UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ANTOINETTE E. JOHNSON
United States Air Force

ACM 34889

21 May 2004

Sentence adjudged 30 May 2001 by GCM convened at Spangdahlem Air Base, Germany. Military Judge: Rodger A. Drew.

Approved sentence: Dishonorable discharge, confinement for 14 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, Major Maria A. Fried, and Captain James M. Winner.

Appellate Counsel for the United States: Captain Stacey J. Vetter (argued), Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel Lance B. Sigmon, and Major John D. Douglas.

Before

BRESLIN, ORR, and GENT
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

A general court-martial comprised of officer and enlisted members found the appellant guilty, contrary to her pleas, of two specifications of assault consummated by a battery and one specification of assault on a security forces member in the execution of her duties, in violation of Article 128, UCMJ, 10 U.S.C. § 928, and two specifications of assault with intent to commit voluntary manslaughter, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The sentence adjudged and approved was a dishonorable discharge, confinement for 14 years, forfeiture of all pay and allowances, and reduction to E-1.

The case is before this Court for review under Article 66, UCMJ, 10 U.S.C. § 866. The appellant raises numerous allegations of error. She asserts: (1) The military judge committed plain error in admitting an e-mail message; (2) The evidence is legally and factually insufficient to prove the appellant had the requisite intent to kill; (3) The trial counsel made improper argument in findings; (4) The sentence is inappropriately severe; and (5) The military judge erred in denying a motion for a new trial. The appellant also submitted a petition for new trial claiming newly discovered evidence and fraud on the court-martial. For the reasons discussed below, we find no error but take action on the sentence.

Background

The appellant was stationed at Spangdahlem Air Base, Germany, and assigned to the 52d Equipment Maintenance Squadron. She met Airman First Class (A1C) Amy Wheeler, a security forces member, and they began a lesbian relationship that lasted about one year. The relationship was turbulent, resulting in arguments and physical confrontations. When A1C Wheeler tried to end the relationship in January 2000, the appellant took an overdose of pills in an apparent suicidal gesture. Thereafter, they resumed their relationship.

A1C Wheeler served at a deployed location between May and September 2000. Upon her return, A1C Wheeler broke off the affair with the appellant. In late September 2000, A1C Wheeler met Airman (Amn) Nichole Wesolowski, another security forces member, and they became friends. The appellant suspected that A1C Wheeler was romantically involved with Amn Wesolowski, and was jealous and angry. This led to the two incidents that formed the basis for the charges in this case.

The first incident occurred in A1C Wheeler's dormitory room in late September or early October 2000. The appellant was upset about A1C Wheeler's relationship with Amn Wesolowski. They argued and the appellant choked A1C Wheeler. This incident formed the basis for one specification of assault consummated by a battery on A1C Wheeler.

The appellant made another suicidal gesture in October 2000. A1C Wheeler found her when she returned a vehicle to the appellant's home and got medical assistance. As a result, the appellant faced administrative discharge from the Air Force.

The second incident occurred at the armory in the early morning hours of 21 October 2000. Amn Wesolowski was visiting A1C Wheeler, who was on duty as the armorer for the security forces squadron, responsible for safeguarding and issuing small arms. The appellant called A1C Wheeler, and they argued. The appellant went to the armory, and a physical altercation ensued between the appellant, A1C Wheeler, and Amn Wesolowski. The appellant attempted to take A1C Wheeler's handgun but was

unsuccessful. She then seized a handgun from the storage racks, inserted a loaded magazine, chambered a round, and pointed the weapon at A1C Wheeler and Amn Wesolowski. A1C Wheeler aimed her service weapon at the appellant and warned her repeatedly to drop the gun. The appellant did not comply. A1C Wheeler shot the appellant in the leg, incapacitating her. The appellant was charged with assault consummated by a battery on Amn Wesolowski, assault upon A1C Wheeler, a security policeman in the execution of her duties, and assault with intent to commit murder against both A1C Wheeler and Amn Wesolowski.

Admissibility of E-Mail Message

In a preliminary session held outside the members' presence, the prosecution offered into evidence a copy of an e-mail message sent by the appellant to A1C Wheeler the day before the incident in the armory. The text of the message indicated it was intended for someone named Katie. The message discussed the appellant's anguish over her break-up with A1C Wheeler. The message noted, "We had a fight a couple of weeks ago and I choked her. I hurt her pretty bad." It also included a threat to kill Amn Wesolowski. The defense counsel objected, claiming the message was not relevant and that it was unduly prejudicial. The military judge denied the objections on those grounds, and admitted the document as Prosecution Exhibit 21. The defense counsel raised no objection to the evidentiary foundation for the message.

Later in the trial, A1C Wheeler identified the document as an e-mail message she received a few hours after the incident at the armory. The appellant subsequently testified that she intended to send the message to a friend at Nellis Air Force Base, but mistakenly sent it to A1C Wheeler instead.

The appellant now contends that the military judge erred by admitting the e-mail message without requiring the prosecution to establish an evidentiary foundation. Noting the absence of a defense objection on that basis, the appellant avers that it was "plain error," and suggests that the prosecution would not have been able to establish the required foundation for the document.

Mil. R. Evid. 103(a)(1) provides that error may not be predicated upon a ruling that admits evidence unless, "a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context." *See United States v. McLemore*, 10 M.J. 238, 240 (C.M.A. 1981) (failure to make a timely objection constituted waiver). Where, as here, trial defense counsel did not object to the admission of the document on the grounds that it lacked a proper foundation, the issue will normally be considered waived upon appellate review.

Mil. R. Evid. 103(d) allows a court to notice "plain errors that materially prejudice substantial rights" even though they were not raised by objection. "Plain error" is

defined as error that is plain or obvious and that materially prejudices substantial rights. *United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998). The appellant argues that it was obvious error to admit the document without any authentication. We disagree. It would not be obvious to a trial judge that the document was not authentic, especially where the defense does not object on that basis. *See United States v. Robinson*, 12 M.J. 872, 875 n.4 (N.M.C.M.R. 1982). More importantly, we will not find an error regarding the authenticity of the document where the appellant, testifying under oath, authenticated it by identifying it as a message she sent to A1C Wheeler by mistake.

Evidence of Intent to Kill

The appellant argues the evidence is legally and factually insufficient to support the finding that the appellant had the requisite intent to kill. We find no merit in this argument.

As noted above, the government charged the appellant with assault with intent to murder A1C Wheeler and Amn Wesolowski. The court-martial found her guilty of the lesser included offense of assault with intent to commit voluntary manslaughter for both victims. The offense of assault with intent to commit voluntary manslaughter requires proof of intent to kill. *Manual for Courts-Martial, United States (MCM),* Part IV, ¶ 64b (2000 ed.).

Under Article 66(c), UCMJ, we may approve only those findings of guilt we determine to be correct in both law and fact. The test for legal sufficiency of the evidence is whether, considering the evidence in the light most favorable to the prosecution, a rational fact finder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). According to our superior court, the test for factual sufficiency "is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," the court is "convinced of the accused's guilt beyond a reasonable doubt." *Reed*, 54 M.J. at 41 (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

We considered carefully all the facts and circumstances of the case. The appellant was the aggressor. She was distraught about the loss of her relationship with A1C Wheeler, and hostile toward Amn Wesolowski. This emotion, coupled with the effects of alcohol and the impact of her telephone conversation with A1C Wheeler, made her very angry and vengeful. We note she made repeated attempts to take A1C Wheeler's handgun, beginning with the first scuffle. Her claim that she did so to defend herself or because she intended to kill herself is not consistent with her conduct that evening. When the appellant had the clear opportunity to escape from the armory, she seized a handgun, inserted a magazine, chambered a round, and advanced on A1C Wheeler and Amn Wesolowski. Both A1C Wheeler and Amn Wesolowski testified that the appellant pointed the handgun at them and threatened to kill them, even while A1C Wheeler aimed

her weapon at the appellant and told her to drop the gun. The appellant admitted to investigators that she pointed the gun at A1C Wheeler and Amn Wesolowski. The members found the appellant guilty of assault with intent to commit voluntary manslaughter, requiring an intent to kill formed in the heat of sudden passion caused by adequate provocation. Considering the evidence in the light most favorable to the prosecution, a rational fact finder could have found all the essential elements beyond a reasonable doubt. We too are satisfied beyond a reasonable doubt that the appellant intended to kill A1C Wheeler and Amn Wesolowski.

Improper Argument

The appellant maintains the trial counsel engaged in improper argument during the findings and sentencing portions of the trial. She further contends that these errors were so egregious that, even absent any objection at trial by assigned defense counsel, we should find plain error. Contrary to the appellant's assertions, we do not find plain error in this case.

"A trial counsel 'may strike hard blows, [but] he is not at liberty to strike foul ones.'" *United States v. Stargell*, 49 M.J. 92, 93 (C.A.A.F. 1998) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Both counsel may argue the evidence of record and reasonable inferences fairly derived from the evidence. *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). Counsel may comment on the "testimony, conduct, motives, interests and biases of witnesses." Rule for Courts-Martial (R.C.M.) 919(b), Discussion. Trial counsel may also bring to the attention of the court-martial the fact that the accused, "enjoyed ample opportunity to preview the Government's evidence and to decide how best to fashion his own account." *United States v. Fitzpatrick*, 14 M.J. 394, 399 (C.M.A. 1983). The trial counsel may not suggest that the court members put themselves in the place of a victim, but may invite the members to imagine the victim's suffering. *Baer*, 53 M.J. at 237-38. Counsel may comment on contemporary history or matters of common knowledge, but may not inject command policy considerations. *United States v. Kropf*, 39 M.J. 107, 108-09 (C.M.A. 1994).

Reviewing courts do not focus on specific words from an argument in isolation. *Baer*, 53 M.J. at 238 (citing *United States v. Young*, 470 U.S. 1, 16 (1985)). We look instead at the entire argument "viewed in context" of its direction, tone, theme, and presentation. *Id.* at 239.

Failure to object to improper argument waives the objection, absent plain error. *See* R.C.M. 919(c) (findings); R.C.M. 1001(g) (sentencing); *United States v. Ramos*, 42 M.J. 392, 397 (C.A.A.F. 1995). As our superior court noted, "the accused has sitting beside him or her an advocate. It is the duty of this advocate to ferret out improper argument, object thereto, and seek corrective action . . . ." *United States v. Edwards*, 35 M.J. 351, 354 (C.M.A. 1992). An appellate court may be reluctant to find plain error in

an argument that, when presented to the court-martial, was insufficient to stir trial defense counsel to object.

The appellant contends that three comments during the findings argument constituted plain error. First, in findings argument, trial counsel said,

> [T]he accused has had months, months, to concoct these stories, to make up these tales, fit the pieces together, work with her attorneys, she knows, she knows what will happen if she is convicted. She knows what the maximum punishment will be, which, if you convict her of everything, you can essentially put her in jail until she is an old woman.

The trial defense counsel raised no objection to the argument.

The appellant contends that this was plain error, because it improperly suggested that the appellant was lying under the guidance of her attorneys. We are not convinced that this was the meaning of the argument. To the contrary, the thrust of trial counsel's argument seemed to be that it was the appellant who had the opportunity and motive to tailor the testimony to suit her best interests. Certainly it was not "clear" or "obvious" that an improper meaning was intended, thus we find no plain error.

The appellant also maintains the trial counsel committed plain error by arguing that the appellant testified untruthfully because she knew "the maximum confinement time for the lesser included offense of assault with a dangerous weapon is less than half that of assault with intent to commit murder." The appellant asserts the reference to the disparity in punishment was irrelevant and improper in the argument on findings, because the members may not base their verdict on the consequences of the crimes. In this case, the government did not argue that the members should consider the maximum sentence in deciding what offense the appellant committed. Rather, trial counsel argued that the disparity in punishment gave the appellant a motive to lie. Moreover, trial counsel did not indicate specifically the maximum allowable punishment for each offense. Under the circumstances, the argument did not rise to the level of plain error. *United States v. Jefferson*, 22 M.J. 315, 329 (C.M.A. 1986).

In findings argument, trial counsel commented on the defense counsel's argument, describing it as "all that righteous indignation," and noting, "I have seen his theatrics before." The appellant argues that the comments were irrelevant and inflammatory, and as such constituted plain error. We do not agree. "A criminal trial is not a tea dance, but an adversary proceeding to arrive at the truth. Both sides may forcefully urge their positions so long as they are supported by the evidence." *United States v. Rodriguez*, 28 M.J. 1016, 1023 (A.F.C.M.R. 1989), *aff'd* 31 M.J. 150 (C.M.A. 1990). Either counsel may comment upon the opponent's argument in an attempt to show why it is not persuasive. However, counsel should not comment on matters not introduced before the members or on facts in others cases. *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A.

1983); *United States v. Shoup*, 31 M.J. 819, 821 (A.F.C.M.R. 1990). In that regard, trial counsel's comment about what she had seen opposing counsel do in other cases was improper. However, we find that this comment was not so serious an error as to materially prejudice the appellant's substantial rights, therefore we find no plain error.

Finally, the appellant submits that a comment by trial counsel during the sentencing argument was improper. Specifically, the appellant takes issue with trial counsel's remark, "This accused has so little regard for human life that she will take it in an instant." The appellant argues the language was inflammatory and improperly commented on the appellant's likelihood to commit similar crimes in the future. We are not convinced this was plain error. Given the evidence and the members' findings, it seems a fair inference that the appellant is a person who was capable of quickly forming the intent to kill. We are not persuaded that the language was intended to comment on possible future crimes. In any event, that meaning was not plain or obvious, nor would the comment, considered in the context of the entire argument, materially prejudice the appellant's substantial rights.

Motion for New Trial

The appellant argues that the military judge erred in denying a motion for a new trial. The appellant also submitted a petition for new trial on the same grounds. We find the military judge did not err in denying the motion for a new trial.

At the outset of the trial, it was apparent that the relationships between the appellant, A1C Wheeler, and Amn Wesolowski would be matters of concern. The government acknowledged that the nature of the relationship between A1C Wheeler and the appellant would be relevant, but moved to keep out evidence of specific acts, to which the defense agreed. The government also moved to exclude evidence of the relationship between A1C Wheeler and Amn Wesolowski. The defense maintained that it was relevant and necessary to show bias under Mil. R. Evid. 608(c). The military judge agreed, and allowed the defense to explore the nature of the relationship generally.

The evidence presented at trial included testimony about these relationships. A1C Wheeler testified about her lesbian relationship with the appellant and the disputes between them. The cross-examination of A1C Wheeler focused on her lesbian affair with the appellant. The trial defense counsel asked A1C Wheeler if she started dating Amn Wesolowski "right after the incident at the armory," but she denied it. A1C Wheeler denied kissing Amn Wesolowski, but explained that Amn Wesolowski tried to kiss her; she demurred and Amn Wesolowski kissed her on the cheek. She admitted that she and Amn Wesolowski had changed dormitory rooms to share adjoining rooms after the incident. Trial defense counsel's cross-examination challenged Amn Wheeler extensively about false statements to investigators about her lesbian relationship, and alleged inconsistencies in her prior statements. The defense called as a witness A1C

Jessica Ackerman, a security forces investigator, who related that Amn Wesolowski said she had started dating A1C Wheeler shortly after the armory incident.

Both parties rested on 4 May 2001. Due to conflicting commitments, the trial judge recessed the trial for three weeks. The proceeding resumed with oral arguments on findings on 29 May 2001.

During the recess, Air Force investigators looked into an allegation that A1C Wheeler had stolen a television belonging to the appellant. During the previous summer, the appellant agreed to purchase a television from another airman for $200.00. Delivery was an issue, because of conflicting leave and deployment schedules. They worked out an arrangement where the appellant mailed her check to the seller, who cashed it. Just before deploying, the seller left a note and his room key, inviting A1C Wheeler or the appellant to get the television from his room. When he returned in December, the television was gone and the key was returned, so the seller assumed all was in order. By then, the appellant was in pretrial confinement resulting from the incident at the armory. While making arrangements to store her property, the appellant realized the television was missing, and reported it stolen. On 10 May 2001, the investigators questioned A1C Wheeler about the missing television. She made a written statement denying any knowledge of its location.

Trial resumed on 29 May 2001 with arguments on findings. The court-martial found the appellant guilty as noted above, and the sentencing hearing followed. Both A1C Wheeler and Amn Wesolowski testified during the sentencing case concerning the impact of the offenses on them.

After trial, the investigators questioned Amn Wesolowski about the television. She indicated she helped A1C Wheeler move a television to a dormitory room. In the same statement, Amn Wesolowski noted a fact about the incident at the armory that she had omitted. She reported that, before A1C Wheeler opened the armory door, she drew her handgun "in fear of her life," Amn Wesolowski asked her what she was doing, and A1C Wheeler re-holstered the weapon. Amn Wesolowski said she did not know why she had not mentioned that before, other than she thought it was not relevant.

On 25 July 2001, the investigators re-interviewed A1C Wheeler about the television. She indicated that when she returned from the deployment, she found the note inviting her to pick up the television, and she did so. Apparently the television fell and may have been damaged while in A1C Wheeler's possession. A1C Wheeler admitted that she made a false official statement to investigators when she denied knowledge of the location of the television. She said she did it because the appellant's lawyers "would have used it against me," and that, "they would have tried to say I wasn't a credible witness and I would have lost my case."

There was one other incident post-trial that came to the attention of the defense counsel. On 3 August 2001, Ms Erica Shipp walked into the lobby of the base Finance office, and saw two women, in uniform, kissing. She reported it to a clerk on duty. He checked the sign-in roster, and one of the names was "Wesolowski."

The defense counsel moved for a new trial under R.C.M. 1210. They based the request on "newly discovered evidence," specifically Amn Wesolowski's report that A1C Wheeler drew and re-holstered her weapon before opening the door, and A1C Wheeler's false official statement about knowing the location of the missing television. The defense counsel also asked the military judge to consider additional statements from their previous witness, A1C Ackerman, about specific conduct between A1C Wheeler and Amn Wesolowski, arguing that A1C Ackerman had just remembered the details. The defense also asserted that A1C Wheeler and Amn Wesolowski committed fraud on the court by concealing the extent of their personal relationship.

The military judge reconvened the court-martial for a post-trial session and took statements and evidence on the motion. *See United States v. Scaff*, 29 M.J. 60, 65 (C.M.A. 1989). A1C Wheeler and Amn Wesolowski asserted their right to remain silent. The convening authority denied the defense request for testimonial immunity for these witnesses. The military judge entered extensive findings of fact and conclusions of law, and denied the motion. Applying the criteria in R.C.M. 1210, the military judge found that the false official statement about the television and the report of drawing and re-holstering the weapon was discovered after trial, and was not such that it would have been discovered before trial in the exercise of due diligence. However, he concluded that the new evidence probably would not have resulted in a substantially more favorable result for the accused. The military judge also concluded that, in light of the evidence admitted at trial about the relationship between A1C Wheeler and Amn Wesolowski, the additional evidence would not have had a substantial contributing effect on the findings of guilty or the sentence. He declined to consider the additional evidence A1C Ackerman remembered after trial. The appellant now avers the military judge erred.

Under Article 73, UCMJ, 10 U.S.C. § 873, an accused may petition for a new trial "on the grounds of newly discovered evidence or fraud on the court." R.C.M. 1210(f) provides:

> (f) *Grounds for new trial.*
>
> (1) *In general.* A new trial may be granted only on grounds of newly discovered evidence or fraud on the court-martial.
>
> (2) *Newly-discovered evidence.* A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that:
>
> (A) The evidence was discovered after the trial;

(B) The evidence was not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and

(C) The newly-discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

(3) *Fraud on court-martial*. No fraud on the court-martial warrants a new trial unless it had a substantial contributing effect on a finding of guilty or the sentence adjudged.

Petitions for a new trial "are generally disfavored." *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993). They will be granted "only if a manifest injustice would result absent a new trial . . . based on proffered newly discovered evidence." *Id. See also United States v. Rios*, 48 M.J. 261, 267 (C.A.A.F. 1998); *United States v. Niles*, 45 M.J. 455, 456 (C.A.A.F. 1996).

When petitions for a new trial are submitted to this Court, we have the "'prerogative' of weighing 'testimony at trial against the' post-trial evidence 'to determine which is credible.'" *United States v. Bacon*, 12 M.J. 489, 492 (C.M.A. 1982) (quoting *United States v. Brozauskis*, 46 C.M.R. 743, 751 (N.C.M.R. 1972)). Consistent with federal civilian practice, we may review the evidence "both in terms 'of credibility as well as of materiality.'" *Id.* (quoting *Jones v. United States*, 279 F.2d 433, 436 (4th Cir. 1960)). We review a military judge's ruling on a motion for a new trial for an abuse of discretion. *United States v. Humpherys*, 57 M.J. 83, 96 (C.A.A.F. 2002).

We first examine Amn Weslowski's statement that A1C Wheeler drew and re-holstered her weapon before answering the armory door. It is clear that this evidence was not discovered until after trial. It is not clear whether Amn Wesolowski intentionally withheld this information or whether no one ever asked her about it. The military judge decided the evidence would not have been discovered in the exercise of due diligence simply because it did not surface after extensive pretrial investigation. Because the military judge was in a better position to assess the relationship between the witness and the defense, and the credibility of the witnesses, we will accept his conclusion. In any event, we concur with the military judge's determination that the newly discovered evidence would not probably produce a substantially more favorable result for the accused. This additional evidence would logically indicate A1C Wheeler was afraid of the appellant before she opened the armory door. Indeed, it could have blunted the force of the defense argument at trial that opening the door showed A1C Wheeler was not afraid of the appellant and had not been threatened.

We next consider A1C Wheeler's false official statement regarding the location of the television. It is readily apparent that the evidence was only discovered after trial, and it would not have been discovered before trial in the exercise of due diligence. The

statement is troubling, because it could have been used to attack the credibility of A1C Wheeler and, perhaps, Amn Wesolowski. Impeachment evidence may constitute "newly discovered" evidence sufficient to support a request for a new trial. *Williams*, 37 M.J. at 355; *Niles*, 45 M.J. at 459. In this case, trial defense counsel got A1C Wheeler to admit that she lied to investigators at first about the nature of her relationship with the appellant, and why she left the weapons racks unlocked the night in question. Additionally, trial defense counsel confronted her at length about alleged inconsistencies in her previous statements and her bias. Unlike the *Williams* and *Niles* cases, the newly discovered impeachment evidence does not go to the substance of the defense, but rather to a separate matter not otherwise relevant to the proceeding. Considering all the evidence presented on this matter, the military judge concluded the appellant failed to show that the additional impeachment evidence would probably have rendered a substantially more favorable result. Under all the circumstances, we find the military judge did not abuse his discretion.

Finally, we address the allegation that A1C Wheeler and Amn Wesolowski committed a fraud on the court by denying their homosexual relationship, and that the military judge erred by not granting a new trial based upon new evidence of the witnesses' post-trial conduct. The military judge noted that there was substantial evidence introduced at trial, in an attempt to show bias, which suggested that A1C Wheeler and Amn Wesolowski were involved in a lesbian relationship. Certainly it was clear that they were close friends, and were the only witnesses—other than the appellant—to the events inside the armory on the night in question. The military judge concluded that more evidence of this alleged relationship would not have had a substantial contributing effect on the findings or the sentence. We agree.

For these reasons, we find the military judge did not abuse his discretion in denying the motion for new trial. For the same reasons, we deny the petition for new trial.

Sentence Appropriateness

Article 66(c), UCMJ, provides that this Court "may affirm . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." In *Jackson v. Taylor*, 353 U.S. 569, 576-77 (1957), the Supreme Court considered the statute and its legislative history, and concluded it gave the (then) Boards of Review the power to review not only the legality of a sentence, but also whether it was appropriate. Our superior court has likewise concluded that the Courts of Criminal Appeals have the power to, "in the interests of justice, substantially lessen the rigor of a legal sentence." *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955). *See United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002).

We carefully reviewed the facts and circumstances of this case, and all the matters presented in the sentencing phase of the trial. The offenses are serious indeed; the adverse impact upon the two victims and the disruption to good order and discipline warrant significant punishment. The sentence is within legal limits and no error prejudicial to the appellant's substantial rights occurred during the sentencing proceedings. Nonetheless, we find that a lesser sentence of a dishonorable discharge, confinement for 10 years, forfeiture of all pay and allowances, and reduction to E-1 should be affirmed.

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; *Reed*, 54 M.J. at 41. However, we affirm only so much of the sentence as includes a dishonorable discharge, confinement for 10 years, forfeiture of all pay and allowances, and reduction to E-1. Accordingly, the findings and the sentence, as modified, are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator