UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain VARUN K. NARULA
United States Air Force

ACM 37658

27 July 2011

Sentence adjudged 11 December 2009 by GCM convened at Vandenberg Air Force Base, California. Military Judge: David S. Castro.

Approved sentence: Dismissal, confinement for 6 years, and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Stephen B. Pence, Esquire (argued); Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; and J. Denis Ogburn, Esquire.

Appellate Counsel for the United States: Captain Michael T. Rakowski (argued); Colonel Don. M. Christensen; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges

OPINION OF THE COURT

GREGORY, Senior Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of one specification of aggravated sexual assault, two specifications of conduct unbecoming, and one specification of wrongful sexual contact in violation of Articles 120 and 133, UCMJ, 10 U.S.C. §§ 920, 933. The military judge accepted his plea of guilty to an additional charge of fraternization, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The court-martial sentenced the appellant to a dismissal, confinement

for 6 years, and forfeiture of all pay and allowances. The convening authority approved the sentence adjudged.

The appellant raises five issues. First, he argues that the military judge erred by failing to sua sponte sever the aggravated sexual assault charge from the remaining charges to prevent an impermissible spillover effect. Second, he argues another sua sponte error by the military judge not intervening to prohibit certain prosecution comments during opening statement and closing argument, inviting impermissible spillover. Third, related to the first two issues, he asserts that his counsel was ineffective by not moving to sever the aggravated sexual assault charge from the remaining charges and not objecting to prosecution comments during opening statement and closing argument on the basis that they invited impermissible spillover. Fourth, he attacks the sufficiency of the evidence to support his conviction of aggravated sexual assault, essentially arguing that inclusion of other charges impermissibly bolstered the credibility of the victim's account. Fifth, in an assignment of error styled as sentence appropriateness, he again argues that the aggravated sexual assault charge should not have been included with the other charges and asks that the conviction of that charge be set aside. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Background

The appellant was assigned as a dentist at Vandenberg AFB, CA, in August 2007. The fraternization charge to which he pled guilty stems from an inappropriate sexual relationship he developed with Airman First Class (A1C) BR, who he met as a patient at the dental clinic in March 2008. They cohabited for several months, and the relationship ended in August 2008. The two specifications of conduct unbecoming involve two other Airmen. The first, A1C HS, visited the appellant's apartment in June 2008 with her boyfriend, an Airman who worked in the dental clinic, and while there the appellant forcibly kissed her. The second, Senior Airman (SrA) ND, also worked in the dental clinic. In March or April 2008, the appellant kissed her while she was being sedated for dental surgery, and he continued to make inappropriate sexual comments to her throughout 2008.

The charge of wrongful sexual contact involved Ms. DF, a civilian employee at the dental clinic, who, on 16 August 2008, attended a dental clinic party at the appellant's apartment complex. As she was carrying a tray of food up some stairs, the appellant groped her from behind by putting his hand between her legs. The offense against Ms. DF occurred later on the same day as the remaining charge of aggravated sexual assault on Captain (Capt) KR.

The appellant met Capt KR during the course of her duties as a nurse in Vandenberg's Medical Group. On Thursday, 14 August 2008, he invited her to a dental

clinic party planned for Saturday, 16 August, at his apartment complex. When Capt KR called the appellant early Friday evening to get directions to the party, he invited her to join him at a local restaurant for dinner and drinks. She accepted and ultimately went home with the appellant where they engaged in consensual sexual intercourse, after which she fell asleep. She was later awakened by the appellant having sexual intercourse with her, and testified that she did not consent to this second act of intercourse.

Severance of Charges

Although the appellant made no motion at trial to sever any charges, he now argues that the military judge's failure to sua sponte sever the charge of aggravated sexual assault against KR from the remaining charges created an impermissible spillover effect. Because no motion to sever was made at trial, we review this issue for plain error. Rule for Courts-Martial (R.C.M.) 905(b)(5)(e). Plain error occurs when (1) an error was committed at trial; (2) the error was plain, clear, or obvious; and (3) the error resulted in material prejudice to the substantial rights of the appellant. *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998). "An error is not 'plain and obvious' if, in the context of the entire trial, the accused fails to show the military judge should be 'faulted for taking no action' even without an objection." *United States v. Burton*, 67 M.J. 150, 153 (C.A.A.F. 2009) (quoting *United States v. Maynard*, 66 M.J. 242, 245 (C.A.A.F. 2008)).

The military justice system favors referring all charges to a single court-martial. R.C.M. 307(c)(4); *Burton*, 67 MJ at 152 (citing *United States v. Weymouth*, 43 M.J. 329, 335 (C.A.A.F. 1995)). Regarding sexual offenses, joinder is common. *See United States v. Simpson*, 56 M.J. 462, 464-65 (C.A.A.F. 2002) (joinder of indecent assault, attempted rape, and forcible sodomy allegations by three different victims); *United States v. Duncan*, 53 M.J. 494 (C.A.A.F. 2000) (joinder of two rape allegations involving different victims and different defenses to each). Within this legal context favoring joinder, we evaluate the appellant's particular claims in this case.

Appellant asserts that joinder created an impermissible spillover effect by improperly bolstering the credibility of KR and improperly permitting trial counsel to tie all the offenses together into a common theme or motive. The military judge, however, provided a proper spillover instruction that prohibited the court members from using a finding of guilt on one offense "as a basis for inferring, assuming, or proving that [the appellant] committed any other offense," and the court members are presumed to follow the instructions. *United States v. Jenkins*, 54 M.J. 12, 20 (C.A.A.F. 2001). Both trial and defense counsel argued the specific evidence on each charge, and both referenced the spillover instruction in their respective closing arguments. The record shows that both the presentation of evidence and the arguments of counsel were sufficiently compartmentalized such that the proof of each offense clearly stood separate from the others. Given the legal preference for joining all known offenses at a common trial and

the context of the evidence and argument in this case, we find no plain error in not severing the charges.

Opening Statement and Closing Argument

Although he made no objection at trial to the comments now complained of on appeal, the appellant argues that trial counsel's comments during opening statement and closing argument invited impermissible spillover. Given the lack of objection, we review the comments for plain error. *United States v. Paxton*, 64 M.J. 484 (C.A.A.F. 2007). Plain error in argument requires an erroneous argument at trial that is plain or obvious and which materially prejudiced a substantial right of the appellant. *Paxton*, 64 M.J. at 487. Even an improper argument does not necessarily result in plain error. *Burton*, 67 M.J. at 153.

Burton involved two separate sexual offenses which trial counsel improperly but without objection asked the members to compare for a "propensity to commit these types of offenses." *Id*. at 152. Although erroneous, the argument did not rise to the level of plain error because (1) the evidence as to each offense was clearly distinct, (2) the military judge instructed on spillover, (3) the military judge instructed that argument was not evidence, and (4) the lack of objection indicated the minimal impact of the argument. *Id*. at 153-54. Such is the case here where, unlike the blatant propensity argument in *Burton*, counsel carefully discussed the evidence of each contested charge separately. While common themes such as crossing "boundaries" emerged in the argument, counsel detailed the evidence supporting each charged instance of such boundary crossing and never invited the members to convict based on propensity. The statements are even more innocuous than those in *Burton* where, though erroneous, the statements did not rise to the level of plain error. We find no plain error in either the government's opening statement or closing argument.

Ineffective Assistance of Counsel

Related to the appellant's plain error arguments on severance of charges and improper argument, the appellant asserts that his trial defense counsel were ineffective by not moving to sever the charges and by not objecting to prosecution comments that invited impermissible spillover. We review ineffective assistance of counsel claims de novo. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002) (citing *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997)). Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000)). Claims of ineffective assistance of counsel are reviewed by applying the two-prong test set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Under *Strickland*, an appellant must demonstrate: (1) a deficiency in counsel's performance that is "so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment," and (2) that the deficient performance prejudiced the defense through errors "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. The deficiency prong requires that an appellant show that the performance of counsel fell below an objective standard of reasonableness, according to the prevailing standards of the profession. *Id*. at 688. The prejudice prong requires a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

The appellant bears the heavy burden of establishing that his trial defense counsel was ineffective. *See United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001). The law presumes counsel to be competent, and we will not second-guess a trial defense counsel's strategic or tactical decisions. *Garcia*, 59 M.J. at 450 (quoting *Strickland*, 466 U.S. at 689); *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993) (quoting *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977)). To prevail on a claim of ineffective assistance of counsel, the appellant "must rebut this presumption by pointing out specific errors made by his defense counsel which were unreasonable under prevailing professional norms. . . . The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987) (internal citation omitted). In the present case, the appellant's assertions are matters of opinion on trial strategy and tactics that can be resolved by reference to the record without the need for a post-trial evidentiary fact-finding hearing. *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997).

Turning first to trial defense counsel's decision not to move to sever Charge I, the appellant alleges "[t]here is no explanation for the failure of counsel to make [this] motion." In a declaration submitted in response to the appellant's allegations, the appellant's civilian trial defense counsel, Mr. FS, offers three primary reasons for not making the motion to sever. First, he correctly notes that severance motions are rarely granted: "Based on thirty years of experience in practicing military law, I do not believe that a motion to sever would have been granted given the factual allegations and charges in this case." He also cites his knowledge that a spillover instruction would be given to prevent improper use of one offense to prove another. Second, Mr. FS describes a common tactical basis for not moving to sever the charges: "[W]hen the government joins minor allegations, which also often include weak allegations, with major allegations . . . the government risks losing credibility in the presentation of their case," adding that he has "won many acquittals in similar circumstances." Third, he explains that the defense strategy focused on the "unique factual details of each specification" to support the theory that the appellant's actions may have been inappropriate in some instances but did not rise to the level of criminal activity: "In other words, hitting on or being unduly

friendly with the other women did not make him a criminal. Our theme was that [the appellant], a single man, sought consensual sexual responses from women."

Evaluating counsel's performance from his "perspective at the time of the alleged error and in light of all the circumstances," we find his decision to fight the charges without moving to sever entirely reasonable. *See Scott*, 24 M.J. at 188. The decision is consistent with his trial strategy, and the record supports his opinion that the distinct factual situations of the allegations greatly minimized the risk of confusion and impermissible spillover. The military judge gave the expected spillover instruction, and both counsel incorporated it into their respective arguments. Further, for the reasons discussed above regarding the lack of plain error in not severing the charges, we agree with trial defense counsel's assessment that a motion to sever had little probability of success. When the basis of an ineffective assistance claim is failure to make a motion at trial, the appellant must show "a reasonable probability that such a motion would have been meritorious." *United States v. Jameson*, 65 M.J. 160, 163-64 (C.A.A.F. 2007). Given the strong precedent supporting joinder of sexual offenses, we find no such probability in this case. *See Simpson*, 56 M.J. at 464; *Duncan*, 53 M.J. 497.

Concerning the lack of objection to argument, Mr. FS states that he did not view the argument as "telling the members to use one allegation to prove another." To the contrary, he viewed the argument as supporting the defense theory "that [the appellant] might hit on women, including enlisted women, either by being inappropriately friendly or seeking consensual sexual activity, but never with the intent to assault them." The record supports defense counsel's view that the prosecution did not invite the members to improperly use the proof of one offense to convict on another: trial counsel clearly stated that the members "cannot use one offense that you find the accused guilty of to find him guilty of another offense." Having considered the prosecution's comments in opening statement and closing argument in the context of the entire trial, we find no prejudicial error that would support a finding of ineffective assistance of counsel. *See Paxton*, 64 M.J. at 489 (failure to object to comments that do not amount to plain error is not ineffective assistance of counsel).

Sufficiency of the Evidence

The appellant argues that the evidence is insufficient to support conviction of aggravated sexual assault, stating that "no credible evidence" exists to prove beyond a reasonable doubt that the appellant "did not believe or engage in the second sexual act without consent." Capt KR testified that, after engaging in consensual sexual intercourse with the appellant, she fell asleep and was awakened later by the appellant having sexual intercourse with her, without her consent. When interviewed by the Air Force Office of Special Investigations (AFOSI) the appellant admitted to twice having sexual intercourse with Capt KR, but asserted that both acts were consensual.

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

"The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *Turner*, 25 M.J. at 324). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

The military judge instructed that the charged aggravated sexual assault required proof beyond a reasonable doubt that the appellant engaged in an act of sexual intercourse with Capt KR when she was substantially incapacitated. He further instructed that consent and mistake of fact as to consent were defenses to the charge.[1] The military judge explained that consent is a voluntary agreement to sexual activity by a competent person and that a person who is substantially incapacitated cannot consent. He further instructed that mistake of fact as to consent is a defense if the appellant believed as a result of ignorance or mistake that Capt KR consented, but the appellant's belief must be reasonable under all the circumstances.

Capt KR testified that the second act of sexual intercourse began while she was asleep, without her consent. Although she admitted that the first act of sexual intercourse was consensual, Capt KR stated that she did not give the appellant permission to begin

[1] The instructions on consent and mistake of fact as to consent are inconsistent with the current Article 120(r) and (t)(16), UCMJ, 10 U.S.C. § 920. After denying a defense motion to dismiss the Article 120, UCMJ charge based on an unconstitutional burden shift concerning consent, the military judge stated that he saw no prejudice to the appellant if he instructed on consent and mistake of fact as to consent if raised by the evidence, and that this approach would be consistent with the proposal according to the interim change to Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, ¶ 3-45-5 (1 July 2001). At the conclusion of the evidence, the defense requested instructions on both consent and mistake of fact as to consent. The trial counsel agreed, and the military judge instructed on both. This approach has since been found to be error but harmless beyond a reasonable doubt. *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011).

sexual intercourse with her a second time while she was asleep.[2] The appellant argues that Capt KR's lack of physical resistance requires a finding of consent, relying on *United States v. Bonano-Torres*, 31 M.J. 175 (C.M.A. 1990). *Bonano-Torres*, however, involved a victim who, while awake, permitted an accused to have sexual intercourse with her so that he would "leave her alone" and she could go to sleep. *Id*. at 176. Holding that the lower court did not legally err in reversing the conviction for rape, the Court considered the totality of the circumstances surrounding the act of sexual intercourse, but the Court expressly declined to find physical resistance a necessary element of the offense of rape. *Id*. at 179.

Here, unlike the victim in *Bonana-Torres*, Capt KR testified that she was awakened by the appellant penetrating her and, once awake, did not know how to react. This is not consent. *See United States v. Briggs*, 46 M.J. 699, 701 (A.F. Ct. Crim. App. 1996), *aff'd*, 48 M.J. 143 (C.A.A.F. 1998) (passive acquiescence of sleeping woman is not consent to sexual intercourse). Viewing her testimony and the other evidence in the case, including the statements of the appellant, in the light most favorable to the prosecution, we find that a reasonable factfinder could have found beyond a reasonable doubt that the appellant is guilty of aggravated sexual assault. Therefore, the evidence is legally sufficient to support conviction.

After independently weighing the evidence ourselves and making allowances for not having observed the witnesses, we find the evidence factually sufficient to support the finding of guilt. Capt KR maintained that she did not consent to the second act of sexual intercourse, and testified that she did not resist after she awoke because she did not know how the appellant would react: "You don't know what you are going to do until you are in that situation, and you tell yourself, you hear these things from other people, 'Oh, fight back,' but you don't know until you are in that situation." The appellant asserts that she consented or that at least he had a mistaken belief that she did. Physical evidence presented at trial is consistent with either account. But the appellant's statements admitted at trial weigh against his claim.

The appellant first told his roommate, Lieutenant (Lt) PTP, about his night with Capt KR on the same Saturday morning as the assault. Lt PTP awoke around 1030 and went upstairs to the common living area next to the appellant's bedroom. The appellant entered the living room and sat on the couch beside him. The appellant told him that he had sex with Capt KR and "kicked her ass out this morning" because of how she was acting. He added that he told Capt KR "don't come back for the party." This version is consistent with Capt KR's account of how the appellant rushed her out of the apartment in the early morning hours after telling her that she needed to "find a new dentist."

[2] The evidence shows no prior or on-going sexual relationship between the appellant and Captain KR that would support the appellant's claim of mistake as to consent. Existence of such a sexual history would perhaps weigh in the appellant's favor, but that is not the case here.

On Monday, the appellant's version of events softened. He approached his colleague at the clinic, Dr. MS, who testified that the appellant came to his office and appeared to have "something he wanted to talk about." The appellant told Dr. MS that he and Capt KR returned to his apartment after having drinks, he told Capt KR that he was going to bed, and he awoke during the night to find Capt KR in bed with him. They had sexual intercourse, and he went back to sleep. Surprised to find her still there when he awoke the next morning, he told her it was time to leave. The appellant told Dr. MS that they had sex one time.

Four days later when questioned by AFOSI, the appellant described himself as an even more passive participant in the sexual encounter with Capt KR that ended cordially. He told AFOSI agents that he and Capt KR returned to his apartment after having drinks. He suggested that they sleep in separate rooms, but she wanted to sleep together. They had sexual intercourse, and both fell asleep. Capt KR awoke him about 0430, they again had sexual intercourse, and the appellant again fell asleep. About 30 minutes later Capt KR awoke him a third time. The appellant told her, "I can't go again." He says that Capt KR smiled and told him that she was leaving. He "escorted her" downstairs and told her that he would see her at his party that afternoon.

The inconsistencies in the appellant's accounts cast doubt on his claim of honest and reasonable mistake as to consent. From the sexual bravado in his first account in which he told his roommate that after having sex with Capt KR he "kicked her ass out" and told her not to come to his party, the appellant's versions of what happened portrayed himself as an increasingly passive participant. By Monday morning, his story had changed from kicking her out to escorting her out after finding her still there when he awoke the next morning. By the time he was interviewed by AFOSI on Friday, his story had evolved to portraying Capt KR as an aggressive sex partner who left on friendly terms and who he expected to see at his party. In contrast, Capt KR consistently maintained that she did not consent to the second act of sexual intercourse. Having impartially considered all the evidence, we are convinced beyond a reasonable doubt that Capt KR did not consent to the second act of sexual intercourse and that the appellant did not mistakenly believe that she consented.

Sentence Appropriateness

In support of a claim that his sentence is inappropriately severe, the appellant renews his arguments addressed above: that the offenses should have been severed, that trial counsel engaged in improper argument, and that the evidence is insufficient to support conviction of aggravated sexual assault. Based on this, he asks that we set aside the conviction for aggravated sexual assault and approve only so much of the sentence as would be appropriate for fraternization and conduct unbecoming. But sentence appropriateness is not based on the findings as appellant wishes them to be.

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant used his position as a dental officer to facilitate conduct which he himself concedes could be considered "crass and unprofessional." The appellant treated A1C BR as a patient in March 2008, and he began an inappropriate sexual relationship with her that lasted until August 2008. A1C HS visited the appellant's apartment in June 2008 with her boyfriend, an Airman who worked in the dental clinic, and while there the appellant forcibly kissed her. The appellant kissed SrA ND, who was also assigned to the dental clinic, while she was being sedated for dental surgery and continued making inappropriate sexual comments to her in the dental clinic throughout 2008. Ms. DF, a civilian employee at the dental clinic, attended a dental clinic party at the appellant's apartment complex and while there was groped from behind by the appellant putting his hand between her legs. Finally, the appellant met Capt KR as both a patient and through her duties as a nurse in the Medical Group.

All of the appellant's misconduct occurred within the first year of his arrival at Vandenberg. His only performance report, which coincides with that year and closed out one week prior to the sexual assault on Capt KR, describes his professionalism as "beyond reproach." However, the behavior brought to light at his court-martial shows otherwise. For his wanton conduct, the appellant faced a maximum of a dismissal and confinement for 35 years. Having considered the character of this offender, the nature and seriousness of his offenses, and the entire record of trial, we find his sentence appropriate.

Conclusion

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 the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court