UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ALEXANDER L. COHEN
United States Air Force

ACM 34975

18 May 2004

Sentence adjudged 11 June 2001 by GCM convened at Goodfellow Air Force Base, Texas. Military Judge: Israel B. Willner.

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

Appellate Counsel for Appellant: Major Rachel E. VanLandingham (argued), Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Kyle R. Jacobson.

Appellate Counsel for the United States: Captain C. Taylor Smith (argued), Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Lieutenant Colonel Robert V. Combs.

Before

STONE, MOODY, and JOHNSON-WRIGHT
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, in accordance with his pleas, of two specifications of indecent acts, in violation of Article 134, UCMJ, 10 U.S.C. § 934. He was convicted, contrary to his plea, of one specification of indecent assault, in violation of Article 134, UCMJ. He was acquitted of rape, in violation of Article 120, UCMJ, 10 U.S.C. § 920, and fraudulent enlistment, in violation of Article 83, UCMJ, 10 U.S.C. § 883. The general court-martial, consisting of officer members, sentenced the appellant to a dishonorable discharge, confinement for 4 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved only 3 years of confinement but

otherwise approved the sentence as adjudged. Subsequently, the Commander of the 11th Wing, Bolling Air Force Base (AFB), D.C., remitted that portion of the sentence to confinement to be served after 25 February 2004. The appellant has submitted five assignments of error: (1) that the military judge erred in not suppressing a statement the appellant made to the Goodfellow AFB Inspector General (IG); (2) that the military judge erred in admitting two instances of prior sexual assaults pursuant to Mil. R. Evid. 413; (3) that the appellant was improperly placed and continued in pretrial confinement; (4) that the indecent act offenses constitute an unreasonable multiplication of charges; and (5) that the appellant, while in confinement following trial, suffered cruel and unusual punishment. The appellant submitted this last assignment of error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Finding no error, we affirm.

I. Facts

During the times alleged, the appellant was a trainee at Goodfellow AFB, Texas. In February 2000, the appellant and other trainees—two males and two females—attended a concert in Abilene, Texas. After consuming alcohol at the concert, they decided to spend the night at a motel in Abilene rather than risk being apprehended at the Goodfellow AFB gate for driving while intoxicated.

While in the motel room that evening, the victim, Airman (Amn) M, became extremely intoxicated. The two males engaged in sexual acts with Amn M and the other female. The appellant photographed these acts. In addition, the appellant penetrated Amn M's vagina with his fist. He was able to photograph his hand in this position, and the photograph was admitted into evidence. When questioned by the prosecution, a witness to this act testified as follows:

> Q: How was [Amn M] responding to . . . [the appellant] putting his fist inside of her?
>
> A: She was mumbling. I didn't hear her say any clear words. She was mumbling.
>
> Q: Was she moving?
>
> A: No.
>
> Q: Did she appear conscious to you?
>
> A: No. She looked passed out.

This witness also testified about the rape allegation for which the appellant was acquitted. This witness testified that during the alleged rape, Amn M said, "No" and then cried.

The photographing of the other two males engaged in sexual activity constituted the basis for the two indecent act specifications, and the appellant's own act of inserting his fist into Amn M's vagina constituted the basis of the indecent assault.

II. Mil. R. Evid. 413 -- Propensity Evidence

We review the military judge's decision to admit propensity evidence for an abuse of discretion. *United States v. Bailey*, 55 M.J. 38 (C.A.A.F. 2001); *United States v. Dewrell*, 55 M.J. 131 (C.A.A.F. 2001). When the military judge performs a Mil. R. Evid. 403 balancing test on the record, his ruling will not be overturned unless there is a "clear abuse of discretion." *United States v. Ruppel*, 49 M.J. 247, 251 (C.A.A.F. 1998). We review the military judge's findings of fact according to a "clearly erroneous" standard. *United States v. Springer*, 58 M.J. 164, 167 (C.A.A.F. 2003). *See United States v. Burris*, 21 M.J. 140 (C.M.A. 1985).

Our superior court has provided guidance for evaluating the admissibility of propensity evidence under Mil. R. Evid. 413. Three threshold findings are required:

> 1. The accused is charged with an offense of sexual assault—Mil. R. Evid. 413(a);
>
> 2. "[T]he evidence proferred is 'evidence of the defendant's commission of another offense of . . . sexual assault'"; and
>
> 3. The evidence is relevant under Rules 401 and 402.

United States v. Wright, 53 M.J. 476, 482 (C.A.A.F. 2000) (citations omitted).

In addition to logical relevance, however, the military judge must evaluate the proffered evidence under Mil. R. Evid. 403. Our superior court has provided several nonexclusive factors to take into account in performing a Mil. R. Evid. 403 balancing test: "Strength of proof of prior act—conviction versus gossip; probative weight of evidence; potential for less prejudicial evidence; distraction of factfinder; . . . time needed for proof of prior conduct[;] . . . temporal proximity; frequency of the acts; presence or lack of intervening circumstances; and relationship between the parties." *Id*. (citations omitted).

In its case-in-chief, the prosecution called two female witnesses who testified about prior sexual assaults involving the appellant. Over the objection of the defense

counsel and after conducting a balancing analysis pursuant to Mil. R. Evid. 403, the military judge allowed the two women to testify.

The first to testify was Ms. E, who at the time of the assault was on active duty and married to the appellant. At the motion hearing, Ms. E testified that she and the appellant never consummated their marriage. In fact, their marriage was a sham intended to avoid a base policy requiring junior airmen to live in base dormitories unless they were married. At trial, her testimony revolved around one occasion at their off-base apartment when the appellant assaulted her. She testified as follows:

> Q: And, was there ever an instance where the accused tried to force you into having sex?
>
> A: Yes.
>
> Q: Can you tell the court when that instance was?
>
> A: I was in my bedroom and I was wrapping presents, and he came in and sat down beside me. I didn't think anything about it, and he was on the phone to his brother, Mark.
>
> A: We were sitting there and suddenly he grabbed the back of my head and pushed it in his lap and said, "Yo, bitch, give me head."
>
> Q: How hard did he grab you?
>
> A: Hard enough I had to like peel his hand off my head to get up.
>
> Q: And, how did you get up?
>
> A: I had to pull his hand off the back of my head, and then I stood up.
>
> Q: Now, what happened next?
>
> A: I grabbed a pair of scissors and told him he'd better get out of my room and leave me alone.

Ms. E further testified that after this incident she would sometimes stay with a friend. On those evenings when she slept in her room in their apartment, she placed a bell on her door to alarm her should the appellant try to enter.

The second witness was Ms. C, a then 15-year-old acquaintance of the appellant's. She testified that in April 1999 the appellant picked her up at her home and took her to

his father's house. The appellant suggested they watch television in a downstairs room. She testified as follows:

> A: I really didn't want to go downstairs, but he said, "We'll just watch TV." And, we went downstairs, and he shut the door, and he lay down on me so I could not get up.
>
> Q: You were sitting on the couch?
>
> A: Yes.
>
> Q: And, how was he on you?
>
> A: He was positioned so his head was over by me and his feet were down at the end of the couch.
>
> . . . .
>
> Q: And, what happened?
>
> A: [H]e started kissing me and trying to go up my shirt. And, I told him, "No." And, he said, "Well, John [Ms. C's prom date] doesn't have to know." And, he said, "Well, if you kiss me, I'll let you go. If you kiss me, I'll let you go."
>
> Q: What were you doing at this point?
>
> A: Trying to push him off of me—and, I said, "No." I was crying.
>
> Q: Could you push him off?
>
> A: I couldn't push him off; he was too big to push off. I said, "No," and you know, "I don't want to do anything." And, this went on for a good 15-20 minutes, and he left a hickey on my neck and on my chest.

Ms. C further stated that her father discovered the assault and called the police. As a result, the appellant was prosecuted and convicted in state court for this conduct.

The appellant argues that the military judge abused his discretion in admitting the testimony of Ms. C and Ms. E because their testimony did not share a "clear enough

similarity" to the act of digitally penetrating an unconscious female in a hotel room.[1] It should be noted that none of the nine *Wright* factors listed above explicitly address factual similarity as a matter to be considered in weighing the probative value of the propensity evidence against unfair prejudice to an accused. However, the Analysis to Mil. R. Evid. 413 delineates several factors to weigh when conducting a Mil. R. Evid. 403 determination, to include "proximity in time to the charged or predicate misconduct; *similarity to the charged or predicate misconduct*; frequency of the other acts; surrounding circumstances; relevant intervening events; and *other relevant similarities or differences*." Drafter's Analysis, *Manual for Courts-Martial, United States (MCM)*, A22-37 (2000 ed.) (emphasis added).

It is clear that an analysis of the probative weight of the propensity evidence would necessarily require some consideration of the degree to which the charged and uncharged misconduct are alike. *See United States v. Roberts*, 55 M.J. 724, 730 (N.M. Ct. Crim App. 2001) (no abuse of discretion for military judge to hold that the accused's prior act of running his hand across a victim's stomach in the direction of her genitals was sufficiently similar to the charged offense of having sex with another woman too impaired by alcohol to give consent), *pet. denied*, 56 M.J. 467 (C.A.A.F. 2002). Certainly the more similarity that exists, the greater the probative value of the propensity evidence.

To the extent similarity is one of many factors to consider when determining the probative weight of the uncharged acts under a Mil. R. Evid. 413 analysis, it is clear there is no requirement for the prior acts to be virtually identical or substantially similar as might be expected when considering character evidence in other contexts. *See generally Dewrell*, 55 M.J. at 137 (trial judge found child molestation offenses admissible under Mil. R. Evid. 404(b), 413, and 414 because the "evidence is of such similar nature"); *United States v. Munoz*, 32 M.J. 359 (C.M.A. 1991) (evidence that accused had similarly molested an older daughter was held relevant to demonstrate a common plan or scheme under Mil. R. Evid. 404(b)).

The military judge, in conducting his analysis under Mil. R. Evid. 403, made the following conclusions:

> 1. Although the defense contests that the assaults were committed by the accused against either [Ms. C] or [Ms. E], the evidence of each offense is

[1] The appellant suggests that this court apply a de novo review based upon an incorrect standard the military judge applied in determining the threshold question of whether the similar acts actually occurred. We disagree. It is clear the military judge used the correct standard by considering all of the evidence offered and concluding the court members could reasonably find that the similar acts were committed. He is not required to make this determination based upon a preponderance of the evidence. *See Huddleston v. United States*, 485 U.S. 681, 690 (1988); *United States v. Humpherys*, 57 M.J. 83, 90-91 (C.A.A.F. 2002). *But cf. Wright*, 53 M.J. at 483.

sufficiently strong that a reasonable court could conclude that the prior offenses actually occurred as claimed by the alleged victims;

2. The probative weight of the evidence is significant in that it demonstrates a pattern that the accused forced women to engage in sexually abusive conduct;

3. There was no less prejudicial evidence of the prior acts presented to the court on this motion[;]

4. The court is confident that the court members will not be distracted by evidence of the prior acts;

5. The time needed to present all of the evidence concerning the prior acts is reasonable;

6. Each of the prior acts occurred within approximately a year of the charged offenses;

7. The relationship between the accused and the women is somewhat similar. Although he was married to [Ms. E], the marriage was clearly a sham. His relationship with [Ms. C] was apparently a casual friendship[; and]

8. The court also notes that there are several significant dissimilarities in the charged and uncharged acts. For example, alcohol was apparently involved only in the charged acts, and other individuals were apparently not present during the prior acts. Additionally, [Ms. C] is the only woman under the age of 16 at the time of the various alleged acts.

We find no cause to disturb the military judge's Mil. R. Evid. 403 analysis. He specifically considered certain similarities and dissimilarities among the charged and uncharged offenses alongside the other factors listed in *Wright*. He also determined the uncharged misconduct was probative of "a pattern that the accused forced women to engage in sexually abusive conduct." We agree. Each victim was subjected to a degree of restraint. The appellant lay on Ms. C as she struggled to free herself, and he held Ms. E's head in his lap until she pried his hand loose. Although Amn M's mobility was impaired by her own voluntary consumption of alcohol, that intoxication prevented her from resisting as the appellant exploited this vulnerability to facilitate the assault. We also note that each case is marked by a pronounced element of sexual humiliation for each victim. According to Ms. C, the appellant lay on her for 15 to 20 minutes as she struggled and wept. In the case of Ms. E, the appellant held her head in his lap and called her a degrading name as he demanded that she sodomize him. As for Amn M, the

photography and the participation of others gave the offense an even more pronounced quality of humiliation than in the cases of Ms. C or Ms. E.

In addition to considering the similarities and dissimilarities of the offenses in determining the probative value of the uncharged sexual assaults, the military judge instructed the members, "The evidence of [prior assaults] may be considered for their tendency, if any, to show the accused's propensity to engage in sexual assault. You may not consider this evidence for any other purpose. You may not convict the accused merely because you believe he committed these other offenses." This instruction places the propensity evidence in its proper context. The fact that the appellant was acquitted of rape provides reason to believe that the panel followed the instructions and extended to the propensity evidence no more weight than it was due. *See Dewrell*, 55 M.J. at 138.

In light of the above, we hold that the military judge did not abuse his discretion in determining that the evidence of prior acts of sexual assault was more probative than prejudicial. *Wright*, 53 M.J. at 483.

III. Pretrial Confinement

This Court reviews a military judge's ruling on the legality of pretrial confinement for an abuse of discretion. *United States v. Wardle*, 58 M.J. 156 (C.A.A.F. 2003). This Court reviews a military judge's decision to continue an accused in pretrial confinement *pendente lite* for an abuse of discretion. *United States v. Gaither*, 45 M.J. 349 (C.A.A.F. 1996).

An accused can be placed in pretrial confinement if he has committed an offense triable by court-martial; it is foreseeable that the accused either will not appear at trial or will engage in serious criminal misconduct; and lesser forms of restraint are inadequate. Rule for Courts-Martial (R.C.M.) 305(h)(2)(B). Some of the factors, which should be considered are the nature and circumstances of the offenses; the weight of the evidence; the accused's service record, including prior misconduct; and the likelihood that the accused can and will commit further serious criminal misconduct. R.C.M. 305(h)(2)(B), Discussion.

Serious criminal misconduct includes "offenses which pose a serous threat to . . . the effectiveness, morale, discipline, readiness or safety of the command." R.C.M. 305(h)(2)(B). "[T]he 'quitter' who disobeys orders and refuses to perform duties . . . has [an] immensely adverse effect on morale and discipline which, while intangible, can be more dangerous to a military unit than physical violence." *MCM*, A21-18. *See also United States v. Rosato*, 29 M.J. 1052 (A.F.C.M.R. 1990), *reversed as to sentence on other grounds*, 32 M.J. 93 (C.M.A. 1991).

The appellant's commander placed him in pretrial confinement on 29 May 2001, within a week of the beginning of trial. On 31 May 2001, the Pretrial Confinement Reviewing Officer (PCRO), conducted a hearing into the propriety of the confinement. The evidence consisted of testimony by the appellant's commander and first sergeant, as well as a number of written documents describing various acts of misconduct. In a motion prior to trial, the first sergeant testified as to what he told the hearing officer:

> Q: What kind of threat did he pose?
>
> A: [H]e is a serious threat to good order and discipline and morale within the unit. He is a poison to the other airmen.
>
> Q: Why is he a poison to the other airmen?
>
> A: [B]ecause he continually breaks the rules and does what he wishes to do. Nothing that we have tried gets him to stop it.

Both the first sergeant and the commander testified as to the appellant's extensive record of rules violations, such as failed room inspections, "spitting on drapery," and other infractions. They also referred to more recent incidents, occurring in the middle of May 2001, in which the appellant made harassing statements to several women, most of them active duty.

The PCRO considered documentary evidence as well. These included numerous letters of reprimand and counseling, as well as written statements by the women whom the appellant allegedly harassed. One woman, Ms. G, stated that the appellant told her that it was her job as a wife to perform oral sex, "head," on her husband and that if she refused, she was "a bad wife." On another occasion, Ms. G stated that the appellant repeatedly asked her about her stillborn child and claimed that she was currently pregnant by another airman. He told her that it was her "duty as a wife" to give her husband sons, and that if she did not, she should be divorced.

Airman First Class (A1C) M also provided a statement to the effect that on 12 May 2001, the appellant approached her and repeatedly told her that it was her responsibility to give her husband "head" and that "every woman likes to give head." A1C M stated that on 15 May 2001 she and two other women—all airmen—were approached by the appellant on base and subjected to similar language, with the result that they became angry and "screamed" at him. One of the other women, A1C H, corroborated the 15 May 2001 incident.

After considering all the matters contained in the record, including the testimony presented prior to trial and the report of the PCRO with its attachments, we conclude that neither the PCRO nor the military judge abused their discretion in upholding the

appellant's entry into pretrial confinement. Furthermore, we conclude that the military judge did not abuse his discretion by continuing the appellant in pretrial confinement *pendente lite*, following his de novo review.

We disagree with the appellant's contention that the sexual harassment as described in the PCRO report did not constitute serious criminal misconduct. Despite counsel's assertion in oral argument that the appellant was merely boorish rather than criminal, we find that the harassing conduct directed toward the women in question could have been punished under Article 134, UCMJ, since it was disorderly conduct and of a nature to prejudice good order and discipline, especially in a training environment. As such, the evidence supports the conclusion that, without confinement, the appellant would continue to commit serious criminal misconduct. *See Rosato*, 29 M.J. at 1054.[2]

IV. Other Issues

We resolve the remaining issues adversely to the appellant. The Goodfellow AFB IG, to whom the appellant made the incriminating statements, was not acting in a law enforcement or disciplinary capacity, and he asked questions "limited to that required to fulfill his operational responsibilities." *United States v. Loukas*, 29 M.J. 385, 389 (C.M.A. 1990). Therefore, the IG was not required to read the appellant his rights under Article 31, UCMJ, 10 U.S.C. § 831. Furthermore, there is no basis to conclude that the IG made promises of confidentiality such as would render the appellant's statements to him involuntary. *See United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992). Therefore, we hold that the military judge did not abuse his discretion in admitting the statements. Even if the admission was error, the evidence of indecent assault was sufficiently strong (the appellant having photographed himself committing the act) that he would have been convicted even if the statements had been suppressed. As a consequence, we hold that the admission of the statements did not materially prejudice a substantial right of the appellant and was harmless error. Article 59(a), UCMJ, 10 U.S.C. § 859(a). *See Loukas*, 29 M.J. at 390; *United States v. Hallock*, 27 M.J. 146, 148-49 (C.M.A. 1988).

The offenses of which the appellant was convicted do not misrepresent or exaggerate his criminality. Consequently, they do not constitute an unreasonable multiplication of charges. *See United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001). Finally, we conclude that we can resolve the cruel and unusual punishment claim without ordering post-trial factfinding pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). The appellant's post-trial submissions consist in large measure of "speculative or conclusory observations." *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). The facts, which are provided, examined in light of the submissions as

[2] We note that the appellant's brief also asserts that his pretrial confinement violated the Bail Reform Act (18 U.S.C. § 3141 *et seq.*) as interpreted by *United States v. Salerno*, 481 U.S. 739 (1987). However, the Bail Reform Act does not extend to courts-martial. 18 U.S.C. § 3156. In oral argument, counsel for appellant conceded the inapplicability of *Salerno* to the case sub judice.

a whole, do not merit relief even if true. *Id.* Therefore, we hold that the appellant was not subjected to cruel and unusual punishment while at the Navy Brig in Charleston, South Carolina. *See United States v. White*, 54 M.J. 469 (C.A.A.F. 2001); *United States v. Brennan*, 58 M.J. 351, 354 (C.A.A.F. 2003); *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

IV. 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 approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator