UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic JASON J. DIXON
United States Air Force

ACM S30510

20 March 2006

Sentence adjudged 14 November 2003 by SPCM convened at Ramstein Air Base, Germany. Military Judge: Thomas W. Pittman (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 8 months.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, and Major L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Lieutenant Colonel William B. Smith.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

JACOBSON, Judge:

The appellant was convicted, in accordance with his pleas, of making a false official statement, slashing the tire of a fellow Airman's car with a knife, stealing a credit card and two computers, in violation of Articles 107, 109, and 121, UCMJ, 10 U.S.C. §§ 907, 909, 921. A military judge, sitting alone as a special court-martial, sentenced him to a bad-conduct discharge and confinement for 8 months. The convening authority approved the sentence as adjudged. On appeal, the appellant asserts: (1) The military judge erred by admitting hearsay evidence during the prosecution's sentencing case and (2) The military judge erred by admitting evidence of specific instances of conduct in support of a witness's opinion regarding the appellant's rehabilitation potential. We find

the appellant's first assignment of error to be without merit. As to the second assignment of error, we agree with the appellant that the military judge improperly admitted statements by the appellant's first sergeant during the sentencing phase, but find the error to be harmless. We therefore affirm the findings and sentence.

Background

The appellant was assigned to the 86th Services Squadron at Ramstein Air Base, Germany. At the time of his trial he had served approximately 25 months on active duty. During his short time in the Air Force, he had accumulated two Article 15, UCMJ,[1] punishments, one vacation action, four letters of reprimand, one letter of admonishment, and one letter of counseling. At trial, the appellant admitted that in January 2003, he used an eight-inch knife to slash the tire of Senior Airman (SrA) C's car, after a discussion with friends regarding how much they disliked her. SrA C lived in a dormitory near the appellant's dormitory building. Her car was parked outside her dormitory building at the time it was vandalized. When the appellant was confronted by Security Forces personnel with this allegation he lied about it, thus forming the basis for the false official statement charge. The appellant further admitted to stealing a credit card and laptop computer belonging to Airman First Class (A1C) T, a squadron mate who was deployed at the time of the thefts. This theft occurred sometime between 1 July 2003 and 14 August 2003. While the appellant did not admit to being the person that entered A1C T's room, he admitted accepting the credit card and computer and keeping the items with no intention of returning them. The appellant also admitted that he used the stolen credit card to purchase a second computer. Security Forces personnel found the items stolen from A1C T's room in the appellant's room on 22 August 2003.

The errors assigned in this case arise from the testimony of the squadron's first sergeant during the sentencing phase of the trial. The government called Senior Master Sergeant (SMSgt) W to present evidence in aggravation. The appellant avers that two types of improper testimony were elicited from this witness: Inadmissible hearsay and specific incidents of conduct in support of evidence regarding the rehabilitation potential of the appellant.

Discussion

We review issues concerning the admissibility of evidence for abuse of discretion. *United States v. Holt*, 58 M.J. 227, 230 (C.A.A.F. 2003); *United States v. Becker*, 46 M.J. 141, 142-43 (C.A.A.F. 1997). That discretion is abused when evidence is admitted based upon an erroneous view of the law. *Holt*, 58 M.J. at 230-31.

[1] 10 U.S.C. § 815.

1. *Inadmissible Hearsay*

The basis for the first error asserted by the appellant arose during a portion of SMSgt W's testimony, during which he described a meeting he conducted with residents of the squadron's dormitory. The meeting occurred two days after charges were preferred against the appellant. The following exchange took place during direct examination:

> [Trial Counsel]. Have you had any meetings of the dorm residents in the past few weeks or months or so?
>
> [SMSgt W]. Yes, Sir. We had a dorm meeting the last Sunday in October. And at that time we were just talking about what was coming up; what we were going to do; how we were going to prepare for cleaning up the dormitory. And at that point, I excused two of my residents. One was Airman [L] and the other one was [the appellant]. And I asked them to leave and I sat down and talked to the dorm residents and said: "Okay, do you understand everything that is going on right now? I want you to understand that none of this stuff is your fault. And at that time, some of the residents, especially some of our female residents, started crying. First, they started crying out of their concerns that this gentleman put them through this and why is that they are going through these things that they're going through.
>
> And, second, some of them were concerned, "Well, how do we go about -- how can we trust him and what if he's going to hurt us if he's going to trial? And, we're afraid he may do some other things to us."
>
> [The defense counsel stood.]
>
> MJ [Military Judge]: And defense, you have an objection?
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> DC [Defense Counsel]: Especially that last part, Your Honor. This -- apparently making everybody in this dorm to become victims and this mass hysteria --
>
> MJ: Stop for a second. What's the objection?
>
> DC: The objection is one of relevance -- prejudicial effect over relevance and, finally, it doesn't come within the rules of the actual aggravation. We had the victim come in here and testify and we heard what she had to say. And we don't need to have made-up victims come in here through hearsay statements through the First Sergeant, Your Honor.

> MJ: Okay. The objection is noted and overruled. There has been a proper foundation laid for the First Sergeant to testify about the overall morale impact of these offenses on the unit, and I can't think of any person in a better position to do that than a First Sergeant, as to what these offenses had on other people feeling that their stuff might be at risk by a larceny.

Trial defense counsel's actual objection to these statements was relevance, but he eventually used the word hearsay in attempting to explain his position. Either way, we do not find the military judge abused his discretion in ruling that the first sergeant's statements were admissible. The testimony was certainly proper evidence in aggravation, tending to show aggravating circumstances directly relating to or resulting from the offenses of which the accused was found guilty and its relevancy far outweighed any prejudicial impact. *See* Rule for Courts-Martial (R.C.M.) 1001(b)(4) and Mil. R. Evid. 403. Specifically, it described the reactions of dormitory residents who had recently become aware that two individuals who lived in their dormitory had been accused of surreptitiously entering the room of a female resident, and slashing the tire of another resident's car in the adjacent parking lot. It was therefore properly admitted under R.C.M. 1001(b)(4) and Mil. R. Evid. 403.

Mil. R. Evid. 801(c) defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay evidence is not admissible, except as provided by the Military Rules of Evidence, in trials by court-martial. Mil. R. Evid. 802. The Rules are applicable during sentencing proceedings, but, at the discretion of the military judge, may be relaxed with respect to matters in extenuation and mitigation. R.C.M. 1001(c)(3). If this occurs, the military judge may also relax the Rules during rebuttal and surrebuttal to the same degree. R.C.M. 1001(d). If the Rules are not relaxed, however, the prosecution cannot admit hearsay evidence unless an exception to the hearsay rule applies. *See* Mil. R. Evid. 802. *See, e.g.*, *Holt*, 58 M.J. at 227.

Mil. R. Evid. 803, 804, and 807 set forth the many exceptions to the general rule that hearsay evidence is not admissible. The government specifically directs our attention to Mil. R. Evid. 803(2) and 803(3) in urging that the statements at issue, while hearsay, are nonetheless admissible. Mil. R. Evid. 803(2) states: "Excited utterance. 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." Mil. R. Evid. 803(3) provides: "Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)."

In the case sub judice, the military judge did not relax the Rules prior to SMSgt W's testimony. Therefore, because the statements appear to be paraphrases and a general description of the overall mood of the meeting we do not find them to be hearsay.

However, assuming arguendo they were hearsay, we find that the statements would qualify as an exception under Mil. R. Evid. 803(3). SMSgt W testified that he attempted to ensure that the dormitory residents understood what was going on regarding the dormitory thefts and help them understand that the events were not their fault. The statements at issue express the "then existing state of mind, emotion, sensation, or physical condition" of the dormitory residents in attendance at the meeting. The statements simply show that the declarants, at the time the statements were made, were afraid. The statements by the first sergeant would therefore be admissible under Mil. R. Evid. 803(3).

2. *Specific Instances of Conduct*

The second error asserted by the appellant is derived from the following portion of SMSgt W's testimony on direct examination:

> Q. Could you describe [the appellant's] work ethic?
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> A. He had no work ethic. It's --
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> DC: Objection, Your Honor.
>
> MJ: And the objection?
>
> DC: Counsel has failed to lay foundation for his opinion to show or indicate that this witness has proper a [sic] knowledge or understanding of [the appellant], to be making an opinion, which I assume is what counsel is trying to get from this witness, Your Honor.
>
> MJ: Okay, in regard to the work ethic only?
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> DC: That's the only question, so far, Your Honor.
>
> MJ: Duty performance? Okay. The objection is sustained. Trial counsel, if you would just go back and lay the foundation for that.
>
> **Direct examination continued:**
>
> Q. How often have you encountered [the appellant]?
>
> A. Multiple times, including in his dormitory, including times where supervisors had to call him for failure to go to work or failure to do what he needed to do.

Q. So, have you become familiar with his duty performance through your various encounters with him?

A. Yes, Sir.

Q. So, could you please describe, based on your firsthand knowledge, [the appellant's] work ethic?

A. Okay. His work ethic is -- he has no work ethic. His work ethic is that he does what he wants to do, when he feels it's appropriate for him to do it. He has more of an anarchic or anarchist idea about authority and who's over him and when they tell him to do something, it's a constant you have to follow-up, you have to check in on him and, at times, he just refuses to even get it done.

DC: Objection, Your Honor. I can appreciate the added comments of the First Shirt in this matter, but I believe the opinion is supposed to be just the opinion, Your Honor, and not going into further explanation or issues of specific conduct in this case.

MJ: Okay, well, first of all, I think that's in regard to giving an opinion as to rehabilitative potential, which I don't think the question has been asked. I think what we're talking about here, at this point, is, essentially, the accused's character for military service. So, the objection is --

[The defense counsel stood.]

MJ: Go ahead, defense. Did you have something further?

DC: Just to clarify, Your Honor, in [R.C.M.] 1001, the notes in paragraph 5, events [sic] in the form of opinions concerning the accused's previous performance and the service conduct and potential for rehabilitation -- so it indicates there that both of those areas should be in the forms of opinion, Your Honor.

MJ: Okay.

TC: Sir, the witness has --

MJ: Hold on just a second. I mean, I haven't heard anything that the witness has said so far that's not in the form of an opinion, other than the background.

. . . .

> MJ: Other than the foundation that the witness laid, at defense request, for how he is able to arrive at that opinion -- I mean, if the opinion is that he has no work ethic and that he has a view of authority that is without rule, more or less, to paraphrase the witness -- but he hasn't gone into specific instances to reflect. Is that your objection, defense?
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> DC: Well, Your Honor, I think he was starting to go into the reaction that he has to authority, and what the authority has to do, and going beyond that, I think it starts to talk about conduct in specific instances, so it's more than an opinion at that point. That's why I objected at that point, Your Honor.
>
> MJ: Okay. I understand. Well, the objection is noted, but it's overruled at this point. But, trial counsel, I just caution you not to go into areas beyond an opinion of the witness.

Moments later, trial counsel attempted to elicit specific instances of misconduct by the appellant and a defense objection was sustained.

The prosecution has the authority to admit evidence of an accused's rehabilitative potential during the sentencing phase of trial. R.C.M. 1001(b)(5). Evidence of rehabilitative potential can include opinions about an "accused's previous performance as a servicemember and potential for rehabilitation." R.C.M. 1001(b)(5)(A). However, "[a]n opinion offered under this rule 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 to this Rule elaborates on this limitation by stating:

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

Specific instances of conduct that may be the basis for a witness's opinion regarding an accused's rehabilitative potential are not admissible on direct examination by the trial counsel. *United States v. Gregory*, 31 M.J. 236, 238 (C.M.A. 1990). Further, "the limitations against mention of specific instances of conduct, except on cross-examination, apply to all opinions given under R.C.M. 1001(b)(5), not just to opinions about rehabilitation potential." *United States v. Sheridan*, 43 M.J. 682, 684 (A.F. Ct.

Crim. App. 1995) (holding that R.C.M. 1001(b)(5) uses the term "rehabilitation potential" to include "opinions concerning the accused's previous performance as a servicemember").

We hold that the military judge erred when he overruled the trial defense counsel's objection and admitted SMSgt W's answer to the "work ethic" question into evidence. We agree with the appellant's assertions that the first sergeant's testimony, while not specific to any one occasion during which misconduct occurred, clearly provided specific reasons that formed the basis for the opinion that the appellant had no rehabilitative potential. The rules for eliciting opinions on an accused's "rehabilitative potential" are clear and well-established. *See* R.C.M. 1001(b)(5). Trial counsel failed to comply with these rules and the military judge erred by allowing the testimony into evidence. *See Gregory*, 31 M.J. at 238.

Having found error, we must now determine whether the appellant was prejudiced by the admission of the improper evidence. Article 59(a), UCMJ, 10 U.S.C. § 859(a). We hold that he was not. In reviewing the entire record, we find that the first sergeant's testimony regarding the specific acts was cumulative with an overwhelming amount of similar evidence properly admitted by the military judge. Thus, his statements added little, if anything, to the government's case in aggravation.

The main points of SMSgt W's improperly admitted testimony were that the appellant had no work ethic, did "what he wants to do, when he feels it's appropriate for him to do it," had an "anarchic or anarchist idea about authority," required constant follow-up when assigned a task, and sometimes refused to do what he was ordered to do. Evidence regarding each of these points had already been properly admitted by the military judge. For example, the appellant's Enlisted Performance Report (EPR), indicates that the appellant "[f]ails to meet minimum standards" and exhibits unacceptable conduct on and off duty[2]. The appellant's rater notes that he "Often displayed little or no respect for authority -- frequently counseled and received a reprimand" and he "Repeatedly failed to go to his appointed place of duty." Other examples include the appellant's two Article 15, UCMJ, actions and several letters of reprimand that cite numerous incidents of failure to go to his appointed place of duty and disrespect towards a superior Airman.

The properly admitted documents cited above provided the military judge with evidence that showed the appellant had no work ethic, little regard for authority, and required constant counseling and supervision. Thus, we find that the military judge erred in admitting the testimony of the first sergeant regarding his opinion of the appellant's rehabilitation potential, but that the error was harmless because the improperly admitted

[2] The author of the EPR, when considering how well the ratee complies with standards, is instructed to consider dress and appearance, weight and fitness, customs, and courtesies. When rating conduct, the author is instructed to consider, among other factors, respect for authority.

evidence added little, if anything, to the overwhelming amount of evidence that was properly before the sentencing authority.

Conclusion

The 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). On the basis of the entire record, the findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court