UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant TIMOTHY G. RIDGLEY
United States Air Force

ACM 36058

12 December 2006

Sentence adjudged 6 April 2004 by GCM convened at Schriever Air Force Base, Colorado. Military Judge: Kurt D. Schuman.

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Sandra K. Whittington, and Major John N. Page III.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Jefferson E. McBride.

Before

ORR, JACOBSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

JACOBSON, Judge:

The appellant was tried before officer members sitting as a general court-martial at Schriever Air Force Base, Colorado. Contrary to his pleas, he was convicted of maltreating several female subordinates, and engaging in unprofessional relationships with two additional female subordinates, in violation of Articles 93 and 134, UCMJ, 10 U.S.C. §§ 893, 934. The panel of officers sentenced him to a bad-conduct discharge and reduction to the grade of E-1. The convening authority approved the sentence as adjudged. On appeal, the appellant

asserts six assignments of error.[*] Finding merit in one of these assignments, we approve the findings but disapprove the sentence.

Legal and Factual Sufficiency of the Evidence

In his second and third assignments of error, the appellant asserts that the evidence is legally and factually insufficient to support the member's findings of guilty. The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. at 319). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. Having carefully reviewed the record, we conclude that there is sufficient competent evidence to support the court-martial's findings. After weighing all the evidence and making allowances for not having personally observed the testimony of the witnesses, we decline to second-guess the member's findings of guilty. The weight of the

[*] The appellant asserts the following errors. Assignments I, III, and VI are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982):

I.

Whether the attorney-client relationship between the appellant and Lieutenant Colonel Pyle was improperly severed without good cause, thus denying the appellant continued representation by his original detailed trial defense counsel.

II.

Whether the evidence is legally and factually sufficient to support a finding of guilty for Specifications 3 and 4 of Charge I, maltreatment of Staff Sergeant L and Senior Airman E.

III.

Whether the evidence is legally and factually sufficient to support a finding of guilty for Specification 1 of Charge I, Specifications 1 and 2 of Charge III, and the Specification of Additional Charge I.

IV.

Whether the trial counsel's findings argument was improper and materially prejudiced the appellant's substantial rights.

V.

Whether the military judge materially prejudiced the appellant's substantial rights when he instructed the members in sentencing that military confinement facilities are corrective rather than punitive.

VI.

Whether the military judge erred when he denied the defense motion for a new trial based on newly discovered evidence regarding Senior Airman R, the subject of Specification 1 of Charge I.

evidence leaves us convinced of the appellant's guilt beyond a reasonable doubt. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *Turner*, 25 M.J. at 325.

Improper Findings Argument

The appellant's claim that certain portions of the assistant trial counsel's findings argument were improper is without merit. The standard under which claims of improper argument are reviewed depends upon the content of the argument and whether defense counsel objected at trial. The legal test for improper argument is whether it was erroneous and whether it materially prejudiced the substantial rights of the accused. *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). If the trial defense counsel fails to object or request a curative instruction, the issue is waived, absent plain error. Rule for Courts-Martial (R.C.M.) 1001(g); *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001); *United States v. Powell*, 49 M.J. 460, 462-63 (C.A.A.F. 1998).

In the case *sub judice*, the appellant claims that various comments made by the trial counsel during his findings argument were meant to inflame the passions or prejudices of the court members and disparage the defense counsel. The trial defense counsel did not object to any of the comments.

The focus of our inquiry is not on the words of the trial counsel in isolation, but in the context of the entire trial. *Baer*, 53 M.J. at 238. A "criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." *United States v. Young*, 470 U.S. 1, 11 (1985).

It is well established that a trial counsel is permitted to make "a fair response" to claims made by the defense. *Gilley*, 56 M.J. at 120; *See also* R.C.M. 919. Under the "invited response" or "invited reply" doctrine, trial counsel is not prohibited from offering a comment that provides a fair response to claims made by the defense. *See, e.g., United States v. Robinson*, 485 U.S. 25, 32 (1988); *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005); *Gilley*, 56 M.J. at 120-21. A close reading of the entire record of trial indicates that the allegedly improper comments by trial counsel were, in fact, responsive to points and questions raised by trial defense counsel during opening statement and hard-hitting cross-examination of the government witnesses. The assistant defense counsel began his opening statement by introducing the defense's "witch hunt" theme. The defense team subsequently used the term during cross-examination of three different witnesses. During the course of the court-martial, the trial counsel was able to turn this theme against the defense and ultimately referred to it during closing argument. In this context, we view the trial counsel's comments as appropriate

responses to the defense team's theme, and thus do not find error, plain or otherwise.

Assuming, arguendo, that error did occur, we find it to be harmless. *See United States v. Hasting*, 461 U.S. 499, 509 (1983). ("[I]t is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations.")

Improper Sentencing Instruction

In his fifth assignment of error, the appellant claims that the military judge materially prejudiced his substantial rights when he instructed the court members in sentencing that military confinement facilities are corrective rather than punitive. In accordance with precedent set by our superior appellate court in *United States v. Holmes*, 61 M.J. 148, 149 (C.A.A.F. 2005) (summary disposition), we find merit in the appellant's assignment of error.

While instructing the members, the military judge included the following statement: "Military confinement facilities are corrective rather than punitive. Prisoners perform only those types of productive work which may be required of duty airmen." Trial defense counsel did not object to the instruction. The trial counsel had previously focused his sentencing argument on punishing the appellant, arguing to the members "the overriding reason to give a sentence is to punish the accused for his crimes." The appellant argues that the erroneous instruction, combined with the standard punitive discharge instruction and the trial counsel's emphasis on punishment (as opposed to rehabilitation) of the accused, may have misled the members during their deliberations on a proper sentence. In other words, the appellant theorizes that the members agreed with the trial counsel that "punishment of the offender" was the proper sentencing philosophy in this case, and rehabilitation was not necessary. They were then misled by the erroneous instruction into thinking that confinement would not accomplish this objective. Thus, they settled on reduction and punitive discharge, a sentence that deprives the appellant of military retirement. Had the members been properly instructed, the appellant concludes, they may have punished the appellant with a period of confinement and allowed him to retire.

Although the appellant's argument involves some degree of speculation, we are inclined to grant relief for two primary reasons. First, we observe that our superior court in *Holmes* made no distinction between appellants that had been sentenced to confinement and those who had not. The Court simply found the military judge's instruction that military confinement facilities are corrective rather than punitive to be erroneous. Regardless of the sentence actually adjudged, this instruction is inconsistent with the instruction that confinement is a form of

authorized punishment. *See* Article 58(a), UCMJ, 10 U.S.C. §858(a); Rule for Courts-Martial 1003(b)(7); *Holmes*, 61 M.J. at 149; *See also United States v. Brewster*, 64 M.J. 501, 502 (A.F. Ct. Crim. App. 2006). Second, given the appellant's inexcusable and reprehensible behavior toward young female airmen, we do not find it speculative to believe that the members considered the "punishment of the offender" theory of sentencing to be their primary objective. The members were certainly aware that the appellant's military career was about to end, and may have seen no reason to rehabilitate the appellant for what could arguably be considered a purely "military offense." Therefore, we agree with the appellant that, based upon his lengthy record of outstanding achievement and the fact that he was almost retirement eligible, a panel of properly instructed members might have fashioned a sentence that included confinement as punishment and allowed the appellant to retire.

Having found error, we must determine whether we can reassess the sentence or, in the alternative, order a sentence rehearing. In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court summarized the analysis required in sentence reassessment:

> In *United States v. Sales*, 22 M.J. 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id.* at 307. A sentence of that magnitude or less "will be free of the prejudicial effects of error." *Id.* at 308. If the error at trial was of constitutional magnitude, then the court must be satisfied beyond a reasonable doubt that its reassessment cured the error. *Id.* at 307. If the court "cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred," then a sentence rehearing is required. *Id.*

After carefully reviewing the record of trial, we cannot determine that, absent the sentencing instruction error, the sentence would have been at least of a certain magnitude. Since we are not confident that we could reliably discern what the adjudged sentence would have been had the members been properly instructed, we return the case to The Judge Advocate General for a rehearing on sentence. *See United States v. Taylor*, 51 M.J. 390, 391 (C.A.A.F. 1999) (conclusion about the sentence that would have been imposed, absent the error, must be made with "confidence").

We reviewed the appellant's two remaining assignments of error, submitted pursuant to *United States v. Grostefon*, and find them to be without merit. *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

Conclusion

The findings are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. The sentence is set aside. The record of trial is returned to The Judge Advocate General for remand to the convening authority. A rehearing on sentence is ordered.

Senior Judge ORR participated in this decision prior to his reassignment.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator
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