UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ERIC L. BARBER
United States Air Force

ACM 36605

30 June 2008

Sentence adjudged 07 September 2005 by GCM convened at Kunsan Air Base, Republic of Korea. Military Judge: Steven A. Hatfield.

Approved sentence: Dishonorable discharge, confinement for 5 years, and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Captain Anthony D. Ortiz, and Philip D. Cave, Esquire (civilian).

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Captain Coretta E. Gray, and Captain Jefferson E. McBride.

Before

FRANCIS, BRAND, and HEIMANN
Appellate Military Judges

OPINION OF THE COURT

FRANCIS, Senior Judge:

Contrary to the appellant's pleas, a panel of officer members sitting as a general court-martial convicted him of one specification each of making a false official statement, rape, and unlawful entry, in violation of Articles 107, 120, and 134, UCMJ, 10

U.S.C. §§ 907, 920, and 934.[1] The adjudged and approved sentence consists of a dishonorable discharge, five years confinement, and total forfeiture of all pay and allowances. The appellant asserts six assignments of error. We affirm.

Background

On 9 April 2005, the security forces squadron at Kunsan Air Base, Korea, hosted a party for airmen from other units who had served as security forces augmentees during a recently completed Operational Readiness Inspection. The appellant, Airman First Class (A1C) AA, and a male colleague, A1C DC, all worked in the same unit, lived in the same dormitory, and decided to attend together. A1C AA told the appellant and A1C DC in advance that she intended to get drunk at the party and asked them to make sure no one took advantage of her while she was intoxicated. Both men agreed.

A1C AA and A1C DC left for the party together. They stopped at the Base Exchange on the way, where A1C AA bought a bottle of Jack Daniels, which she started drinking as they walked. They got to the party at about 1900 hours, meeting the appellant either as they arrived or shortly thereafter.

True to her prediction, A1C AA quickly got very drunk. So much so that at about 2100 hours, A1C DC and the appellant decided to take her back to the dorm. When they got to her room, the appellant helped A1C AA get her boots, socks, and pants off. She then stripped off her own top and bra in front of both men before getting into bed and covering up. After putting A1C AA to bed, the men left, closing the door behind them. A1C AA woke up the next morning very sore in her inner thighs and vaginal area. She had very little memory about the prior evening's events and none of what happened to her during the night to make her sore. However, based on subsequent conversations with the appellant, she ultimately concluded he raped her while she was passed out.

A1C AA twice confronted the appellant about what happened. The first time was the evening after the assault. When she passed the appellant in the hallway and just looked at him without speaking, he asked if she was mad at him. She said "just a little" and invited him into her room to talk about it. She then asked him "did you do what I think you did when I was passed out?" When he did not answer, she asked him a second time, and he said "yes." A1C AA asked him why, and he said he "was weak" and that he had liked her from the beginning.

The second time A1C AA confronted the appellant was on 14 April 2005, in conjunction with an Air Force Office of Special Investigations (OSI) investigation of the alleged rape. OSI wanted A1C AA to do a pretext telephone call to the appellant.

[1] The appellant was charged with burglary, by nighttime breaking and entering, with intent to commit rape, in violation of Article 129, UCMJ, 10 U.S.C. § 929. The members found him not guilty of that offense, but guilty of the lesser included offense of unlawful entry.

However, because the appellant did not have a telephone in his room, OSI opted instead to hide in A1C AA's wall locker while she invited the appellant back to her room again for a follow-on conversation. A1C AA opened that conversation by asking the appellant if he had used protection. He said "no" and explained that she wouldn't let him use one. When she said that didn't sound like her, he said, "you were really drunk, you know, that night." She then asked him specifically: "So, [sic] you telling me you had sex with me when I was passed out?" He replied "yes", and apologized.

OSI interviewed the appellant on 15 April 2005. During the course of that interview, he admitted having vaginal intercourse with A1C AA the night of the alleged assault but maintained, both verbally and in an initial written statement, that it was consensual. He described A1C AA as the aggressor, actively and repeatedly begging him for sex that evening while at the party, on the way back to the dorm, and in her dorm room when he and A1C DC put her to bed. She also, according to the appellant, tried to pull him into her bed when they tucked her in, but he declined to join her at that time. Instead, he and A1C DC left, with the appellant locking A1C AA's door and sliding the key under the door on the way out. Later that evening, the appellant reportedly went back alone, she invited him in, and they engaged in consensual intercourse. OSI asked the appellant why he previously told A1C AA that he had sex with her when she was passed out if it had really been consensual. He replied that he said it because he felt bad about taking advantage of A1C AA while she was intoxicated and would have said anything at that point to get out of the room as quickly as possible.

A1C DC's version of the evening's events differs significantly from the appellant's. First, he saw none of the sexually aggressive behavior the appellant attributed to A1C AA, even though he had both of them in his sight during both the walk back to the dorm and while they were putting A1C AA to bed. Second, he indicated the appellant did not lock A1C AA's door when they left. Rather, A1C DC, not the appellant, tried to get A1C AA's key from her so they could lock the door, but she had it tightly in her hand and would not give it to them. As a result, they left the door unlocked and A1C DC, who was pulling building security duty that night, periodically checked on A1C AA throughout the evening. Each time the door was still unlocked.

After the appellant completed his initial written statement to OSI, the interviewing agent confronted him with additional evidence. He then completed a second written statement, in which he admitted that he had not locked the door as indicated in his prior statement. While still maintaining that A1C AA voluntarily let him in, he also admitted that he "took advantage of her in her intoxicated state."

The government's position at trial was that A1C AA was passed out drunk and therefore incapable of consenting to the appellant's unwanted advances. The defense position was that the appellant, though intoxicated, was not passed out. Rather, she was

only "blacked out", which affected her memory of the evening's events but did not diminish her capacity to voluntarily consent.

Voir Dire Limitation

The appellant asserts the military judge failed to ensure an adequate voir dire and effectively quashed defense efforts to conduct voir dire, when there was a clear indication that some members would automatically sentence appellant to confinement if convicted.

Military judges have broad discretion in determining the scope of voir dire, including the discretion to personally question the members in lieu of questions by counsel. Rule for Courts-Martial (R.C.M.) 912(d); *United States v. Nieto,* 66 M.J. 146, 149 (C.A.A.F. 2008); *United States v. Williams*, 44 M.J. 482, 485 (C.A.A.F. 1996). We will not overturn a judge's decision to limit voir dire absent a "clear abuse of discretion, prejudicial to [the appellant]." *Williams,* 44 M.J. at 485.

The appellant's complaint stems from voir dire questions posed by trial defense counsel and the military judge to determine each panel member's attitude concerning punishment. During group voir dire, trial defense counsel asked the members if any of them felt that "someone convicted of rape should automatically be sent to jail no matter what the circumstances." Seven of the members responded affirmatively and were called back for individual voir dire on that and other issues.

During individual voir dire of the affected members, the military judge, after some initial questions by trial counsel and trial defense counsel, took control of the questioning and, with some exceptions, precluded further questions by counsel on this issue. In each case, the judge gave the members the following instruction:

> If sentencing proceedings are required, I'll instruct you before you begin your deliberations on the full range of punishments, from no punishment up to the maximum punishment. You should consider all forms of punishment within that range. Consider doesn't mean that you would vote for that punishment. If means that you would think about it and decide one way or the other [if that is] an appropriate punishment. Can you follow this instruction and consider all forms of punishment, including no punishment?

Some of the members stumbled over the concept of "no punishment" if the appellant was convicted of rape, causing the judge to further emphasize the requirement to consider all punishment options. However, all ultimately agreed they would follow the judge's instruction.

Given the broad discretion afforded military judges in controlling voir dire, we find nothing inappropriate in the judge's decision to take over questioning on this issue

and to restrict further questioning by counsel. Indeed, our superior court has specifically sanctioned such a practice. *See Williams*, 44 M.J. at 484-85. The real question is whether the questions posed by the judge, and the answers given, were sufficient to address the concern about the members' attitudes toward punishment. Setting aside for the moment consideration of the three members further discussed below, we conclude that they were. A mere "predisposition" to impose some punishment is not automatically disqualifying. *United States v. Jefferson,* 44 M.J. 312, 319 (C.A.A.F. 1996). Rather, the test is whether the member will keep an open mind and follow the judge's instructions. *Id.*; *United States v. Schlamer*, 52 M.J. 80, 92 (C.A.A.F. 1999). The questions and responses ensured that each member who sat on the appellant's panel met this requirement.

At the conclusion of voir dire, the trial defense counsel challenged three members for cause, Major Y, Major S, and Captain M, citing their "inelastic predisposition" toward punishment. The judge granted the challenges against Major S and Captain M, thereby mooting any possible concern about their voir dire responses. He then denied the challenge against Major Y, explaining that he had carefully observed the three members' responses to his questions and found Major Y's responses more credible than those of the excused members.

Beyond the judge's observation about the credibility of the challenged members, it is difficult to discern from the record any significant difference between Major Y's responses and those of the two members relieved for cause. Indeed, his responses appear even more equivocal. However, even assuming, *arguendo*, that the judge erred in denying the challenge of Major Y, we find no prejudice. After the challenge for cause was denied, the appellant used his sole peremptory challenge against Major Y. As a result, he never sat on the case and had no impact on the appellant's adjudged sentence. Further, in exercising the preemptory challenge, trial defense counsel did not state that he would have used his peremptory challenge against another court member had the challenge for cause of Major Y been granted. At the time of the appellant's trial, such a statement was required to preserve the issue for appeal. *See* version of Rule for Courts-Martial (R.C.M.) 912(f)(4) in effect prior to 13 November 2005.[2] Absent such a statement, any issue concerning the military judge's denial of the challenge for cause was waived. *United States v. Jobson*, 31 M.J. 117, 120 (C.M.A. 1990).

Human Lie Detector Testimony

The appellant asserts the military judge committed prejudicial error when he allowed the admission of repeated instances of human lie detector testimony and failed to provide prompt, curative instructions.

[2] The pertinent language of RCM 912(f)(4) was changed by Executive Order 13387, issued October 14, 2005, and effective November 13, 2005.

This claim stems from the testimony of the OSI agent who interviewed the appellant and took his two written statements. Part of the agent's testimony centered on the discrepancies between the first and second written statements, concerning whether or not the appellant locked A1C AA's door after he and A1C DC put her to bed. On cross-examination, trial defense counsel questioned the agent closely about the two statements. When answering defense questions, the agent twice opined that the appellant "told the truth" when making the second statement. The agent's comments were made during the following colloquy:

> DC: (Referring to the two different statements) Okay. And during the second interview, you wanted him to put certain things in his statement, correct?
> Agent: The first statement, we gave him the opportunity to give his side of the story and then we confronted him with the evidence we had. And we asked him again the same questions and this time he told the truth.
> DC: Right. And you wanted -- you suggested some certain things that he needed to correct, correct?
> Agent: I asked him certain questions and he this time told the truth.
> DC: And then after -- and then after that he made the second statement?
> Agent: Correct.

The defense made no objection to the "told the truth" comments at the time they were made. However, the appellant now asserts that military judge should have *sua sponte* instructed the members to disregard such testimony and that failure to do so constitutes plain error, prejudicial to the appellant. We disagree.

Opinions as to whether an individual is or is not telling the truth are not admissible. *United States v. Brooks,* 64 M.J. 325, 328 (C.A.A.F. 2007). The OSI agent's testimony that the appellant "told the truth" in his second written statement constitutes such an opinion. The fact that the testimony was elicited by the defense during cross-examination does not make it less objectionable, particularly when, as here, the comments went beyond the questions posed by counsel. *See generally Brooks*, 64 M.J. at 329 (citing with apparent approval the Delaware Supreme Court decision in *Powell v. State,* 527 A.2d 276 (Del. 1987)).

Failure to object to the admission of such evidence forfeits the issue for appeal, absent plain error. *Brooks*, 64 M.J. *at* 328. "To demonstrate that relief is warranted under the plain error doctrine, an appellant must show that: (1) there was error; (2) the error was plain or obvious; and (3) the error was materially prejudicial to his substantial rights." *Id.* We do not here address the first two criteria because we find that any error, if it occurred, did not materially prejudice the substantial rights of the appellant.

The OSI agent's gratuitous comments were insignificant when considered in light of the other evidence presented at trial. The second written statement of the appellant that was the subject of the agent's testimony itself effectively indicated that he had not been entirely forthcoming in his first statement, indicating that he "didn't lock the door as stated before." The second statement, like the first, included an averment by the appellant that it was "true and correct to the best of [his] knowledge." Given the nature of the second statement, and it's timing vis-à-vis the first, a fair reading of the statements is that the appellant was not truthful in his first statement on this issue, and corrected the error, *i.e.*, "told the truth", on the second statement. That interpretation was bolstered at trial by the testimony of A1C DC that he and the appellant left A1C AA's door unlocked after putting her to bed. Finally, no evidence was raised at trial to suggest that the appellant was not telling the truth when he admitted that his prior statement was not accurate. In light of this evidence, we are convinced beyond a reasonable doubt that the OSI agent's limited comments that the appellant "told the truth" in his second sworn statement had no material impact on the outcome of the appellant's trial and therefore did not operate to his prejudice.

Ineffective Assistance of Counsel[3]

The appellant asserts that his trial defense counsel, "through a constellation of errors," failed to provide him effective assistance of counsel.

In reviewing ineffective assistance of counsel claims, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Tippit,* 65 M.J. 69, 76 (C.A.A.F. 2007). To prevail, the appellant must show both: (1) that any deficiency in counsel's performance was "so serious that counsel was not functioning as the "counsel" guaranteed . . . by the Sixth Amendment"; and (2) that counsel's deficient performance prejudiced the defense to such an extent that it "[deprived] the [appellant] of a fair trial . . . ." *Strickland*, 466 U.S. at 687. With regard to the first prong, an error in counsel's performance, if it occurred, does not per se amount to ineffective assistance of counsel. Rather, the real question is whether, considering any perceived error, "the level of advocacy [fell] measurably below the performance . . . [ordinarily expected] of fallible lawyers." *United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991) (quoting *United States v. DiCupe*, 21 M.J. 440, 442 (C.M.A. 1986)). In making this assessment, we generally "will not second-guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006).

The appellant points to a number of purported failures by counsel. The first three concern separate assertions of error raised by the appellant and are addressed elsewhere in this opinion. Having resolved all three adversely to the appellant, they merit no further

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

discussion within the context of this claim. Based on our careful examination of the remaining purported deficiencies in light of the record, a responding affidavit from appellant's trial defense counsel[4], and the legal guidelines referenced above, we conclude that they too are without merit and that the appellant received effective assistance of counsel. To be sure, there are some things that counsel arguably might have done differently. However, that is not the test. It is whether counsel's performance fell measurably below that expected of professional counsel. It did not.

Rights Advisement[5]

The appellant asserts that the joint actions of OSI and A1C AA made A1C AA an OSI "agent", such that she was required to advise the appellant in accordance with Article 31, UCMJ, 10 U.S.C. § 831, before asking him questions about the alleged offense.

This assertion of error refers to the second time A1C AA questioned the appellant about what he had done to her, when OSI was hiding in the closet listening. Because the appellant failed to raise a timely objection to the affected evidence at trial, the issue is forfeited, absent plain error. *Brooks*, 64 M.J. at 328. We find no error, plain or otherwise.

Our superior court has developed a two-pronged test for determining when an Article 31, UCMJ rights advisement is required. "[I]n each case it is necessary to determine whether (1) a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation." *United States v. Price*, 44 M.J. 430, 432 (C.A.A.F. 1996). "Unless both prerequisites are met, Article 31(b) does not apply." *Id.*

In this case, A1C AA initiated the second conversation with the appellant at the behest of OSI, and was therefore acting in an official capacity, satisfying the first prong of the test. *See generally, United States v. Harvey*, 37 M.J. 140, 143 (C.M.A. 1993); *United States v. White*, 48 M.J. 251, 256-57 (C.A.A.F. 1998). However, it is clear from the circumstances under which the conversation occurred that the appellant did not perceive A1C AA's questions as an official inquiry. The conversation took place in A1C AA's room, to which the appellant voluntarily followed her for what he thought was to be a private conversation. Nothing about the environment in which their conversation took place was coercive and the appellant was not aware that A1C AA had contacted OSI. Accordingly, the second prong of the test was not met, and no Article 31, UCMJ warning

---

[4] Trial defense counsel's affidavit was considered in accordance with the principles set forth in *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997).

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

was required. *Price,* 44 M.J. at 433; *United States v. Aaron*, 54 M.J. 538, 543 (A.F. Ct. Crim. App. 2000).

Improper Argument

The appellant asserts that the trial counsel, during findings and sentencing arguments, improperly commented on appellant's declination to testify and inserted his own personal credibility into the trial. He also asserts trial counsel's argument was improperly inflammatory. The asserted argument errors are raised for the first time on appeal, with no objection made at trial.

"[T]rial counsel [are] at liberty to strike hard, but not foul, blows." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). Thus, counsel may not comment during argument on the accused's exercise of his constitutionally protected rights, including his right to remain silent and not testify at trial. *United States v. Paxton*, 64 M.J. 484, 487 (C.A.A.F. 2007); *United States v. Edwards*, 35 M.J. 351, 356 (C.M.A. 1992). Nor may counsel insert matters into argument that "unduly . . . inflame the passions or prejudices of the court members." *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007) (quoting *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983). "It is [also] improper for a trial counsel to interject [himself] into the proceedings by expressing a 'personal belief or opinion as to the truth or falsity of any testimony or evidence.'" *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005). Absent plain error, "[f]ailure to object to improper argument before the military judge begins to instruct the members...constitutes waiver". *Id.* Further, "[i]mproper argument does not require reversal unless 'the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone.'" *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007) (quoting *Fletcher*, 62 M.J. at 184).

The appellant highlights several comments made by trial counsel during argument that he asserts violated the precepts outlined above. Considering the referenced comments within the context of the entire argument and the evidence properly admitted at trial, we do not read into them the meanings and effects urged by the appellant and find no prejudicial error.

With regard to his decision not to testify, the appellant points to three comments by counsel. First, counsel stated at one point that "I don't think anybody in this courtroom will contradict what I'm going to say, is (sic) that she just doesn't remember a whole lot." The appellant asserts this statement constituted a veiled reference to the appellant, as one of the people sitting in the courtroom. It did not. From the surrounding context, it is clear counsel was simply conceding that A1C AA's memory of the night's events was extremely poor, and that the members would therefore have to look to other evidence to determine what happened.

Second, counsel, referring to the appellant, stated "we can't crack open his head or read his mind or anything like that". The appellant argues that this was a comment on the member's inability to ask the appellant questions because he did not testify. It was not. Taken within context, it was simply an acknowledgement that the government had no direct evidence of the appellant's intent when he re-entered A1C AA's room that night. Counsel then went on to argue that the members could nonetheless infer the appellant's intent from the surrounding circumstances.[6]

Third, trial counsel stated "You've got three people. You've got a victim, you've got the victim's friend, you've got the accused . . . . I challenge you to look at these people and evaluate their credibility." The appellant asserts this statement invited the members to improperly compare A1C AA and A1C DC, who testified, with the appellant, who did not. Again, we read the quoted language differently. The appellant's two written statements to OSI were admitted at trial. The appellant's account of the evening's events, as set forth in those statements, was diametrically opposed to the testimony of A1C AA and A1C DC on numerous key points. Trial counsel's comment simply acknowledged that conflict and correctly advised the members of the need to evaluate the credibility of the testimony and statements to reach a verdict.

In asserting that the trial counsel improperly injected his personal opinion into the trial, the appellant points to various points in the argument where trial counsel used the person pronoun "I". Having reviewed the entire argument, we conclude counsel's use of the word "I", though inartful, did not seek to inject his personal opinion into the trial, but simply was his way of stating the government's position on the points then being argued.

The appellant's last assertion is that trial counsel's use of the term "whore" in reference to A1C AA during closing argument was improperly inflammatory, in that it suggested that the appellant had literally called her that when he had not. We find no merit in the argument. Trial counsel used the term three times during closing argument. All were in connection with counsel's discussion of the appellant's version of the night's events, as set forth in his first statement to OSI. That statement painted A1C AA as the sexual aggressor, repeatedly begging the appellant for sex in very graphic terms, gyrating against the appellant, forcing his hand down her pants, and trying to pull him into bed with her. The credibility of the appellant's version of events, as set forth in that statement, was very much in issue at trial, in that it directly conflicted with A1C AA's and A1C DC's testimony. Trial counsel argued that the appellant's statement was simply not believable, and read more "like a letter to *Penthouse* magazine" than something that really happened. He argued that the appellant falsely described A1C AA's behavior in that manner to "put all the spotlight on her", effectively attempting to paint her as a woman of less than chaste character, *i.e.,* in counsel's words, a "whore", and thereby

[6] By finding the appellant not guilty of burglary, but guilty of unlawful entry, the members declined to find that the appellant intended to rape A1C AA's when he entered her room, an essential element of the greater charged offense.

hiding the appellant's own culpability. Given the nature of the statement at issue, and the conflicting evidence introduced at trial, the argument was a fair one. Further, although the language used was harsh, it was not, within the context of the argument and the evidence, improperly inflammatory.

Legal and Factual Sufficiency[7]

The appellant asserts the government failed to prove him guilty by proof beyond a reasonable doubt of the offenses of which he was convicted.

We review claims of legal and factual insufficiency de novo, examining all the evidence properly admitted at trial, and applying the standards established by our superior courts. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c); *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Washington,* 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Quintanilla,* 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner,* 25 M.J. 324 (C.M.A. 1987).

A1C AA testified she was extremely drunk the night in question and, despite her admitted lack of memory, indicated on cross-examination it was "not possible" that she consented to having sex with the appellant. That testimony, together with A1C DC's testimony of the night's events, the appellant's written admission to OSI that he "took advantage of [A1C AA] in her intoxicated state", and his oral admissions to A1C AA that he had sexual intercourse with her while she was passed out, aggregately provided a sufficient basis for a rational trier of fact to conclude beyond a reasonable doubt that the appellant committed the offenses of which he was found guilty. Further, we ourselves are convinced beyond a reasonable doubt the appellant is in fact guilty of those offenses.

Erroneous Court-Martial Order

Although not raised by the appellant, we note that the court-martial order erroneously indicates he was tried by military judge alone. The government is directed to publish a new order, correctly reflecting trial by officer members.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.

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

Article 66(c), UCMJ; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court