UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant RANDY J. DARJEAN
United States Air Force

ACM 35938

21 December 2005

Sentence adjudged 24 January 2004 by GCM convened at Hickam Air Force Base, Hawaii. Military Judge: Dawn R. Eflein.

Approved sentence: Bad-conduct discharge, confinement for 5 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, and Major John N. Page III.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Steven R. Kaufman.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignments of error, and the government's answer. The appellant argues the military judge erred by admitting evidence of the appellant's prior sexual misconduct with his teenage sister-in-law.[1] He also claims the staff judge advocate (SJA) failed to properly advise the convening authority of his option to defer automatic forfeiture of pay and allowances. We disagree with appellant on both counts and affirm.

At the time of trial, the appellant was 32 years old and had been in the Air Force for 14 years. In October 2002, the appellant and his wife went out to celebrate his

[1] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

birthday. They left their three children in the care of JRW, a 17-year-old, female babysitter. The appellant and his wife returned at about 0230 and went to bed. JRW was sleeping in an adjacent bedroom. At around 0500, JRW felt someone's hand on her buttocks. She then felt someone insert a finger into her vagina from behind. Finally, she felt a penis penetrate her vagina. Throughout this time, JRW did not cry out or protest. She testified that she pretended she was asleep because she was afraid the person would hurt her. Shortly thereafter, the intruder got up and left the bedroom. The appellant was the only adult male living in the house.

After the intruder left the bedroom, JRW called her boyfriend and asked him to meet her at the Base Shoppette. She told him the appellant had raped her. After discussing what to do next, they decided to tell the appellant's wife what the appellant had done. JRW and her boyfriend (armed with a tire iron) went back to the appellant's house and woke up the appellant's wife. When JRW told her what had happened, the appellant's wife recalled that six years earlier the appellant had fondled her 18-year-old sister while she was sleeping. Consequently, the appellant encouraged JRW to go to the hospital for an examination. When medical personnel conducted a rape exam, they found semen in JRW's vagina. DNA tests showed the semen belonged to the appellant.

At trial, the appellant's defense counsel objected to the admission of any evidence that the appellant fondled his sister-in-law. He argued that the appellant's prior actions were too remote in time, dissimilar, and prejudicial. The military judge disagreed and allowed the appellant's sister-in-law to testify. She found the evidence admissible under Mil. R. Evid. 404(b) and 413. She also found no unfair prejudice under Mil. R. Evid. 403.

We review a military judge's admission of evidence under these rules for an abuse of discretion. *United States v. Dewrell*, 55 M.J. 131, 137 (C.A.A.F. 2001). The military judge found the appellant had touched his sister-in-law's buttocks with his hand and pressed his groin against her buttocks. She also found the appellant did these acts with the intent to gratify his sexual desires and that his actions constituted "sexual contact" under Mil. R. Evid. 413. Finally, she ruled the evidence admissible to show "opportunity" and "absence of mistake" under Mil. R. Evid. 404(b). In weighing the probative value of this evidence against its prejudicial impact, she applied the factors discussed in *United States v. Bailey*, 55 M.J. 38, 40 (C.A.A.F. 2001) and *United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2000). We find no abuse of discretion here.

The appellant also complains the SJA improperly advised the convening authority about his options to defer forfeitures, resulting in prejudice to the appellant. We disagree. Our de novo review shows the convening authority had all of the information he needed from both the SJA and trial defense counsel prior to taking his action. *See United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997). His decision clearly indicates his intent to take care of the appellant's dependents, not to give additional money to the appellant.

He did not abuse his discretion by relying on erroneous advice as the appellant asserts. *See United States v. Sollmann*, 59 M.J. 831, 837-38 (A.F. Ct. Crim. App. 2004). No new post-trial processing is necessary.

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). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court