UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain ANTHONY M. ALVARADO
United States Air Force

ACM 38694

24 March 2016

Sentence adjudged 22 July 2014 by GCM convened at Schriever Air Force Base, Colorado. Military Judge: Wendy L. Sherman.

Approved Sentence: Dismissal and confinement for 6 months.

Appellate Counsel for Appellant: Major Thomas A. Smith.

Appellate Counsel for the United States: Major Jeremy D. Gehman and Gerald R. Bruce, Esquire.

Before

MITCHELL, DUBRISKE, and BROWN
Appellate Military Judges

OPINION OF THE COURT

BROWN, Judge:

At a general court-martial composed of officer members, Appellant was convicted, contrary to his pleas, of six specifications of assault consummated by a battery and one specification of communicating a threat, in violation of Articles 128 and 134, UCMJ, 10 U.S.C. §§ 928, 934.[1] The members sentenced Appellant to a dismissal and six months of confinement. The convening authority approved the sentence as adjudged.

[1] Appellant was found not guilty of three specifications of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928. Appellant was also found not guilty of a specification of child endangerment, in violation of Article 134, UCMJ, 10 U.S.C. § 934.

On appeal, Appellant alleges that the military judge abused her discretion by refusing to grant a defense-requested mistrial. We disagree and affirm the findings and sentence.

Background

Appellant and his girlfriend, Ms. MA, had a tumultuous and violent relationship. Although Appellant claimed at trial that he, rather than she, was the victim of domestic abuse, the members convicted Appellant of repeatedly beating and choking Ms. MA between February and October of 2012.

The incident at issue in this appeal arose during the testimony of a police officer about his response to the shared residence of Appellant and Ms. MA in October 2012. The responding officer testified that, upon arriving on scene, he talked to both Appellant and Ms. MA, and saw that Appellant was bleeding from his right eye and had a contusion on the back of his head. He did not notice any injuries to Ms. MA. Based on his assessment of the situation, the officer testified that he determined Ms. MA was the aggressor, and he arrested her.

Nevertheless, based upon Ms. MA's allegations that Appellant abused her, the officer took her to the hospital for further evaluation. During this evaluation, a forensic nurse examiner identified four bruises and six abrasions on her body. After the evaluation, the officer then took her to jail. Five months later, the local prosecutor dismissed the charges against Ms. MA.

Refusal to Declare Mistrial

The Defense's request for a mistrial stemmed from trial counsel's "did-you-know" questions to the police officer about the disposition of Ms. MA's case.

During the Government's cross examination of the arresting officer, the officer testified that he was not aware that the local prosecutor later dropped the charges against Ms. MA. The Defense then asked the officer if he was aware that charges were dropped because Appellant "declined to participate." The officer further clarified that he was not aware of the outcome in Ms. MA's case at all. This back and forth continued during the Government recross examination of the officer:

> [Trial Counsel]: Sir, you were asked about . . . the charges being dropped and were asked about the charges, as far as Captain Alvarado not participating. Are you aware that that's not, in fact, true? That the reason why it was dropped is because they had determined that the wounds were defensive in nature? Were you aware of that?

Appellant objected based upon the officer's previously asserted lack of knowledge about the outcome of Ms. MA's case. The military judge sustained the objection and instructed the members to disregard the question.

The members then submitted several questions for the witness. One of the member's questions was, "Is it possible Capt[ain] Alvarado's wounds were defensive?"[2] Although Appellant did not object to the question, trial counsel objected based on their belief that the witness did not have sufficient knowledge to answer the question. As a result, the military judge first asked the officer whether he had any training to differentiate between offensive and defensive wounds. When the officer testified he had no such training, the military judge did not ask the member's question.

Outside the presence of the members, the Defense then requested a mistrial. The defense argued that a mistrial was necessary for two reasons. First, the Defense claimed that the prosecution committed a discovery violation by not providing the Defense with adequate information about the resolution of Ms. MA's case prior to trial. Second, the Defense claimed that the member's question demonstrated a refusal to follow the military judge's earlier instruction to disregard trial counsel's question about why the charges may have been dropped against Ms. MA.

As to the mistrial request based on the purported discovery violation, the military judge made the following findings of fact and conclusions of law:

> The defense first requests a mistrial on the basis that there was a discovery violation. Defense counsel specifically requested that information about the outcome of [Ms. MA's] arrest be provided to the defense. Trial counsel responded that there was no such information available. During the course of the trial, it became clear through trial counsel questions that trial counsel had some knowledge of the outcome of [Ms. MA's] arrest. Specifically, trial counsel asked whether the witness was aware that the charges against [Ms. MA] were dropped because it was determined she had defensive injuries.
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> During argument on the motion, trial counsel asserted that this information was provided to them verbally and was relayed by the military liaison to the local prosecutor's office. It is clear that this information was not passed on to the

[2] This question, as phrased by the member, was ambiguous as to what the member meant by "defensive" wounds. Presumably, the question was intended to either ask whether Appellant's injuries could have been inflicted as he tried to defend himself from Ms. MA, or whether they were inflicted as Ms. MA attempted to defend herself from him. Regardless, this distinction is not critical to this court's resolution of this issue.

> defense. Notwithstanding this discovery violation, I do not find it be so severe as to warrant a mistrial.
>
> A failure to disclose this information does not cast substantial doubt upon the fairness of the proceedings. Trial is still continuing today and we are still within the defense case-in-chief. I will give the defense ample time to decide what, if anything they wish to do with the information and order the production of either any witnesses or documentation relating to this information in order to assist the defense.

At the Defense's request, the military judge later granted a continuance for the Government to obtain additional clarification from the local prosecutor regarding why Ms. MA's case was dismissed and to provide this information to the Defense. Although this did not result in any additional information from the local prosecutor, the Government did provide the court and the Defense with an online docket that stated the case was dismissed because of a pre-plea investigation report favorable to Ms. MA. Although the Government previously provided the pre-plea investigation report to the Defense, it appears they did not previously provide the docketing information that specifically linked that report to the decision to dismiss the charges.

As to the mistrial based upon the member's question, the military judge concluded that a mistrial was not manifestly necessary in the interest of justice and denied the request. In doing so, she reasoned that the member's question did not reflect an unwillingness or inability to follow her instructions. She told the members to disregard the prosecutor's question about the outcome of Ms. MA's case. She did not, however, instruct the members that they could not ask the responding police officer about his own conclusions about defensive injuries. To ensure the members understood this distinction, the military judge provided the members with this additional curative instruction:

> I want to advise you that the questions of counsel are not evidence. There is no evidence currently before you about the outcome of [Ms. MA's] October 2012 arrest. Unless evidence is subsequently introduced on this matter, you are not to speculate about whether the case was dismissed against [Ms. MA], or why. The only evidence before you at this point is that [Ms. MA] was arrested, and I believe [the officer] testified that was for harassment and assault in October of 2012.

A 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 which cast substantial doubt upon the fairness of the proceedings." Rule for Courts-Martial (R.C.M.) 915(a). "[A] mistrial is an unusual and disfavored remedy. It

should be applied only as a last resort to protect the guarantee for a fair trial." *United States v. McFadden*, 74 M.J. 87, 89 (C.A.A.F. 2015) (quoting *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003)) (alteration in original). "It is reserved for only those situations where the military judge must intervene to prevent a miscarriage of justice." *Id*. (quoting *United States v. Vazquez*, 72 M.J. 13, 19 n.5 (C.A.A.F. 2013)) (internal quotation marks omitted).

"Because of the extraordinary nature of a mistrial, military judges should explore the option of taking other remedial action, such as giving curative instructions." *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009). A curative instruction is preferred to granting a mistrial, which should only be granted "when 'inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members.'" *Diaz*, 59 M.J. at 92 (quoting R.C.M. 915(a), Discussion); *see also United States v. Heimer*, 34 M.J. 541, 546 (A.F.C.M.R. 1991) ("Mistrial is appropriate when curative instructions are inadequate to remove the prejudicial effect of evidence erroneously placed before the members . . . ."). "We will not reverse a military judge's determination on a mistrial absent clear evidence of an abuse of discretion." *Ashby*, 68 M.J. at 122. "In determining whether the military judge abused [her] discretion by not granting a mistrial, we look to the actual grounds litigated at trial." *McFadden*, 74 M.J. at 90.

On appeal, Appellant asserts that the military judge abused her discretion in denying the mistrial in three ways: (1) the military judge failed to appreciate how the purported discovery violation negatively impacted the Defense's strategy; (2) the military judge did not consider the potential impact on the members from trial counsel inferring that the Defense provided untruthful information with their previous "did you know" question; and (3) the military judge failed to realize that a question from a member about defensive wounds demonstrated the member's unwillingness to comply with the military judge's instructions. We conclude that the military judge correctly applied the law and did not abuse her discretion in denying Appellant's request for a mistrial.

A. Impact of Discovery Violation

Appellant first asserts on appeal that, had the Government not committed a discovery violation, the Defense would not have pursued a strategy to question their witness about the reason local prosecutors dropped the charges against Ms. MA. Even if true, the issue is not whether the conflict could have been avoided, but the military judge's determination of a proper remedy for the Government's failure to disclose.

Although a mistrial is a potential remedy for this error, it is also a rare and extreme remedy that should only be utilized where failure to grant relief will result in a substantial doubt upon the fairness of the proceedings. In this case, the military judge determined that providing a curative instruction, granting a defense delay request, and requiring the Government to provide additional discovery prior to Appellant's decision on whether to

testify were appropriate remedies to redress the wrong. As to these remedies, the military judge did not abuse her discretion.

Here, the military judge not only instructed the members to disregard the initial question by the trial counsel, but also provided a later, more detailed curative instruction to the members. The curative instruction was appropriate and sufficient to remove any prejudicial effect. The military judge instructed the members that there was no evidence yet before them regarding the outcome of Ms. MA's case and they must not speculate as to whether it was dismissed or why.

Additionally, the military judge granted a defense-requested continuance to insure the Defense had all available information prior to Appellant testifying in findings. After receiving all available information, Appellant ultimately testified that he did not participate in the prosecution of Ms. MA and that he requested the case against Ms. MA not go forward. Appellant's testimony constituted the only evidence provided to the members regarding the resolution of Ms. MA's charges. In other words, the Defense was able to provide to the members additional testimony, unrebutted by the prosecution, supporting their good faith basis for their earlier question.

B. Impact of Untruthful Information

Appellant next argues the military judge failed to consider or remedy the potential impact of trial counsel alleging, through a "did you know" question, that the Defense was positing untruthful information to the members as to why the charges were dismissed.

As an initial matter, the Defense did not raise this specific issue at the trial level. This omission is significant as we look to the grounds for mistrial as articulated at trial. *See McFadden*, 74 M.J. at 90. Regardless, the military judge's curative instruction directed the members to disregard the trial counsel's question and specifically advised the members that there was no evidence before them regarding whether the charges had been dismissed, or the basis for any such dismissal if it had occurred. We find that the curative instruction was a sufficient remedy such that there was not a substantial doubt about the fairness of the proceedings.

C. Whether the Member's Question Demonstrated an Inability to Follow the Military Judge's Instruction to Disregard Trial Counsel's Question

Finally, Appellant argues the military judge erred in concluding that the member's question did not demonstrate an unwillingness to comply with the judge's curative instructions. In support of this argument, Appellant cites the military judge's acknowledgment that it was "clear that this exchange probably put the thought of defensive injuries in the member's head."

Absent evidence to the contrary, members are presumed to have complied with the judge's instructions. *See Lakeside v. Oregon*, 435 U.S. 333, 340 (1978); *United States v. Ricketts*, 1 M.J. 78, 82 (C.M.A. 1975); *Donaldson v. United States*, 248 F.2d 364, 367 (9th Cir. 1957), *cert. denied*, 356 U.S. 922 (1958). In this case, there was insufficient evidence to overcome this presumption.

As the military judge concluded, the trial counsel's question—that the military judge instructed the members to disregard—was whether *the civilian prosecutor* dismissed those charges based upon *the civilian prosecutor's* determination that the wounds were defensive in nature. The member's question, however, was whether *the responding officer* was able to personally differentiate defensive wounds from other injuries when he responded to the scene. Regardless of whether the trial counsel's question may have put the phrase "defensive injuries" in the member's mind, the concept of "defensive injuries" was directly related to the defense-raised assertion that Ms. MA was the aggressor. Considering that the member's question was merely an attempt to flesh out the Defense's own theory with the Defense's own witness, it is of no surprise that the Defense did not object to the member's question about "defensive" injuries. Furthermore, the curative instruction clarified for the members that neither the disposition of Ms. MA's charges nor a local prosecutor's rationale for that disposition were relevant in Appellant's case.

For the aforementioned reasons, the military judge did not abuse her discretion when denying the Defense's request for a mistrial. The military judge took appropriate remedial actions regarding the discovery violation and provided a sufficient curative instruction that further clarified her earlier ruling for the members. Under the facts of this case, a mistrial was not manifestly necessary in the interest of justice. The failure to grant the request for a mistrial did not cast a substantial doubt upon the fairness of the proceedings.

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. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are **AFFIRMED**.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist