UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman JOSEPH M. GENTRY
United States Air Force

ACM 36116

30 October 2006

Sentence adjudged 10 July 2004 by GCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Harvey A. Kornstein.

Approved sentence: Dishonorable discharge, confinement for 8 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major John N. Page III.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Michelle M. McCluer, and Captain Daniel J. Breen.

Before

ORR, FRANCIS, and SOYBEL
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ORR, Senior Judge:

The appellant was convicted contrary to his pleas, by a general court-martial of one specification of rape, two specifications of dereliction of duty, and one specification of unlawful entry, in violation of Articles 92, 120 and 134, UCMJ, 10 U.S.C. §§ 892, 920, 934. A panel of officer members sentenced the appellant to a dishonorable discharge, confinement for 8 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the findings and sentence as adjudged.

The case is before the Court for review under Article 66, UCMJ, 10 U.S.C. § 866. On appeal, the appellant avers that he received ineffective assistance of counsel.[1] Additionally, he contends that the military judge erred in instructing the members on the mistake of fact defense when he required the appellant to have an honest and reasonable belief that the victim had the capacity to consent and that she did consent. He also asks that we find his sentence to be inappropriately severe.[2] We find all three assignments of error to be without merit and affirm.

Background

On 10 October 2003, the appellant and several of his co-workers were drinking at a party in the dayroom on the second floor of the dormitory. Airman (Amn) FJ decided to celebrate her nineteenth birthday by drinking shots of rum, followed by a beer chaser. The appellant was also drinking rum and actively pursuing Amn FJ at the party. Some of the other Airmen at the party described Amn FJ as being talkative, flirtatious and obviously drunk. After drinking several shots of rum, Amn FJ started feeling like she was losing control of herself so she called her friend Airman First Class (A1C) Mitchell, who was at work. She asked A1C Mitchell to come and get her and to take her back to her room. While Amn FJ was on the phone, the appellant poured rum into her cup containing beer. Amn FJ drank the beer spiked with rum and she called A1C Mitchell again to tell him to hurry up because she was ready to go. A1C Mitchell arrived and took Amn FJ to her room on the first floor. When they arrived, they noticed that the appellant was passed out lying across Amn FJ's bed. As a result, A1C Mitchell escorted Amn FJ to his room and put her on his bed. He then locked the door and went to the pool hall. Before leaving, A1C Mitchell told A1C Trott not to try to go inside of his room, and if he was going to have sex with somebody, he should do it with consent.

About an hour later, A1C Trott and A1C Davis went to Amn FJ's room and woke up the appellant. The appellant asked them whether they knew where Amn FJ was. A1C Trott told the appellant that she was upstairs in A1C Mitchell's room. A1C Trott and A1C Davis helped Amn Gentry up the stairs and down the hall to A1C Mitchell's room.

There is no direct evidence as to who or how they unlocked the door, but evidence was presented that A1C Davis had a master key to all the rooms in the dormitory. The appellant went inside A1C Mitchell's room and saw Amn FJ lying on the bed. As he started talking to her, he noticed the vomit on her clothes and on the corner of the bed. He then convinced her to let him help her take off her shirt and pants. As he was doing so, Amn FJ started to vomit. He grabbed around her stomach so that the vomit would go on the floor. When she finished, he put her back on the bed. The smell of her vomit made the appellant sick so he went outside onto the balcony. A1C Trott and A1C Davis were standing outside A1C Mitchell's door. At approximately 0030 hours, A1C Davis

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

started to pat the appellant on his back while he was vomiting over the railing on the balcony. Once the appellant finished vomiting, he went back inside the room and sat on the bed. He asked Amn FJ whether she was okay and she said "yes." He then started having sexual intercourse with her from behind. He then noticed that A1C Trott was standing inside the room at the front of the bed near Amn FJ's face. While standing in the corner, A1C Davis asked the appellant to "Let me hit it." The appellant waived the two of them out of the room while he continued to have sex with Amn FJ. When he finished, he put a blanket over Amn FJ and went back to his room.

When A1C Mitchell returned to his room about 0230 hours, he could smell alcohol and vomit as soon as he opened the door. He also noticed that Amn FJ was wrapped up in a blanket wearing only her underwear. He had difficulty waking her so he put water on her face. Amn FJ responded "Stop Gentry." A1C Mitchell stayed with her for the rest of the night and slept in his recliner chair. He left for work three hours later. On 11 October 2003, the appellant talked to A1C Mitchell and A1C Davis while at work. During their conversation, the appellant told A1C Mitchell that he had consensual sex with Amn FJ the previous night in A1C Mitchell's room. On 17 October 2003, Special Agent (SA) Russ from the Air Force Office of Special Investigations called the appellant in for an interview. The appellant told SA Russ that he had consensual sex with Amn FJ in A1C Mitchell's room.

Ineffective Assistance of Counsel

The appellant believes he received ineffective assistance of counsel because his trial defense counsel conceded his guilt to the two specifications alleging willful dereliction of duty by drinking underage and providing alcohol to a minor. Specifically, he asserts that his trial defense gave the following argument without his permission:

> It is not an uncommon experience to want to celebrate your 19th birthday in a setting where you and your friends get together and get some alcohol. Unfortunately, many state legislatures have made the decision that persons of 18 and above are minors for the purpose of consuming alcohol. . . . With respect to those specifications Captain [R] is correct. Airman Gentry has [sic] illegal conduct. You have a legal basis to convict him, he told you so. It's willful dereliction of duty, he failed to comply with a lawful obligation.

As a result, the appellant asks this Court to set aside the findings of guilt for the Additional Charge and its Specifications as well as the sentence.

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997). To prevail on a claim of ineffective assistance of counsel, the appellant must show (1) that counsel's performance was deficient; and (2) that counsel's deficient performance resulted in prejudice. *Strickland v. Washington*, 466

U.S. 668, 687 (1984). The deficiency prong of *Strickland* requires that the appellant show counsel's performance fell below an "objective standard of reasonableness," according to the prevailing standards of the profession. *Id*. at 688. There is a "strong presumption" that counsel was competent. *Id*. at 689. The prejudice prong requires that the appellant show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*.

In the instant case the appellant did not consent or object to his counsel's argument. Although, the appellant is correct in claiming that his trial defense counsel conceded his guilt, his trial defense counsel chose not to contest the two specifications the appellant testified that he was guilty of at trial. Arguably, in certain circumstances there is prejudice per se when a trial defense counsel concedes guilt on any specification when an appellant pleads not guilty. *See United States v. Cronic,* 466 U.S. 648, 659 (1984). Such circumstances do not exist here. Because there were other charges that were still in dispute, we believe the appellant's trial defense attorney made a tactical decision to concede the two specifications in an effort to maintain credibility with the panel members. This Court follows the guidance dictated by our Superior Court in that, "We will not second-guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Morgan,* 37 M.J. 407, 410 (C.M.A. 1993) (quoting *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977)). Given the gravity of the potential sentence that the appellant was facing on the other charges, we are convinced that the appellant's trial defense counsel's concession during his findings argument was reasonable. *See Florida v. Nixon*, 543 U.S. 175, 191 (2004). Therefore, we conclude that the appellant has not met his burden of showing that his trial defense counsel provided ineffective assistance.

Military Judge's Instruction on Mistake of Fact Defense

In his second assignment of error, the appellant asserts that the military judge erred when he instructed the members on the defense of mistake of fact for the rape specification. He contends that the military judge's tailored instruction placed an additional burden upon him to show that Amn FJ was capable of consenting.

During the trial, the appellant asserted that Amn FJ consented to having sexual intercourse with him. Specifically, he testified that he was concerned about Amn FJ and that he went into A1C Mitchell's room to see if she was okay. When he noticed the vomit on her clothes, he was only acting as a "good samaritan" when he encouraged her to take them off. After the appellant got sick himself, he said he only went back inside the room because Amn FJ asked him to come back. He then laid down on the bed next to her and she put her leg over him and asked him for sex. After her third request, he acquiesced and had sexual intercourse with her.

Based on the appellant's testimony that Amn FJ consented to sexual intercourse, the appellant's trial defense counsel asked the military judge to instruct the members on the defense of mistake of fact. The trial counsel objected and argued that the defense of mistake of fact is not available if the appellant alleges that the victim consented. After a discussion with both parties, the military judge overruled the trial counsel's objection and gave the following instruction:

> Now the evidence raised the issue of mistake on the part of the accused concerning whether Airman [FJ] was capable to consent to sexual intercourse and did consent in relation to the offense of rape. If the accused had an honest and mistaken belief that Airman [FJ] was capable to consent to the act of sexual intercourse and did consent he is not guilty of rape, if the accused [sic] belief was reasonable. To be reasonable the belief must have been based on information or lack of it which would indicate to a reasonable person that Airman [FJ] was capable to consent to sexual intercourse. . . . The burden is on the prosecution to establish the accused's guilt. If you are convinced beyond a reasonable doubt that at the time of the charged rape the accused was not under the mistaken belief that Airman [FJ] was capable to consent to the sexual intercourse, the defense of mistake does not exist.

Because the appellant did not object to this instruction at trial, we review the military judge's instruction for plain error. *United States v. Boyd*, 52 M.J. 758, 761 (A.F. Ct. Crim. App. 2000). To establish plain error, the appellant must demonstrate that there was error, that it was plain or obvious, and that it materially prejudiced a substantial right. *See generally United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998).

We first consider whether it was error for the military judge to give the challenged instruction. The defense theory at trial and the nature of the evidence presented by the defense are factors that may be considered in determining whether the accused is entitled to a mistake of fact instruction, but neither factor is dispositive. *See United States v. Jones*, 49 M.J. 85, 90-1 (C.A.A.F. 1998); *United States v. Taylor,* 26 M.J. 127, 131 (C.M.A. 1988). "Any doubt whether an instruction 'should be given should be resolved in favor of the accused.'" *United States v. Brown*, 43 M.J. 187, 189 (C.A.A.F. 1995) (quoting *United States v. Steinruck*, 11 M.J. 322, 324 (C.M.A. 1981)). In the case sub judice, the military judge's instructions were given at the request of the trial defense counsel. Nonetheless, the appellant argues that it was error to instruct the members using the portion of the instruction highlighted above, because it created an additional burden on the defense of presenting evidence that he had an honest and reasonable belief that Amn FJ was capable of consenting. We disagree.

In addition to the challenged instruction, the military judge gave a standard instruction on rape from the Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 3-45-1 (15 Sep 2002), which provides:

> When a victim is incapable of consenting because she is asleep, unconscious, or intoxicated to the extent that she lacks the mental capacity to consent, no greater force is required than that necessary to achieve penetration. . . . If Amn [FJ] was incapable due to lack of mental or physical facilities of giving consent, then the act was done by force and without consent. . . . If Amn [FJ] was incapable of giving consent, and if the accused knew or had reasonable cause to know that Amn [FJ] was incapable of giving consent because she was asleep, unconscious, or intoxicated, the act of sexual intercourse was done by force and without consent.

The ultimate issue is "whether there is a *reasonable likelihood* that the jury has applied the challenged instruction in a way that [violates the Constitution]." *Boyde v. California*, 494 U.S. 370, 380 (1990) (emphasis added); C*f.* *United States v. Loving*, 41 M.J. 213, 277 (C.A.A.F. 1994) (the ultimate issue is "whether there is a *reasonable possibility* that the jury understood the instructions in an unconstitutional manner" (emphasis added)) (quoting *Peek v. Kemp*, 784 F.2d 1479, 1489 (11th Cir. 1986) (en banc)). "Instructions should be tailored to fit the circumstances of the case, and should fairly and adequately cover the issues presented." Rule for Courts-Martial (R.C.M.) 920(a), Discussion. Confusing jury instructions are subject to a plain error analysis. *United States v. Curry*, 38 M.J. 77, 79 (C.M.A. 1993); *United States v. Smith*, 34 M.J. 200, 201 (C.M.A. 1992).

We find the military judge's instructions taken in context were not confusing or obvious error, because the instructions would not have reasonably caused the panel members to believe that the appellant had to affirmatively prove that Amn FJ was capable of consenting.

Even if we assume plain error, we find no prejudice. The evidence in this case includes the testimony of several witnesses who stated that Amn FJ was intoxicated. In fact, the appellant encouraged her to drink and later found Amn FJ asleep lying in her own vomit. As he began to talk to her, she vomited again. The evidence that he had sex with her while she was intoxicated is overwhelming. Even though the appellant presented evidence sufficient to raise the defense of consent, we are convinced that the appellant knew Amn FJ was intoxicated and incapable of consenting to intercourse. After the appellant's trial defense counsel requested an instruction on mistake of fact for the rape specification, the military judge proposed the challenged instruction. Once the military judge read his proposed tailored instructions, the appellant's civilian trial defense attorney stated that he believed they had adequately addressed the issues previously

raised. Additionally, we find no material prejudice because the appellant's contradictory and implausible explanation for having sex with Amn FJ was utterly unpersuasive. Therefore, we are convinced "beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002) (citing *Neder v. United States*, 527 U.S. 1, 18 (1999)).

Sentence Appropriateness

This Court has the authority to review sentences pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866(c), and to reduce or modify sentences we find inappropriately severe. Generally, we make this determination in light of the character of the offender and the nature and seriousness of his offense. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We may also take into account disparities between sentences adjudged for similar offenses in closely related cases. *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001). Our duty to assess the appropriateness of a sentence is "highly discretionary," but does not authorize us to engage in an exercise of clemency. *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant avers that his punishment is inappropriately severe because he was young, inexperienced, and that alcohol was a factor in the events that transpired. Additionally, he claims that he apologized to Amn FJ and they continued to interact constructively after the events occurred. The critical factor that the appellant failed to mention is that he encouraged Amn FJ to get drunk and had sex with her while she was obviously intoxicated and incapable of consenting to sexual intercourse. Additionally, the appellant failed to acknowledge the effects of his actions upon the victim. After carefully examining the record and taking into account all of the facts and circumstances surrounding the crimes to which the appellant was convicted of, we do not find the appellant's sentence inappropriately severe. *See Snelling*, 14 M.J. at 268.

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

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator