UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class GAYLON L. MEYER
United States Air Force

ACM S30074

31 March 2004

Sentence adjudged 29 November 2001 by SPCM convened at Malmstrom Air Force Base, Montana. Military Judge: Gregory E. Pavlik.

Approved sentence: Bad-conduct discharge, confinement for 90 days, forfeiture of $500.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Major Antony B. Kolenc (argued), Colonel Beverly B. Knott, Major Terry L. McElyea, Major Maria A. Fried, and Major Patrick J. Dolan.

Appellate Counsel for the United States: Captain C. Taylor Smith (argued), Colonel LeEllen Coacher, and Lieutenant Colonel Lance B. Sigmon.

Before

BRESLIN, ORR, and GENT
Appellate Military Judges

OPINION OF THE COURT

GENT, Judge:

A special court-martial convicted the appellant, contrary to his pleas, of one specification of unlawful entry of his former girlfriend's dormitory room, and two specifications of failure to follow a lawful order to have no contact with her, in violation of Articles 134 and 92, UCMJ, 10 U.S.C. §§ 934, 892. The court-martial acquitted the appellant of burglary, assault, and communicating a threat. His sentence included a bad-conduct discharge, confinement for 90 days, forfeiture of $500 pay per month for 3 months, and reduction to E-1. The convening authority approved the sentence, except that he remitted 7 days of confinement.

The appellant asserts numerous allegations of error. He contends that: (1) The military judge erred by excluding the testimony of four witnesses; (2) The evidence was factually and legally insufficient to convict the appellant of unlawful entry; (3) The evidence was factually and legally insufficient to convict the appellant of violating two "no contact" orders; and (4) The military judge erred when instructing the members concerning a bad-conduct discharge. We find no error and affirm.

I. Exclusion of Testimony

The appellant asserts the military judge violated his Fifth and Sixth Amendment rights to present a defense by excluding testimony from four witnesses who would have supported the defense theory that the appellant mistakenly believed he had permission to enter the victim's room. Appellate defense counsel allege these witnesses were: Stephanie Welch, Derek Manee, Jermaine Saunders,[1] and the appellant's mother.

A. Background

The victim, Airman AR, testified that she and the appellant had been dating for about six months before the events on 8 October 2001 that gave rise to the appellant's conviction for unlawful entry. In June 2001, the appellant moved into Airman AR's dormitory room. At one point, they spoke about marriage, but their relationship was frequently strained. Just after 11 September 2001, Airman AR told the appellant to remove his belongings from her room and not to come see her again.

At first, Airman AR tried to break all contact with the appellant. On 13 or 14 September 2001, one of her superiors ordered him to stay away from her during duty hours because his presence caused her additional stress. According to Airman AR, the appellant began "banging on the [dormitory suite] doors at all hours of the night" and "coming around all the time." Airman AR thought it would be better if she tried to be "friends" so he wouldn't keep "coming around all the time angry when [she] didn't return letters that he would always put on [her] door."

During the evening of 7 October 2001, Airman AR allowed the appellant to join others in her room who were watching movies. When the movies ended and the others were leaving, the appellant hid behind the bathroom wall while Airman AR made a phone call. The appellant remained in her room for some time listening to her talk on the telephone. Later he sneaked out, but returned and knocked on the door while Airman AR was still talking on the telephone. She agreed to speak with him, but in his room, after the call was finished. When Airman AR went to the appellant's room, he told her that he

[1] During oral argument before this Court, appellate defense counsel asserted that Jermaine Saunders' testimony was also "possibly" among that erroneously excluded by the military judge.

had hidden in her room. This frightened Airman AR. They quarreled and she left the appellant's room angry.

Airman AR returned to her room and went to bed. During her sleep, she felt someone touching her face and kissing her, but she thought she was dreaming. When she returned from work the next day, she noticed that her window was open and the appellant had left a letter on her bathroom sink. The letter made her feel very uncomfortable because she realized that the appellant had been in her room while she was sleeping. The letter said, "I do the things I do b/c [sic] I love you too much!" It also said, "You're beautiful when you sleep."

Airman AR's room was on the first floor. Her window was between three and four feet above the ground. She testified that she had entered her room through the window once or twice. Airman AR denied any recollection of giving the appellant permission to do so. She said she was aware that the appellant had crawled through her window once while they were still sharing her room, because he did not have a key to it. On cross-examination, Airman AR denied giving others permission to enter her room through her window, but she admitted knowing others had done so in the past.

The trial defense counsel asked Airman AR, "Do you recall, during that time, during one of those visits by the [appellant's] mother, that you told Airman Meyer that, if he needs something, just crawl through the window?" Airman AR answered "no." Then trial defense counsel asked, "Does that mean it didn't happen?" Airman AR just shrugged. In answer to a question from the military judge, Airman AR indicated that the appellant's mother had come to visit in September, but the events of 11 September 2001 delayed her departure.

Airman AR was the government's final witness. In anticipation of the defense's case in chief, the military judge announced, sua sponte, his unwillingness to entertain evidence concerning whether Airman AR gave others, except the appellant, permission to enter her room through the window absent some showing that it was relevant to the appellant's state of mind. The military judge said that he would give the parties, particularly the defense, the opportunity to address this issue, but he was "cognizant of not wanting to go down collateral matter issues." With respect to the testimony of the witnesses other than the appellant's mother, the military judge said that Mil. R. Evid. 608, 613, and impeachment by contradiction would prohibit using extrinsic evidence to impeach on collateral matters. After listening to a proffer of the appellant's mother's testimony, the military judge ruled that her testimony was too confusing and excluded it under Mil. R. Evid. 403. The trial defense counsel replied, "Well, just for planning purposes, I realize the court wants to get in as much as possible, you just gut-shot most of my defense, so my first four witnesses have gone down. . . ." The defense requested a recess to reconsider its strategy and rested the next day without presenting evidence.

B. Analysis

Mil. R. Evid. 103 states that:

> Error may not be predicated upon a ruling which . . . excludes evidence unless the ruling materially prejudices a substantial right of a party, and
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> . . . .
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> In case the ruling is one excluding evidence, the substance of the evidence was made known to the military judge by offer or was apparent from the context within which questions were asked.

We would note at the outset that, except for the appellant's mother, trial defense counsel never specifically identified the witnesses he intended to call to put forward a mistake of fact defense. Similarly, trial defense counsel made no offer of proof concerning their testimony. The scant reference to the other witnesses in the record before us fails to indicate the substance of their testimony. Moreover, when given an opportunity to argue the relevance of their testimony, trial defense counsel declined to do so. We hold that the appellant affirmatively waived this issue with regard to the unidentified witnesses. *United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998).

We turn now to the exclusion of the appellant's mother's testimony. The Constitution does not confer upon an accused the right to present any and all types of evidence at trial, but only that evidence which is legally and logically relevant. *United States v. Dimberio*, 56 M.J. 20, 24 (C.A.A.F. 2001) (citing *Chambers v. Mississippi*, 410 U.S. 284 (1973)). Rules that exclude evidence from criminal trials do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve. Evidence may be excluded even though of probative value if its disallowance tends to prevent confusion of the issues, unfair surprise and undue prejudice. *Dimberio*, 56 M.J. at 26 (citing *Michelson v. United States*, 335 U.S. 469 (1948)).

The appellant argues his Fifth and Sixth Amendment rights were abridged, however, we find no weighty constitutional interests at stake here. The military judge violated neither the appellant's right to testify in his own behalf, nor his right to present evidence in accordance with the rules of evidence. *Rock v. Arkansas*, 483 U.S. 44, 50-51 (1987). The appellant could have testified, but he elected not to do so. As we explain below, the military judge's ruling excluding the testimony of the appellant's mother was a reasonable application of the military rules of evidence. Accordingly, we hold that the exclusion of the appellant's mother's testimony did not violate the appellant's constitutional rights.

We will review the military judge's decision to exclude the mother's testimony for an abuse of discretion. *United States v. McCollum*, 56 M.J. 837, 842 (A.F. Ct. Crim. App. 2002) (citing *United States v. McElhaney*, 54 M.J. 120, 132 (C.A.A.F. 2000)). To reverse for an abuse of discretion involves far more than a difference in opinion. The challenged action must be found to be arbitrary, fanciful, clearly unreasonable, or clearly erroneous in order to be invalidated on appeal. *Id.* at 842-43. The appellant's mother's proffered testimony concerned an occasion when Airman AR gave the appellant permission to come into her room through the window if she was not there. However, there were significant intervening circumstances between the date when the permission was allegedly given and the entry occurred. Specifically, the couple had ended their relationship, the appellant was required to remove all his belongings from the room, and Airman AR had just expressed her anger when she learned that the appellant had hidden in her room. Moreover, this testimony would have been of little impeachment value. Airman AR did not deny that, in the presence of the appellant's mother, she might have given the appellant permission to enter her room if she was not there. We conclude that the military judge's ruling excluding the proffered testimony was reasonable. We hold that the military judge did not abuse his discretion.

II. Bad-Conduct Discharge Instruction

The appellant next asserts that the military judge erred because he failed to follow an instruction in Department of the Army (D.A. Pam.) Pamphlet 27-9, *Military Judges' Benchbook (*1 Apr 2001), when instructing the court members concerning the effect of a bad-conduct discharge. The appellant avers it was error for the military judge to omit the word "ineradicable" and the phrase "severe punishment," and that the use of the expression, "under other than honorable conditions" led the members to equate a bad-conduct discharge with an administrative discharge. Finally, the appellant contends that the military judge erred when instructing the members about how the Veteran's Administration administers benefits for those with a bad-conduct discharge.

A. Background

The military judge held an Article 39(a), UCMJ, 10 U.S.C. 839(a) session during which he discussed the instructions he planned to give. He also gave counsel for both sides a draft copy of the instructions. He said, "They pattern DA Pamphlet 27-9, but they don't exactly—they don't mirror 27-9." Referring specifically to the bad-conduct discharge instruction he said, "I will note that a bad conduct discharge is the only punitive discharge available. I do not give 'ineradicable.' I do say 'stigma.'" Both sides concurred in the proposed instructions.

The instruction the military judge gave concerning a bad-conduct discharge was:

> A bad conduct discharge is a punitive discharge. The stigma of a punitive discharge is commonly recognized by our society, and it will affect the accused's future with regard to legal rights, economic opportunities, and social acceptability. The issue before you is not whether the accused should remain a member of the Air Force, but whether he should be punitively separated from the service. A bad conduct discharge is designed as punishment for bad conduct. It is for those who should be separated punitively under conditions other than honorable.
>
> With regard to veterans' benefits, a bad conduct discharge adjudged by a special court-martial is reviewed on its facts by the agency administering the benefit in question before determining eligibility. You are not required to adjudge a discharge. But if you do, you may only adjudge a bad conduct discharge.

After the military judge read this instruction to the members, trial defense counsel again indicated he had no objection to it.

While the members were deliberating, they requested that the court be reopened so they could ask for additional information. One of the questions they wanted answered was, "When does a member separate after confinement, i.e. will member [sic] be able to roam freely between end [sic] of confinement and actual discharge?" During an Article 39(a), UCMJ, session, the military judge and counsel discussed how this question should be answered. The trial defense counsel opposed giving further instructions. He said, "The instructions have been read as to what they should consider in determining whether they should vote on a bad conduct discharge or not." Trial defense counsel thus had yet another opportunity to request further instructions concerning a bad-conduct discharge. Instead, he voiced his satisfaction with the instruction as given. The military judge outlined how he planned to answer the question, and once again, trial defense counsel agreed with the military judge.

When the court members returned to the courtroom, the military judge instructed them that he could not answer the question about when a member separates following confinement. He said the answer depended upon variables over which the court had no control. Thereafter, one court member asked, "Are separation actions separate from judicial actions that come forth?" The military judge responded, "Yes, they are. Separation action—your issue with regard to this sentence is not whether the accused should remain a member of the Air Force, but it's whether he should be punitively separated. And the separation action is completely different." The member then said, "And it takes time." The military judge responded by saying, in part, "It may or may not take a lot of time. Again, that's another factor that you don't concern yourself with. I understand why you want to, but that's a separate decision by a separate chain, and really

has no bearing on this case." Trial defense counsel, once again, offered no objection to these instructions.

B. Analysis

We review the sentencing instructions of a military judge for abuse of discretion. *United States v. Hopkins*, 56 M.J. 393, 395 (C.A.A.F. 2002) (citing *United States v. Greaves*, 46 M.J. 133 (C.A.A.F. 1997)).

Rule for Courts-Martial (R.C.M.) 1005(f) states:

> Failure to object to an instruction or to omission of an instruction before the members close to deliberate on the sentence constitutes waiver of the objection in the absence of plain error. The military judge may require the party objecting to specify in what respect the instructions were improper.

In the case before us, trial defense counsel voiced no objection to the instruction. When court members sought additional information on the status of a military member after confinement, trial defense counsel noted his satisfaction with the instruction as read and suggested that no further instruction was necessary. We hold the appellant has affirmatively waived this issue. *United States v. Smith*, 50 M.J. 451, 456 (C.A.A.F. 1999) (affirmative waiver when defense counsel showed purposeful decision to agree with the military judge's instruction).

Even if we did not apply waiver, we find the instruction was not plain error. R.C.M. 1005(e)(2) requires certain instructions concerning a bad-conduct discharge: "A statement of the effect any sentence announced including a punitive discharge and confinement, or confinement in excess of six months, will have on the accused's entitlement to pay and allowances." The rule does not require military judges to instruct specifically about the stigma associated with a bad-conduct discharge, the severity of a punitive discharge, or the impact of a punitive discharge on veterans' benefits.

Similarly, case law does not mandate specific language for instructions about punitive discharges. In *United States v. Soriano*, 20 M.J. 337, 341 (C.M.A. 1985), our superior court found an instruction erroneous because, unlike the "standard instruction," it failed to use the expression "ineradicable stigma." Instead, it stated that the "stigma" associated with a bad-conduct discharge "may" (rather than "will") place limitations on employment opportunities, and "may" (rather than "will") affect an accused's future with respect to legal rights, economic opportunities and social acceptability. *Id.* The instruction, however, did, *explicitly* state that a bad-conduct discharge is "severe punishment." *Id.* Although the instruction in *Soriano*, included the phrase "severe punishment," our superior court concluded that the use of the word "may" rather than "will" conflicted with its long established view that Congress and the President intended

a bad-conduct discharge to be severe and to be treated as severe by those who impose sentences at courts-martial. *Id.* at 342. Our superior court, nevertheless, found the errors harmless, because, among other reasons, the instruction as a whole clearly conveyed the message to the members that the punitive discharge is a severe punishment. *Id.* at 343. Based on *Soriano*, we conclude that specific phrases are not mandatory; rather we must review the instruction as a whole to determine whether it properly advised the court members of the significant adverse consequences of a bad-conduct discharge.

The appellant argues that the instruction was erroneous because it did not use the phrase "ineradicable stigma" contained in the standard instruction in D.A. Pam. 27-9. In *United States v. Greszler*, 56 M.J. 745 (A.F. Ct. Crim. App. 2002), *rev. denied*, 56 M.J. 470 (C.A.A.F. 2002), we upheld a bad-conduct discharge instruction that did not use the adjective "ineradicable" to describe the stigma of a bad-conduct discharge. We noted that, while the D.A. Pam. 27-9 is widely used as a reference guide, Air Force judges are not obligated to use it. *Id.* at 746. A*ccord*, *Hopkins*, 56 M.J. at 394 (guidance in *Military Judges' Benchbook* is "nonbinding"). Rather than rely solely on this reference pamphlet, judges should ensure their instructions meet the requirements of the *Manual for Courts-Martial*, the Rules for Courts-Martial, and case law. *Id.*

In *United States v. Rasnick*, 58 M.J. 9, 10 (C.A.A.F. 2003), our superior court also upheld an instruction where the military judge declined to use the word "ineradicable" when instructing about the stigma associated with a bad-conduct discharge. The Court said that while "ineradicable stigma" provides an appropriate means of describing the future impact of a punitive discharge, it is not the exclusive means of doing so. The Court noted that the instruction "adequately advised the members that a punitive discharge was a 'severe' punishment, that it would entail specified adverse consequences, and that it would affect Appellant's 'future with regard to his legal rights, economic opportunities, and social acceptability.'" *Id.*

The appellant also argues the bad-conduct discharge instruction was erroneous because it did not include the expression "severe punishment." The history of the use of this phrase is instructive. Cases decided by our superior court in the early 1960s indicate the concern about "severity" of punishments centered around which form of punishment was more severe than another for the purposes of convening authority action to commute a sentence, and consideration of sentence appropriateness by the convening authority and appellate courts. *See generally*, *United States v. Johnson*, 31 C.M.R. 226 (C.M.A. 1962); *United States v. Quesinberry*, 31 C.M.R. 195 (C.M.A. 1962). In *United States v. Wheeler*, 38 C.M.R. 72, 74 (C.M.A. 1972), our superior court described as "severe" all the penalties under the UCMJ that may be imposed only in courts-martial. In *Wheeler*, the law officer did not give instructions in the version of D.A. Pam. 27-9 then in use. Instead, he merely instructed on the maximum penalty the court-martial could impose. Our superior court reiterated its view that, "Since the court-martial is not bound. . . to adjudge a maximum sentence, it is appropriate for the law officer to provide 'general

guides governing the matters to be considered in determining the appropriateness of the particular sentence.'" *Id.* at 75 (quoting *United States v. Rake*, 28 C.M.R. 383, 384 (C.M.A. 1960)) (internal citation omitted).

Appellate defense counsel has cited no case, and we have found none, that stands for the proposition that the term "severe punishment" must be used explicitly in a bad-conduct discharge instruction before it will withstand appellate scrutiny. In the instant case, we find that the challenged instruction properly provides sound general guides to characterize the severity and effect of a bad-conduct discharge. Considered within the context of the other instructions given, such as voting on sentences beginning with the least severe, we conclude that the instructions conveyed the relative severity of a bad-conduct discharge.

Appellate defense counsel described the instruction in the instant case as "improvised." It appears to us to be consistent with case law. In fact, some of the language used in the bad-conduct discharge instruction in the instant case has been used for decades. *See Quesinberry*; *United States v. Maharajh*, 28 M.J. 797 (A.F. Ct. Crim. App. 1989). We find the military judge relied on the *Manual for Courts-Martial* and case law to guide his formulation of the bad-conduct discharge instruction. *Grezler*, 56 M.J. at 745.

Contrary to appellate defense counsel's assertion, we find no suggestion in the record that the members were misled into believing that a bad-conduct discharge has consequences equivalent to an administrative discharge. The military judge's answers to court members' questions make this abundantly clear. Trial defense counsel correctly offered no objection to the military judge's accurate explanation that separate "chains" handle the administrative and punitive discharge processes.

Finally, appellate defense counsel argue that the instruction makes the Veteran's Administration "benefits review process sound quite benign" to the substantial prejudice of the appellant. We disagree. First, we find no indication in the *Manual for Courts-Martial* or case law that the reference to the Veteran's Administration contained in D.A. Pam. 27-9 is preferred to the statement used in *Quesinberry*, *Maharajh*, and in the case now before us. The challenged statement is as accurate today as it was when used in *Quesinberry* in 1962. No one would contest that eligibility for programs administered by the Veteran's Administration and the Department of Defense is affected by a number of factors, each of which is subject to revision, as authorities deem appropriate. Since this statement is accurate, and entirely concordant with *Quesinberry*, we find this final argument similarly unpersuasive.

In sum, the challenged instruction is consonant with the *Manual for Courts-Martial*, and it is firmly grounded in the law of our superior court and this Court as well. Therefore, we hold that, taken in their entirety, the instructions provided sufficient

general guides to indicate the severity and specified adverse consequences of a bad-conduct discharge, including effects upon the appellant's legal rights, economic opportunities, and social acceptability. The instructions contained no error. Having said that, in those cases where the death penalty is not before the members, we believe the better practice is for military judges to explicitly instruct that a punitive discharge is a "severe" form of punishment.

Even, assuming for the sake of argument that the military judge erred, we find that this error was harmless. Trial defense counsel argued that a bad-conduct discharge has "serious" consequences, so this concept was placed before the members. In addition, the nature and number of the offenses of which the appellant was convicted, and evidence of his prior administrative punishment presented during the sentencing portion of the trial[2] could properly be viewed as more than sufficient evidence that a punitive separation was appropriate.

III. Conclusion

We find the remaining assignments of error without merit. The approved findings and the 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

FELECIA M. BUTLER
Chief Court Administrator

[2] The evidence during the sentencing portion of the trial included the appellant's punishment under Article 15, UCMJ, 10 U.S.C. § 815, for making himself a false identification card.