UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class BRANDON D. BERRY
United States Air Force

ACM 37310

07 May 2010

Sentence adjudged 08 May 2008 by GCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Bryan D. Watson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 18 years, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, Major Marla J. Gillman, Major Lance J. Wood, and Major David P. Bennett.

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

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, a military judge sitting as a general court-martial found the appellant guilty of two specifications of indecent acts, in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] Contrary to his pleas, the appellant was found guilty of

[1] Regarding Specification 2 of Charge II, the military judge found the appellant guilty except the words "with intent to commit rape, commit an assault upon," substituting therefore the words "commit an indecent act upon the body of." The exceptions and substitutions changed this specification from an assault with intent to commit rape to an indecent act. This Court notes that under Rule for Courts-Martial 307(c), Specification 2 of Charge II was potentially duplicitous as originally charged because it seems to combine elements of an assault with intent to

one specification of attempted rape and one specification of indecent acts, in violation of Articles 80 and 134, UCMJ, 10 U.S.C. §§ 880, 934.[2] The approved sentence consists of a dishonorable discharge, 18 years of confinement, and reduction to the grade of E-1. The convening authority deferred and waived the mandatory forfeitures for the benefit of the appellant's dependent daughter.

On appeal, the appellant asks this Court to grant a new trial, to set aside the findings of guilty to the Specification of Charge I and Specification 3 of Charge II, to reassess the sentence or set aside the sentence, and to approve some lesser amount of confinement or provide other meaningful relief. As the basis for his appeal, the appellant avers that: (1) the military judge permitted the trial counsel to refresh a witness's memory in an improper manner; (2) the sexual assault nurse examiner improperly provided expert testimony; (3) the portion of his sentence that includes 18 years of confinement is inappropriately severe; and (4) he is entitled to a new trial in light of newly discovered evidence.[3]

Background

At the time of trial, the appellant was a 27-year-old airman assigned to the 2d Maintenance Squadron at Barksdale Air Force Base (AFB), Louisiana. The appellant's victim (HH), his former stepdaughter, was approximately 14 years old when the first charged criminal offense was committed and 16 years old when she testified against the appellant at his court-martial.

The appellant first met HH when he began dating her mother, TH. After dating for over three years, the appellant and TH married in 2004 and HH became his stepdaughter. At the time, HH was 12 years old. HH called the appellant "dad" and thought of him as her father.

The appellant enlisted in the Air Force in November 2006, and took leave to visit his family during the "Christmas Exodus" from technical school in December 2006. During this visit, the appellant climbed into bed with HH while she slept. He rubbed her stomach and vaginal area with his hand and then proceeded to digitally penetrate her vagina. Although HH woke up while the appellant was touching her, she pretended to sleep. The appellant began to pull down the pants of his PT uniform, but he stopped when HH's mother walked upstairs.

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commit rape and an indecent assault, in violation of Article 134, UCMJ, 10 U.S.C. § 934. However, as the appellant pled guilty to and was convicted of an indecent act by exceptions and substitutions, we find that he had sufficient notice of the alleged misconduct.

[2] Regarding the Specification of Charge I, the military judge found the appellant not guilty of rape but guilty of attempted rape, in violation of Article 80, UCMJ, 10 U.S.C. § 880. With respect to Specification 3 of Charge II, the military judge found the appellant guilty except the words "hands upon her legs and vagina, and by inserting his finger into her vagina," substituting therefore the words "hand under her panties and rubbing her vaginal area."

[3] Issues 3 and 4 are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

After completing technical school, the appellant moved his family to Barksdale AFB in May 2007. Shortly after their move, they traveled to Texas to retrieve their household items from storage. One morning while in Texas, the appellant rubbed HH's vaginal area with his hand. The appellant stopped when HH's mother called for him.

During the early morning hours of 9 June 2007, the appellant entered HH's bedroom in their home on Barksdale AFB. He climbed into HH's bed as she slept, rubbed her stomach, one of her breasts, and vaginal area with his hand, and digitally penetrated her vagina. He then took off HH's panties and pulled down his pants and underwear. HH awoke while he was touching her, but she again pretended to sleep. As the appellant held her down, he attempted to insert his penis into her vagina. HH was frightened and called out to her mother, who then called 911.

Discussion

Method of Refreshing Recollection

The appellant asserts that the trial counsel improperly refreshed HH's recollection on redirect examination during the findings phase of his court-martial. The appellant specifically faults one exchange:

> Q: And, at any time, did he get under the covers?
>
> A: I don't remember.
>
> Q: Is there anything that I could show you that would refresh your memory?
>
> A: I don't know.
>
> Q: If I showed you your statement, would that refresh your memory?
>
> A: I don't know.
>
> . . . .
>
> TC: I am handing the witness what was previously marked as Appellate Exhibit XXXIX. [HH], would you please read on page 5 of 8 starting about half way down?

At that point, the trial defense counsel objected to the manner in which the trial counsel was trying to refresh HH's recollection. Although the military judge overruled the objection, he instructed the trial counsel to retrieve the document from HH before she

began testifying again. After retrieving the document, the trial counsel again asked the question that HH had been unable to answer. HH's response was the same as her prior testimony on cross-examination but different from the pretrial statement used to refresh her recollection. The appellant now claims that this exchange between the trial counsel and HH undermined the defense trial strategy of attacking HH's ability to recall details.

We review rulings on the admissibility of evidence for abuse of discretion. *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005) (quoting *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997)). "A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the [appellant]." Article 59(a), UCMJ, 10 U.S.C. § 859(a). In testing for harmless error under Article 59, UCMJ, we evaluate and weigh: "(1) the strength of the [g]overnment's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999).

Mil. R. Evid. 612 provides that a writing may be used to refresh a witness's memory either while the witness is on the stand or before she testifies. There is an accepted manner by which counsel may refresh a witness's recollection: (1) counsel must establish that the witness has difficulty in recalling the incident to which she is testifying; (2) counsel should ask whether there is anything that would assist her in testifying; (3) counsel should mark the document as an exhibit and provide it to the witness for review; and (4) counsel should retrieve the document and allow the witness to continue her testimony without direct reference to the reviewed material. *United States v. Haston*, 24 M.J. 313, 314 (C.M.A. 1987). Further, in the discretion of the military judge, the opposing party is entitled to inspect the document, cross-examine the witness using the document, and introduce into evidence the portion of the document that relates to the witness's testimony. Mil. R. Evid. 612. Thus, this "rule is designed to regulate discovery of documents." *Haston*, 24 M.J. at 315.

In this case, the trial counsel attempted to refresh HH's memory of the incident that occurred in December 2006. The trial counsel clearly established that HH could not recall whether the appellant went under the covers, she asked HH whether her pretrial statement would help her remember that detail, the trial counsel then marked the statement and gave it to HH, and she retrieved the document from HH before again asking the question. Although HH responded that she was not sure whether the statement would refresh her memory, HH did not say it would not help her as she testified and the trial counsel had a good faith basis for believing that the pretrial statement would help. Similar to a military judge's exercise of discretion to allow leading questions, it was within the military judge's discretion to briefly give this young, emotional witness the opportunity to review her pretrial statement so she could determine whether it would assist her testimony. *See, e.g.*, *United States v. Crocker*, 35 C.M.R. 725, 736 (C.M.A. 1964) (finding that when "a witness is fearful, embarrassed or reluctant, or where there

are language difficulties, leading questions may be asked to the extent necessary under the circumstances"). Therefore, under the circumstances, we find that the military judge did not abuse his discretion when he allowed the trial counsel to provide HH with her pretrial statement for review at trial.

Assuming, arguendo, that there was error, the error was harmless. In considering the harmless error test set forth in *Kerr*, all four criteria weigh in favor of the government in this case. *See Kerr*, 51 M.J. at 405. Based on his statements to law enforcement and his admissions during the plea inquiry, the appellant was found guilty of indecent acts in December 2006 as well as indecent acts and attempted rape on 9 June 2007. Further, the defense had an opportunity to fully cross-examine HH on any inconsistencies, to include her pretrial statement and in-court testimony regarding the incident which occurred in December 2006. Additionally, in keeping with the defense strategy of attacking HH's credibility, the defense counsel commented on HH's inconsistent statements in his findings argument. Moreover, both the materiality and quality of the evidence elicited from the refreshed memory was negligible because HH's testimony merely corroborated the appellant's pretrial and trial admissions and her answer was not unfavorable to the defense. Thus, any error was harmless as we find that the appellant was not materially prejudiced.

Admission of Expert Witness Testimony

The appellant contends that PW, a sexual assault nurse examiner, improperly provided expert testimony at his court-martial because the government did not formally move to recognize PW as an expert witness. During the findings portion of trial, the government called PW to testify about HH's sexual assault examination. Without an objection from the defense, PW's curriculum vitae, which detailed her training, education and background, was admitted. PW then testified without defense objection as follows:

> Q: Did you during your examination, did you find any evidence that [HH] had been sexually abused?
>
> A: No. Because I did not find any tears or anything like that, any redness, or anything like that. There are, you can't tell a lot of times.
>
> Q: What do you mean by that, "You can't tell?"
>
> A: Just because you don't find evidence, doesn't mean nothing happened. The absence of evidence means nothing.
>
> Q: So, from your examination you could not determine if something did or did not happen to [HH]?

A: Right.

In accordance with the Military Rules of Evidence, expert testimony is admissible if it is reliable, relevant, and its probative value outweighs any prejudice. *United States v. Huberty*, 53 M.J. 369, 372 (C.A.A.F. 2000) (citing *United States v. St. Jean*, 45 M.J. 435, 444 (C.A.A.F. 1996)). "The military judge has broad discretion as the 'gatekeeper' to determine whether the party offering expert testimony has established an adequate foundation with respect to reliability and relevance." *United States v. Green*, 55 M.J. 76, 80 (C.A.A.F. 2001).

When trial defense counsel fails to object to the admissibility of expert testimony, we examine the issue for plain error. *United States v. Raya*, 45 M.J. 251, 253 (C.A.A.F. 1996). "The plain error standard is met when '(1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights.'" *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008) (quoting *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007)). The appellant bears the burden of establishing plain error, and when plain error is alleged in a military judge alone trial, "an appellant faces a particularly high hurdle." *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000). "A military judge is presumed to know the law and apply it correctly, is presumed capable of filtering out inadmissible evidence, and is presumed not to have relied on such evidence . . . ." *Id*. Thus, a finding of "plain error before a military judge sitting alone is rare indeed." *Raya*, 45 M.J. at 253.

The appellant has failed to establish that the military judge erred by allowing PW's testimony. First of all, this testimony was elicited from PW, a fact witness with expertise in the area of sexual assault injuries, to clarify her answer to the trial counsel's question of whether she had found evidence that HH had been sexually abused. The defense counsel also brought out this same information from PW on cross-examination, asking, "Based on just your own observations, is it fair to say that you just can't tell what happened that previous night?"

Even supposing that the comments veered into the realm of expert testimony, the trial counsel first questioned PW about her experience and qualifications and PW's curriculum vitae was admitted without defense objection. It was only then that PW testified that the lack of physical evidence found during the sexual assault examination neither confirmed nor disproved whether an attempted rape and indecent acts occurred on 9 June 2007. This testimony was relevant, reliable, and its probative value was not outweighed by undue prejudice. Furthermore, there is no evidence to suggest that the defense was not provided with notice of this witness under Mil. R. Evid. 701. Thus, it was within the military judge's discretion to allow PW's testimony. Moreover, assuming, arguendo, that it was error for the military judge to allow PW's testimony, such an error was not plain or obvious and PW's testimony did not cross the line into

expert testimony to the prejudice of the appellant's substantial rights. Therefore, we hold there was no plain error.

Sentence Appropriateness

The appellant avers that his sentence, which includes 18 years of confinement, is inappropriately severe. We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). 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, 10 U.S.C. § 866(c). 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. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). This Court has a great deal of discretion in determining whether a particular sentence is appropriate but we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *Healy*, 26 M.J. at 395-96.

The appellant committed multiple indecent acts against his young stepdaughter while he believed she was sleeping. His egregious conduct culminated in the attempted rape of HH in their on-base home while her mother and younger sister slept in the next room. The appellant's actions are a clear departure from the norms of society and expected standards of conduct in the military. After carefully considering the submissions of counsel, the appellant's military record, and the facts and circumstances surrounding the offenses of which he was found guilty, we hold that the appellant's sentence—one which includes 18 years of confinement—is appropriate.

Newly Discovered Evidence

While the appellant was attending basic training and technical school between November 2006 and February 2007, he received cards and letters from HH and TH. During the trial, in accordance with Mil. R. Evid. 414, HH testified that the appellant had been inappropriately touching her since she was 10 years old. At some unspecified point after trial, the appellant's parents found the notes and drawings from HH and TH in the appellant's personal possessions.

An appellant may petition for a new trial within two years after the convening authority's approval of his sentence based on newly discovered evidence or fraud on the court. Article 73, UCMJ, 10 U.S.C. § 873; *see also* Rule for Courts-Martial (R.C.M.) 1210(a). We review the question of whether a petition meets this Article 73, UCMJ, criteria de novo. *United States v. Denier*, 43 M.J. 693, 699 (A.F. Ct. Crim. App. 1995), *aff'd*, 47 M.J. 253 (C.A.A.F. 1997).

R.C.M. 1210 provides further guidance:

> (2) *Newly discovered evidence*. A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that:
>
> (A) The evidence was discovered after the trial;
>
> (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
>
> (C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

R.C.M. 1210(f)(2).

"A petition for [a] new trial is not favored and, absent a manifest injustice, will not be granted." *United States v. Niles*, 45 M.J. 455, 456 (C.A.A.F. 1996) (citing *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993)). The petitioner bears the burden of demonstrating that a new trial is the proper remedy in his case. *Id.* (citing *United States v. Giambra*, 38 M.J. 240 (C.M.A. 1993)).

Here, the appellant has failed to meet the three requirements for a new trial under R.C.M. 1210(f)(2). First of all, the evidence was not "newly discovered." Rather, the cards and letters were sent to and received by the appellant while he attended training. Second, the appellant has failed to demonstrate how this evidence, which his parents found in his personal possessions, was unavailable at the time of trial through the exercise of due diligence. Finally, we are not convinced that this evidence, if considered by the military judge "in the light of all other pertinent evidence" including the appellant's own admissions, would likely have resulted in "a substantially more favorable result for the accused." *United States v. Brooks*, 49 M.J. 64, 69 (C.A.A.F. 1998) (quoting R.C.M. 1210(f)(2)(C)). The appellant's petition for a new trial is therefore denied.

Post-trial Delay

Although not raised by the appellant, we note that this case has been with this Court in excess of 540 days.[4] Thus, the overall delay between the trial and completion of review by this Court is facially unreasonable. 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

[4] This case was joined on 16 February 2010, and day 540 was on 23 March 2010. We note that the appellate defense counsel, with the consent of the appellant, moved for 11 enlargements of time to file the appellant's assignment of errors and brief with this Court, and ultimately filed their submission on 14 December 2009.

right to timely review and appeal; and (4) prejudice." *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances, the lack of any objection by defense, and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and that 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