UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant CHRISTOPHER J. ROBERTS
United States Air Force

ACM 36905

24 July 2009

Sentence adjudged 15 September 2006 by GCM convened at Moody Air Force Base, Georgia. Military Judge: Gary M. Jackson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 4 years, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, and Captain Jamie L. Mendelson.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

PER CURIAM:

In accordance with his plea, the appellant was convicted by a military judge sitting as a general court-martial of one charge and specification of assault consummated by a battery upon his wife, ER, in violation of Article 128, UCMJ, 10 U.S.C. § 928. Contrary to his pleas, the military judge found the appellant guilty of an additional specification of assault consummated by a battery upon his wife, one charge and one specification of raping his wife, and one charge and one specification of communicating a threat to his wife, in violation of Articles 128, 120, and 134, UCMJ, 10 U.S.C. §§ 928, 920, 934.

On appeal, the appellant alleges five errors: (1) the military judge denied the appellant his Sixth Amendment[1] right to confront a witness against him when the military judge prohibited the appellant from demonstrating that ER had a motive to fabricate the rape allegation based on her extra-marital relationship with FL, which either gave her a motive to get the appellant "out of the picture" or to protect her extra-marital relationship; (2) the military judge abused his discretion by excluding certain evidence that tended to prove the appellant's wife would experience significant vaginal trauma during consensual sex and that nonconsensual sex would cause more trauma than that purportedly suffered; (3) the military judge abandoned his role as an impartial and neutral arbiter and assumed the role of a partisan advocate for the prosecution; (4) the errors asserted require reversal pursuant to the cumulative error doctrine; and (5) the evidence is legally and factually insufficient to sustain a rape conviction. We also address the issue of post-trial processing delays in this case, in accordance with *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). After considering the entire record of trial and submissions from counsel, we find no prejudicial error and affirm the findings and sentence.

Factual Background

This case arose from an incident on 21 February 2006 at the home of the appellant and his spouse, ER. The appellant had recently returned from a deployment to Iraq. The appellant and ER's marriage was failing and the two were contemplating divorce. In addition, the appellant was convinced that ER was having an extramarital affair with FL. On the evening in question, ER had gone to bed but was awoken by the appellant, who was angered because FL had called ER's cell phone. The appellant grabbed ER around the throat. This act led to the first assault specification, to which the appellant pleaded guilty. What happened next was a matter of some dispute. Although the appellant did not contest that he had intercourse with ER, ER alleged that the appellant raped her while the appellant claimed that they had "rough," but consensual, intercourse. In addition, ER alleged that the appellant, during intercourse, threatened to kill her if she told anyone about the incident and, after intercourse, the appellant shoved her down a hallway in the house while demanding that she leave the home. This led to the charge of making a threat and the additional specification of assault. After the incident, ER left the house and went to a nearby park, where she made and received several calls on her cell phone. Some of the calls were from the appellant. ER also testified that she called FL while she was in the park. After ER made these calls she contacted the appellant's supervisor and reported that he had assaulted her.

Additional facts necessary to the disposition of the assignments of error are recited below.

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[1] U.S. CONST. amend. VI.

Discussion

Military Judge's Exclusion of Evidence

In the first assignment of error, the appellant claims the military judge denied him his Sixth Amendment right to confront a witness against him by prohibiting the appellant from presenting evidence of ER's alleged affair and from cross-examining ER about the alleged affair. The appellant claims this information was constitutionally required under Mil. R. Evid. 412(b) because it tends to prove ER had a motive to fabricate a rape allegation against him. He supports this claim by arguing that, first, ER would fabricate a claim of rape to get the appellant out of their home, and second, ER would fabricate a claim of rape to protect her affair with FL.

Generally, evidence of a victim's sexual behavior is inadmissible. Mil. R. Evid. 412(a). One exception to this general rule is where the evidence is "constitutionally required to be admitted." *United States v. Buenaventura*, 45 M.J. 72, 79 (C.A.A.F. 1996); *see also* Mil. R. Evid. 412(b)(1)(C). Evidence is constitutionally required to be admitted where it is "relevant, material, and favorable to [the] defense." *United States v. Dorsey*, 16 M.J. 1, 5 (C.M.A. 1983) (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982)); *see also United States v. Banker*, 60 M.J. 216, 222 (C.A.A.F. 2004). Where, as here, the defense seeks to offer evidence under Mil. R. Evid. 412 to support a theory that a witness has a motive to lie and should not be believed, the military judge may require the defense to present additional evidence to explain the nexus between the evidence offered and the alleged motive to lie, unless the defense theory is one which is "commonly understood and obvious." *United States v. Sanchez*, 40 M.J. 782, 785 (A.F.C.M.R. 1994) (citing *United States v. Colon-Angueira*, 16 M.J. 20 (C.M.A. 1983)), *aff'd*, 44 M.J. 174 (C.A.A.F. 1996); *Dorsey*, 16 M.J. at 5-6. If the military judge erroneously excludes evidence that is constitutionally required to be admitted, we must reverse unless we can conclude, beyond a reasonable doubt, that the error was harmless. *Buenaventura*, 45 M.J. at 79-80 (citing *United States v. Bins*, 43 M.J. 79, 86 (C.A.A.F. 1995)).

While we do find the military judge erred in excluding some evidence the appellant offered to prove that ER and FL were having an affair, we conclude, beyond a reasonable doubt, that the error was harmless.

The appellant sought to introduce evidence of a sexual relationship between ER and FL in several forms. First, the appellant attempted to call a witness, DT, who had accompanied FL on a trip to a house where a woman who shared ER's first name resided. During a closed hearing, DT testified that the woman and FL spent an hour and a half to two hours in the bedroom of the house with the door closed, while the witness sat in the living room. The witness could not recall the location of the home, nor could he identify ER as the woman at the home. Second, the appellant attempted to introduce testimony of

the appellant's ex-wife, LH, to support the defense theory that there was a relationship between FL and ER. Specifically, LH stated that FL had told her that FL and ER had been "spending a lot of time together." LH explained she understood this to mean that FL and ER were having a sexual relationship. During cross-examination, LH admitted this was the only time FL had discussed his sexual relationship with another woman with LH.[2] Third, the appellant attempted to introduce evidence that ER and FL had traveled to Florida together. Finally, the appellant attempted, unsuccessfully, to cross-examine ER on her relationship with FL. The military judge refused to admit any of this evidence and restricted any inquiry into ER and FL's relationship, including questions about FL's phone call to ER's cell phone prior to the incident and ER's phone call to FL following the incident.

We begin by finding the military judge properly excluded the testimony of DT and LH. Their testimony is precisely the evidence Mil. R. Evid. 412 seeks to exclude. Those two witnesses provided no direct evidence of a sexual relationship between FL and ER, and their testimony amounts to mere conjecture and innuendo. *Banker*, 60 M.J. at 219. While the relevance of ER's trip to Florida with FL is a much closer call, we find this issue rendered moot. The defense made a timely disclosure that they intended to introduce evidence that ER and FL "took a weekend trip to Florida together" during the appellant's deployment. The military judge ruled this evidence inadmissible under Mil R. Evid. 412, but during findings, the government, without objection, offered the appellant's statement to the Air Force Office of Special Investigations. In this statement, the appellant described the trip and, in fact, went as far as to say that he knew ER and FL were in a hotel room together. Therefore, evidence of the trip and ER and FL's companionship was presented to the military judge.

We find the military judge did err, however, in limiting the trial defense counsel's cross-examination of ER. Specifically, we find that during cross-examination of ER the trial defense counsel should have been allowed to inquire into ER's relationship with FL and her phone call to FL after the incident and before she reported it to the appellant's supervisor.[3] We find that such an inquiry was constitutionally required under the Sixth Amendment and under Mil. R. Evid. 412(b). *See United States v. Israel*, 60 M.J. 485, 486 (C.A.A.F. 2005); *United States v. Whitaker*, 34 M.J. 822, 829 (A.F.C.M.R. 1992). Moreover, as the substance of the conversation between ER and FL is unknown, it may not have even been the kind of evidence contemplated by Mil. R. Evid. 412.

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[2] LH knew FL well, and they had a child together.

[3] The trial defense counsel only elicited ER's testimony that she called FL from the park before the military judge ceased further questioning on the matter. Had cross-examination continued, we presume that the trial defense counsel would have inquired into the subject matter of the phone call.

With respect to the existence of a relationship between ER and FL, we believe that an extra-marital affair would establish a motive to lie that is "commonly understood and obvious." *Sanchez*, 40 M.J. at 785. The trial defense counsel argued that ER was motivated to fabricate a rape allegation against the appellant because she wanted him out of the marital home and because she wanted to protect her relationship with FL. Although this theory is not the traditional theory of a victim lying about infidelity to protect a pre-existing or primary relationship, it is commonly understood and is not highly speculative. *Id.* (citing *United States v. Ferguson*, 14 M.J. 840 (A.C.M.R. 1982)). Therefore, the appellant was entitled to cross-examine ER about her relationship with FL.

With respect to ER's phone call to FL, the record does not reflect what ER said to FL and vice versa. However, we question whether a conversation that was not sexual in nature would even require a Mil. R. Evid. 412 analysis. Mil. R. Evid. 412 exists "to protect alleged victims of sexual offenses from undue examination and cross-examination of their sexual history." *Banker*, 60 M.J. at 221. Nothing in this stated purpose suggests it is so broad as to exclude platonic conversations between two parties, regardless of the parties' relationship. Even if we were to apply a Mil. R. Evid. 412 analysis to the conversation, we believe the statements were constitutionally required to be admitted. While some of them might have been hearsay, there are grounds for their admission. For example, statements by ER may have been admissible as evidence of her then-existing mental, emotional, or physical condition under Mil. R. Evid. 803(3) or as an excited utterance under Mil. R. Evid. 803(2). Furthermore, ER testified about leaving the home and going to the park, receiving phone calls from the appellant, and deciding to go to a supervisor's house to make the report that set this case in motion. This, as the saying goes, "opened the door" to the issue of what ER did in the brief period between her departure from the home and when she made her report to the appellant's supervisor. Thus, whether or not the statements were sexual in nature, in all likelihood any interactions ER had with FL between the time she left her house and the time she reported the appellant to her supervisor a short time later were admissible under the rule of completeness. *See United States v. Goldwire*, 55 M.J. 139, 143 (C.A.A.F. 2001) (applying common law rule of completeness doctrine to courts-martial).

Because we find the appellant should have been permitted to cross-examine ER on her relationship with FL under Mil. R. Evid. 412(b) and under the appellant's right of cross-examination generally protected by the Sixth Amendment, we must reverse the case unless we are convinced, beyond a reasonable doubt, that any error was harmless. *Buenaventura*, 45 M.J. at 79; *United States v. Zak*, 65 M.J. 786, 792 (Army Ct. Crim. App. 2007) (citing *United States v. Andreozzi*, 60 M.J. 727 (Army Ct. Crim. App. 2004)). A review of the evidence in this case convinces us, beyond a reasonable doubt, that any error by the military judge was harmless.

The appellant's theory at trial was that he had "rough" but consensual "make-up sex" with his wife following his accusations that she was cheating on him. Thus, the defense disputed lack of consent but conceded that considerable force was used. To establish this theory, the defense unsuccessfully attempted to show that the appellant and his wife had a history of "rough" intercourse. The appellant offered no evidence of this history aside from his cross-examination of ER, during which ER flatly denied such a history. She clearly suffered bruising as a result of the incident. This evidence belies a conclusion that there was rough, but consensual, intercourse. Furthermore, there is no dispute that ER accused the appellant of raping her within moments of them having intercourse.[4] These facts, when compared to the appellant's already implausible story that he did have "rough," but consensual, intercourse with ER, leave us convinced beyond a reasonable doubt that cross-examining ER on her relationship with FL, or on what she and FL discussed after ER left the home but before she reported the appellant to his supervisor, would not have impacted the outcome of the case.

Limitation on the Evidence About the Size of the Appellant's Penis

With respect to the appellant's second assignment of error, he complains that he was limited in the amount of evidence he was allowed to present regarding the size of his penis. The appellant argues that his penis is so large it would have caused the injuries on ER even during consensual sex, and, therefore, the size of his penis is relevant.

This issue has no merit. The appellant complains because the military judge prevented him from offering testimony about the size of his penis through LH and *her* personal sexual experiences with the appellant. The military judge correctly concluded that LH's sexual history with the appellant was completely and totally irrelevant to ER's personal sexual experiences with the appellant. Moreover, the appellant elicited from ER, on cross, that the appellant has a large penis; that ER has a "vaginal condition" which causes her vagina "to not lubricate well"; that ER sometimes experienced pain during, and bleeding following, consensual intercourse with the appellant; that ER bruises easily; and that she has what is called a "friable cervix."[5] In other words, the evidence excluded by the military judge was not only irrelevant, but any arguably relevant portion of it was cumulative. The military judge did not err.

The Military Judge's Neutral and Detached Role

With respect to the appellant's third assignment of error, that the military judge abandoned his neutral and detached role, we find against the appellant. The appellant claims the military judge abandoned his neutrality when he stated, to ER, "[T]hank you for your testimony. I really appreciate you being upfront and honest. I realize that these

[4] According to the appellant, ER accused him of rape before she left the home.
[5] A friable cervix, according to a defense expert's testimony, is one that is fragile and easily injured.

are probably not easy questions to answer, certainly, not before a packed courtroom." In addition, the appellant argues that the military judge's questions of one defense witness, KJ, were designed, either actually or through reasonable perception, to elicit substantial incriminating testimony against the appellant.

"The military judge is the presiding authority in a court-martial and is responsible for ensuring that a fair trial is conducted." *United States v. Quintanilla*, 56 M.J. 37, 41 (C.A.A.F. 2001) (citing Article 26, UCMJ, 10 U.S.C. § 826; Rule for Courts-Martial 801(a) and its Discussion). Included in the military judge's authority is the right to call and question witnesses. *Id.* An accused has a right to a fair and impartial military judge. *Id.* at 43 (citing *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999)).

With respect to the military judge's statements to ER, it is patently obvious that the military judge was thanking ER for answering questions about various medical conditions affecting her gynecological health as well as her sexual habits with the appellant. In addition, ER was also cross-examined about her possession and use of a vibrator. We find nothing improper about a military judge acknowledging that a witness may be uncomfortable testifying about such deeply personal matters. As for the military judge's questioning of KJ, some context is appropriate. According to the appellant, KJ was the first person the appellant spoke with following the incident on 21 February 2006. The trial defense counsel elicited only that the appellant spoke with KJ on the telephone on the night of the incident and never confessed to raping ER during that conversation. The military judge inquired into what was discussed during the phone call, other conversations the appellant had with KJ, and other information pertinent to what KJ knew – either through his personal observations or through conversations with the appellant – about what happened between the appellant and ER. These questions were perfectly appropriate and within the bailiwick of the military judge, who was also the fact-finder in the case. Furthermore, KJ's answers were often unclear, requiring extensive follow-up questioning. While it would be impractical to include the military judge's entire examination of KJ here, what follows is an excerpt:

> Q: Has he subsequently had a conversation with you wherein he told you about having sexual intercourse with [ER]?
> A: Yes.
> Q: When was this?
> A: The next day.
> Q: So, this is on the 22nd of February 2006.
> A: Yes.
> Q: And what did he tell you?
> A: He said that during their argument or whatever, from the accusation, sir, that she told him, "Well, if you believe I'm cheating on you, get some right – you can have some right now" or something along that line.
> Q: All right, can you just go through that again? Just tell me exactly what it is that he told you about the sexual intercourse with his wife.

A: She told him if he was – that if she was – didn't believe him, "he can have some right now."
Q: And he used those words, "He can have some right now"?
A: I was thinking, yes, sir.
Q: He didn't say what "some" is?
A: No, but --
Q: Okay, and did he tell you what happened after that?
A: No, the conversation ended after that.
Q: So, he didn't tell you that he did, in fact, get some or he did, in fact, have sex with his wife?
A: Well, I generally figured out yes, he did, and I told him – well – I told him that was a big mistake.
. . . .
Q: So, he didn't tell you that he did, in fact, have sex with his wife?
A: Yes, he did.

As this portion of the transcript makes clear, the military judge spent a good deal of time attempting to clarify KJ's answers. We see no evidence of bias in this questioning. The extent of his questioning was appropriate and he did not abandon his role as a neutral and detached arbiter.

Cumulative Error

The appellant, in his fourth assignment of error, asserts that, even if none of his three previous assignments of error entitle him to relief, he is nevertheless entitled to relief under the cumulative error doctrine. *United States v. Dollente*, 45 M.J. 234, 242-43 (C.A.A.F. 1996); *United States v. Banks*, 36 M.J. 150, 171 (C.M.A. 1992). Having found two of his assignments of error without merit, this issue is rendered moot.

Legal and Factual Sufficiency

In his fifth assignment of error, the appellant claims the evidence is factually and legally insufficient to sustain a rape conviction. We review claims of legal and factual insufficiency de novo, examining all the evidence properly admitted at trial. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). 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 essential elements of the crime beyond a reasonable doubt." *Quintanilla*, 56 M.J. at 82 (alteration in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *see also United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987). In resolving questions of legal sufficiency, we must "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) (citations omitted). The appellant notes that rape has two elements: (1) an act of sexual

intercourse (2) committed by force and without consent. The appellant does not dispute that sex occurred but disputes on appeal, as he did at trial, that ER did not consent. However, ER testified that she did not consent. Although the trial defense counsel vigorously cross-examined prosecution witnesses and attempted to put on evidence to undermine ER's assertion that she did not consent, we find the evidence legally sufficient. 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 ourselves are] convinced of the [appellant's] guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. The appellant urges us that, in light of the lack of vaginal trauma to ER, ER's lack of credibility, and the appellant's conduct following the incident, the evidence is insufficient to sustain a rape conviction. We disagree, find the evidence against the appellant to be compelling, find the appellant's theory of the case to be implausible, and are ourselves convinced of the appellant's guilt beyond a reasonable doubt. Accordingly, we find against the appellant on this issue.

Unreasonable Post-Trial Delay

We note that this case has been with this Court in excess of 540 days. In this case, the overall delay between the trial and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Moreno*, 63 M.J. at 135. When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and that no relief is warranted.

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

STEVEN LUCAS, YA-02, DAF
Clerk of the Court