

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman First Class MICHAEL J. LIEBEGOTT
United States Air Force**

ACM S31796

26 September 2011

Sentence adjudged 4 March 2010 by SPCM convened at Mountain Home Air Force Base, Idaho. Military Judge: Don M. Christensen.

Approved sentence: Bad-conduct discharge, confinement for 2 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Captain Andrew J. Unsicker.

Appellate Counsel for the United States: Captain Joseph Kubler and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with his pleas, appellant was convicted at a special court-martial composed of officer members of two specifications of dereliction of duty, one specification of failing to obey a lawful order, one specification of fleeing apprehension, one specification of driving while intoxicated, and one specification of providing alcohol to a minor, in violation of Articles 92, 95, 111 and 134, UCMJ, 10 U.S.C. §§ 892, 895, 911, 934. Contrary to his pleas, the appellant was convicted of two specifications of assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928. The adjudged sentence consisted of a bad-conduct discharge, confinement for 2 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged. The appellant

raises one issue for our consideration: Whether trial counsel improperly commented on the appellant's constitutional right to remain silent and his right to plead not guilty. Finding no error that materially prejudices a substantial right of the appellant, we affirm.

Background

The appellant was involved in two domestic altercations with his wife that formed the basis for the contested assault and battery specifications* as well as the issue before us. During findings, the government called AL, the appellant's wife, to testify about the two incidents. She testified that during an argument, the appellant assaulted her by grabbing her by the neck and pushing her head into a car window. She also described an occurrence where the appellant grabbed her and shoved her into a wall.

During his findings argument, trial counsel stated the following:

He's a professional in the profession of arms. But what he wants you to do, what the defense contends, is that once he does something wrong he wants to be able to run back to the playpen like children rather than ante up and be held accountable for what he did . . . And members, I encourage you to see this for what it is. It's not possibilities, it's facts. And you can use your common sense and knowledge of the ways of the world to filter through the possibilities to see the facts. It's exactly how [AL] said it was.

Comment on Appellant's Right to Remain Silent and his Right to Plead Not Guilty

Whether there has been improper reference to an accused's invocation of his constitutional rights is a question of law that we review de novo. *United States v. Alameda*, 57 M.J. 190, 198 (C.A.A.F. 2002). An accused military member has the right not to testify at his court-martial and the prosecution "may not comment directly, indirectly, or by innuendo, on the fact [the] accused did not testify in his defense." *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005) (quoting *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990)). "A constitutional violation occurs only if either the defendant alone has the information to contradict the government evidence referred to or the jury 'naturally and necessarily' would interpret the summation as comment on the failure of the accused to testify." *Id.* (citing *United States v. Coven*, 662 F.2d 162, 171 (2d Cir. 1981)). "Under the 'invited response' or 'invited reply' doctrine, the prosecution is not prohibited from offering a comment that provides a fair response to claims made by the defense." *Carter*, 61 M.J. at 33 (quoting *United States v. Gilley*, 56 M.J. 113, 121 (C.A.A.F. 2001)). We must look at trial counsel's comments "within the context of the [appellant's] entire court-martial." *United States v. Moran*,

* The appellant was charged with three specifications of assault and battery. He was convicted of two of the specifications and acquitted of the third specification.

65 M.J. 178, 186 (C.A.A.F. 2007) (quoting *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000)). The Government bears the burden to establish that any error was harmless beyond a reasonable doubt. *Carter*, 61 M.J. at 35.

The appellant argues trial counsel improperly made reference to the appellant's right not to testify and right to plead not guilty by stating the appellant would rather "run back to the playpen like children rather than ante up and be held accountable for what he did." The appellant contends, "The context of the government's argument was that not anteing up is synonymous with [the a]ppellant not taking the stand and taking responsibility."

Considering the remarks in their proper context, we have no difficulty finding trial counsel did not cross an impermissible line into commenting upon the appellant's right not to testify. Trial defense counsel began his opening statement with, "[W]hat the evidence is going to show in the case is basically you've got two young people who had a lot of growing up to do." He later said, "You know, it was more like children where it was kind of bickering back and forth." Trial defense counsel made other references to child-like behavior interspersed throughout his opening statement. In his closing argument, trial counsel responded to the trial defense counsel's assertions the incidents were akin to child's play. Trial counsel's remarks were in no way a comment upon the appellant's right to remain silent. Rather they were fair responses to trial defense counsel's argument that the incidents were the result of youthful indiscretions. Looking at the remarks in the context of the entire court-martial, coupled with the fact trial defense counsel made no objection during trial counsel's argument, we find no error, plain or otherwise. We further find no reasonable possibility that the members mistook the comments as referring to the appellant's failure to testify. The appellant's argument is 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



A handwritten signature in blue ink, appearing to read "S. Lucas", is written over a faint, light blue circular stamp or watermark.

STEVEN LUCAS
Clerk of the Court