**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Staff Sergeant ANDRE M. SANDERS**
**United States Air Force**

**ACM 36443**

**15 July 2008**

Sentence adjudged 12 May 2005 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Barbara Shestko (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 14 years, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Vicki A. Belleau (Argued) and Lieutenant Colonel Mark R. Strickland.

Appellate Counsel for the United States: Major Brendon K. Tukey (Argued), Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Kimani R. Eason, Major Donna S. Rueppell, Captain Daniel J. Breen, and Captain Jason M. Kellhofer.

Before

FRANCIS, BRAND, and HEIMANN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

BRAND, Senior Judge:

Contrary to his pleas, the appellant was convicted, by military judge sitting alone[1], of one specification of forcible sodomy, one specification of assault and battery, and one specification of indecent assault, in violation of Articles 125, 128, and 134, UCMJ, 10

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[1] The forum in the Court-martial Order (CMO) incorrectly states that the sentence was adjudged by enlisted members.

U.S.C. §§ 925, 928, 934. The approved sentence consists of a dishonorable discharge, confinement for 14 years, and reduction to E-1.[2]

The asserted issues on appeal are:

I. Whether the evidence is factually and legally insufficient to support the appellant's convictions for Charges I and III, where the alleged victims were not credible and the evidence did not support forcible sodomy or indecent assault;

II. Whether the appellant was denied a fair trial when the military judge would not grant a mistrial following the discovery of the alleged victim's highly relevant medical records;

III. Whether the military judge erred by admitting evidence in violation of R.C.M. 1001 and evidence that was not relevant and highly prejudicial;

IV. Whether the appellant's sentence of 14 years confinement and a dishonorable discharge is inappropriately severe in light of the circumstances surrounding the offenses and the mitigating factors;

V. Whether the appellant received ineffective assistance from his trial defense counsel;[3]

VI. Whether the evidence is factually and legally insufficient to support the appellant's convictions;[4]

VII. Whether the appellant received ineffective assistance of counsel;[5]

VIII. Whether the military judge's erroneous admission of hearsay substantially prejudiced the appellant's right to confrontation under the Sixth Amendment; and

IX. Whether the appellant's due process rights were violated when the United States failed to uncover discoverable information in the possession of the government that was material to the preparation of the defense and which would have made a different trial result reasonably probable.[6]

Oral argument, on Issues II and III, was presented to this Court on 11 June 2008.

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[2] The Convening Authority deferred, and then waived the mandatory forfeitures.
[3] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[4] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[5] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[6] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

*Background*

On 29 June 2004, the appellant was driving his vehicle and stopped it by pulling up to where a woman, JR, was standing. JR got in the car and agreed to have sex with the appellant. The appellant drove to a secluded spot (where JR had taken other clients in the past). When she asked for her money up front, the appellant got mad, flipped her over, and using a plastic grocery store bag coated with Vaseline as a condom, sodomized her. He pushed her out of the car and drove off. JR memorized the appellant's license plate number, and flagged down a cab, the driver of which notified the police. When the police responded, JR took them to the spot where the incident occurred, and they retrieved the grocery store bag. The bag was tested by USACIL – on one side was semen matching the appellant's deoxyribonucleic acid (DNA), and on the other was blood matching JR's DNA.

On or about 12 July 2004, MH was walking along a road when the appellant stopped her and asked for directions. Then he forced her into his car, ripped off her clothes, flipped her over, and digitally penetrated her. While apparently getting ready to do more, the appellant was distracted and MH was able to escape. She ran to a nearby business, where she requested assistance from JC. She did not want to report the situation, and just wanted to go 'home'.[7] As JC was driving MH to her 'home', MH saw the appellant's sports utility vehicle (SUV) and became very emotional. She told JC that the guy in the SUV was the perpetrator. JC was able to get the license plate number and called 911.

Sometime, shortly thereafter (around 27 July 2004), CM was out and about, and was picked up by the appellant. When she asked for her money before she performed the requested fellatio, the appellant called her a b----, and punched her in the face. She jumped out of the car, ran to a busy (relatively speaking) street, and saw a familiar police officer, who asked her why she was crying. She started telling him that she was having family problems but as she was speaking she saw the appellant's vehicle. She then told the police officer she had been assaulted. The police officer ran the plate and found out the appellant had been previously reported for assault.

When the appellant was questioned about his contact with prostitutes, the appellant said "it would have been morally wrong to deal with prostitutes".

*Legal and Factual Sufficiency (Issues I and VI)*

We review claims of legal and factual insufficiency de novo, examining all the evidence properly admitted at trial. *See* 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

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[7] Home for these women was located under a bridge or in abandoned buildings.

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, 318-19 (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). 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 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. We are convinced of the appellant's guilt on all charges, and find Issues I and VI to be without merit.

*Mistrial (Issue II)*

Prior to sentencing, the military judge released, to counsel, additional medical records[8] of two of the victims. These were entries the military judge had previously determined were not relevant under Mil. R. Evid. 412. The information consisted of four pages of medical records, three concerning JR and one concerning MH. The information in JR's record revealed that over seven years prior to trial, that she told a medical practioner she had been raped ten times. Additionally, there was an entry made in 2001 revealing she had been molested by her grandfather from the time she was 5-years old until she was 13-years old. MH's record entry, from 7 ½ years prior to trial, revealed she had been abused 13 years previously.

Based upon this information, the trial defense counsel requested a mistrial stating the evidence was necessary for findings and the appellant was denied a fair trial. The theory was that there could be evidence that JR, and potentially the others, made claims of rape or assault when their clients failed to pay. The defense was in possession of the criminal records of the victims and this theory was not supported. The military judge denied the motion.

The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings that cast substantial doubt upon the fairness of the proceedings. R.C.M. 915 (a). A mistrial is a drastic remedy, which should only be granted in extraordinary cases. *United States v. Barron*, 52 M.J. 1, 4 (C.A.A.F. 1999). We review a military judge's ruling on the decision whether to grant a mistrial for an abuse of discretion. *See United States v. Lavender*, 46 M.J. 485, 489 (C.A.A.F. 1997). "As a matter of military law, the decision to declare a mistrial is within the sound discretion of the military judge." *United States v. Rosser*, 6 M.J. 267, 270 (C.M.A. 1979). In *United States v. Diaz,* 59 M.J. 79, 90 (C.A.A.F. 2003), our superior court held the military judge

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[8] Prior to court, some medical records pertaining to the victims were released.

has "considerable latitude in determining when to grant a mistrial". (Citing *United States v. Seward*, 49 M.J. 396, 371 (C.A.A.F. 1998)). The challenge for both the trial judge and the appellate court is to determine the prejudicial impact of an error. *Diaz,* 59 M.J. at 91. Further, the Court will not reverse the military judge's decision absent clear evidence of abuse of discretion. *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993).

Mil. R. Evid. 412 (b) (1) (C) states evidence is admissible when "the exclusion of [such evidence] would violate the constitutional rights of the accused." Evidence is constitutionally required to be admitted when the evidence is "so particularly unusual and distinctive as to verify the defendant's version." *United States v. Pagel*, 45 M.J. 64, 70 (C.A.A.F. 1996) (citing *United States v. Sanchez*, 44 M.J. 174, 179-80 (C.A.A.F. 1996). A defense theory that is too speculative, and too insubstantial, does not meet the threshold of relevance and necessity for the admission of evidence. *United States v. Briggs*, 46 M.J. 699, 702 (A.F. Ct. Crim. App. 1996). A conclusory argument as to the materiality is insufficient. *Id. (*citing *United States v. Branoff*, 34 M.J. 612, 620 (A.F.C.M.R. 1992); *rev'd on other grounds*, 38 M.J. 98 (C.M.A. 1993).

The evidence that was released to the defense team at the time of sentencing was determined by the military judge to be relevant only at sentencing. She did not abuse her discretion when she did not release the evidence prior to findings. However, assuming argunedo she did, the question before this Court is the prejudicial impact of an error and whether she abused her discretion when she denied the motion for a mistrial.

The defense thoroughly explored, throughout the trial, the fact that the victims were prostitutes, heavy drug users and worked in the same area. The inconsistencies in their testimony were revealed through the thorough cross-examination. The fact that JR claimed she had been raped previously, without more, would not have significantly assisted the defense. A mistrial is a drastic measure remedy to be used by the military judge "when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." R.C.M. 915 (a). The military judge did not abuse her discretion when she denied the motion for a mistrial.

*Admissibility of Evidence (Issue III)*

Over defense objection, the military judge admitted a document addressed to the appellant's wife entitled *Last Will and Testament.* The appellant argues the evidence was inadmissible based upon relevance under R.C.M. 1001, and that the prejudicial value far outweighed the probative value under Mil. R. Evid. 403.

We review a military judge's decision to admit or exclude evidence under an abuse of discretion standard. *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006) (citing *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)). "[A] military

judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *Barnett*, 63 M.J. at 394 (quoting *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)).

The evidence contained in the *Last Will and Testament* was clearly aggravation evidence and therefore admissible. The military judge stated she was admitting it for rehabilitation potential and that she would not consider the derogatory comments that were contained in the document and directed at her, for any purpose. We need not address whether the evidence was admissible as evidence of rehabilitative potential because the "fact that evidence may be inadmissible under one rule does not preclude its admissibility under a different rule". *United States v. Gogas*, 58 M.J. 96, 98 (C.A.A.F. 2003). *See also United States v. Edwards*, 35 M.J. 351, 354-356 (C.M.A. 1992). Further, the evidence in question would have been admissible in rebuttal to the appellant's unsworn statement. The military judge did not abuse her discretion.

*Inappropriately Severe Sentence (Issue IV)*

We "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ. We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982).

After a careful review of the record of trial, to include the appellant's post-trial submissions, we conclude the appellant's sentence to a dishonorable discharge and 14 years confinement is not inappropriately severe.

We have considered the additional assignments of error, and have found them to be without merit. *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987). However, we order the promulgation of a corrected Court-Martial Order indicating the correct forum, and a corrected action indicating credit for 143 days of illegal pretrial confinement.

*Conclusion*

The findings and the 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 findings, and sentence, are

AFFIRMED.

OFFICIAL

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