UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman DOUGLAS L. SAFERITE JR.
United States Air Force

ACM 34378

10 January 2003

Sentence adjudged 18 July 2000 by GCM convened at Spangdahlem Air Base, Germany. Military Judge: Rodger A. Drew Jr.

Approved sentence: Dishonorable discharge, confinement for 6 years, fine of $14,565.00 and to be further confined until the fine is paid but not for more than 1 year, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Timothy W. Murphy, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Captain Christa S. Cothrel.

Before

VAN ORSDOL, BRESLIN, and ORR, V.A.
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

A general court-martial convened at Spangdahlem Air Base (AB), Germany, found the appellant guilty, contrary to his pleas, of three specifications of attempted sale of military property worth more than $100.00, in violation of Article 80, UCMJ, 10 U.S.C. § 880, eight specifications of wrongful sale of military property worth more than $100.00, in violation of Article 108, UCMJ, 10 U.S.C. § 908, and twelve specifications of larceny of military property worth more than $100.00, in violation of Article 121, UCMJ, 10 U.S.C. § 921. The sentence adjudged and approved was a dishonorable discharge, confinement for 6 years, a fine of $14,565.00 and to be further confined until the fine is paid but for not more than one year, and reduction to the grade of E-1. The appellant

alleges that the military judge erred in admitting documents during the sentencing proceeding as evidence of the bias of the appellant's wife, and that the promulgating order is incorrect. We affirm, but order correction of the promulgating order.

In the summer of 1999, the appellant was assigned to the Network Control Center at Spangdahlem AB, responsible for computer systems used for communications. He planned to separate from the Air Force in September 1999, and had a job awaiting him in Germany. He was also engaged to Isabelle Scholzen, a citizen of Luxembourg, who was expecting their child in December 1999.

From about July to September 1999, the appellant stole large quantities of expensive computer equipment and electronic components from his duty section, and sold them over the Internet through a popular public auction site. On the night before he was scheduled to out-process from the Air Force, he stole processors from the eight computers handling the installation's unclassified e-mail. He was careful to take only three of the four processors from each machine, so the system would continue to operate even though its capabilities were greatly reduced. Nonetheless, technicians soon discovered the missing processors, and the appellant was apprehended before his separation from active duty. A search of his rented car and his girlfriend's home revealed more stolen government property, and ultimately led investigators to records of his sales of government property over the Internet. The total loss to the United States exceeded $100,000.00.

The appellant was placed in pretrial confinement on 2 October 1999. Air Force authorities allowed him to marry Isabelle Scholzen while in confinement, and four days later she gave birth to their child.

The appellant was arraigned on 11 January 2000, and pled not guilty to all charges and specifications. The trial was delayed to depose witnesses in the United States. During this time, the appellant was brought to Spangdahlem AB to prepare for trial with his defense counsel. The military judge issued a special order allowing the appellant to remain at Spangdahlem AB and sleep in billeting, under guard, rather than driving two hours back to the confinement facility at Mannheim, Germany. On 29 February 2000, the appellant called his wife from his defense counsel's office, while his attorneys were in another room. On the night of 2 March 2000, the appellant tied his bed sheets together, slipped out his third-floor billeting window, and fled on foot. The noise alerted the guard who pursued him, but he escaped. Military police spotted the appellant's wife, Isabelle Saferite-Scholzen, driving off Spangdahlem AB at 0045 hours. German authorities eventually stopped her near Bitburg, Germany. She claimed she had come to the base in the hope of talking to her husband. Authorities could not locate the appellant on the air base.

The appellant never returned to military control. He was tried in absentia, and convicted as indicated above. During the sentencing proceedings, the government introduced personnel records indicating the appellant had escaped from confinement. The defense counsel submitted Defense Exhibit C, a letter from the appellant's wife, Isabelle Saferite-Scholzen, concerning their personal and family circumstances, and offering her opinion of the appellant's character. In rebuttal, the prosecution offered a statement from the escort concerning the appellant's telephone call to his wife, and a statement from a security forces member indicating the appellant's wife was seen leaving Spangdahlem AB at 0045 the night of the escape. After performing the balancing test required under Mil. R. Evid. 403, the military judge admitted redacted copies of the documents under Mil. R. Evid. 608(c), over defense objection, as evidence of Ms. Saferite-Scholzen's bias. The appellant's counsel now argues this ruling was error. We do not agree.

The appellant's argument includes several points. First, the appellant argues that because Mrs. Saferite-Scholzen did not testify in person, Mil. R. Evid. 608(c) does not apply. However, Mil. R. Evid. 806 makes it clear that whenever a hearsay statement has been admitted in evidence, "the credibility of the declarant may be attacked . . . by any evidence which would be admissible for those purposes if declarant had testified as a witness." *See United States v. Hart*, 55 M.J. 395, 396 (2001); *United States v. Goldwire*, 55 M.J. 139, 143 (2001).

The appellant also argues that the challenged statements did not rebut anything in Mrs. Saferite-Scholzen's statement. However, that is not required. Evidence showing bias is a general attack on the credibility of the declarant.

> Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony. The 'common law of evidence' allowed the showing of bias by extrinsic evidence, while requiring the cross-examiner to 'take the answer of the witness' with respect to less favored forms of impeachment.

United States v. Abel, 469 U.S. 45, 52 (1984). As the military judge noted,

> it does tend to show that the accused's wife is willing to engage in criminal activity in order to support her husband with regard to the judicial proceedings present. That certainly does establish some bias on her part which colors her letter that she has provided in these very judicial proceedings.

We agree completely, and find that the statements properly exposed the bias of the declarant.

Finally, the appellant contends the evidence was unfairly prejudicial. The military judge did the balancing test required by Mil. R. Evid. 403, and found that evidence did not unfairly prejudice the appellant. "When a military judge conducts a proper balancing test under Mil. R. Evid. 403, the evidentiary ruling will not be overturned unless there is a 'clear abuse of discretion.'" *United States v. Hursey*, 55 M.J. 34, 36 (2001) (quoting *United States v. Ruppel*, 49 M.J. 247, 250 (1998)). We find no abuse of discretion in this case.

The appellant also notes that the promulgating order contains several errors relating to the findings of the court-martial. Specifically, Specification 1 of Charge III on the promulgating order incorrectly indicates the appellant was convicted of stealing 29 processors, although the specification was amended at trial to allege the theft of 27 processors. Also Specification 3 of Charge III in the promulgating order incorrectly reflects that the appellant was convicted of stealing twelve 256 Random Access Memory, Dual Inline Memory Modules, when that specification was amended at trial to allege the theft of four of these items. The government concedes error, but apparently has not made corrections.

The record is returned to The Judge Advocate General for administrative correction of the promulgating order. The record need not be returned to this Court following this administrative correction unless further appellate review is required.

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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator