

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CHRISTOPHER J. CURRAN
United States Air Force

ACM 37185

22 January 2009

Sentence adjudged 09 January 2008 by GCM convened at Wright-Patterson Air Force Base, Ohio. Military Judge: Beth A. Townsend.

Approved sentence: Bad-conduct discharge, confinement for 4 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Lance J. Wood, and Captain Timothy M. Cox.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Major Steven R. Kaufman.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

THOMPSON, Judge:

Consistent with the appellant's pleas, a military judge convicted him of one charge and three specifications of dereliction of duty and failure to obey a lawful general regulation and one charge and one specification of adultery, in violation of Articles 92 and 134 UCMJ, 10 U.S.C. §§ 892, 934. A panel of officers sentenced him to a bad-conduct discharge, confinement for four months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged. The appellant asserts the military judge erred when she allowed, as evidence in aggravation at sentencing, testimony from the investigating officer regarding unit impact during the

commander-directed investigation into the appellant's criminal conduct. Finding no error, we affirm.

Background

The appellant was a recruiter assigned to a recruiting office in Michigan. Beginning in December 2006 and continuing until June 2007, the appellant behaved inappropriately with several young women he met while performing his recruiting duties. He made sexual comments about the body of one recruit and asked her to have sex with him on the night before she traveled to Lackland Air Force Base, Texas for the basic military training course. He engaged in inappropriate sexual advances and accepted sexual favors from another recruit on more than one occasion. At his recruiting office, he kissed a recruit and made sexually explicit remarks to the recruit and her friend. Finally, the appellant, while in uniform and driving a government-owned vehicle, traveled to the home of a female friend of a recruit and engaged in sexual intercourse with the young woman. The appellant was married at the time of his offenses.

Unit Impact Sentencing Evidence

During sentencing, the trial counsel called Senior Master Sergeant (SMSgt) F to testify about her duties as the operations flight chief for the recruiting squadron. As the operations flight chief, SMSgt F was responsible for ensuring that standards were met across the squadron in accordance with the recruiting regulations. She was responsible for the processing stations at two locations in Michigan and also supervised an operations staff at the squadron headquarters. When the allegations came to light, the squadron commander appointed SMSgt F to serve as the investigating officer for a commander-directed investigation. She testified that her investigation took approximately 12 to 16 hours per day for 9 days. Following this testimony, the trial defense counsel objected. The military judge allowed SMSgt F to continue, finding the testimony proper unit impact evidence. During this timeframe, SMSgt F's sole duty was to complete the investigation. She testified that working as an investigating officer was not within her normal duties and that the investigating work was her sole focus during the nine days of the investigation. She performed none of her normal duties during this time. When asked whether the removal of the appellant from his recruiting duties had any impact on the unit, SMSgt F testified that one of her responsibilities is to review cancellations and refusals from applicants in the field and that there were a couple of cancellations from the appellant's office. On cross examination, the trial defense counsel elicited testimony from SMSgt F that during the charged timeframe, the recruiting squadron met its recruiting goals. During sentencing argument to the members, the trial counsel made a brief reference to unit impact, with no specific reference to any particular impact. The trial defense counsel, however, pointed out in his sentencing argument that the unit met its recruiting goals during the charged timeframe.

The appellant asserts that the military judge erred in allowing SMSgt F to testify about her service as the investigating officer and how that impacted the unit. He argues the commander had a duty to investigate allegations involving his unit members and the time involved in conducting such an investigation is not proper aggravation evidence. The appellant requests this Court set aside the sentence and order a rehearing or, in the alternative, to reassess the sentence. Finding no error, we affirm.

Discussion - Sentencing Evidence

Rule for Courts-Martial (R.C.M.) 1001(b)(4) governs the scope of permissible evidence in aggravation at sentencing. It provides:

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 or entity who was the victim of an offense committed by the accused and *evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.*

(Emphasis added).

Our superior court, in *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007) noted, “[t]here are two primary limitations on the admission of aggravation evidence. First, such evidence must be ‘directly relating’ to the offenses of which the accused has been found guilty [and second, the evidence] must also pass the test of Military Rule of Evidence . . . 403, which requires balancing between the probative value of any evidence against its likely prejudicial impact.” (Citations omitted).

We review a military judge’s decision on admission of sentencing evidence for an abuse of discretion. *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)); *United States v. Gogas*, 58 M.J. 96, 99 (C.A.A.F. 2003). “[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)). If evidence was improperly admitted, we must also determine whether or not the appellant was “substantially prejudiced” by the erroneous admission of this evidence. *United States v. Boles*, 11 M.J. 195, 199 (C.M.A. 1981). “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 accused.” Article 59(a), UCMJ, 10 U.S.C. § 859.

SMSgt F's testimony regarding the adverse impact on the unit was admissible as evidence in aggravation under R.C.M. 1001(b)(4). We find such evidence was directly related to the offenses committed by the appellant. We further find the probative value of such evidence outweighs any prejudicial impact on the appellant by its admission. When allegations regarding the appellant's misconduct came to light from a family member of one of the victims, the investigation was a logical and necessary next step. The hours and days expended by SMSgt F prevented her from performing her duties as the recruiting squadron operations flight chief. The impact was not because she conducted the investigation, but because she was then unable to perform her normal duties. This impact on the unit was a sufficiently direct and immediate result of the appellant's offenses, and therefore, admissible as evidence in aggravation. See *United States v. Thornton*, 32 M.J. 112, 113 (C.M.A. 1991) (holding that the appellant no longer being permitted access to classified materials and the time and effort expended by the service in training the appellant were proper unit mission impact evidence in aggravation); *United States v. Stephens*, 66 M.J. 520, 528 (A.F. Ct. Crim. App. 2008) (holding that evidence regarding the impact on a thirteen-year-old sexual assault victim by having to testify on multiple occasions was proper evidence in aggravation); *United States v. Key*, 55 M.J. 537, 538-39 (A.F. Ct. Crim. App. 2001) (holding that testimony explaining how the accused's removal from the customer service section left it "short-handed and heavily tasked," and "required everyone else to work harder, reduced efficiency, and lowered morale" was admissible under R.C.M. 1001(b)(4)), *aff'd*, 57 M.J. 246 (C.A.A.F. 2002); *United States v. Bellingham*, ACM 33674, unpub. op. at 6-7, (A.F. Ct. Crim. App. 29 Jan 2001) (holding that the adverse impact on the victim's credit and the difficulties he encountered correcting these problems were proper evidence in aggravation at the appellant's court-martial for wrongful use of the victim's credit card); *United States v. Lawson*, 33 M.J. 946, 959-60 (N.M.C.M.R. 1991) (holding that evidence of the costs associated with searching for a missing Marine was admissible as evidence in aggravation in the court-martial of an officer who was derelict in the performance of his duties by failing to pick up a posted road guard), *aff'd*, 36 M.J. 415 (C.M.A. 1993).

Even if the evidence was admitted in error, we find such admission to be harmless. We find the appellant was not prejudiced. In his sentencing argument, the trial counsel made only a passing reference to the impact of the appellant's offenses on the unit. By contrast, trial defense counsel both impeached SMSgt F's testimony about mission impact by eliciting her concession that the appellant's squadron met its recruiting goals during the charged time frame and argued this point during sentencing argument. Finally, we note that the mission impact evidence provided by SMSgt F was a relatively minor fact given the gravity of his offenses: as a military recruiter, he made sexual advances toward recruits and undeniably used his position to obtain sexual favors from young women over the course of seven months. The record belies any claim of prejudice arising from the admission of this evidence.

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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). The approved findings and sentence are

AFFIRMED.

OFFICIAL



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