UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ROBERT MEJIA
United States Air Force

ACM 36705

19 December 2007

Sentence adjudged 16 March 2006 by GCM convened at Charleston Air Force Base, South Carolina. Military Judge: Donald Plude.

Approved sentence: Bad-conduct discharge, confinement for 60 days, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Imelda L. Paredes, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Jason M. Kellhofer.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT

FRANCIS, Senior Judge:

Contrary to his plea, the appellant was convicted by general court-martial of one specification of forcible sodomy of a female Airman, in violation of Article 125, UCMJ, 10 U.S.C. § 925. A panel of officer and enlisted members sentenced him to a bad-conduct discharge, confinement for 60 days, and reduction to E-1. The convening authority approved the adjudged sentence.

The appellant asserts three errors: (1) The military judge improperly failed to instruct the members on the lesser included offense of consensual sodomy; 2) The military judge abused his discretion by admitting pre-sentencing testimony not "directly

related to" or "resulting from" the charged offense; and 3) The military judge improperly failed to excuse a panel member who had a social friendship with the alleged victim's husband, and who had also spoken to the alleged victim's husband on the first day of the court-martial.[1] Finding no error, we affirm.

Failure to Instruct on Lesser Included Offense

At trial, the defense contended the victim, Staff Sergeant (SSgt) CD,[2] either consented to the sodomy or that the appellant mistakenly believed she consented. To that end, the defense, through aggressive cross-examination of SSgt CD and an Air Force Office of Special Investigations agent who investigated the offense, elicited several facts potentially indicative of consent. Based on that evidence, the military judge instructed the members on both consent and mistake of fact related to consent. However, he did not instruct the members on the lesser included offense of consensual sodomy. The appellant asserts failure to instruct on the lesser included offense was prejudicial error. We disagree.

We review a military judge's decision to give, or not give, a lesser included offense instruction de novo. *United States v. Smith*, 50 M.J. 451, 455 (C.A.A.F. 1999). "Failure to object . . . to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error." Rule of Courts-Martial (R.C.M.) 920(f). Waiver under this rule requires "*affirmative* action of the accused's counsel [rather than] mere failure . . . to object to erroneous instructions." *Smith*, 50 M.J. at 455-56 (internal citations omitted) (emphasis in original).

At the beginning of trial, the defense advised the military judge that if the government requested an instruction on the lesser included offense of consensual sodomy as a potential basis for conviction, the defense would object on constitutional grounds.[3] The trial counsel indicated no decision had yet been made as to whether to request such an instruction, but that he would promptly notify the appellant if the government decided to do so. After brief discussion, the matter was thereafter never raised again and neither the defense nor the government requested such an instruction when the military judge discussed potential findings instructions.

The defense's threatened objection to any government request for an instruction on the potential lesser included offense of consensual sodomy constitutes a clear, affirmative waiver of the need for that instruction. The defense having consciously elected to pursue an "all or nothing" approach to the charged offense on this issue, we

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[1] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[2] At the time of the charged offense, the victim was a single Senior Airman. By the time of trial, she had married and been promoted. This opinion uses her rank and name (initials) at time of trial.

[3] Though unstated at trial, it appears the defense intended to raise such an objection under the rationale of *Lawrence v. Texas*, 539 U.S. 558 (2003), and *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).

will not now second-guess the defense stratagem simply because it proved to be unsuccessful. *Smith*, 50 M.J. at 455. There was no error, plain or otherwise.

Sentencing Evidence

During pre-sentencing, SSgt CD testified that after reporting the offense, she endured numerous, lengthy interviews with investigative, medical, and trial and defense personnel, and did not find it pleasant to talk about what the appellant did to her. She also provided details on the invasive nature of the medical exam she was given and indicated she worried about the results of tests she was given for sexually transmitted diseases. Additionally, she testified the trial forced her to miss her sister's wedding. The appellant contends none of this testimony was proper evidence in aggravation and therefore should not have been admitted. We find no prejudicial error.

We review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003); *United States v. Gogas*, 55 M.J. 521, 523 (A.F. Ct. Crim. App. 2001). During sentencing, trial counsel is allowed to present evidence of "aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4). Such evidence "includes, but is not limited to, evidence of . . . social, psychological, and medical impact on or cost to any person . . . who was the victim of an offense committed by the accused." *Id.* "[A] military judge has broad discretion to determine whether evidence proffered by the prosecution as aggravation evidence will be admitted under R.C.M. 1001(b)(4)." *United States v. Wilson*, 47 M.J. 152, 155 (C.A.A.F. 1997). "Whether a circumstance is 'directly relat[ed] to or results from the offenses' calls for considered judgment by the military judge, and we will not overturn that judgment lightly." *Id.*

Applying the above standards, we find SSgt CD's testimony about the medical impacts of the appellant's crime and the unpleasantness she experienced in having to repeatedly relate the details of the assault during the investigative process directly related to or resulted from the appellant's offense. Sex offenses, by their very nature, generate significant victim impact. As it was in this case, one impact logically flowing from such an offense can be the need to repeatedly discuss embarrassing details with strangers. The military judge did not abuse his discretion in admitting it.

The government concedes, and we agree, that the "missed wedding" comment was improper. As this Court previously noted in *United States v. Bellingham*, ACM 33674, unpub. op., (A.F. Ct. Crim. App. 29 Jan 2001), references to adverse impacts resulting from the timing of a court-martial constitute impermissible comments on the exercise of an accused's right to a trial and therefore are not proper matters in aggravation. Nonetheless, we find no prejudice. After SSgt CD's sentencing testimony, the defense requested, and the military judge issued, a curative instruction, advising the court

members that the fact the appellant "chose to exercise his Constitutional right to a trial by members cannot be considered as a matter in aggravation." Although the language of this curative instruction was very broad, the wording was drafted by the defense. In doing so, the defense specifically declined the military judge's offer to put the instruction in context by referring to the offending comment, choosing not to highlight it further. Given this clear defense strategy, the military judge did not abuse his discretion in issuing the curative instruction drafted by the defense and such instruction obviated any prejudice that might otherwise have flowed from the remark.

Failure to Excuse Panel Member

During a recess shortly after completion of voir dire, but prior to the presentation of opening statements or evidence, one of the panel members, Technical Sergeant (TSgt) JP, was seen talking in the hallway to SSgt CD's husband, SSgt RD. When called back for additional individual voir dire to flush out the contact, TSgt JP indicated he had known SSgt RD for a couple years and that they had twice happened to attend the same social gatherings. Further, while he would not classify SSgt RD as a "friend," they were certainly cordial whenever they happened to see each other in passing. Based on that relationship, and the fact that TSgt JP had talked to SSgt RD while the trial was already underway, the appellant asserts the military judge should have excused TSgt JP as a court member. We find otherwise.

With certain exceptions not here applicable, a "ground for challenge is waived if the party knew of . . . the ground for challenge and failed to raise it in a timely manner." R.C.M. 912(f)(4). Although the same rule allows a military judge, in the interest of justice, to remove a member even in the absence of a challenge, it does not require that he do so. "A military judge is not required to second guess the tactical decision of a counsel not to raise a challenge for cause when counsel [is] obviously aware that grounds exist for such challenge." *United States v. Davis*, 29 M.J. 1004, 1007 (A.F.C.M.R. 1990), *aff'd*, 33 M.J. 13 (C.M.A. 1991).

In this case, it is clear from the above referenced voir dire of TSgt JP that he and SSgt RD were nothing more than casual acquaintances. Indeed, when questioned further by the military judge, TSgt JP admitted he did not even know SSgt RD was married until the military judge told him so. He also indicated he did not know SSgt CD and would not give her testimony any more credibility simply because she was SSgt RD's wife. Further, when talking with SSgt RD in the hallway, they did not discuss the court-martial.

With all of this information fully developed on the record, the military judge offered the appellant's trial defense counsel the opportunity to challenge TSgt JP for cause. The defense expressly declined to do so. The appellant having knowingly and voluntarily made that election, and waived any potential challenge for cause, the military judge was not required to sua sponte remove the member. *Id.*

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, GS-11, DAF
Clerk of the Court