UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant CHRISTOPHER T. CHAMBERS
United States Air Force

ACM 38044

03 July 2013

Sentence adjudged 17 June 2011 by GCM convened at Kirtland Air Force Base, New Mexico. Military Judge: J. Wesley Moore.

Approved Sentence: Dishonorable discharge, confinement for 42 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Christopher D. James and Captain Shane A. McCammon.

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

Before

STONE, HELGET, and MARKSTEINER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Senior Judge:

Contrary to his pleas, a general court-martial composed of officer members convicted the appellant of one charge and one specification of rape and one charge and one specification of simple assault in violation of Articles 120 and 128, UCMJ, 10 U.S.C. § 920, 928.[1] The members sentenced the appellant to a dishonorable discharge,

[1] The appellant was acquitted of one charge and specification of burglary with intent to commit aggravated assault, in violation of Article 129, UCMJ, 10 U.S.C. § 929. The appellant was also charged with and acquitted of one

confinement for 42 months, and reduction to E-1. The convening authority approved the findings and sentence, as adjudged.

Before this Court, the appellant raises four assignments of error: (1) whether the evidence is factually and legally sufficient to prove beyond a reasonable doubt that the appellant forced TSgt GD to engage in vaginal intercourse by displaying a knife to her; (2) whether trial counsel committed prosecutorial misconduct when, during closing argument, he invited the members to ignore the military judge's instructions that they were not to infer from the fact that TSgt GD went to a sexual assault nurse examiner as evidence that she was indeed sexually assaulted; (3) whether the Government's violation of the 120-day post-trial processing standard for taking action after completion of trial warrants meaningful relief under *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002);[2] and (4) whether the military judge abused his discretion when he admitted into evidence as excited utterances all statements made by TSgt GD to Mr. Chavez.[3] Finding no error that materially prejudices a substantial right of the appellant, we affirm.

Background

The complainant in this case, Technical Sergeant (TSgt) GD, and the appellant were married on 10 May 2002. Their marriage was dissolved on 29 February 2009. Sometime around February 2010, TSgt GD began dating TSgt William Tucker. On Friday, 12 February 2010, TSgt Tucker traveled from Cannon Air Force Base (AFB), NM, to Albuquerque, NM, and spent the weekend at TSgt GD's apartment. At around 0200 on Sunday morning, 14 February 2010, the appellant knocked on TSgt GD's door, and after what sounded like a scuffle, entered the apartment and proceeded to TSgt GD's bedroom where TSgt Tucker was sitting on the bed. The appellant and TSgt Tucker went to the kitchen area where the appellant inquired about TSgt Tucker's relationship with his ex-wife. The appellant ultimately wished TSgt GD happiness and left her apartment. The rest of the weekend continued without incident and TSgt Tucker returned to Cannon AFB on Monday afternoon, 15 February 2010.

On 16 February 2010, at approximately 0300, TSgt GD's neighbor, Mr. Randy Chavez, heard a loud "thud" (banging noise) coming from TSgt GD's apartment. He retrieved his gun and went outside to check to see if everything was secure. Mr. Chavez noticed that TSgt GD's patio furniture had been moved so he checked her window but did not go around to the back of her apartment. He then returned to his apartment.

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charge and specification of aggravated assault under Article 128, UCMJ, 10 U.S.C. § 928, but found guilty of the lesser included offense of simple assault, in violation Article 128, UCMJ.

[2] Although not raised as an issue by the appellant, we will also address whether or not the appellant's post-trial processing rights were violated as it has taken longer than 540 days to process this case

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

A few hours later that morning, TSgt GD rang Mr. Chavez's doorbell. Upon opening the door, he noticed that she was "trembling and crying." It appeared that she had been through a traumatic situation. He also noticed that she had a narrow, red mark on her throat as if something had been held against it. TSgt GD indicated that her ex-husband had broken into her apartment and held a knife to her throat. When they heard Mr. Chavez walking around earlier, TSgt GD stated that she informed the appellant that he should leave because her neighbor was up and was going to call 9-1-1. Upon seeing TSgt GD, Mr. Chavez immediately called 9-1-1 to report the incident and TSgt GD contacted her commander who also testified that she appeared to be distraught.

On 16 February 2010, Officer Louis J. Armijo, Albuquerque Police Department, responded to a priority one call to TSgt GD's apartment. A priority one call is issued when it appears someone's safety is in jeopardy. Upon arrival, he noticed that TSgt GD's patio furniture had been moved and a back window was broken. Due to the fact the screen had been taken off and most of the broken glass was on the floor inside the apartment, Officer Armijo surmised that someone had entered the apartment through the window.

Inside the apartment, Officer Armijo, along with Mr. Larry Flores, a Crime Scene Specialist with the Albuquerque Police Department, found a significant amount of blood evidence. They found a spot of blood on one of the blinds and a spot of blood in the hallway, near the refrigerator which signified that someone had been standing there, as it appeared the blood dripped and fell straight from the person. In the bedroom, there was blood smeared all over the sheets which indicated to the police that some sort of a struggle had taken place. On top of the dresser in the bedroom was a knife. The blade of the knife was out and there was a blood stain on its handle. Finally, the police noticed a blood stain on the door leaving the apartment. Mr. Flores took swabs of the blood and placed them along with the bedding and knife into evidence.

After the crime scene investigation, TSgt GD was examined by Ms. Gail Starr, Albuquerque Sexual Assault Nurse Examiner (SANE). Ms. Starr observed some suction hematomas (red marks) on TSgt GD's neck. She also observed minor damage to her vaginal tissue consistent with the top layer of skin being torn or rubbed away. This occurs in sexual encounters and indicates a lack of lubrication. However, she could not determine if TSgt GD engaged in consensual or non-consensual intercourse. Ms. Starr also observed blood on TSgt GD's gray exercise pants. She took vaginal and cervical swabs and collected the blood-stained pants.

On 16 February 2010, the police collected a DNA swab from the appellant and took various photographs of him, specifically his hands. The appellant had linear lacerations on his hands indicating that he had been cut.

The Government's final witness was Mr. Robert M. Fisher, a Forensic DNA Examiner for the United States Army Criminal Investigation Laboratory. He tested the blood collected from the hall floor, TSgt GD's pants and the knife. All of these blood stains matched the appellant. Additionally, Mr. Fisher tested semen found on the inside crotch of TSgt GD's sweatpants as well as vaginal and cervical swabs. These tests also matched the appellant. However, Mr. Fisher could not state whether TSgt GD engaged in consensual or non-consensual intercourse.

TSgt GD did not testify.

Legal and factual Sufficiency

The appellant asserts that the evidence was legally and factually insufficient to support his conviction for rape. We disagree.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *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 fact finder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humphreys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))). In resolving legal-sufficiency questions, we are "bound to draw every reasonable inference from the evidence in favor of the prosecution." *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993) (quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)); *see also United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007). 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).

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 [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

To establish the offense of rape under Article 120, UCMJ, the Government was required to prove the following elements, as instructed by the military judge: (1) the appellant caused TSgt GD to engage in a sexual act, to wit: vaginal intercourse; (2) the appellant did so by using force against TSgt GD, to wit: displaying a dangerous weapon or object; in this case a knife. *Manual for Courts-Martial, United States*, A28-1, ¶ 45.a.(a)(1) (2012 ed.). A sexual act is defined as "contact between the penis and the vulva . . .

[which] occurs upon penetration, however slight." *Id*. at ¶ 45.a(t)(1)(A). Force is defined as "action to compel submission of another or to overcome or prevent another's resistance by [] the use or display of a dangerous weapon." *Id*. at ¶ 45.a(t)(5)(C).

Based upon our review of the record of trial, the conviction is legally and factually sufficient. The appellant's main contention is that since the alleged victim did not testify, there is insufficient evidence that a rape occurred, i.e., that the sexual intercourse was non-consensual. However, considering TSgt GD's excited utterance to her next door neighbor that the appellant threatened her with a knife, the fact the appellant broke into her apartment through the window, the smearing of blood all over the bed signifying a struggle of some manner occurred, and a knife with the appellant's blood was found on the dresser in the bedroom, there is sufficient evidence for the members to have concluded that the prosecution proved the elements of rape beyond a reasonable doubt.

We have considered the evidence in the light most favorable to the prosecution. We have also made allowances for not having personally observed the witnesses. Having paid particular attention to the matters raised by appellant, we find the evidence legally and factually sufficient to support his conviction for rape. We are convinced beyond a reasonable doubt that the appellant is guilty of the rape charge and specification of which he was convicted.

Prosecutorial Misconduct

The appellant's second assignment of error is whether trial counsel committed prosecutorial misconduct when, during closing argument, he invited the members to ignore the military judge's instructions that they were not to infer from the fact that TSgt GD went to a sexual assault nurse examiner as evidence that she was indeed sexually assaulted.

This Court reviews an assertion of prosecutorial misconduct de novo. *United States v. Argo*, 46 M.J. 454, 457 (C.A.A.F. 1997); *see also United States v. Arindain*, 65 M.J. 726, 729 (A.F. Ct. Crim. App. 2007), *aff'd*, 66 M.J. 192. "The standard of review for an improper argument depends on the content of the argument and whether the defense counsel objected to the argument." *United States v. Erickson*, 63 M.J. 504, 509 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 221 (C.A.A.F. 2007). "The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the [appellant]." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) (citations omitted). The question of whether the comments are fair must be resolved by viewing them within the entire context of the court-martial. *United States v. Gilley*, 56 M.J. 113, 121 (C.A.A.F. 2001).

Prior to instructing the members, the trial defense counsel made a specific request for an instruction concerning the SANE examination. The trial defense counsel requested

that the military judge instruct the members that they are not to assume there was an assault simply because TSgt GD underwent an examination. The military judge concurred and instructed the members, as follows:

> However, as I instructed you earlier, you may not draw any inference adverse to the accused from the fact that an allegation was made or that charges were preferred and referred to this court for trial. Similarly, you may not infer from the fact that Technical Sergeant [GD] was examined by a Sexual Assault Nurse Examiner as indicating that she was indeed the victim of a sexual assault.

During his closing argument, trial counsel made no reference to the special instruction. However, in the trial defense counsel's closing argument, he broached the issue of TSgt GD's motivation for visiting the SANE:

> What is the motive here? Is this a spurned ex-husband who is upset that his ex-wife is dating someone else? Or is this someone else with a motive? Is this an alleged victim with a motive, someone who, after having a consensual encounter with her ex-husband, realizes, "Oh, oh. I've got a boyfriend." Call him at 5:30 in the morning, and then at 6:30 all of a sudden reports that she's been a victim of an assault by her husband. And note, at that point, that is all she says, "He broke in my house and held a knife to me." Rape doesn't become an issue until she goes to the SANE, and all of a sudden, the semen in her vagina, "How do I explain that? I guess I was raped."

During his rebuttal argument, the trial counsel responded to the trial defense counsel's argument:

> I will briefly talk with you about a few things the defense counsel said. He talked about their theory, that she went to the SANE and then somehow, at that point, she says, "Oh, my goodness. There is sperm in me. I've been sexually assaulted—I've had sex with him, so I'd better make up a story for my boyfriend." That doesn't make sense.
>
> That she would go to the SANE later. There is only one reason one goes to the SANE. It's because in her mind, she believes that she needed to. In her mind, she believed she needed to.

The trial defense counsel objected to this argument based on the statement, "that there is only one reason one goes to the SANE." The military judge then reminded the members of his "earlier instruction that the mere fact of going to a SANE is not

something from which you can conclude a sexual assault took place," and beyond that overruled the objection.

The trial counsel then proceeded with his argument, stating:

> And as to that, consider—the defense sort of impugned her motives about what would happen in the case as to why she might come up here and fabricate a story about what happened. Why would she go to that SANE, go in there, put herself up in that lithotomy position, expose herself to an entire--a whole--a stranger, someone she did not even know, did not know from Adam or Eve; had this medical exam done, have a painful shot? Et cetera, et cetera, et cetera. Why would she go through this if what they are saying is true or even close to being accurate? She wouldn't have.

We find that under these circumstances the trial counsel did not commit prosecutorial misconduct. He never asked the members to specifically infer that since TSgt GD went to the SANE she must have been sexually assaulted. Instead, the trial counsel responded to the trial defense counsel's argument that TSgt GD was examined by the SANE as part of her motive to fabricate her sexual encounter with her ex-husband. Additionally, even if the trial counsel's rebuttal argument was improper in that it violated the military judge's instruction, the military judge immediately provided a curative instruction to the members.

Having reviewed the trial counsel's argument in its entirety, the trial defense counsel's objections, and the military judge's responses thereto, we find that the appellant has not suffered any material prejudice to a substantial right and the appellant's argument on this issue is without merit.

Post-Trial delay

The appellant's third assignment of error is whether the Government's violation of the 120-day post-trial processing standard for taking action after completion of trial warrants meaningful relief under *Tardif*, 57 M.J. 219. Although not raised by the appellant, we will also address whether the appellant has been denied his due process right to a speedy post-trial review and appeal since there has been more than 540 days from the date his case was docketed with this Court on 17 November 2011.

The appellant's court-martial was completed on 17 June 2011, and the convening authority took action on 31 October 2011, 136 days later. The appellant argues that his period of confinement should be reduced by 136 days due to this delay which is unacceptable and reflects poorly on the Air Force.

We review de novo claims that an appellant was denied his due process right to a speedy post-trial review and appeal. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). In conducting this review, we assess the four factors laid out in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Id.* at 135 (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *United States v. Toohey*, 60 M.J. 100, 102 (C.A.A.F. 2004)). Because both the delay noted in the appellant's assignment of errors as well as the delay in excess of 18 months it has taken this Court to render a decision are facially unreasonable, we would customarily analyze each factor and determine whether the factor weighs in favor of the Government or the appellant, then balance our analysis of the factors to determine whether there has been a due process violation. However, when we assume error but are able to directly conclude that any error was harmless beyond a reasonable doubt, we need not engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances and entire record in light of the *Barker* factors, we conclude that any denial of the appellant's right to speedy post-trial review and his appeal was harmless beyond a reasonable doubt, and that relief is not otherwise warranted. *United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *Tardif*, 57 M.J. at 224.

Excited Utterance

The appellant's final assignment of error is whether the military judge abused his discretion when he admitted into evidence as excited utterances all statements made by TSgt GD to Mr. Chavez.[4]

This Court reviews a military judge's decision to admit evidence for an abuse of discretion and will not overturn the military judge's ruling unless it is "'arbitrary, fanciful, clearly unreasonable, or clearly erroneous,' or influenced by an erroneous view of the law." *United States v. Thompson*, 63 M.J. 228, 230 (C.A.A.F. 2006) (quoting *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004).

"A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," is admissible as an excited utterance. Mil R. Evid. 802(2). Excited utterances have long been admissible as an exception to the rule against hearsay on the assumption "that persons are less likely to have concocted an untruthful statement when they are responding to the sudden stimulus of a 'startling event.'" *United States v. Feltham*, 58 M.J. 470, 474 (C.A.A.F. 2003)

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

(quoting *United States v. Lemere*, 22 M.J. 61, 68 (C.M.A. 1986)). In *United States v. Arnold*, 25 M.J. 129 (C.M.A. 1987), our superior Court established a three-prong test:

> (1) The statement must be spontaneous, excited, or impulsive rather than the product of reflection;
>
> (2) The event prompting the utterance must be startling, and;
>
> (3) The declarant must be under the stress of excitement caused by the event.

Feltham, 58 M.J. at 474 (citing *United States v. Arnold*, 25 M.J. 129 (C.M.A. 1987); *United States v. Donaldson*, 58 M.J. 477 (C.A.A.F. 2003)).

At trial, the Government moved to admit certain statements TSgt GD made to Mr. Chavez as excited utterances under Mil. R. Evid. 802. Trial defense counsel objected to the admission of this evidence. After consideration of the evidence and argument of counsel, the military judge determined that:

> As to the statements to Mr. Chavez, though they were clearly not testimonial, they are just as clearly hearsay, so the question turns to whether they fit within the excited utterance exception to the hearsay rule. In that connection, Mr. Chavez' testimony indicates that TSgt [GD] did experience a startling event, the statements were made within one to two hours of the startling event, the statements were not the product of questioning but were instead volunteered and the nature of the startling event is of a nature that would likely have startling effects that would be ongoing for hours thereafter. On the other hand, TSgt [GD's] age and temperament, as described in particular by Lt Col Ilcus would indicate that she is a person who deals well with stress and is not easily overcome by it. Nonetheless, Mr. Chavez observations of TSgt [GD], that she was shaking and crying and appeared to be "scared for her life," seem to confirm that she was still under the influence of the startling event and her statements to him are directly motivated by that event. Accordingly, those statements do fit within the excited utterance exception.

Based on this conclusion, the military judge granted the Government's motion. Considering our review of this case, we find that the military judge did not abuse his discretion in admitting the statements made by TSgt GD to Mr. Chavez. Accordingly, this assignment of error is without merit.

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

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court