UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic ROBERT E. CLARK
United States Air Force

ACM S31673

16 March 2010

Sentence adjudged 07 May 2009 by SPCM convened at Little Rock Air Force Base, Arkansas. Military Judge: Terry A. O'Brien (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 2 months, and forfeiture of $933.00 pay per month for two months.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Andrew J. Unsicker.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Joseph Kubler, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

THOMPSON, Judge:

Consistent with the appellant's pleas, a military judge convicted him of one charge and specification of wrongfully selling military property and one charge and specification of larceny of military property, in violation of Articles 108 and 121, UCMJ, 10 U.S.C. §§ 908, 921.[1] The military judge sentenced him to a bad-conduct discharge, confinement for two months, and forfeiture of $933 pay per month for two months. The convening

[1] The military judge excepted the language "on divers occasions" from the larceny specification.

authority approved the sentence as adjudged. The appellant asserts that the military judge erred when she allowed, as evidence of rehabilitation potential at sentencing, testimony from two supervisors regarding uncharged misconduct. Finding no error, we affirm.

Background

The appellant was a network infrastructure technician assigned to the communications squadron at Little Rock Air Force Base (AFB), Arkansas. In late October 2008, the appellant returned to his squadron after duty hours and stole six government laptop computers, five power cords, and two computer bags. The appellant was being processed for administrative discharge and planned to sell the military property to pay off his debts.[2] The appellant gave one laptop to his best friend and listed three laptops for sale on the internet website Craig's List. He sold two of the laptops to local civilians who responded to the advertisement. On 30 October 2008, the appellant met Mr. CW at an off-base location and transferred to him one laptop, a power cord, and a carrying case for $400. During the morning of 10 November 2008, the appellant met Mr. JW at an off-base location and transferred to him one laptop computer and a power cord for $400. Both of the purchasers asked if the items were stolen. The appellant lied and told the purchasers the items were not stolen. The final sale was made in the afternoon of 10 November 2008 to an undercover special agent with Air Force Office of Special Investigations who met the appellant at a designated off-base location. Following the sale, the appellant was apprehended.

The appellant's court-martial convened at Little Rock AFB on 7 May 2009. During sentencing, the trial counsel introduced as evidence a host of disciplinary paperwork served upon the appellant evidencing numerous and repeated failures to go, dereliction in duty, failure to obey a lawful order, and sex with a minor in his dormitory room.[3] The appellant's only enlisted performance report was a referral report with the lowest possible overall rating. The trial counsel called two witnesses to testify about the appellant's potential for rehabilitation pursuant to Rule for Courts-Martial (R.C.M.) 1001(b)(5).

Master Sergeant (MSgt) SI testified about her supervision of the appellant beginning at some point in August or September 2008 to the date of trial.[4] The majority

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[2] In just over one year, the appellant received a referral performance report, two non-judicial punishments, one vacation action of non-judicial punishment, three letters of reprimand, and one letter of counseling for a host of disciplinary problems.

[3] The reprimand in the non-judicial punishment action for sex with a minor noted that both the victim and the victim's parents refused to cooperate in prosecution of the appellant on the charge.

[4] The appellee asserts that this testimony was offered as evidence in aggravation pursuant to Rule for Courts-Martial (R.C.M.) 1001(b)(4). The appellant began working directly for Master Sergeant (MSgt) SI prior to the commission of the offenses for which he was court-martialed and continued working for her to the day of trial. It was not clear whether the testimony applied to duty performance and unit impact prior to the offenses or as a result of the offenses. Thus, this Court is unable to determine that any of the testimony would be proper aggravation evidence

of MSgt SI's testimony, covering fourteen pages in the record, dealt with her knowledge about the appellant and his character, performance of duty, moral fiber, and determination to be rehabilitated. However, MSgt SI also testified about the appellant's "sleeping issues." She responded to four questions regarding this issue, outlining various times the appellant failed to show up for duty on time before the defense counsel objected.[5] The military judge ruled that she would allow the trial counsel to continue with the questioning, but told counsel the testimony must comply with R.C.M. 1001(b)(5). Later, the military judge reminded the trial counsel that the "evidence of rehabilitative potential can be offered in the form of opinion, if you can lay a foundation, and then [MSgt SI] can offer opinion as to [the appellant's] rehabilitative potential. So do you understand the framework that I'm going for?" As the trial counsel continued to lay her foundation, the defense counsel objected once more. The military judge reminded the trial counsel to stick to questions related the number of contacts the witness had with the appellant; what period of time; and whether or not, based on those contacts, she has an opinion about his rehabilitative potential. The trial counsel continued along those lines, but stopped short of asking whether MSgt SI had an opinion of the appellant's rehabilitation potential. The defense counsel elicited testimony from MSgt SI regarding the appellant's good duty performance.

The second witness, Technical Sergeant (TSgt) JB, had been the appellant's supervisor from the appellant's arrival at Little Rock AFB in November 2007 until TSgt JB deployed in September 2008. In addition to discussing the appellant's duty performance, he also described his efforts to rehabilitate the appellant. Included within this testimony he also specifically referenced the counselings and "paperwork" served upon the appellant in his attempt to rehabilitate. TSgt JB's testimony regarding "paperwork" correlated with the disciplinary paperwork that had previously been admitted into evidence. When the defense counsel objected that the testimony was cumulative, the military judge asked the trial counsel to move on. The trial counsel asked no further questions. The defense counsel asked three questions which covered the appellant's "roller coaster" performance and the corrective actions taken against the appellant. TSgt JB's testimony and cross-examination covered only four pages of the record of trial.

The appellant asserts that the testimony of both MSgt SI and TSgt JB were not directly related to the charged offenses, nor were they proper opinion testimony. Thus, he asserts that the proceedings were tainted with uncharged misconduct. He requests that the bad-conduct discharge be set aside. We do not concur. We affirm the findings and sentence.

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pursuant to R.C.M. 1001(b)(4). Therefore, our analysis will be limited to whether or not this is proper rehabilitation potential evidence pursuant to R.C.M. 1001(b)(5).

[5] We note that the defense counsel objected to the fourth question by asserting that the testimony was not relevant. The trial counsel responded that the testimony was necessary to obtain an opinion from the witness regarding rehabilitation potential.

Discussion

R.C.M. 1001(b)(5)(A) provides that the "trial counsel may present, by testimony or oral deposition . . . , evidence in the form of opinions concerning the accused's previous performance as a servicemember and potential for rehabilitation." As foundation for the opinion, R.C.M. 1001(b)(5)(B) provides that:

> The witness or deponent . . . must possess sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority. Relevant information and knowledge include, but are not limited to, information and knowledge about the accused's character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offense or offenses.

The opinion offered by the witness "is limited to whether the accused has rehabilitative potential and to the magnitude or quality of any such potential." R.C.M. 1001(b)(5)(D) The Discussion of R.C.M. 1001(b)(5)(D) provides that:

> On direct examination, a witness or deponent may respond affirmatively or negatively regarding whether the accused has rehabilitative potential. The witness or deponent may also opine succinctly regarding the magnitude or quality of the accused['s] rehabilitative potential; for example, the witness or deponent may opine that the accused has "great" or "little" rehabilitative potential. The witness or deponent, however, generally may not further elaborate on the accused's rehabilitative potential, *such as describing the particular reasons for forming the opinion.*

Emphasis added.

When the defense fails to object to the introduction of evidence, we generally grant relief only if the introduction of the evidence was plain error.[6] *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (citing Mil. R. Evid. 103(d); *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008) (quoting *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007))); *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998). The appellant has the burden of persuading us that: "(1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to [the appellant's] substantial rights." *Hardison*, 64 M.J. at 281 (citing *Powell*, 49 M.J. at 463-65). Although the threshold for establishing prejudice in this context is low, the appellant must nonetheless make at least "some colorable showing of possible prejudice." *United States v. Scalo*, 60 M.J. 435, 436-37 (C.A.A.F. 2005) (quoting *United*

[6] The trial defense counsel made some objections, however, these arose long after much of the testimony had been made in court and the basis for the objections did not raise issues with R.C.M. 1001. The appellant acknowledges as much in his brief. Therefore, we will treat this case as one in which no objections were made.

States v. Kho, 54 M.J. 63, 65 (C.A.A.F. 2000). Further, "[m]ilitary judges are presumed to know the law and to follow it absent clear evidence to the contrary." *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)). Additionally, "[this Court] must presume that the military judge disregarded any improper testimony that was not objected to by [the] appellant." *United States v. Raya*, 45 M.J. 251, 254 (C.A.A.F. 1996).

In this case, both MSgt SI and TSgt JB testified on direct examination about the appellant's failures to go and the great efforts expended by the unit in ensuring his timely presence at his place of duty. Although the appellant's disciplinary record is replete with documentation evidencing his poor duty performance and such documentation was properly admitted sentencing evidence, such testimony on direct examination was improper. We need not address whether this was error, for clearly there was no prejudice.

The record is abundantly clear that the military judge knew the law. In fact, at one point, the military judge recited R.C.M. 1001(b)(5) to the trial counsel and emphasized what testimony was proper on direct examination during sentencing. Additionally, we presume that the military judge disregarded the improper testimony when the defense counsel did not object. The crimes the appellant committed were egregious. Not only did he steal government property, but he continued with his criminal behavior for nearly two weeks as he advertised and sold the property to unsuspecting civilian purchasers. He shared his bounty with his best friend. He planned to erase his personal debt problems before he was discharged from the Air Force. His criminal behavior was not a one-time error; it was a calculated criminal plan. Clearly, a bad-conduct discharge was appropriate. Finally, we note that the sentence imposed by the military judge was well below the maximum allowable sentence for a special court-martial. The record belies any claim of prejudice arising from the admission of this evidence.

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).

The approved findings and sentence are

AFFIRMED.

OFFICIAL

CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court