UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CORNELIUS T. IRVIN
United States Air Force

ACM 35167

24 March 2005

Sentence adjudged 1 March 2002 by GCM convened at Kunsan Air Base, Republic of Korea. Military Judge: Bryan T. Wheeler.

Approved sentence: Dishonorable discharge, confinement for 7 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Mary T. Hall (argued), Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Kyle R. Jacobson.

Appellate Counsel for the United States: Captain Jin-Hwa Frazier (argued), Colonel LeEllen Coacher, Major John D. Douglas, and Captain C. Taylor Smith.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ORR, Senior Judge:

The appellant was convicted, contrary to his pleas, of one specification of rape, in violation of Article 120, UCMJ, 10 U.S.C. § 920, and one specification of unlawful entry, in violation of Article 134, UCMJ, 10 U.S.C. § 934. A panel of officer members sentenced him to a dishonorable discharge, confinement for 8 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority reduced the amount of confinement to 7 years and approved the remainder of the adjudged sentence.

The case is before this Court for review under Article 66, UCMJ, 10 U.S.C. § 866. The appellant asserts seven errors for our consideration: (1) Whether the military judge erred by granting the trial counsel's peremptory challenge against the sole African-American member of the court-martial panel; (2) Whether the trial counsel improperly expressed his personal opinion about the evidence during argument and the assistant trial counsel improperly expressed his personal disgust at the trial defense counsel's suggested sentence; (3) Whether the evidence was legally and factually insufficient to support the charge of rape; (4) Whether the approved sentence was inappropriately severe; (5) Whether the appellant received ineffective assistance of counsel; (6) Whether the military judge failed to sua sponte call witnesses, make findings, and then suppress the appellant's statements to the Air Force Office of Special Investigations (AFOSI); and (7) Whether the appellant was subjected to cruel and unusual punishment at the United States Disciplinary Barracks, Fort Leavenworth, Kansas. For the reasons set out below, we find no prejudicial error and affirm.

Background

On Sunday 26 August 2001, at around 0100 hours, the appellant, an African-American male assigned to Kunsan Air Base, went to visit his friend in another dormitory. His friend wasn't there but her roommate, Senior Airman (SrA) TA, told him he could wait in the room for her. SrA TA left the appellant in her room while she and another airman went to the recreation center to get something to eat. On the way to the recreation center, they changed their minds and went to the other airman's dormitory room. While he was waiting for his friend, the appellant went to use the bathroom and noticed that SrA TA's suitemate, SrA DW, a white female, had left her door open. SrA DW did not have a roommate, but her room was connected to SrA TA's room by a common bathroom. The appellant looked into the room and noticed that SrA DW was lying on her bed. SrA DW had been drinking heavily and admits being drunk. In fact, another member of her squadron walked her back to her dormitory room because he was concerned about her welfare.

The appellant took a condom out of his shirt pocket and started having sexual intercourse with SrA DW. When the appellant noticed that the victim was startled as she opened her eyes, he stopped, went into the bathroom, flushed his condom down the toilet, and left. SrA DW thought she was having a dream and when she fully woke up, the appellant was gone. SrA DW remembers going to bed with a T-shirt and sweat pants on. She recalls that, sometime later, a man's hands were on her knees pulling her legs open and that the man's face and the hands on her knees were darker than her knees. She was unable to identify the man, but she believed he was black. When she later became fully conscious, she called her boyfriend who then called the police. When the AFOSI agents arrived at SrA DW's room, they noticed a partially-smoked cigar on the vanity and a condom wrapper on the floor near the foot of SrA DW's bed. The AFOSI agents questioned the victim and her suitemates. SrA TA told the AFOSI agents she

remembered seeing the appellant leaving the dormitory when she returned from her friend's dormitory room. Additionally, SrA TA said that the appellant called her at 0300 hours to ask her what she was doing. She also told the AFOSI agents that the appellant was the only one she knew that smoked cigars.

Based on this information, AFOSI called the appellant in for questioning. Over a three-day period, the appellant provided three sworn, written statements recounting his activities during the evening of 25 August 2001 and the early morning of 26 August 2001. Additionally, he consented to a search of his room and provided a vial of blood for DNA testing. When AFOSI agents searched the appellant's room, they found a box of cigars and a box of condoms, which were the same brand as those found in SrA DW's room. The tear fracture on the condom wrapper found on the floor in SrA DW's room also matched other condoms found in the appellant's room. The appellant's DNA from the blood sample matched the DNA recovered from the cigar found in SrA DW's room.

Peremptory Challenge

Originally, the court-martial panel was composed of nine officers. After voir dire, trial defense counsel challenged two members for cause. The military judge granted the challenge for cause as to one member, but denied the challenge for cause as to the other. The trial counsel then exercised a peremptory challenge against the only African-American panel member. The military judge, sua sponte, asked the trial counsel to give a race-neutral reason for making this challenge. The trial counsel explained that his challenge was based on "her involvement in a court-martial just last week and the results of that court-martial." The military judge was not satisfied with the trial counsel's explanation and asked him to provide additional rationale for his challenge. In response, the trial counsel stated:

> Generally speaking, the outcome of the court-martial as well as the sentence imposed, we have some concerns that maybe some preconceived ideas or positions that she made [sic] have had in this case would carryover. . . . Furthermore, she had an opportunity to listen to at least one of our four witnesses, Special Agent Richardson. I can only imagine that she must have given some assessment as to his testimony and credibility and again, that's a concern that maybe when she hears him again, if she has some preconceived ideas about that.

The military judge accepted the trial counsel's explanation and sustained the peremptory challenge, stating that the trial counsel had "made a race-neutral reason under Batson."[1] The trial defense counsel did not object to the trial counsel's explanation or the military judge's ruling.

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

We review a military judge's factual determination regarding the presence or absence of discrimination underlying a peremptory challenge for an abuse of discretion. "The military judge's determination of purposeful discrimination will be overturned only if it is clearly erroneous." *United States v. Chaney*, 53 M.J. 383, 385 (C.A.A.F. 2000) (citing *United States v. Greene*, 36 M.J. 274, 281 (C.M.A. 1993)).

In *United States v. Watson*, 54 M.J. 779, 781 (A.F. Ct. Crim. App. 2001), this Court stated:

> Rule for Courts-Martial (R.C.M.) 912(g)(1) simply provides that each party may challenge one member of a panel peremptorily. At one time, a party's use of a peremptory challenge was virtually unassailable. In recent years, however, civilian and military courts have refined this practice to ensure that it is not used to further discrimination in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States. Now, "[n]either the prosecutor nor the defense may engage in purposeful discrimination on the basis of race or gender in the exercise of a peremptory challenge." *Chaney*, 53 M.J. at 384 (citing *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Consistent with the Supreme Court's ruling in *Batson*, in courts-martial, the party exercising a peremptory challenge against an African-American court member, when the member is of the appellant's race, must explain it if the other party objects. *United States v. Moore*, 28 M.J. 366, 368 (C.M.A. 1989). The challenging party's explanation must be neutral regarding race and the "'explanation need not rise to the level' of justification for a challenge for cause." *United States v. Tulloch*, 47 M.J. 283, 285 (C.A.A.F. 1997) (quoting *Batson*, 476 U.S. at 97-98). The judge must then assess counsel's explanation and make a factual determination on its neutrality. A peremptory challenge will be sustained unless the proffered reason is "unreasonable, implausible, or . . . otherwise makes no sense." *Chaney*, 53 M.J. at 385 (quoting *Tulloch*, 47 M.J. at 287).

In this case, the trial defense counsel did not object to the government's peremptory challenge. Ordinarily, the failure to object to the trial counsel's challenge would result in a waiver of the issue because the defense must first establish a prima facie case of purposeful discrimination. *See Batson*, 476 U.S. at 97-98; *United States v. Gray*, 51 M.J. 1, 34 (C.A.A.F. 1999). Because the military judge raised the issue sua sponte, we considered the issue as if the trial defense counsel had objected to the trial counsel's peremptory challenge. The burden then shifted to the trial counsel to provide a race-neutral explanation. The trial counsel provided an explanation and the trial defense counsel did not challenge the prosecutor's explanation, nor did the trial defense counsel object when the judge sustained the challenge. Therefore, the appellant has waived his right to raise this issue on appeal. *Gray*, 51 M.J. at 35.

Even if it is later determined that the appellant did not waive this issue by failing to object to the trial counsel's explanation or the military judge's ruling, we find that the military judge did not abuse his discretion in finding no purposeful discrimination. The trial counsel's explanation included a reference to the challenged panel member's participation in the *United States v. Martin* case, held the previous week. The trial counsel and military judge were also participants in the *Martin* case. Airman First Class (A1C) Martin was charged with attempted rape and forcible sodomy, but convicted of an indecent act and sodomy. A1C Martin was sentenced to hard labor without confinement for 45 days, restriction to base for 45 days, reduction to E-1, and a reprimand.[2] While the trial counsel did not claim to know the opinion or vote of the challenged member, we are certain that he was disappointed with the outcome of the *Martin* case. As a result, he did not want the challenged member to serve on this case.

In *United States v. Jackson*, 52 M.J. 756, 758 (A.F. Ct. Crim. App. 1999), this Court held that, when a military judge rules on a peremptory challenge that is opposed under *Batson*, the military judge should consider whether the trial counsel's "proffer is sincere, based on the military judge's knowledge of counsel, his observation of counsel's demeanor at trial, and his evaluation of other available evidence." The fact that the trial counsel did not challenge this member in the *Martin* case a week earlier, coupled with the fact that this military judge presided over the *Martin* case, makes us confident that the judge weighed counsel's assertions and relied upon his own in-court observations of the trial counsel and the panel member in sustaining the challenge in this case. *See Gray*, 51 M.J. at 34.

During oral argument, the appellate defense counsel asserted that the military judge's finding of no purposeful discrimination was insufficient because he did not articulate a complete legal basis for his findings. Specifically, the appellate defense counsel argued that the military judge should have affirmatively stated that the trial counsel's explanation for challenging the panel member was race-neutral and was not unreasonable, implausible or made no sense. *See Tulloch*, 47 M.J. at 287. In the alternative, the appellate defense counsel averred that, at a minimum, the military judge should have stated that he found no purposeful discrimination based upon the *Batson* line of cases. Either alternative would have resolved any doubt whether the military judge based his ruling on *Baston* and the line of related cases that followed, rather than just the *Batson* case alone.

While a more thorough articulation by the judge may have been preferable, "It is undisputed that a military judge is presumed to know the law and to follow it, absent clear evidence to the contrary." *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997); *United States v. Prevatte*, 40 M.J. 396, 398 (C.M.A. 1994); *United States v.*

[2] This information on A1C Martin's sentence was included in the appellate government's brief.

Vangelisti, 30 M.J. 234, 240 (C.M.A. 1990). Given the fact that the military judge raised the issue sua sponte, and specifically mentioned the *Batson* case when making his findings, we see no evidence to conclude that the military judge did not follow the law. The trial counsel's explanation for challenging that particular court member was entirely reasonable, patently plausible, and made perfect sense. While we find no error on the judge's part in this case, we encourage judges and counsel to be thorough in articulating their explanation and analysis of peremptory challenges when applied to minority panel members.

Improper Argument of Counsel

During his closing argument in the findings portion of the trial, the trial counsel expressed his personal opinion on the evidence. Specifically, he stated:

> Now I've said before there was only one thing that was true about any of his statements and that was the fact that he had intercourse with [SrA DW]. But I misspoke. There's one other little nugget that I think is true as well, and that's the statement that he made that [SrA DW] was startled when she woke up. I believe that. I believe startled is an understatement.

During the sentencing portion of the trial, the assistant trial counsel commented on the trial defense counsel's recommended amount of confinement. He said, "We give you a five-year minimum, they give you six months, which I'm disgusted and I hope you are too."

On appeal, the appellant asserts that these portions of the arguments were improper and asks this Court to set aside the findings and the sentence. The standard of review for an improper argument depends on the content of the argument and whether the defense counsel objected to the argument. The legal test for improper argument is whether it was error and whether it materially prejudiced the substantial rights of the accused. *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). If the defense counsel fails to object or request a curative instruction, the court will grant relief only if the improper argument amounts to plain error. *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001); *United States v. Southwick*, 53 M.J. 412, 414 (C.A.A.F 2000); *United States v. Boyd*, 55 M.J. 217, 222 (C.A.A.F. 2001); *United States v. Powell*, 49 M.J. 460, 464 (C.A.A.F. 1998); *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986).

In the case sub judice, both the trial counsel and the assistant trial counsel clearly expressed their personal opinions as to the evidence and the sentence. "Indeed, it is impermissible and unprofessional for a lawyer in closing argument to express his personal belief or opinion in the truth or falsity of any testimony or evidence." *United States v. Fuentes*, 18 M.J. 41, 52 (C.M.A. 1984) (citing *United States v. Knickerbocker*, 2 M.J. 128 (C.M.A. 1977)). Therefore, these comments were improper argument.

However, in both instances, the trial defense counsel did not object to the improper argument. When a defense counsel fails to object to an improper argument, the objection is waived. *See* Rules for Courts-Martial (R.C.M.) 919(c) and 1001(g). Under the holding in *Gilley*, 56 M.J. at 123, this Court must apply a plain error analysis to determine whether relief should be granted.

Accordingly, we must determine whether these improper arguments were prejudicial to the appellant. *Powell*, 49 M.J. at 464-65. After reviewing the contents of the trial and assistant trial counsel's argument in context, we do not believe that they "had an unfair prejudicial impact on the jury's deliberations." *Fisher*, 21 M.J. at 328 (quoting *United States v. Young*, 470 U.S. 1, 17 n.14 (1985)). Therefore, we find no material prejudice to the substantial rights of the appellant.

Legal and Factual Sufficiency

The appellant further argues that the evidence is legally and factually insufficient to support his conviction for rape. Because there was no physical evidence of penetration, such as semen, pubic hair, or physical trauma, the appellant avers that the victim was not a credible witness, and that the government did not prove penetration beyond a reasonable doubt. Legal sufficiency is a question of law that the Court reviews de novo. *United States v. Tollinchi*, 54 M.J. 80, 82 (C.A.A.F. 2000). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). Here, there is sufficient, competent evidence in the record of trial to find legal sufficiency to support the court members' finding that the appellant had sexual intercourse with SrA DW as she lay in her bed intoxicated and, therefore, incapable of giving consent.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, we are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; Article 66(c), UCMJ, 10 U.S.C. § 866(c). Reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). "[T]he factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979).

The victim in this case testified that she could not tell whether the appellant had actually penetrated her. However, she remembers having a dream that someone was having sex with her and when she opened her eyes, she discovered it was really happening. In a hysterical state, she then called her boyfriend shortly after the appellant left her room. She doesn't remember exactly what she said but she described what happened in sufficient detail that her boyfriend called Security Forces. The appellant

provided three written statements. Although the statements are somewhat conflicting, he admits being in the victim's room in all three statements. Additionally, in the latter two statements, the appellant admits inserting his penis inside the victim's vagina. Applying the standard for factual sufficiency to the appellant's conviction for rape, we are convinced of his guilt beyond a reasonable doubt.

Sentence Appropriateness

The appellant also claims his sentence is inappropriately severe. Specifically, he asks this Court not to approve any confinement in excess of five years. This Court may only affirm those findings and sentences we find are correct in law and fact and determine, on the basis of the entire record, should be approved. Article 66(c), UCMJ. In determining sentence appropriateness, we must exercise our judicial powers to assure that justice is done and that the accused receives the punishment he deserves. Performing this function does not authorize this Court to grant clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). The primary manner in which we discharge this responsibility is to give individualized consideration to an appellant on the basis of the nature and seriousness of the offenses and the character of appellant. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

In the instant case, the appellant was convicted of unlawfully entering the room of another airman, whom he had never met before, and raping her. Additionally, the appellant had a disciplinary record that included nonjudicial punishment and three letters of reprimand for minor disciplinary infractions. We find that, based on the serious nature of the appellant's offenses and his record of service, his sentence is not inappropriately severe.

Other Issues

And finally, we have considered the appellant's three remaining asserted errors submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Quick*, 59 M.J. 383 (C.A.A.F. 2004); *United States v. Matias*, 25 M.J. 356 (C.M.A. 1987).

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court