North Dakota law and not "rape."[3]

In addition to analyzing this issue under the standards set out above, we review the voluntariness of a confession de novo. *United States v. Ellis*, 57 M.J. 375, 378 (C.A.A.F. 2002). "Whether the confession is voluntary requires examining the 'totality of all the surrounding circumstances-both the characteristics of the accused and the details of the interrogation.'" *Id. (*citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)).

At trial there was no motion to suppress the interrogation conducted by civilian authorities nor was there any objection at trial to the evidence from the interrogation. Under the totality of the circumstances, the admissions by the appellant to the civilian

[3] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

authorities were voluntary. The military judge did not abuse his discretion nor commit plain error when he admitted the evidence from the interrogation.

VI. Cross-Examination Limited

The final issue is whether the appellant was denied his Sixth Amendment right to confront witnesses against him and present evidence when the military judge limited the trial defense counsel's cross-examination of AKL on her ability to manifest lack of consent under Mil. R. Evid. 412.[4]

We review a military judge's decision to admit or exclude evidence under an abuse of discretion standard. *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006) (citing *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)). A military judge has wide discretion to limit repetitive cross-examination or to prohibit cross-examination that may cause confusion. *United States v. James*, 61 M.J. 132, 136 (C.A.A.F. 2005).

At trial the military judge permitted information under Mil. R. Evid. 412 to be presented to the members; however he limited the information to that which was constitutionally required. The military judge made extensive findings of fact and conclusions of law. The military judge did not abuse his discretion when he properly limited cross-examination to relevant and admissible evidence.

Conclusion

The findings and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings, and sentence, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court

[4] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982)