UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Major STEPHEN G. BURGH
United States Air Force

ACM 38207

16 April 2014

Sentence adjudged 6 July 2012 by GCM convened at Dyess Air Force Base, Texas. Military Judge: Matthew D. van Dalen.

Approved Sentence: Dismissal.

Appellate Counsel for the Appellant: Major Scott W. Medlyn; Captain Nicholas D. Carter; and Philip D. Cave, Esquire.

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

Before

ROAN, HARNEY, and HECKER
Appellate Military Judges

OPINION OF THE COURT

HECKER, Judge:

Contrary to his pleas, the appellant was convicted at a general court-martial of wrongful sexual contact and assault consummated by a battery, in violation of Articles 120 and 128, UCMJ, 10 U.S.C. §§ 920, 928. Officer members sentenced him to a dismissal. The convening authority approved the sentence as adjudged.

The appellant raises eight issues on appeal. First, he contends panel member misconduct occurred, arguing that at least one member of his panel improperly found him guilty because the appellant did not testify at trial on his own behalf. He avers the

evidence is factually and legally insufficient to prove his guilt. He also claims the military judge erred in giving the members the "false exculpatory statement" instruction, in allowing trial counsel to make an improper findings argument, and by failing to grant a defense request for continuance. The appellant further argues, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the military judge abused his discretion by failing to release certain medical and mental health records to the defense and by failing to allow the defense to question a witness about her prior sexual assault allegations. Finally, the appellant contends his sentence was inappropriately severe. We disagree on all grounds. Finding no error materially prejudicial to the substantial rights of the appellant, we affirm.

Background

The charges in this case stem from an incident that occurred at the appellant's off-base residence following a dinner party on 14 October 2011. Earlier that evening, the appellant and several other members assigned to Dyess Air Force Base were having drinks at the base club. After an hour or so, the appellant and two other male officers decided to grill steaks at the appellant's house. The two male officers were Lieutenant Colonel (Lt Col) KG and Lt Col JB. Lt Col KG, invited a civilian woman, Ms. WM, to join them. Later, Lt Col KG also invited First Lieutenant (Lt) B. Lt Col KG had previously dated Ms. WM and was now casually dating Lt B. The group of five met at the appellant's house.

Lt Col KG left around midnight. He testified that the party had been relatively low-key, and no one was drunk or acting inappropriately, including the appellant and Lt B. Similar testimony was provided by the other male officer at the party, as well as Ms. WM. Ms. WM left the party next, followed by the other male officer, leaving only the appellant and Lt B at his house.

Lt B testified that she had consumed several alcoholic beverages during the course of the evening but was in control of herself and was not intoxicated. When Lt Col KG left the party, Lt B and the appellant began dancing the "two-step" on the back porch. The appellant then kissed her on the forehead and on the lips. She protested and he initially backed off but then continued this behavior. Lt B testified that she tried to move away, but he pulled her against him and began "grinding" against her back. He then pulled her into the house and put his hands on her buttocks underneath her pants and on her breasts underneath her bra. He continued this type of behavior as he pushed her down onto the couch and then pulled her into the bedroom. She described herself as feeling "disbelief and confusion" as these events unfolded. She was eventually able to escape his residence. For this conduct, the appellant was convicted of engaging in wrongful sexual contact with Lt B by touching her buttocks and breasts underneath her clothing and without her permission, and assault consummated by a battery for pushing her and kissing her on the mouth.

Panel Member Misconduct

The appellant did not testify at his court-martial. On appeal, along with his assignments of error, the appellant submitted a motion to attach a declaration signed by Lt Col JB, one of the officers who testified at the trial, regarding a post-trial encounter he had with the president of the appellant's court-martial panel. In that declaration, Lt Col JB described how he shared with the panel member his belief that this case involved just one of multiple sexual assault allegations Lt B had made, and that, in his opinion, Lt B seemed to have a "pattern of behavior and a desire to push a personal agenda." To which the panel member stated, "If that's what was going on, how come [the appellant] didn't take the stand and tell us that. Why did [the appellant] just sit there? If that had been me [on trial] and I was innocent, I would be saying it at the top of my voice."

The appellant claims this statement demonstrates that at least this panel member improperly found him guilty because he did not testify at his trial, thus violating his "constitutional and regulatory right to a fair and impartial panel." However, on 5 November 2013, our Court denied the appellant's motion to attach Lt Col JB's declaration pursuant to Mil. R. Evid. 509 and 606(b), as well as *United States v. Green*, 68 M.J. 360 (C.A.A.F. 2010) ("Courts in the military justice system may not consider members' testimony about their deliberative processes."). [*] The appellant has not asked for reconsideration of this ruling and has not submitted any further evidence to support his claim of panel member misconduct. Consequently, without evidence to support this contention, we find the claim is without merit.

Factual and Legal Sufficiency

The appellant contends the evidence is factually and legally insufficient to sustain his convictions for these offenses. The gravamen of his claim is threefold: (1) It is impossible to conclude beyond a reasonable doubt that the appellant did these acts because the physical evidence is not consistent with Lt B's story of a series of forcible assaults in the house; (2) Lt B's actions could have contributed to the appellant believing she was interested in this contact; and (3) Lt B had a motive to fabricate and exaggerate the events of that night (namely, to use this allegation as leverage in her effort to obtain a medical waiver for pilot training). We disagree.

[*] Rule for Courts-Martial 923 provides that findings may only be impeached upon the grounds set forth in Mil. R. Evid. 606. *United States v. Brooks*, 42 M.J. 484, 487 (C.A.A.F. 1995). Mil. R. Evid. 606(b) prohibits us from receiving evidence regarding "the effect of anything upon [a panel] member's . . . mind or emotions as influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith." Three exceptions to this general rule allow a member to testify; a panel member may testify on whether: (1) Any extraneous prejudicial information was improperly brought to the attention of the members of the court-martial; (2) Any outside influence was improperly brought to bear upon any member; or (3) There was unlawful command influence. Mil. R. Evid. 606(b); *United States v. Straight*, 42 M.J. 244, 249 (C.A.A.F. 1995).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (citation and internal quotation marks omitted). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

"The test for legal sufficiency of the evidence 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." *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (citation and internal quotation marks omitted). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

As charged here, the Government's burden of proof for the wrongful sexual contact offense was to prove by legal and competent evidence, beyond a reasonable doubt that (1) The accused engaged in sexual contact with Lt B by touching her breasts and buttocks underneath her clothing; (2) He did so without her permission; and (3) This sexual contact was without legal justification or lawful authorization. *Manual for Courts-Martial*, (*MCM*) *United States*, A28-9 (2012 ed.). In doing so, the Government had to prove beyond a reasonable doubt that Lt B did not consent to this activity, and the mistake of fact as to consent did not exist. For the assault consummated by a battery offense, the Government had to prove beyond a reasonable doubt that (1) The appellant did bodily harm to Lt B; (2) He did so by pushing her with his hands and kissing her on the mouth; and (3) The bodily harm was done with unlawful force or violence. *MCM*, Part IV, ¶ 54.b.(2).

Having considered the entirety of the evidence presented at trial, we find the evidence factually and legally sufficient to sustain the appellant's convictions for these two offenses. This includes the testimony of Lt B regarding what she experienced physically and mentally on the night in question, and the testimony of the other witnesses who observed the appellant and Lt B shortly before these events unfolded. We also considered the statement made by the appellant under rights advisement. After being told he was suspected of attempted rape, the appellant initially told the law enforcement agents that he had experienced a blackout during the party and had no recollection of any sexual or romantic encounter. Several hours into the interview, however, the appellant

told the agents he recalled "flashes" of kissing a woman and then that he remembered "kissing and groping" Lt B. He said he remembered dancing with her and kissing her, and then moving through the kitchen and living room while engaging in mutual kissing, rubbing and touching. This continued until Lt B said it was a "bad idea" and left his house. The appellant denied touching her under her clothes and claimed Lt B was a willing participant in the activities. We do not find the appellant's recitation of the events to be credible, especially when considered in light of the other evidence in the case.

After weighing the totality of the evidence and making allowances for not having observed the testimony of the trial witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. We also find that a reasonable factfinder could have found all the elements of these offenses beyond a reasonable doubt, considering the evidence in the light most favorable to the prosecution.

Instruction on False Exculpatory Statements

As described above, the appellant initially stated to investigators that he had no memory of the night in question because he had blacked out due to excess alcohol consumption, but he later admitted to engaging in sexual contact with Lt B. When discussing instructions, the military judge proposed a variation of the benchbook's instruction on false exculpatory statements. Trial defense counsel did not object and the panel was instructed as follows:

> There has been evidence that after the offenses were allegedly committed, the accused may have made a false statement about the alleged offenses, specifically that he told investigators that he had passed out and had no knowledge of the facts surrounding the allegations on the night in question.
>
> Conduct of an accused, including statements and acts done upon being informed that a crime may have been committed or upon being confronted with a criminal charge, may be considered by you in light of other evidence in the case in determining the guilt or innocence of the accused. If an accused voluntarily offers an explanation or makes some statement tending to establish his innocence, and such explanation or statement is later shown to be false, you may consider whether this circumstantial evidence points to a consciousness of guilt. You may infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his innocence. The drawing of this inference is not required. Whether the statement was made, was voluntary, or was false is for you to decide.

In findings argument, trial counsel referenced the appellant's "false exculpatory statement" several times, pointing out aspects of the appellant's recorded statement that

the prosecution believed were lies. The appellant now argues the military judge's decision to give this instruction constitutes plain error. We disagree.

Absent objection at trial, we review the military judge's decision to give an instruction for plain error. *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011). To establish plain error, the appellant must show, "(1) there was an error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the [appellant]." *Id.*

The instruction given by the military judge reflects an established principle of law, namely that "false statements by an accused in explaining an alleged offense may themselves tend to show guilt." *United States v. Colcol*, 16 M.J. 479, 484 (C.M.A. 1983) (citing *Wilson v. United States*, 162 U.S. 613 (1896)). Here, the appellant initially told law enforcement he had no memory of the events involving Lt B, and then said he did recall engaging in certain consensual sexual behavior with her. The appellant did not merely deny guilt in a general fashion. Instead, he described scenarios that, if believed, would exonerate him of any wrongdoing. This falls within the recognized principle of law that false exculpatory statements may properly be considered as circumstantial evidence that points to a consciousness of guilt. We find this instruction was fairly raised by the evidence adduced at trial, and the military judge did not commit plain error in so instructing the members.

Findings Argument

Trial defense counsel did not object to any aspect of the findings argument. The appellant now contends trial counsel's argument improperly implied trial defense counsel was dishonest, and by "wrapp[ing] himself in the mantle of the members," trial counsel sought to have the members align themselves with the Government against the appellant.

When making his findings argument, trial counsel stated:

> When an *enemy* is retreating, they try and hide the evidence. When they're on the run, they throw smoke bombs behind them as a distraction and concealment. These motives . . . are ludicrous on their face. They're smoke bombs. They're distractions. That bathroom is a smoke bomb. This waiver process to get a UPT slot is a smoke bomb . . . .

When making his findings rebuttal argument, trial counsel went on to say:

> Smoke, mirrors, dangling keys in front of you like they're trying to distract a toddler. A smoke bomb. That is what defense is focused on. . . . That's the smoke bomb. That's the keys dangling in front of you. . . .

Also in his findings argument, trial counsel stated:

> *We* know in *our* heart of hearts, based on *our* common experience and *our* understanding of the ways of the world, that when you're confronted with something, if you're truly innocent, you don't lie. If you were falsely accused of something, you wouldn't lie about it. That's common sense. . . . *We* know that from *our* common interaction with any other individual, any day of the week, because *we* know what truth is. *We* know it.

(emphasis added).

Improper argument is a question of law reviewed de novo. *United States v. Pope*, 69 M.J. 328, 334 (C.A.A.F. 2011). One must object to an improper argument before the military judge begins to instruct the members on findings; otherwise, the objection is waived. Rule for Courts-Martial (R.C.M.) 919(c). In the absence of an objection, we review for plain error. *United States v. Rodriguez*, 60 M.J. 87, 88 (C.A.A.F. 2004). "Plain error occurs when there is (1) error, (2) the error is obvious, and (3) the error results in material prejudice to a substantial right" of the appellant. *Id.* at 88-89 (citation omitted).

"It is improper for a trial counsel to interject [themselves] 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) (citations and internal quotation marks omitted). It is also improper for trial counsel to characterize a defense as fabricated. *Id. at* 182 (citations omitted). However, trial counsel's comments must be examined in context of the full record and what may otherwise be deemed improper argument may be justified in light of trial defense counsel's trial tactics. *United States v. Haney*, 64 M.J. 101, 104 (C.A.A.F. 2006). Therefore, our analysis should not focus "on the words in isolation, but on the argument as 'viewed in context'" of the entire court-martial. *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000) (citations omitted).

In evaluating such a situation, our decision need not depend on whether any of trial counsel's findings arguments were, in fact, improper if we conclude the appellant has not met his burden of establishing the prejudice prong of the plain error analysis. "In assessing prejudice under the plain error test where prosecutorial misconduct has been alleged: '[W]e look at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial.'" *United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007) (quoting *Fletcher*, 62 M.J. at 184). The "best approach" to the prejudice determination involves balancing three factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Fletcher*, 62 M.J. at 184. Improper argument does not require reversal unless "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." *Id.*

Here, we do not find reversal to be warranted. Trial counsel used the first person pronoun "we" while describing the appellant's statement to investigators. He also characterized trial defense counsel's theory as "ludicrous" and described trial defense counsel as an "enemy" who was using "smoke bombs" to distract the panel. These tactics can stray into the arena of improper argument. However, considering the cumulative impact of any allegedly improper arguments in the context of the trial as a whole, we find that the third *Fletcher* factor weighs so heavily in favor of the Government that we are confident the appellant was convicted on the basis of the evidence alone. Given the relatively limited nature and number of these comments, especially when considered in light of all the evidence presented at trial, which included a highly inculpatory interview the appellant gave to investigators, we do not find plain error.

Defense Request for a Continuance

On 1 July 2012, the prosecution notified the defense that certain statements made by Lt B existed and provided copies of those statements to the defense the following day. These statements included information on other sexual assault allegations made by Lt B regarding different men. The defense moved for a continuance so it could investigate these prior allegations to determine if any grounds existed to impeach Lt B or demonstrate her bias, motive to fabricate or lack of ability to perceive events. The military judge denied the motion, finding the evidence sought, if it existed, did not appear relevant and would not be admissible under a variety of evidentiary rules. He found "the facts relating to prior events unrelated to this case are highly speculative, not shown to be relevant and/or necessary or material, and do not warrant a continuance." The appellant argues this constituted an abuse of the military judge's discretion. We disagree.

Article 40, UCMJ, 10 U.S.C. § 840, provides "The military judge . . . may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just. Further, R.C.M. 906(b)(1) provides: "A continuance may be granted only by the military judge." The non-binding Discussion of R.C.M. 906(b)(1) explains: "Reasons for a continuance may include: insufficient opportunity to prepare for trial."

The standard of review of a military judge's decision to deny a continuance is abuse of discretion. *United States v. Weisbeck*, 50 M.J. 461, 464 (C.A.A.F. 1999). An abuse of discretion is found "where reasons or rulings of the military judge are clearly untenable and . . . deprive a party of a substantial right such as to amount to a denial of justice; it does not imply an improper motive, willful purpose, or intentional wrong." *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997) (citation and internal quotation

marks omitted). In determining whether a military judge abused his discretion in this context, we consider the factors articulated in *Miller*:

> [S]urprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice.

Id.

When considering those factors and the information presented at trial, we do not find the military judge abused his discretion in denying the defense request for a continuance. He correctly found that trial defense counsel's plan to investigate the prior allegations of sexual misconduct made by Lt B was not likely to lead to any evidence that would be admissible in the appellant's court-martial.

Cross-Examination of Lt B

Pursuant to *Grostefon*, the appellant alleges the military judge abused his discretion by refusing to allow the defense to cross-examine Lt B about her prior sexual assault allegations, as described above. We disagree.

Generally, evidence of a victim's past sexual behavior is inadmissible under Mil. R. Evid. 412. If constitutionally required, such evidence can be admitted, where "the evidence is relevant, material and the probative value of the evidence outweighs the dangers of unfair prejudice." *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011). A military judge's decision on whether to admit or exclude evidence pursuant to Mil. R. Evid. 412 is reviewed for abuse of discretion. *Id.* at 317. "Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed de novo." *Id.* We find the military judge did not abuse his discretion by refusing to permit the defense to ask Lt B about the prior sexual assaults she experienced.

Medical and Mental Health Records

At an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session on 15 June 2012, the parties litigated trial defense counsel's motion for the release of Lt B's medical and mental health records. Trial defense counsel believed the records were relevant and necessary because they could include information about Lt B's relationship with Lt Col KG and her desire to make him jealous by fabricating the allegations against the appellant. The military judge conducted a hearing pursuant to Mil. R. Evid. 513 and reviewed the records in camera and provided the defense with 79 pages of Lt B's records.

In his written ruling, the military judge noted the records did not contain any reference to the relationship between Lt B and Lt Col KG.

Pursuant to *Grostefon*, the appellant contends the military judge abused his discretion by declining to release *all* of Lt B's medical and mental health records to the defense "when they could be relevant to evidence on findings and on sentencing, where [Lt B] testified about the traumatic effects of [the] [a]ppellant's conduct." We disagree.

Mil. R. Evid. 513(a) states, "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist . . . in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition." This privilege is subject to certain exceptions found in Mil. R. Evid. 513(d). An in camera review of the evidence, or proffer thereof, is required under Mil. R. Evid. 513(e)(3) if necessary to rule on a motion.

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Jenkins*, 63 M.J. 426, 428 (C.A.A.F. 2006). We conclude the military judge did not abuse his discretion when he released to the parties only some of the medical and mental health records. In our opinion, he properly reviewed the records in camera, pursuant to Mil. R. Evid. 513(e)(3), and released the appropriate material. The findings of fact in his ruling were not clearly erroneous. The military judge's ruling cites the appropriate and correct legal authorities relevant to this issue, and his decision is not "outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008).

Sentence Severity

The appellant contends that his sentence, a dismissal, is inappropriately severe. To support his claim, the appellant cites multiple letters from military and civilian personnel that were submitted on his behalf in the sentencing phase of his court-martial. Included within that assignment of error is a reference to a potential error made by the military judge when he overruled a defense objection to trial counsel's argument that "Your sentence today needs to convince [the appellant] what a mistake he made when he believed he could escape justice by piling up character statements and saying he's sorry." The appellant contends the court-martial panel was improperly encouraged to ignore the matters in mitigation that he presented and to punish the appellant for pleading not guilty at this trial.

We note the panel was instructed by the military judge on the principles of sentencing, and the panel was instructed that they should consider all matters presented at trial concerning the appellant, including "all matters in extenuation and mitigation and any other evidence he presented." Panel members are presumed to follow a military

judge's instructions and any improper argument can be cured by appropriate instructions. *United States v. Jenkins*, 54 M.J. 12, 20 (C.A.A.F. 2000) (citation omitted). When considered within the context of the complete sentencing argument and the instructions provided by the military judge, this comment by trial counsel did not deprive the appellant of a fair sentencing hearing.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005). 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 offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate, *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999), but are not authorized to engage in exercises of clemency. *United States v. Healy*, 26 M.J. 394, 395-396 (C.M.A. 1988).

Applying the above standards to the present case, we do not find the dismissal to be an inappropriately severe punishment for the appellant's offenses, as he faced a maximum sentence of 18 months confinement, total forfeiture of all pay and allowances, and a dismissal. We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all other matters contained in the record of trial. The approved sentence was clearly within the discretion of the convening authority and was appropriate in this case. Accordingly, we hold the approved sentence is not inappropriately severe.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist