UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman WILLIAM B. GLEASON
United States Air Force

ACM 36444

31 May 2007

Sentence adjudged 7 May 2005 by GCM convened at Lajes Field, Azores, Portugal. Military Judge: Adam Oler.

Approved sentence: Dishonorable discharge, confinement for 3 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert v. Combs, and Major Matthew S. Ward.

Before

BROWN, BECHTOLD, and BRAND
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

BRAND, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his plea, of rape in violation of Article 120, UCMJ, 10 U.S.C. § 920. The convening authority approved a sentence consisting of a dishonorable discharge, confinement for 3 years, and reduction to the grade of E-1.

Background

The appellant was on temporary duty (TDY) at Naval Air Station Rota, Spain, when he met HS. On several occasions, the appellant and HS would see each other at the local bars. On or about 10 November 2004, the appellant and HS ran into each other at a local establishment. The appellant volunteered to give HS a ride to the airport the next day to catch a flight to her home in Norway. The appellant, HS, and several others, bar-hopped until the wee hours of the morning. At about 0500 hours, HS and the appellant walked to HS' apartment. She invited the appellant to stay. She rationalized it was nothing to be concerned about because they would be leaving for the airport within a few hours and the appellant had never shown any romantic interest in HS. HS allowed the appellant to sleep in her bed fully clothed and on top of the covers. The only other bed in her apartment was a child- size bed that was not large enough for an adult.

Shortly thereafter, HS awoke to find the appellant completing sexual intercourse with her. She kept her eyes closed, heard him zip his pants, and leave. HS immediately contacted a Marine Judge Advocate Officer who put her in touch with the local Naval Criminal Investigation Service Detachment. She reported the incident, provided a written statement, and submitted to a rape protocol examination. The appellant returned to his duty station at Lajes Air Field, Portugal, but was not interviewed until February 2005. On 22 February 2005, he wrote, in a statement to investigators that he and HS had consensual sex twice. The second time she might have been asleep. He didn't believe she was awake. Three days later, he wrote another statement. Initially, the appellant said they had sex twice and it was consensual. Toward the end of his eight-page statement, the appellant said, during the walk to her apartment, he thought they were going to have sex. He also stated that he tried to wake her up and couldn't. He then removed some of her clothing, had sex with her, tried to wake her up again and was unsuccessful, so he got up and left.

During an extended recess after presentation of the sentencing evidence, the trial counsel informed the military judge and trial defense counsel that HS had what appeared to be an anxiety attack in the vicinity of the deliberations room. After discussing this with the counsel, the military judge conducted voir dire of the members. Three members indicated they had seen the victim that morning. After asking a few questions and offering counsel for both sides the opportunity to question the members or request a session pursuant to Article 39(a), UCMJ, 10 U.S.C. § 839(a), the military judge continued the trial. He instructed all members:

> It is imperative that you not give any heed nor pay attention to anything you may have seen or observed outside of this court-martial in regard to this case. That instruction applies to whether or not it was passing somebody in the hallway, it applies to whether or not it was an opportunity to observe them in a different environment, it includes everything of that nature. You

> must base your decision in this case based solely on what you observe in this courtroom, the facts that are presented to you and the instructions on the law that I have given you and will give you in the future.

In her sentencing argument, the trial counsel argued, "This is a United States member, TDY to Spain, who raped a Norwegian woman. This is international…." The military judge, sua sponte, stopped the trial counsel and instructed the members to disregard the last comment. Then counsel went on to say, "There have been a lot of Air Force scandals out there lately and you may or may not have agreed with their outcome, but today you have a decision. You get to decide what this outcome is going to be. You can say we here at Lajes will not tolerate rapists. That we here at Lajes will punish rapists with serious punishment." Again, the military judge stopped the trial counsel and instructed the members to look at the appellant, his family and the best interest of the appellant and the Air Force and not to forget the victim. The trial defense counsel voiced no objections.

Discussion

The first assigned error is whether the military judge erred when he did not conduct an inquiry of the three members that included questions of what the victim's demeanor and physical appearance were when the members observed her outside the courtroom. The military judge has wide discretion in deciding whether to investigate the potential introduction of extraneous information. *United States v. Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001). Since there was no objection voiced at the court-martial, the appellant bears the burden of establishing plain error. *United States v. Reyes*, 63 M.J. 265, 267 (C.A.A.F. 2006). In this case, the military judge conducted a limited inquiry, offered counsel the opportunity to voir dire the members, and issued a "curative" instruction. In the absence of evidence to the contrary, members are presumed to follow the instructions of the military judge. *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000) (citing *United States v. Loving*, 41 M.J. 213, 235 (C.A.A.F. 1994)). There is no evidence the members did not follow the military judge's instruction. Additionally, the appellant failed to meet his burden in establishing plain error.

The second assigned error, raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), is that the evidence is legally and factually insufficient to sustain the appellant's conviction for the offense of rape. We reviewed the record of trial, including the testimony of the victim and the statements of the appellant. We carefully considered the appellant's assertion that the evidence is legally and factually insufficient to sustain his conviction for rape. *See generally United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). Applying this guidance, we conclude that the evidence is legally and factually sufficient. *See United States v. Traylor*, 40 M.J. 248, 249 (C.M.A. 1994).

The final assignment of error asserts the trial counsel's sentencing argument was improper. The legal test for improper argument is "whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) (citing *United States v. Shanberger*, 1 M.J. 377 (C.M.A. 1977)). We reviewed the determinations of the military judge to see if they are clearly erroneous. *United States v Rodriguez-Rivera*, 63 M.J. 372, 378 (C.A.A.F. 2006) (citing *United States v. Warner*, 62 M.J. 114, 124 (C.A.A.F. 2005)). Although the sentencing argument by trial counsel may have been improper, the immediate actions of the military judge eliminated the potential for any error that may have materially prejudiced the rights of the appellant.

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

MARTHA COBLE-BEACH, TSgt, USAF
Court Administrator