UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JUSTIN E. HOLCOMB
United States Air Force

ACM 37510

19 April 2010

Sentence adjudged 08 May 2009 by GCM convened at Spangdahlem Air Base, Germany. Military Judge: William E. Orr, Jr. (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 4 years and 10 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Nicholas W. McCue.

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

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, the appellant was convicted of one specification of attempted sexual intercourse with KM, a child over the age of 12 and under the age of 16; three specifications of sexual contact with KM, a child over the age of 12 and under the age of 16; and one specification of sodomy with KM, a child over the age of 12 and under the age of 16,[1] in violation of Articles 80, 120, and 125, UCMJ, 10 U.S.C. §§ 880,

[1] The appellant was charged with sodomy by force and without consent. He pled and was found guilty by excepting the by force and without consent language.

920, 925. The approved sentence consists of a dishonorable discharge, confinement for four years and ten months, and reduction to E-1.[2]

The issue on appeal is whether the military judge erred by allowing the introduction of improper evidence when he: permitted Master Sergeant (MSgt) SLT to testify without first being sworn; permitted MSgt SLT to testify to irrelevant matters; permitted the trial counsel to inappropriately lead MSgt SLT during direct examination; and permitted the trial counsel to elicit testimony from Mrs. DH, when the trial counsel knew such testimony was impermissible.[3] Finding no prejudicial error, we affirm.

Background

After the appellant providently pled guilty to abusing his 14-year-old stepdaughter, the government introduced the appellant's Personal Data Sheet and his Enlisted Performance Reports in the presentencing phase of the trial. Thereafter, the government rested. After requesting the rules of evidence be relaxed, the defense then introduced Exhibits A-R, including a number of character statements. The appellant's mother testified, and then the appellant read his unsworn statement to the military judge.

In rebuttal, the government called the appellant's wife and MSgt STL, who had provided a character statement. Specifically, the government wanted to rebut statements contained in the unsworn statement and wanted to test the basis of MSgt STL's opinion contained in his character statement. The trial counsel forgot to administer an oath to MSgt STL prior to his testimony but did so at the conclusion upon prompting by the military judge and without objection by the defense counsel.

Discussion

We review a military judge's ruling regarding admissibility of evidence for abuse of discretion. *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005) (quoting *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997)); *United States v. Gilbride*, 56 M.J. 428, 430 (C.A.A.F. 2002) (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). Rule for Courts-Martial (R.C.M.) 807(b)(1)(B) requires that witnesses be sworn prior to testifying. Military judges are "presumed capable of filtering out inadmissible evidence." *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000). "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness." Mil. R. Evid. 611(c). R.C.M. 1001(c)(2)(C) prohibits the cross-examination of the accused about an unsworn statement but permits rebuttal of any facts contained in the statement.

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[2] The appellant and the convening authority entered into a pretrial agreement, in which the appellant agreed to plead guilty to the charges and specifications in exchange for the convening authority's promise not to approve confinement in excess of five years and to waive automatic forfeitures for the benefit of the appellant's dependants.

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

From reviewing the record, it is quite clear the military judge was able to discern the relevant and the irrelevant evidence. He sustained a number of objections and overruled others.

Although, MSgt STL did in fact testify without being administered an oath prior to his testimony, he was administered an oath at the conclusion of his testimony. There was no objection by the defense counsel. When the trial counsel examined MSgt STL, it was clear that the trial counsel was exploring the witness's foundation for his opinion he supplied in the defense exhibit admitted into evidence. Although there may have been some leading questions, there were no objections and the issue is not preserved for appeal. There was no abuse of discretion by the military judge in allowing the evidence presented by MSgt STL. Further, the timing of the oath for MSgt STL, while not optimal, rectified the situation. The issues are without merit.

As for the testimony of the appellant's wife, she was called to rebut the appellant's statements that he had learned his lesson, was remorseful, was concerned for his family, and was looking forward to being reunited with his family. This issue is also 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, 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

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