UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic RENATO SANCHEZ DEL CARPIO
United States Air Force

ACM 37276

10 December 2009

Sentence adjudged 06 December 2007 by GCM convened at RAF Lakenheath, United Kingdom. Military Judge: Gordon R. Hammock.

Approved sentence: Dishonorable discharge and confinement for 17 years.

Appellate Counsel for the Appellant: Michael D.J. Eisenberg, Esquire (civilian counsel) (argued), Major Jennifer J. Raab, and Captain Marla J. Gillman.

Appellate Counsel for the United States: Captain Michael T. Rakowski (argued), Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Senior Judge:

Contrary to his pleas, a panel of officer and enlisted members sitting as a general court-martial found the appellant guilty of two specifications of rape, in violation of Article 120, UCMJ, 10 U.S.C. § 920. The members sentenced the appellant to a dishonorable discharge and 18 years of confinement. The convening authority approved the dishonorable discharge and 17 years of confinement. On appeal, the appellant asks this Court to: (1) set aside the charge and specifications with prejudice or remand the

case for separate trials on each specification; and (2) set aside the sentence and either order a sentence rehearing or reassess the sentence.

As the basis for his request, he opines: (1) the evidence is legally and factually insufficient to support his rape convictions; (2) his Sixth Amendment[1] right to confront a witness was violated by the military's unlawful command influence; (3) the military judge erred by not severing the two rape specifications into separate trials; (4) the military judge erred by allowing the trial counsel to argue the effect the trial had on the victims and such argument was an impermissible comment on his constitutional right to plead not guilty and to confront witnesses against him; (5) his trial defense counsel was ineffective by failing to object to the trial counsel's sentencing argument; (6) his sentence to 18 years of confinement is unduly disproportionate; and (7) the cumulative errors warrant relief. Finding no prejudicial error, we affirm.

Background

During the evening hours of 28 October 2005, then-Airman Basic (AB) AB had dinner and alcoholic drinks with friends at a fellow airman's dormitory room. After dinner, AB AB and her friends went to the base enlisted club for drinks and then to another friend's dormitory room for snacks. While in her friend's room, the appellant approached AB AB's friend and asked her if she would like to participate in a "threesome." She rebuffed the appellant's advances. Not long after, two of AB AB's friends escorted AB AB to AB AB's dormitory room. Upon entering her room, AB AB's friends departed and she fell asleep. Shortly thereafter, AB AB awoke to find the appellant having sexual intercourse with her. AB AB unsuccessfully attempted to push the appellant off of her. When the appellant finally stopped, he left her dormitory room. AB AB reported the incident to two of her friends who, in turn, reported the incident to authorities against her wishes.

Approximately one year later, the appellant invited Senior Airman (SrA) KK, a recent but former girlfriend, to his dormitory room. While there, the appellant attempted to kiss SrA KK on two occasions, but she rebuffed his advances. The appellant convinced SrA KK to join him on the bed, where the appellant pulled her pants down, moved her underwear to the side, and began having sexual intercourse with her. SrA KK told the appellant to stop. As he continued, she lay silently and cried. After the appellant finished, SrA KK left and reported the incident to her roommate. Approximately two weeks later, a neighbor anonymously reported the incident to the Air Force Office of Special Investigations.

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

Legal and Factual Sufficiency

In accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c), 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 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 *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)). In resolving questions of legal sufficiency, this Court is "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).

We have considered the evidence produced at trial in a light most favorable to the government, and find a reasonable fact finder could have found all of the essential elements of the rape specifications. Specifically, we note AB AB's testimony, SrA KK's testimony, and the appellant's audiotaped admission that SrA KK told him no but he engaged in sexual intercourse with her anyway amply and legally support the appellant's rape convictions. 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 accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973). We have carefully considered the evidence in this case and are convinced beyond a reasonable doubt that the appellant is guilty of these specifications.

Unlawful Command Influence and the Sixth Amendment Confrontation Right

For the first time on appeal, the appellant asserts the government, in a calculating fashion, allowed a witness, former Airman First Class AW (hereinafter Ms. AW) to separate from the United States Air Force, knowing the witness would not be amenable to process for an overseas court-martial. In so doing, he argues the government denied him his Sixth Amendment right to confront the witness "physically in front of the jury." We review questions of unlawful command influence de novo, deferring to findings of fact made by the trial judge unless they are clearly erroneous. *United States v. Denier*, 43 M.J. 693, 698 (A.F. Ct. Crim. App. 1995) (citations omitted).

The prohibition against unlawful command influence arises from Article 37(a), UCMJ, 10 U.S.C. § 837(a), which provides, in part: "No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . in reaching the findings or sentence in any case . . . ." Article 37(a), UCMJ.

This provision has been interpreted to preclude unlawful interference with access to witnesses. *See United States v. Stombaugh*, 40 M.J. 208, 212-13 (C.M.A. 1994). Whether the challenged action is unlawful command influence or unlawful interference with access to witnesses, "the burden of production is on the party raising the issue." *Id.* at 213. Here, the burden rests with the appellant.

In determining whether or not unlawful command influence exists, "[t]he test is [whether there exists] 'some evidence' of 'facts which, if true, constitute unlawful command influence, and [whether] the alleged unlawful command influence has a logical connection to the court-martial in terms of its potential to cause unfairness in the proceedings.'" *United States v. Harvey*, 64 M.J. 13, 18 (C.A.A.F. 2006) (quoting *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)). Once the appellant has met the burden of production and proof, the burden shifts to the government to "prove beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings or did not affect the findings and sentence." *Id.* (quoting *Biagase*, 50 M.J. at 151).

In the case at hand, the appellant has failed to meet his burden of production. At best, he offers conjecture of unlawful command influence and "[t]here must be something more than an appearance of evil to justify action by an appellate court . . . . '[P]roof of [command influence] in the air . . . will not do.'" *Stombaugh*, 40 M.J. at 213 (second alteration in original) (quoting *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991)). There is simply no evidence in the record that the government unlawfully impeded or interfered with the appellant's access to witnesses, much less to Ms. AW. Furthermore, even assuming there was unlawful command influence, there is no evidence that such influence was prejudicial to the appellant. At the end of the day, we find no unlawful command influence.

With respect to the appellant's Sixth Amendment claim, we note testimonial statements of a witness-declarant absent from trial are admissible "only where the [witness-]declarant is unavailable" and then "only where the [appellant] has had a prior opportunity to cross-examine" the witness-declarant. *Crawford v. Washington*, 541 U.S. 36, 59 (2004). Axiomatically, the deposition of a witness taken as possible evidence at a court-martial is testimonial. We note a duly authenticated oral deposition is a proper means by which to preserve and bring the testimony of an unavailable witness before a court-martial. Article 49(d), UCMJ, 10 U.S.C. § 849(d); Rule for Courts-Martial (R.C.M.) 702(a) and its Discussion.

The government, in an abundance of caution, properly preserved Ms. AW's testimony so it would be available to the trier-of-fact in the event she were unavailable to testify at the appellant's court-martial. At the time of the appellant's court-martial, Ms. AW was a civilian unaffiliated with the Department of Defense and, as such, was not

amenable to process for the appellant's overseas court-martial. R.C.M. 703(e)(2), Discussion; *see also* Article 49(d)(2), UCMJ. The government attempted to secure her presence, but she refused to travel to England for the appellant's court-martial. Thus, the military judge did not abuse his discretion in finding Ms. AW unavailable.

Moreover, we find the trial defense counsel had the same opportunity and motive to cross-examine Ms. AW during the deposition. In fact, during the deposition, the trial defense counsel conducted a lengthy and thorough cross-examination of her. Since Ms. AW was unavailable for the appellant's court-martial and since the trial defense counsel had the same opportunity and motive to cross-examine Ms. AW at her deposition, Ms. AW's deposition was properly admissible at trial. Put simply, the appellant's Sixth Amendment right to confront Ms. AW was not violated.

Denial of Motion to Sever the Offenses

Convening authorities have the discretion to refer two or more offenses charged against an accused to the same court-martial. R.C.M. 601(e)(2). Military judges are authorized to sever offenses "but only to prevent manifest injustice." R.C.M. 906(b)(10). We review a military judge's ruling on a motion to sever offenses for abuse of discretion. *United States v. Southworth*, 50 M.J. 74, 76 (C.A.A.F. 1999) (citing *United States v. Foster*, 40 M.J. 140, 148 (C.M.A. 1994), *overruled in part by United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009)). To determine whether the military judge abused his discretion, we consider three factors: "(1) whether the evidence of one offense would be admissible proof of the other; (2) whether the military judge provided a proper limiting instruction; and (3) whether the findings reflect an impermissible crossover." *Id.*

Applying the first factor to this case, we find the evidence pertaining to one rape allegation would not have been admissible to prove the other rape allegation. The rapes were dissimilar in three aspects. First, the appellant had a prior romantic and sexual relationship with the second victim, SrA KK, whereas he had no such relationship with the first victim, AB AB. Second, the appellant's past relationship with SrA KK raised an issue of mistake of fact as to consent, whereas no such issue was raised with respect to the rape of AB AB. Lastly, the rape of SrA KK appeared to have been opportunistic, whereas the rape of AB AB appeared to have been planned.

Concerning the second factor, we note the military judge, at the trial defense counsel's request, gave a spillover instruction and the trial defense counsel did not object to the instruction given or request additional instructions. *See Foster*, 40 M.J. at 148 (noting a spillover instruction reduced the risk of members using evidence of one specification to determine guilt on another). Moreover, at the trial defense counsel's request and in compliance with the military judge's ruling, the trial counsel bifurcated or compartmentalized its case by admitting the evidence of each rape specification separately and arguing each rape separately.

Lastly, turning to the third factor, we note the findings do not reflect an impermissible crossover. Instead of a strongly supported rape allegation joined with a weakly supported one, the trial counsel presented strong and independent factual cases with respect to each victim. Considering the evidence presented in support of each specification, we hold the evidence does not suggest spillover and the military judge did not abuse his discretion in denying the motion for a severance of the offenses.

Trial Counsel's Sentencing Argument

Our test for improper argument is "whether the argument 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). We must view the comments within the context of the entire court-martial to determine whether or not the comments are fair. *United States v. Gilley*, 56 M.J. 113, 121 (C.A.A.F. 2001).

It is appropriate for counsel to argue the evidence as well as all reasonable inferences fairly derived from such evidence. *United States v. Nelson*, 1 M.J. 235, 239 (C.M.A. 1975). However, the trial counsel may not comment on the appellant's exercise of his constitutional rights. *United States v. Edwards*, 35 M.J. 351, 356 (C.M.A. 1992); *United States v. Carr*, 25 M.J. 637, 638-39 (A.C.M.R. 1987).

> The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person . . . who was the victim of an offense committed by the accused . . . ."

R.C.M. 1001(b)(4).

Here, AB AB and SrA KK testified, without objection, about the effect the rapes had on them and cried on the witness stand while recounting the events. The emotional stress a victim experiences while participating in the judicial process of her alleged assailant is victim impact—a matter in aggravation—that may be admitted and argued. *United States v. Stephens*, 67 M.J. 233, 236 (C.A.A.F. 2009).[2] Here, the evidence was properly before the members as matters in aggravation and, considering the comments in the context of the trial counsel's entire sentencing argument, we find the argument to be a fair comment on the evidence.

[2] We note the military judge failed to conduct a Mil. R. Evid. 403 balancing test on this issue so we examined the issue ourselves and determined the probative value of the victim impact evidence outweighed the danger of unfair prejudice to the appellant. *See United States v. Stephens*, 67 M.J. 233, 236 (C.A.A.F. 2009) (citing *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000)).

Additionally, assuming arguendo that it was error to allow such argument, failure to object to improper sentencing argument waives the objection absent plain error. R.C.M. 1001(g). To find plain error, we must be convinced: (1) there was error; (2) it was plain or obvious; and (3) that it materially prejudiced a substantial right of the appellant. *United States v. Moran*, 65 M.J. 178, 181 (C.A.A.F. 2007) (citing *United States v. Powell*, 49 M.J. 460, 463-64 (C.A.A.F. 1998)). Here, the error was not plain and there has been no showing of material prejudice to a substantial right of the appellant. On this latter point, we note the trial defense counsel failed to object to the argument and the lack of a defense objection is "some measure of the minimal impact" of the trial counsel's improper argument. *Nelson*, 1 M.J. at 238 n.6. In any event, the military judge did not err in allowing the trial counsel to make such a sentencing argument and any error certainly did not rise to the level of plain error.

Ineffective Assistance of Counsel Claim

Service members, without question, 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). Claims of ineffective assistance of counsel are reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). When there is a lapse in judgment or performance alleged, we ask whether trial defense counsel's conduct was, in fact, deficient. *Strickland*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). If so, we then determine whether counsel's deficient conduct prejudiced the appellant. *Strickland*, 466 U.S. at 687; *see also Polk*, 32 M.J. at 153.

The appellant bears the heavy burden of establishing that his trial defense counsel was ineffective. *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). Counsel are presumed to be competent and "[w]e will not second-guess [the trial defense counsel's] strategic or tactical decisions." *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 make out a claim of ineffective assistance of counsel, the accused must rebut this presumption by pointing out specific errors made by his defense counsel which were unreasonable under prevailing professional norms." *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987).

"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. 'In making [the competence] determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'" *Id*. (alteration in original) (quoting *United States v. Cronic*, 466 U.S. 648, 690 (1984)). Acts or omissions that fall within a broad range of reasonable approaches do not constitute a deficiency. *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001).

In the case at hand, the trial defense counsel's failure to object to the trial counsel's sentencing argument does not amount to deficient conduct. As previously discussed, the trial counsel's sentencing argument was proper. Additionally, the trial defense counsel had strategic and tactical reasons for failing to object; namely, he did not believe an objection would be meritorious and he thought the questioned portion of the trial counsel's argument was beneficial to the appellant. Given the reasonableness of the trial defense counsel's assessment, we will not second-guess his strategic and tactical decisions.

Moreover, even if the trial defense counsel's conduct was deficient, the appellant has failed to show how he was prejudiced by the alleged deficient conduct. In order to constitute prejudicial error, the trial defense counsel's deficient performance must render the result of the proceeding "unreliable" or "fundamentally unfair." *See United States v. Ingham*, 42 M.J. 218, 223 (C.A.A.F. 1995) (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)). In this case, the appellant has failed to show prejudicial error and we decline to find that which does not exist.

Unduly Disproportionate or Inappropriately Severe Sentence

We review sentence appropriateness de novo. *See United States v. Baier*, 60 M.J. 382, 383-84 (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).

In this case, the appellant seriously compromised his standing as a military member and member of society by raping two fellow airmen. The crimes of which he was found guilty coupled with the fact that he has received nonjudicial punishment on two occasions, two vacations of suspended nonjudicial punishment, five letters of reprimand, and a letter of counseling belies any finding of rehabilitative potential. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which the appellant was found guilty, we do not find the appellant's sentence unduly disproportionate or inappropriately severe.

Cumulative Error

We can order a rehearing based on an accumulation of errors that do not individually warrant a reversal. *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F.

1996). Under the cumulative error doctrine, we "must review all errors preserved for appeal and all plain errors." *Id.* (quoting *United States v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993)). We are also required to consider

> each such claim against the background of the case as a whole, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the [military judge] dealt with the errors as they arose . . . ; and the strength of the government's case.

Id. (quoting *United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993)).

Additionally, "[c]ourts are far less likely to find cumulative error '[w]here evidentiary errors are followed by curative instructions' or when a record contains overwhelming evidence of a defendant's guilt." *Id.* (quoting *United States v. Thornton*, 1 F.3d 149, 157 (3d Cir. 1993)). In the case at hand, we found only one error—a post-trial delay in processing the appellant's case. However, for reasons cited below, we find the error harmless. As such, the cumulative error doctrine is not applicable to this case. Moreover, assuming arguendo that additional errors exist, the cumulative error doctrine would be inapplicable because evidence of the appellant's guilt is overwhelming.

Post-Trial Delay

An issue not raised on appeal is the length of the post-trial delay in processing the appellant's case. In this case, the overall delay in excess of 120 days between the completion of trial and the convening authority's action is facially unreasonable. *See United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). 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. *See id*. at 135.

When we assume error but are able to directly conclude that any error was harmless beyond a reasonable doubt, we need not 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 any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and 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