UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class BRYAN A. GORDON
United States Air Force

ACM 37337

30 March 2009

Sentence adjudged 31 July 2008 by GCM convened at Robins Air Force Base, Georgia. Military Judge: Thomas Cumbie and Terry O'Brien (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 years, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Naomi N. Porterfield.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

Pursuant to his pleas, a military judge sitting as a general court-martial found the appellant guilty of two specifications of divers acts of carnal knowledge with children under 16 years of age, one specification of divers acts of sodomy with a child under 16 years of age, and one specification of committing indecent acts with a child, in violation of Articles 120, 125, and 134, UCMJ, 10 U.S.C. §§ 920, 925, 934. The adjudged and

approved sentence consists of a bad-conduct discharge, three years confinement, and a reduction to the grade of E-1.[1]

On appeal the appellant asks this Court to either set aside the sentence and order a sentence rehearing, reassess the sentence, or grant other appropriate relief. The basis for his request is: (1) it was plain error for trial counsel to elicit testimony during the sentencing portion of trial that was not directly related to the charged offenses and (2) the trial defense counsel was ineffective when he failed to object to testimony during the sentencing portion of trial that was not directly related to the charged offenses. Finding no prejudicial error, we affirm.[2]

Background

Between on or about 1 January 2007 and on or about 3 June 2007, the appellant, on multiple occasions, had sexual intercourse with DW and MR, then 15-year-old females. During the same time period, the appellant, on multiple occasions, engaged in oral and anal sex with DW and, on one occasion, digitally penetrated DW's vagina with his finger. On 1 October 2007, PS, then the appellant's 17-year-old girlfriend, discovered the appellant's philandering and reported him to military law enforcement officials who, in turn, reported him to agents with the Air Force Office of Special Investigations (AFOSI).

AFOSI agents interviewed DW, and she admitted that on multiple occasions she and the appellant engaged in sexual, oral, and anal intercourse when she was 15 years of age. AFOSI agents also interviewed MR, and she admitted that on multiple occasions she and the appellant engaged in sexual intercourse. On 2 October 2007, AFOSI agents summoned the appellant to their office for an interview and, after a proper rights advisement, the appellant waived his rights and confessed to his sexual encounters with DW and MR.

During the sentencing portion of trial, the government called RM, a recent high-school graduate the appellant had befriended, as a witness to discuss his social interaction with the appellant. RM, without objection, testified the appellant socialized with high-school students and hung out at the local mall and a fast food restaurant to meet 13- to 15-year-old girls. It is this testimony of which the appellant complains on appeal.

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[1] The appellant and the convening authority signed a pretrial agreement wherein the appellant agreed to plead guilty in return for the convening authority's promise to withdraw a charge and specification of engaging in conduct that was prejudicial to good order and discipline or service discrediting and a promise to approve no confinement in excess of five years.

[2] Although not affecting the legal sufficiency of the findings or the sentence, we note one error in the court-martial order. The findings for Charge IV and its specification are listed as "NG, withdrawn pursuant to PTA." In fact, the charge and specification were withdrawn by the government without any findings being entered. Production of a corrected court-martial order is hereby ordered.

RM's Testimony

We review a military judge's decision to admit or exclude evidence, including sentencing evidence, for an abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000); *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995). A military judge abuses her discretion if her findings of fact are clearly erroneous or her conclusions of law are incorrect. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). Sentencing evidence, like all evidence, is subjected to the Mil. R. Evid. 403 balancing test. *Manns*, 54 M.J. at 166. When a military judge conducts a proper Mil. R. Evid. 403 balancing test, her ruling will not be overturned unless there is a clear abuse of discretion. *Id.*; *United States v. Ruppel*, 49 M.J. 247, 251 (C.A.A.F. 1998). However, when a military judge fails to conduct a proper Mil. R. Evid. 403 balancing test, we give her ruling no deference and decide the issue de novo. *Manns*, 54 M.J. at 166.

Failure to object to the erroneous admission of evidence waives the issue, absent plain error. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007) (citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998); *United States v. Hayes*, 62 M.J. 158, 166 (C.A.A.F. 2005)). To find plain error, we must be convinced: (1) that there was error, (2) that it was plain or obvious, and (3) that it materially prejudiced a substantial right of the appellant. *Powell*, 49 M.J. at 463-64.

In the case sub judice, there was no objection to RM's testimony and this Court is therefore without the benefit of findings of fact and conclusions of law on this issue. We accordingly decide the admissibility of RM's testimony de novo. First, we note that the trial defense counsel failed to object to RM's testimony. Thus, this issue is waived absent plain error. We find the military judge did not err in admitting RM's testimony. Trial counsel ostensibly offered RM's testimony as evidence in aggravation.[3] Rule for Courts-Martial (R.C.M.) 1001(a)(1)(A) provides, inter alia, that during the presentencing portion of trial, trial counsel may present evidence in aggravation. R.C.M. 1001(b)(4) further provides "[t]he trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty."

"Directly related evidence" is evidence that has a direct connection with the charged offense(s) and is "closely related in time, type, and/or often outcome" of the crime. *Hardison*, 64 M.J. at 281-82. We note the appellant's acts of socializing with high-school students and attempting to meet 13- to 15-year-old girls occurred during the charged time period, involved girls from the same age group as the victims in this case, and easily fell within the ambit of the facts and circumstances surrounding the offenses of which the appellant was convicted.

[3] While the trial counsel did not explain the relevancy of RM's testimony, the trial defense counsel explained, in a post-trial affidavit, that he recognized it as proper evidence in aggravation directly related to the charged offenses.

Moreover, applying the Mil. R. Evid. 403 balancing test, we are convinced that the probative value of RM's testimony is not substantially outweighed by the danger of unfair prejudice and the other factors considered under Mil. R. Evid. 403. On this point, we note that: (1) this was a bench trial; (2) the potential for unfair prejudice is substantially less at a bench trial than in a trial by members; and (3) military judges are presumed to disregard any improper testimony not objected to by trial defense counsel. *Manns*, 54 M.J. at 167; *United States v. Raya*, 45 M.J. 251, 253-54 (C.A.A.F. 1996).

Second, assuming arguendo there was error, such was not plain or obvious, as the error clearly does not fall within the ambit of errors routinely criticized by our superior and brethren courts. Third, the testimony of which the appellant now complains was elicited, in part, by his trial defense counsel on cross-examination, and the appellant cannot create an error and then take advantage of a situation of his own making. Invited error does not provide a basis for relief. *Raya*, 45 M.J. at 254 (citing *United States v. Johnson*, 26 F.3d 669, 677 (7th Cir. 1994)).

Moreover, there has been no showing that the error, if any, materially prejudiced a substantial right of the appellant. On this point, we note that the lack of a defense objection is some measure of the minimal impact of the error complained of. *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001).

Lastly, notwithstanding the lack of a defense objection, the appellant's adjudged sentence is fair and appropriate. The offenses of which he was convicted are serious; the military judge adjudged approximately 1/22 of the confinement the appellant faced for his crimes; and the confinement adjudged was two years under the confinement cap of the appellant's pretrial agreement. In the final analysis, the appellant loses on all three prongs of the plain error test, and the failure to meet any one prong results in a finding of no plain error.

Ineffective Assistance of Counsel

Unquestionably, service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005). Claims of ineffective assistance of counsel are reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel is presumed to be competent and we will not play "Monday Morning Quarterback" and second guess trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993).

The appellant bears the heavy burden of establishing that his trial defense counsel was ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001). Where there is a lapse in judgment or performance alleged, we ask: (1) whether the trial defense counsel's

conduct was in fact deficient, and, if so (2) whether the counsel's deficient conduct prejudiced the appellant. *Strickland*, 466 U.S. at 687; *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

In response to the appellant's ineffective assistance of counsel claim, a claim made via his brief rather than an affidavit, the government submitted a post-trial affidavit from Captain WC, the appellant's trial defense counsel. In his affidavit, Captain WC asserts he made a tactical decision not to object to RM's testimony, not only because he thought RM's testimony was proper aggravation evidence, but also because he thought he could better address RM's assertions through an effective cross-examination. Under these facts, we find that the trial defense counsel made a tactical decision not to object to RM's testimony and that such a decision does not amount to ineffective assistance of counsel.

Moreover, assuming the trial defense counsel's conduct was deficient, we find no prejudice. The test for prejudice on a claim of ineffective assistance of counsel is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687, 694. The appellant offers no evidence of prejudice and under the aforementioned facts we find no prejudice.

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

STEVEN LUCAS, YA-02, DAF
Clerk of the Court