

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant WALTER M. PATTON IV
United States Air Force

ACM S30426

8 February 2006

Sentence adjudged 17 May 2003 by SPCM convened at Fort George G. Meade, Maryland. Military Judge: Kevin P. Koehler.

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of \$1,019.00 pay per month for 6 months, and reduction to E-3.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Rachel E. VanLandingham, and Major Andrew S. Williams.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Michelle M. McCluer.

Before

BROWN, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ORR, Senior Judge:

The appellant was convicted, contrary to his pleas, by a special court-martial of committing an indecent assault upon Staff Sergeant (SSgt) JF by reaching into his pants, touching his penis, and masturbating him as he slept, in violation of Article 134, UCMJ, 10 U.S.C. § 934. A panel of officer members sentenced him to a bad-conduct discharge, confinement for 6 months, forfeiture of \$1,019.00 pay per month for 6 months, and reduction to E-3. The convening authority approved the findings and sentence as adjudged.

The case is before this Court for review under Article 66, UCMJ, 10 U.S.C. § 866. The appellant asserts three errors for our consideration: (1) The military judge erred by failing to give prompt cautionary instructions after a prosecution witness gave human lie detector testimony; (2) The military judge erred by allowing the trial counsel to repeatedly ask the appellant about the prosecution witnesses' believability and motive to lie during cross-examination; and (3) A series of cumulative errors materially prejudiced his right to a fair trial.¹ We find no prejudicial error and affirm.

Background

The appellant and SSgt JF were students attending the Airman Leadership School (ALS) at Fort George G. Meade, Maryland. On 13 September 2002, the appellant, SSgt JF, and several other ALS students planned to meet at a local tavern for drinks after classes ended for the day. The appellant arrived at the tavern around 2000 hours and left the following morning, sometime after 0200 hours when the tavern closed. Although the appellant had a few drinks, he drove several of his classmates to the home of another classmate. The appellant and his classmates continued drinking there and they eventually decided to spend the night.

The appellant and SSgt JF ended up sleeping on opposite ends of a couch in the living room. SSgt JF testified that, at one point in the night, he thought he was having a dream of a sexual nature. However, when he awoke, he found the appellant laying on him, with his hands inside his pants masturbating his penis. SSgt JF pushed the appellant off of him and cursed at him. He then went throughout the house telling others what the appellant did to him. SSgt JF then contacted his first sergeant and told him what happened. The appellant's commander subsequently appointed an investigating officer (IO) to investigate SSgt JF's allegations. The person selected as the IO for the commander-directed investigation was the deputy staff judge advocate (DSJA) from the base legal office.

On 4 October 2002, the IO called the appellant in for questioning. The IO read the appellant his rights² and the appellant agreed to provide a statement. Sometime after the IO began questioning the appellant, the appellant stated, "I don't know if I should ask for a lawyer." Not considering this statement an unequivocal request for a lawyer, the IO continued to ask the appellant questions. Once the interview was complete, the IO asked the appellant to return on 9 October 2002 to sign his statement. Prior to 9 October 2002, the base legal office received notice that the appellant was represented by defense counsel. As the DSJA, the IO was aware of the notice of representation. As a result, he was somewhat surprised when the appellant showed up on 9 October 2002 to review and sign his statement. The appellant reviewed the statement and suggested three changes to

¹ The appellant raised the second and third assignments of error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

² Pursuant to Article 31, UCMJ, 10 U.S.C. § 831.

the statement. The IO noted the changes and asked the appellant to sign it. The appellant hesitated, but ultimately decided not to sign the statement. At trial, the appellant's defense counsel made a motion to suppress the appellant's admissions and unsigned statement. The military judge granted the motion in part and suppressed the 9 October 2002 unsigned statement, as well as any statements the appellant made to the IO on the same date. However, the military judge permitted the IO to testify about the admissions the appellant made to the IO during the 4 October 2002 interview.

Improper Opinion Testimony

During his testimony at trial, the IO stated that he gave "significant credibility" to the fact that SSgt JF "spent considerable effort to report this [incident] to a variety of individuals." The IO also said that the appellant's explanation that he could not recall the incident because he may have blacked out "didn't ring true" to him. He based this opinion on the fact that, "the incident I was investigating, it was a very specific point of time he couldn't remember. He had very good recall prior to that point." The appellant asserts that the IO's testimony was an opinion as to whether the appellant or SSgt JF was telling the truth. As such, he avers that this was classic human lie detector testimony and its admission was error. Relying on *United States v. Kasper*, 58 M.J. 314 (C.A.A.F. 2003), the appellant asks this Court to set aside the findings and the sentence.

Because the appellant's trial defense counsel did not object to the IO's testimony, we must consider whether the admission of this testimony was plain error. *United States v. Powell*, 49 M.J. 460, 462-64 (C.A.A.F. 1998). In order to find plain error, this Court must determine (1) that there be an error; (2) that the error be plain, that is, clear or, equivalently obvious; and (3) that the plain error affect substantial rights. *United States v. Olano*, 507 U.S. 725, 732-34 (1993); *see also Powell*, 49 M.J. at 463.

Our superior court held that it is error for a military judge to allow opinion evidence "as to whether the person was truthful in making a specific statement regarding a fact at issue in the case." *Kasper*, 58 M.J. at 316. When viewing the IO's testimony in context, we find the IO was doing exactly this—offering an opinion as to the appellant's truthfulness. While the IO was merely explaining his observations as an investigator, his statements clearly implied that he did not believe the appellant but instead found SSgt JF very credible. Such stamp of untruthfulness "usurps the jury's exclusive function to weigh evidence and determine credibility." *See Id.* at 315 (quoting *United States v. Birdsall*, 47 M.J. 404, 410 (C.A.A.F. 1998)). *See also United States v. Azure*, 801 F.2d 336 (8th Cir. 1986). We are convinced that the contested portion of the IO's testimony was error and such error was obvious.

Even with the admission of the improper testimony, however, we find no prejudice affecting the appellant's substantial rights. *See Powell*, 49 M.J. at 463. The IO testified that SSgt JF's actions subsequent to the appellant's indecent acts added credibility to his

statements during the investigation. The appellant, however, did not challenge SSgt JF's credibility during the investigation or at trial.

Moreover, the appellant's version of the evening was generally consistent with the testimony of the other witnesses with the exception of the time relating to the sexual assault. With regard to the sexual assault, the appellant never directly disputed SSgt JF's version of the incident, but rather, asserted he could not remember because he had blacked out after consuming alcohol. The IO testified that the appellant said that he would not put it past himself going over and touching SSgt JF because he got "touchy-feely at times." Additionally, the appellant testified that when he sat next to SSgt JF, SSgt JF said something like "Oh, I've never had a guy sit this close to me before." While the appellant said he did not believe he stuck his hands down SSgt JF pants and masturbated him, the appellant acknowledged that SSgt JF could be believed if he said that he woke up with the appellant masturbating him, as he did not know of any motive SSgt JF may have to make this up.

Because the appellant's testimony during the trial was inconsistent with some of the statements he made to the IO during his interview, we are convinced that the impact of the IO's improper testimony upon the panel members was minimal. Moreover, the military judge gave instructions to the panel members concerning inconsistent statements and their duty to determine the believability of the witnesses in the case. In fact, the military judge highlighted the fact that the appellant's statements made prior to trial, about the number of drinks he had, as well as the last thing he recalled before getting up in the morning, were inconsistent with his testimony in court. *Kasper*, 58 M.J. at 315; *United States v. Whitney*, 55 M.J. 413, 416 (C.A.A.F. 2001). As a result, we are convinced that the improper opinion testimony did not materially prejudice the appellant. *See Powell*, 49 M.J. at 463.

Other Issues

Finally, we have reviewed the appellant's claims of improper cross-examination and cumulative error and find them to be without merit. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court