UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MICHAEL S. STEINKAMP, JR.
United States Air Force

ACM S32078

31 October 2013

Sentence adjudged 1 June 2012 by SPCM convened at Travis Air Force Base, California. Military Judge: W. Shane Cohen.

Approved Sentence: Bad-conduct discharge, confinement for 60 days, forfeiture of $994.00 pay per month for 2 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

ORR, HARNEY, and MITCHELL
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MITCHELL, Judge:

Contrary to his pleas, the appellant was convicted of two specifications of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928. A special court-martial comprised of officer and enlisted members sentenced him to a bad-conduct discharge, 60 days confinement, forfeiture of $994 pay per month for 2 months, and reduction to E-1. After deferring the reduction in grade, adjudged forfeitures, and mandatory forfeitures until action, the convening authority approved the adjudged sentence.

On appeal the appellant avers that the military judge abused his discretion when he denied a motion for a mistrial. We disagree and affirm the findings and sentence.

Background

The appellant entered the Air Force in April 2009. While on leave to his home state Pennsylvania in December 2009, the appellant began to date MS, who was planning to enlist in the Air Force. He next saw MS when she graduated from basic training in March 2010. During this time, they continued to talk, but their relationship was on and off. MS was discharged from the Air Force during technical school and moved to join the appellant. As the appellant was driving her from the airport to base, he informed her they were travelling to Reno, Nevada to get married the next day. They were married in August 2010. MS was 18 years old at the time and the appellant was 23 years old.

A month after they were married, the appellant began to assault MS. He struck and shoved her on more than one occasion and left bruises, which she photographed. On 15 January 2011, the appellant hit her in the face with his fist resulting in a bloody nose and a black eye. MS left her husband in August 2011, moved back to Pennsylvania, and divorced him.

Mistrial

Trial defense counsel filed a motion in limine regarding testimony that the appellant knew MS was pregnant during some of the assaults. The military judge granted the motion in part and denied it in part. The military judge conducted a balancing test pursuant to Mil. R. Evid. 403 and concluded the evidence of her pregnancy was unduly prejudicial during findings, but the evidence would be admissible at sentencing.

While testifying on direct examination, MS described an incident that began when she and the appellant went to a party off base. She decided to leave the party shortly after they arrived, while he remained there. She returned later to drive him home after he called her to say he was ready to depart. During the car ride the appellant and MS argued, which ended with him punching her twice in the face, resulting in a bloody nose and a blackened eye. She described that when they first arrived at the party:

> Well, we went to where the party area was and there was just a big cloud of smoke. Everyone was smoking cigarettes, you know, because they were all drinking. The smell made me really nauseous. It made me sick and as soon as we opened up the door to go in, I was, like, I can't be in here. This is making me sick like, I don't want to be here. I am just going to go home. And he was like, "You're being overdramatic[,]" and he was like, "You used to smoke cigarettes all the time. You can't even say this." And I said, "Yes, but I quit." Because I had gotten pregnant, I quit smoking. And I

> said that the smell now makes me sick because I had quit. And he was like, "Just stay here with me. I want you here." And I was like, "I can't be here. I can't." He said, "It's not a big deal." I said, "I just want to go home," you know, "I understand that you want [to] have a good time and drink." I said, "I will be at home. I will have my phone on ring and I would just come pick you up whenever. I am not going to go to sleep."

After MS testified on direct, trial defense counsel made a motion for a mistrial, which trial counsel opposed. The military judge denied the motion and instead, instructed the members that why MS stopped smoking and any reference to a pregnancy was irrelevant and must be disregarded. All of the members indicated they could follow the instruction.

The appellant later testified and admitted to hitting his wife the night of the party, but claimed it was self-defense. He asserted that he only hit her because she was yelling at him and hitting him while he was driving. The appellant also admitted that on another occasion he pushed her against her throat with his hand but said he never squeezed.

"[A] mistrial is a drastic remedy [that] is reserved for only those situations where the military judge must intervene to prevent a miscarriage of justice." *United States v. Garces*, 32 M.J. 345, 349 (C.M.A. 1991). The declaration of a mistrial is a drastic resolution and military judges are encouraged to take other remedial actions to correct an error. *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009). A military judge has discretion to "declare a mistrial 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." Rule for Courts-Martial 915(a). "'We will not reverse a military judge's determination on a mistrial absent clear evidence of an abuse of discretion.'" *United States v. Coleman*, 72 M.J. 184, 186 (C.A.A.F. 2013) (quoting *Ashby*, 68 M.J. at 122).

Here, the military judge did not abuse his discretion in denying the motion for a mistrial. The reference to an earlier pregnancy was a miniscule part of a long answer to a short question. The trial counsel's open-ended question on direct was not aimed at eliciting the suppressed evidence of the pregnancy. The military judge gave an appropriate limiting instruction and all of the members agreed that they could follow the instruction. A curative instruction can often be used to render an error harmless. *United States v. Armstrong*, 53 M.J. 76, 82 (C.A.A.F. 2000). Furthermore, the members acquitted the appellant of two specifications of assault, to include a specification that two weeks before he and his wife attended the party, that he unlawfully struck her in the stomach with his fist. Therefore, MS's brief reference to a pregnancy, when combined with the military judge's appropriate limiting instruction, resulted in a situation that did not cast substantial doubt upon the fairness of the proceeding.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred.[1] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[1] The appellant notes some typographical errors in the court-martial order (CMO) but does not seek relief as they are not prejudicial. The errors on the court-martial order are: Specification 2 of the Charge does not include the word "strike" and Specifications 1 and 3 of the Charge contain the word "hands" vice "hand." While we have considered these clerical errors and agree that they are not prejudicial, we order a corrected CMO. Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 10.10 (6 June 2013).