UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JAMES M. BOORE
United States Air Force

ACM 38058

07 May 2013

Sentence adjudged 9 September 2011 by GCM convened at Joint Base Lewis-McChord, McChord Field, Washington. Military Judge: Martin T. Mitchell.

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for the appellant: Captain Nicholas D. Carter and Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; and Gerald R. Bruce, Esquire.

Before

GREGORY, SOYBEL, and SANTORO
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of one specification alleging that he provided alcohol to minors, in violation of Article 92, UCMJ, 10 U.S.C. § 892, and one specification alleging abusive sexual contact while the victim, JG, was substantially incapacitated, in violation of Article 120, UCMJ, 10 U.S.C. § 920. The adjudged and approved sentence was a bad-conduct discharge, confinement for 6 months, and reduction to E-1. The appellant argues that (1) the military judge abused his discretion in denying a motion for a mistrial after a witness commented on the appellant's invocation of his rights under Article 31, UCMJ,

10 U.S.C. § 831, and (2) the version of Article 120, UCMJ, in effect at the time of his trial was unconstitutional. We affirm.

Background

The appellant hosted a party at his home at which he provided alcohol to some of the underaged guests. JG, a civilian who was not well-acquainted with the appellant, attended. During the course of the evening, the appellant asked JG about the marital difficulties she was experiencing. JG was surprised that the appellant knew about her relationship as she had not spoken to him about her personal affairs. During another conversation, the appellant told JG that he and his wife were "swingers." The appellant became irritated and frustrated when others came over to join their one-on-one conversations.

Later, JG played with the appellant's puppy and experienced an allergic reaction. The appellant's wife gave her Benadryl, although the Benadryl ameliorated the allergic reaction, coupled with the alcohol JG had been drinking, it made her flushed, overheated, dizzy, nauseated, and tired. The appellant's wife and one of JG's friends helped her onto a cot in a room in the appellant's house where they urged her to spend the night. The appellant's wife and JG's friend helped her put on a pair of pajama bottoms in addition to the shirt, camisole, and bra she was also wearing when she fell asleep. When JG awoke she was naked from the waist up. Her shirts and bra were folded in a pile on the floor and her bra straps were connected. JG initially had no memory of how she had become naked or why her clothes were arranged as they were, but, as the day went on, she recalled being awakened three times during the night.

The first time she awoke, she felt pressure on her body and someone else's mouth on hers. She tried to move away but was unable to do so. Someone opened the bedroom door and, with the light from the hallway, she saw the appellant leaning over her. She further recalled hearing the appellant's sister ask him what he was doing and his reply to her to "go away."

The second time she awoke, the appellant sat her up and pulled her shirts off, then pulled her bra over her head and began kneading her breasts. Again, she was unable to move or resist.

She remembered feeling cold the third time she awoke because the blanket was down below her waist. The appellant had his hand down her pajama bottoms, inside her underwear, and was rubbing the palm of his hand against her pubic area. At some point during this third encounter, the appellant's wife entered the room, confronted him, noticed that JG was naked, and told the appellant to get out of the room.

Motion for Mistrial

After receiving JG's allegations, Air Force Security Forces investigators interviewed the appellant. Detective NU was one of the interviewers.[*] The appellant initially waived his Article 31, UCMJ, rights and made verbal and written statements. Detectives asked the appellant two follow-up questions after reading his written statement. The appellant then invoked his right to remain silent.

The military judge and the parties discussed the appellant's invocation of his rights and its impact on Detective NU's testimony, during a Rule for Courts-Martial (R.C.M.) 802 conference. The military judge summarized the discussion on that point as follows: "Airman Boore had invoked his right to counsel during the questioning by the investigators and that the investigators were not to mention, in front of members, that Airman Boore had invoked his rights to counsel and that trial counsel was going to ensure that the investigators were aware of that limitation."

Detective NU testified. He began by explaining the initial rights advisement process and the appellant's waiver. After describing the appellant's oral and written statements, the direct examination continued as follows:

> Q. And what actions did you take after you read [the appellant's statement]?
>
> A. I reviewed his statement and Detective C[] reviewed it and then we continued to push for more details as to what had actually gone on during the time period that the accused was alone with the victim.
>
> Q. And what kinds of questions were you asking?
>
> A. We asked him where exactly he was in the room, was he standing or kneeling. He indicated that he was kneeling next to the bed around the victim's chest area and head. We then asked if it was possible if he had touched the victim. He said it was possible that he had touched her. We asked him how and where. At that point he took a deep breath and requested legal counsel.

Defense counsel immediately objected and the military judge sustained the objection, instructing the members as follows:

> [MJ:] Airman Boore has an absolute right at any point during that interview to request legal counsel. The fact that he did so is not relevant to these proceedings and not admissible evidence and cannot be considered by

[*] By the time of trial, Detective NU had become a special agent with the Air Force Office of Special Investigations.

> you. Members, will you be able to follow that instruction and disregard that portion of the testimony?
>
> [MJ:] An affirmative response by all members.

Trial defense counsel requested an Article 39(a), UCMJ, 10 U.S.C. § 839, session, during which they asked the military judge to grant a mistrial based on Detective NU's testimony. Trial defense counsel argued that no curative instruction would be sufficient to remove the taint of Detective NU's statements. The trial counsel conceded that the witness's statements were inadmissible but argued that it was cured by the military judge's immediate corrective instruction.

The military judge denied the motion for mistrial, stating:

> I believe in this case, based off the members' responses, that the clarity of the military judge's instruction as well as their agreement that they will be able to follow the military judge's instructions that the curative instruction was such that it cured the error that was introduced by the reference to Airman Boore's election of counsel.

The military judge went further, however, and ordered the members to disregard not only the comment on the appellant's invocation of rights but also the testimony that the appellant admitted he may have touched the victim and hung his head after saying that. Additionally, the military judge prevented any additional direct examination of Detective NU. Finally, the military judge provided a second curative instruction to the members:

> Members, let me further clarify the instruction I provided you earlier. Members, I earlier instructed you that you must disregard Airman Boore's election of counsel. Airman Boore has a Constitutional right to seek the advice of counsel. This evidence is inadmissible and may not be considered by you.
>
> In connection with this, I have also sustained the objection to the last question and answer that resulted in the inadmissible testimony. I sustained the objection to Special Agent [NU]'s testimony regarding the question he asked Airman Boore regarding how or where he touched [the victim] and his response; this includes both Airman Boore's non-verbal and verbal responses. You must also disregard this portion of the testimony.

Before us, the appellant argues that the testimony was error and that the error was not sufficiently cured by the military judge's actions because (1) the military judge failed to question each court member individually to ascertain whether they understood and could follow his curative instruction, (2) the detective was the final witness called by the

prosecution, and (3) the statement was made after the military judge had specifically reminded trial counsel that such evidence was inadmissible.

The Government concedes that the mention of the appellant's invocation of his rights was error and that the error was of constitutional dimension. *United States v. Sidwell*, 51 M.J. 262 (C.A.A.F. 1999). The Government argues, however, that the error was harmless beyond a reasonable doubt because the statement at issue was a brief, isolated reference at the conclusion of the witness' testimony and was immediately addressed by a curative instruction and affirmation from each member that he would follow the instruction.

In *Sidwell*, our superior court addressed a similar question in a case with similar facts. The prosecution's last witness in that case was an investigator who, in response to a question about whether Sidwell made any statements to him, said, "Subsequent to invoking his rights, he made—" and was immediately cut off by an objection. The military judge, after an overnight recess, denied a defense motion for a mistrial but ordered the witness' testimony stricken and prevented him from further testifying. He also provided a curative instruction which the members agreed, answering as a group, to follow.

The *Sidwell* Court found that the improper testimony, while error, was harmless beyond a reasonable doubt. It was "an isolated reference to a singular invocation" of Sidwell's right, did not identify the right invoked, was followed by a curative instruction the next day, and was not used by the trial counsel to bolster the prosecution's case. *Id.* at 265.

The appellant invites our attention to *United States v. Diaz*, 59 M.J. 79 (C.A.A.F. 1999), in which our superior court held that a mistrial was the appropriate remedy for erroneously-admitted testimony. *Diaz* is easily distinguished. In *Diaz*, two expert witnesses were allowed to testify that they believed the accused was the person who killed his daughter. The Court of Appeals for the Armed Forces held that the judge's limiting instruction was insufficient to cure the prejudice. Unlike in *Diaz*, where the experts testified at length and opined on the ultimate issue of guilt, Detective NU's testimony regarding the appellant's invocation of his rights consisted of only three, albeit significant, words.

In his reply brief, the appellant urges that we reverse the military judge's denial of the mistrial motion because the discussion and consideration of the issue spanned only twenty minutes instead of several hours or overnight. We decline to create such a rule.

The Government's evidence against the appellant was compelling. In addition to JG's testimony, the friend who invited her to the appellant's party testified that she saw the appellant talking to JG during the evening and that, whenever she approached their private conversation, the appellant would become "snippy" and tell her to go away. She

confirmed that JG had ingested Benadryl and alcohol, and that she was "stumbling and completely incoherent" before going to bed wearing a shirt, a camisole, a bra, and pajama bottoms. She also saw the appellant stroking JG's thigh as she lay on the cot.

Other witnesses at the party corroborated the description of the appellant's interactions with JG. The appellant told one that JG was "pretty hot" and "really drunk." One saw the appellant and his wife in a fight in the hallway outside the room in which JG was sleeping. Finally, the appellant's sister testified that she saw him in JG's room on three separate occasions and found it odd that he would be in there. She told the appellant's wife where the appellant was and, thereafter, the appellant's wife "bolted inside" and brought the appellant out of the room with her.

Cross-examination of the Government's witnesses focused on minor inconsistencies among them about small details. The appellant did not testify nor present witnesses. The trial counsel did not make reference to the excluded evidence in closing argument.

We therefore conclude that although there was error, the error was harmless beyond a reasonable doubt. *United States v. Moran*, 65 M.J. 178 (C.A.A.F. 2007).

Constitutionality of Article 120, UCMJ

The appellant next argues that he was deprived of his right to due process because the version of Article 120(c)(2), UCMJ, that applied to his conduct was unconstitutional and that the military judge erroneously instructed the members in a manner that did not employ the terms of the statute. The appellant acknowledges, and we concur, that this issue has already been resolved adversely to his position by *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011).

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court