UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MARIO L. CARTER
United States Air Force

ACM 35027

17 October 2003

Sentence adjudged 29 November 2001 by GCM convened at Brooks Air Force Base, Texas. Military Judge: Steven A. Hatfield.

Approved sentence: Bad-conduct discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Lieutenant Colonel Robin S. Wink (argued), Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Major Shannon J. Kennedy (argued), Colonel LeEllen Coacher, and Lieutenant Colonel Lance B. Sigmon.

Before

VAN ORSDOL, STONE, and ORR, W.E.
Appellate Military Judges

OPINION OF THE COURT

ORR, W.E., Judge:

The appellant was tried at Brooks Air Force Base (AFB), Texas, by a general court-martial composed of officer members. Pursuant to his pleas, he was convicted of wrongful use of marijuana on divers occasions, distribution of marijuana on divers occasions, distribution of cocaine, and introduction of marijuana and cocaine onto Brooks AFB, Texas, with the intent to distribute, all in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Additionally, the appellant was convicted of an indecent assault, contrary to his plea, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The convening authority

approved a sentence of a bad-conduct discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1.

On appeal, the appellant asserted the following errors:

I.

WHETHER THE TRIAL COUNSEL'S ARGUMENT IMPROPERLY COMMENTED ON THE APPELLANT'S FIFTH AMENDMENT RIGHT NOT TO TESTIFY BY REPEATEDLY REFERRING TO THE EVIDENCE AS "UNCONTROVERTED" AND "UNCONTRADICTED" IN A CASE WHERE ONLY THE APPELLANT COULD HAVE CONTROVERTED THE GOVERNMENT'S SINGLE WITNESS.

II.

WHETHER THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT WHEN HIS COUNSEL (1) FAILED TO OBJECT TO TRIAL COUNSEL'S IMPROPER CLOSING ARGUMENT; (2) TOLD THE COURT MEMBERS IN CLOSING THAT THE APPELLANT HAD AN "ABSOLUTE RIGHT NOT TO TESTIFY AND INCRIMINATE HIMSELF"; AND (3) FAILED TO PRESENT IMPORTANT EVIDENCE IN MITIGATION DURING THE SENTENCING PORTION OF THE CASE.

For the reasons stated below, as to Issue I, we hold that the trial counsel's argument was improper and violated the appellant's constitutional rights. As to Issue II, we hold that the appellant received effective assistance of counsel throughout all of the portions of his trial. While we affirm the court's findings on Charge II and its five specifications, we must return the case for further action on Charge I and its specification and the sentence.

The appellant was convicted of committing an indecent assault on Airman First Class (A1C) D. The evidence in the case showed that early in the morning on 24 December 2000, the appellant went to A1C D's room. A1C D and the appellant were assigned to the security forces squadron at Brooks AFB, Texas. At trial, Senior Airman (SrA) D[1] testified that she met the appellant in August of 2000, and that the two of them became close friends. She testified that while they hung out occasionally with a group of friends, the two of them never dated. At approximately 0200 on 24 December 2000, she was lying in bed watching a movie when the appellant knocked on her door. She invited him in to watch the end of the movie with her, but first the appellant left the room to get something to eat. When the appellant returned, SrA D told the appellant he could not sit on her bed and the appellant sat on the floor. The appellant began to squirm around and

[1] A1C D was promoted to Senior Airman between the time of the charged offense and the trial.

make noises. When SrA D asked him what was wrong, the appellant said that he had been drinking earlier that night. The appellant then got up to go to the restroom. When the appellant came back and tried touching SrA D's hand, she moved her hand and said she was "with someone." The appellant started rubbing SrA D's arm and she told him "no" and to "stop." The appellant then went to get some water and came back to the room and sat on her bed. The appellant started rubbing her leg and she told the appellant to "chill out." The appellant then began to lay on top of her and she rolled over in an attempt to get him off of her. They wrestled for a few minutes and the appellant managed to pull her shorts down and to get her shirt and bra up and off. Throughout the struggle, she told the appellant "no" several times before she was able to get to the phone in her room. She called the law enforcement desk, but before the call was answered the appellant disconnected the phone call by pushing talk. The appellant then walked toward the door and she pushed him out and slammed the door. SrA D reported the incident around 1100 that same morning. On cross-examination, she readily admitted having sexual intercourse with the appellant, one time, several months earlier. However, on that occasion, she initiated the encounter.

After SrA D testified, the appellant elected not to testify and the defense rested. During the trial counsel's argument on findings, he stated the following:

> The facts of this case are clear. They are uncontroverted, uncontradicted. No opposing evidence or information. The evidence you have before you is the testimony of Airman D. She sat here on this witness stand. She swore an oath to tell the truth and she told you all what happened on 24 December 2000. And the reason that her testimony is uncontroverted is because she told you what happened and that is what happened.

Even though the trial counsel mentioned the words "uncontroverted" or "uncontested" several more times, the trial defense counsel did not object. However, near the beginning of his findings argument, the defense counsel said:

> Trial counsel talked about there is no opposing story. Well, my client, Airman Carter, has a right, an absolute right not to testify and incriminate himself. And that should be made entirely clear. So we have her story. The facts still do not add up to as much as trial counsel would like you to believe that.

At the conclusion of the trial defense counsel's findings argument and before the trial counsel's rebuttal argument, the military judge gave the following instruction to the members:

> Members, before the trial counsel is given an opportunity to rebut this argument, the argument of the defense counsel reminded me of an instruction that I omitted when I was talking about determining the

> believability of the witness. I will point out that the accused has an absolute right to remain silent. You will not draw any adverse inference to the accused from the fact that he did not testify as a witness. You must disregard the fact that the accused has not testified.

Immediately after the military judge's instruction, the trial counsel restated the government's argument that the facts were "uncontradicted". And again, in the summation paragraph of his rebuttal argument, the trial counsel once again reminded the members that the facts of the case were "uncontradicted."

As the members were about to begin their deliberations, one member asked the military judge what the standard was to ensure an accused has had adequate representation. The military judge responded by saying, "I will assure you the accused has had adequate representation." The military judge then referenced the qualification and certification process set forth in the Uniform Code of Military Justice and concluded by saying he had determined that both defense counsel were qualified to provide defense services to the appellant. The court member was satisfied with the military judge's response to his question, and the members went into their closed-session deliberations.

I. Issue I: Improper Argument

The standard of review for an improper argument depends on the content of the argument and whether the defense counsel objected to the argument. The legal test for improper argument is whether it 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). If the defense counsel fails to object or request a curative instruction, the court will grant relief only if the improper argument is plain error. *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001). *See United States v. Southwick*, 53 M.J. 412, 414 (C.A.A.F. 2000), *overruled in part on other grounds, United States v. Inong*, 58 M.J. 460 (C.A.A.F. 2003); *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998). If the plain error is constitutional error, the government must convince an appellate court beyond a reasonable doubt that the error was not prejudicial. *Powell*, 49 M. J. at 465 (citing *United States v. Adams*, 44 M.J. 251, 252 (C.A.A.F. 1996)).

In the case sub judice, the trial counsel's argument clearly highlighted the fact that the appellant did not testify by repeatedly calling the government's evidence "uncontradicted" and "uncontroverted." In *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990) (citing *Griffin v. California*, 380 U.S. 609 (1965)), our superior court held that "a trial counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense." This principle is also found in the discussion section to the Rule for Courts-Martial (R.C.M.) 919, which prohibits a trial counsel from arguing that the prosecution's evidence is unrebutted if the only rebuttal could come from the accused. SrA D testified that she was alone with the appellant when the events occurred. Since the prosecution did not present any additional evidence on Charge I, the

only person who could have rebutted SrA D's testimony was the appellant. As a result, the trial counsel's argument was improper and we hold it was error. Nevertheless, the trial defense counsel did not object to the argument.

Normally, when a defense counsel fails to object to an improper argument, the objection is waived. *See* R.C.M. 919 (c). Under the holding in *Gilley*, this Court would ordinarily apply a plain error analysis. Because the trial counsel commented on the appellant's constitutional right not to testify, the government now must prove beyond a reasonable doubt that the error was not prejudicial. *Powell*, 49 M.J. at 465; *Adams*, 44 M.J. at 252. In *United States v. Mobley*, 34 M.J. 527, 531 (A.F.C.M.R. 1991), *aff'd*, 36 M.J. 34 (C.M.A. 1992), this Court listed four factors we must analyze to determine whether this improper argument was prejudicial to the appellant:

> 1) whether the language used was "manifestly intended" as comment on the failure of the appellant to testify or was of such a character that the members would "naturally and necessarily" take it as such;
> 2) whether the improper comments were isolated or extensive;
> 3) whether evidence of guilt is overwhelming; and
> 4) whether curative instructions were given, and when.

In this case, the trial counsel mentioned either the word "uncontradicted" or "uncontroverted" at least a dozen times. Although the trial counsel may not have "manifestly intended" to comment on the appellant's silence, the sheer number of times he mentioned the words was of such a character that the members would naturally and necessarily take it as such. Additionally, the fact that he mentioned the words so often makes it difficult to conclude that the comments were isolated.

While we believe there is sufficient evidence to sustain the member's findings on Charge I, we cannot conclude that the evidence is overwhelming. *See United States v. Hasting*, 461 U.S. 499 (1983). Specifically, there are no admissions or confessions by the appellant. Also, there is no physical evidence or the testimony of a witness who saw or heard the event. Additionally, the prosecution did not put in any independent evidence that the victim actually made the aborted call to the law enforcement desk. Given the nature of the charge, it is reasonable that the only evidence before the members was the testimony of the victim. In the absence of any additional independent evidence, we do not find that the evidence presented to the members was overwhelming.

Although trial defense counsel did not object to the trial counsel's improper argument, he elected to comment on the trial counsel's argument during his rebuttal to the trial counsel's findings argument. Specifically, he argued that his client had an absolute right not to testify. At the conclusion of the defense counsel's argument, the military judge gave an instruction to the members concerning the appellant's right to remain silent.

Since the military judge gave this instruction after both sides had referenced the appellant's right to remain silent, it could arguably be considered a curative instruction. However, the judge's prefatory remarks indicate that he merely forgot to read this instruction earlier and that he was not correcting an improper argument by either side. Immediately following the military judge's instruction, the trial counsel stated:

> Along those lines, members, all I would say to you is that is absolutely correct, but what you have to deal with is the evidence that is before you. And the government doesn't change its position one bit about the fact that what you have are uncontradicted facts. And there are other means that the defense can bring to undermine the testimony of a witness, and that has not happened in this case. You have uncontroverted facts that are the basic foundation of the case.

Even if we were to consider this instruction as curative, the trial counsel's rebuttal argument vitiated any curative effect. The fact that the military judge did not stop or correct the trial counsel's rebuttal argument lends further credence to our finding that the military judge's instruction was not intended to be a curative instruction.

After applying the four *Mobley* factors, we conclude that the trial counsel's arguments were error and prejudiced the appellant's substantial rights.

II. Issue II: Ineffective Assistance of Counsel

The appellant claims that he received ineffective assistance of counsel in both the findings and sentencing phases of the trial. The standard for review when an appellant claims ineffective assistance of counsel and the resulting prejudice is de novo. *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997). The United States Supreme Court has set out the test for ineffective assistance of counsel in the case of *Strickland v. Washington*, 466 U.S. 668 (1984). The two-pronged test of *Strickland* requires an appellant to first demonstrate that his counsel's performance was so deficient that he or she was not functioning as counsel within the meaning of the Sixth Amendment, and second, the appellant must demonstrate this deficient performance resulted in prejudice. *United States v. Gibson*, 46 M.J. 77, 78 (C.A.A.F. 1997).

Counsel is presumed competent until proven otherwise. *Strickland*, 466 U.S. at 689; *Gibson*, 46 M.J. at 78; *United States v. Marshall*, 45 M.J. 268 (C.A.A.F. 1996). The appellant has the burden of showing that his counsel was ineffective. *Strickland*, 466 U.S. at 687. In an effort to meet this burden, the appellant avers that his counsel failed to object to some of the trial counsel's findings argument. The appellant also claims that his defense counsel's statement made during his own findings argument amounted to ineffective assistance. Additionally, the appellant avers that defense counsel's decision not to present evidence in sentencing that another airman was working as an undercover

Air Force Office of Special Investigations (AFOSI) agent amounted to ineffective assistance.

We are not convinced that the appellant received ineffective assistance. Even though the defense counsel did not object to the trial counsel's repeated use of the words "uncontradicted" and "uncontroverted," he did respond in his findings argument. Specifically, the defense counsel stated, "Trial counsel talked about there is no opposing story. Well, my client has a right, an absolute right not to testify and incriminate himself." While his response may not have been artful, it was clear that the defense counsel was letting the panel know that his client had a right to remain silent. When taking the defense counsel's statement in context, it was clearly a human mistake, rather than an assertion that his client was guilty. We will not speculate as to why defense counsel waited until his findings argument to rebut the trial counsel's improper argument. One reason may have been that objecting during the trial counsel's argument could have highlighted to the panel that the appellant elected not to testify. In any event, we conclude defense counsel's actions were reasonable.

Finally, the appellant has not shown why the defense counsel's decision not to submit evidence that the appellant's distributions were made to someone working for the AFOSI was ineffective. Although the appellant may believe such evidence would be mitigating, he failed to show why it was mitigating and whether this evidence would have had any effect on the sentence. Additionally, there could be many tactical reasons why the defense counsel elected not to submit this evidence. For example, he may have believed that the testimony of A1C Plante in rebuttal to this evidence may have been an aggravating factor. On its face, this evidence is not clearly mitigating, and we are not convinced that its submission would have had any effect on the sentence. As a result, the appellant has not met his burden of showing his defense counsel provided ineffective assistance during the sentencing portion of his trial.

III. Ruling

The approved findings of Charge II and its specifications 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 of Charge II and its specifications are AFFIRMED. The findings of Charge I, its specification and the sentence are SET ASIDE. The convening authority may order a rehearing on Charge I and the sentence. If a rehearing on Charge I is not practical, the convening authority may order a sentence rehearing for Charge II and its specifications.

STONE, Senior Judge (concurring in part and dissenting in part):

I concur with the lead opinion as to Issue II. Because I find the trial counsel's comments, even if improper, were harmless beyond a reasonable doubt, I dissent as to Issue I.

In *Hasting*, the Supreme Court stated: "Since *Chapman*, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." *Hasting*, 461 U.S. at 509 (citations omitted). In making this determination, we must "strike the balance between disciplining the prosecutor on the one hand, and the interest in the prompt administration of justice and the interest of the victims on the other." *Id*.

In reviewing the trial counsel's entire closing argument, I do not believe his comments were manifestly intended to draw attention to the appellant's failure to testify. In fact, the trial counsel specifically denied such an intention in his rebuttal argument. Nor am I convinced that the court members "necessarily" understood the trial counsel's argument as asking them to use the appellant's silence against him. Rather, the trial counsel's comments went to the unavoidably obvious fact that only the victim testified in the case and that her testimony had been largely unimpeached. And while it is true the trial counsel made a number of comments highlighting the uncontradicted or uncontroverted nature of the evidence, these comments were over the course of approximately 15 pages of trial transcript and did not specifically invite the court members to consider the appellant's silence.

It is my view these comments were fair comment for two reasons. First, it is generally permissible for a factfinder to assess the degree to which a witness has been contradicted as a way to determine the witness's credibility. In fact, the military judge gave the standard benchbook, Department of the Army Pamphlet (DA Pam) 27-9, instruction, without objection, that allows court members to consider "the extent to which each witness is supported or contradicted by other evidence." Second, the trial counsel was simply responding to the theme established in the defense counsel's opening wherein he suggested that the victim's testimony lacked credibility and was fraught with inconsistencies. Defense counsel began his opening statement by asking the court members to focus on the victim's credibility, and then stated:

> Listen carefully. Listen to inconsistencies in her story. Listen to prior inconsistencies. Listen to all of the evidence and weigh it before you make your decision. Most importantly, however, you will be instructed not to leave your common sense and knowledge of the ways of the world outside the door when you deliberate. Use your common sense and knowledge of the ways of the world. They are particularly important in this case because

> a large element in this case--in addition to revolving around the credibility of Airman [D], the alleged victim, is also going to the issue of consent.
>
> ….
>
> Members, the defense has no doubt that when you listen closely, when you listen to those inconsistencies, evaluate the credibility, evaluate the motive to lie, the motivations of perhaps Airman [D], the one witness in this case, the things that don't make sense . . . you will come back [with] a verdict of not guilty.

I agree with the majority that the evidence of guilt in the instant case is not "overwhelming," but it was nonetheless solid and convincing, beyond a reasonable doubt. The appellant's attack on the credibility of SrA D was largely unsuccessful. The appellant was able to establish only one prior inconsistency in SrA D's testimony, and other than her previous consensual sexual encounter with the appellant, which she freely admitted, was unable to make much headway in challenging her credibility. On the other hand, SrA D's credibility was greatly enhanced by: (1) her prompt reporting of the incident; (2) her clear recollection of the evening based upon her lack of alcohol use; (3) the specific details she recalled; and (4) the internal and external consistency of her testimony.

Most importantly, the judge's instruction cured any error in this case. The timing of the judge's instruction prior to trial counsel's rebuttal argument could not have been better. This instruction also was presented to the court members in writing for their use in the deliberation room. Additionally, the military judge gave the standard instruction cautioning court members that the argument of counsel is not evidence. Absent evidence to the contrary, appellate courts presume that the court members comply with the military judge's instructions. *United States v. Ricketts*, 1 M.J. 78, 82 (C.M.A. 1975). The defense counsel's failure to specifically object to the trial counsel's argument or request any relief indicates to me he was satisfied with how this issue was addressed at trial, and further suggests a clear tactical decision, as opposed to ineffective advocacy. To hold otherwise would encourage counsel to engage in gamesmanship by addressing an issue in argument, but not specifically objecting so that any harm can be ameliorated at the most opportune moment.

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