UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class STEVEN J. MCBEE II
United States Air Force

ACM 35346

28 January 2005

Sentence adjudged 4 September 2002 by GCM convened at MacDill Air Force Base, Florida. Military Judge: Ann D. Shane.

Approved sentence: Dishonorable discharge, confinement for 2 years and 6 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Shannon J. Kennedy.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

ORR, Senior Judge:

The appellant was convicted, pursuant to his plea, of one specification of rape, in violation of Article 120, UCMJ, 10 U.S.C. § 920. A panel of officer and enlisted members sentenced him to a dishonorable discharge, confinement for 2 years and 6 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

The case is before this Court for review under Article 66, UCMJ, 10 U.S.C. § 866. The appellant asserts three errors for our consideration: (1) That the military judge erred

in denying the appellant's trial defense counsel an opportunity to fully cross-examine the victim; (2) That the trial counsel improperly commented during sentencing argument on the appellant's right to remain silent; and (3) That the appellant is entitled to 9 days of pretrial confinement credit instead of 8. For the reasons set out below, we find error, take corrective action, and affirm.

Background

The appellant went to a birthday party off base at the apartment of a friend, who was also in the military. All of the partygoers drank a large amount of alcohol to include the appellant and the victim, 20-year–old Airman (Amn) JH. The hosts of the party were concerned that several of the attendees were drunk so they asked them to spend the night and drive home in the morning. In fact, Amn JH was so drunk she felt nauseous and eventually threw up in the bathroom. Some of her friends found her on the bathroom floor and carried her into a spare bedroom where she went to sleep. The spare bedroom had no furniture, so Amn JH slept on the floor. The appellant, who was also drunk, went to sleep in a chair in the living room. Around 0400 hours, the appellant got up to use the bathroom and noticed his friend Amn JH sleeping on the floor in the spare bedroom. He walked into the bedroom and had sexual intercourse with her from behind. Amn JH was very drunk, but woke up while she was being raped. Because the room was dark, she was unable to see who was raping her. After the appellant finished, he returned to the living room and went to sleep on the chair.

The victim told her friend, who was the hostess of the party, that someone at the party had just raped her. Her friend then woke up the five males present and asked them whether they had raped the victim. The appellant consoled the victim and told her how sorry he was that something bad happened to her. When no one confessed, the victim was driven back to the base so she could report the incident. Amn JH told the gate guard that she was raped and asked for help. Security forces personnel then contacted her first sergeant and the local police. A police detective from the county sheriff's office started an investigation and collected saliva samples from several of the men present at the party, including the appellant, for the purpose of comparing DNA. The DNA test results showed that there was a 1 in 204 trillion probability that the semen found inside the victim came from the appellant. After the police detective informed the appellant of the test results, the appellant confessed to raping the victim.

Limited Questioning on Cross-Examination

During the sentencing portion of the trial, the victim testified about the impact of the rape on her. She stated that after the rape, she cut off her hair, had nightmares for the first couple of months, and didn't leave her room. She also testified that she hates most men and doesn't trust them. During an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session prior to beginning his cross-examination, the appellant's trial defense counsel asked the

military judge whether he could ask the victim about her current drinking habits and whether she is now sexually active. Specifically, the trial defense counsel stated that he wanted to ask the victim, "Over the last couple of months, in fact, you've been dating someone, correct? And you're sexually active with that person? And in fact you go out and you still have drinks at parties and you're still having a good time aren't you?" The trial defense counsel's stated concern was that the victim's testimony left the members with the false impression that this is her present disposition. The military judge denied the request and made a finding that the probative value of the testimony the defense counsel wanted to elicit would be outweighed by prejudice in the case. When the trial defense counsel made a second request to question the victim about her current drinking and sexual activity, the military judge ruled that while the evidence may be relevant, "the prejudicial impact of the evidence would far outweigh whatever slight probative value that that evidence might have to the victim impact here."

We review a military judge's ruling on the admissibility of evidence under Mil. R. Evid. 403 for an abuse of discretion. *United States v. McElhaney*, 54 M.J. 120, 129-30 (C.A.A.F. 2000). A military judge's decision to admit evidence will not be overturned "absent a clear abuse of discretion." *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997) (citing *United States v. Redmond*, 21 M.J. 319, 326 (C.M.A. 1986)).

In the instant case, the appellant's trial defense counsel was seeking to counter the aggravating nature of the victim's testimony by questioning her about her current sexual relationship and her continued drinking. After hearing the victim's testimony, and the arguments of counsel, the military judge performed a Mil. R. Evid. 403 balancing test, and limited the trial defense counsel's cross-examination of the victim because she determined the proposed questions would have had a prejudicial impact. A reasonable inference from the trial defense counsel's requested line of questioning could have been that the victim continues to drink (underage) and that she is sexually active (even though she is not married). Thus, the military judge did not allow the appellant to specifically question the victim about her continued drinking and sexual activity. However, she did allow the defense counsel to elicit testimony from the victim saying that she was letting her hair grow again, starting to get back into a regular routine, and now focusing on her work, friends, and her social life. This was the evidence that the appellant's trial defense counsel said that he wanted to present to the members, and he did so during his sentencing argument when he reemphasized that Amn JH has been able to move forward with her life.

After reviewing the victim's testimony, the trial defense counsel's cross-examination, and his sentencing argument, we hold that the limitations the military judge placed on the appellant's trial defense counsel were not an abuse of discretion.

Improper Sentencing Argument

During the sentencing portion of the trial, the assistant trial counsel commented on the fact that the appellant did not originally confess to raping Amn JH even though he had many opportunities to do so. Specifically, he stated:

> But there's another fact that I haven't mentioned yet, and that is that he tried to hide it. He definitely tried to hide it. He did not come forth right at the beginning. He says he's scared. You heard his unsworn statement. He said he was scared, didn't know what to do. He just didn't want to get caught. He had every opportunity from the time that he committed that heinous act to take the moral high ground and to do what was right, to say, "You know what--," to do something, to say something, so she didn't--so she at least didn't have to go through all these other things that she did at the hospital, and so on. First, he leaves--as you will see in the transcript--after he rapes her, he leaves and he goes back to sleep. There's no regret or remorse right there. He went back to sleep. And then when questions started to be asked about what happened, people were awakened, he was awakened, he went and comforted her, not because he felt sorry, because he wanted to deflect blame. He wanted to seem innocent. That's why he did it. He's sitting there. He just raped her, and he's consoling her. And he doesn't say anything. If he wanted to do what was right, he could have said right there, "I'm sorry. Look, it was me." He didn't do that. He's talked to police officers. He's interviewed by a police officer, he denies it. He could have said something right there, could have done something.

On appeal, the appellant asserts that this portion of the argument is improper and asks this Court to set aside the sentence and order a rehearing.

The standard of review for an improper argument depends on the content of the argument and whether the defense counsel objected to the argument. The legal test for improper argument is whether it was error, 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). If the defense counsel fails to object or request a curative instruction, the court will grant relief only if the improper argument is plain error. *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001) (citing *United States v. Southwick*, 53 M.J. 412, 414 (C.A.A.F. 2000)). *See also United States v. Powell*, 49 M.J. 460, 464 (C.A.A.F. 1998); *United States v. Boyd*, 55 M.J. 217, 222 (C.A.A.F. 2001); *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986). If the plain error is of a constitutional dimension, the test for constitutional error is "whether the error was harmless beyond a reasonable doubt." *United States v. Walker*, 57 M.J. 174, 178 (C.A.A.F. 2002) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

This Court must first determine whether the assistant trial counsel's comments were improper. During his sentencing argument, the assistant trial counsel commented that the appellant did not originally come forward and identify himself as the perpetrator of the offense. The appellant argues that this was error, in that the assistant trial counsel indirectly referenced his right to remain silent.

Ordinarily, a trial counsel may not comment on an appellant's right to remain silent. However, in *Gilley*, our superior court recognized the right of the government "to make 'a fair response' to claims made by the defense, even when a Fifth Amendment right is at stake." *Gilley*, 56 M.J. at 120 (quoting *United States v. Robinson*, 485 U.S. 25, 32 (1988)). In this case, the appellant, in his unsworn statement, raised the issue of his initial silence and made the following comments:

> I know that night, just like everybody else, I was heavily drinking, and I know this is not an excuse for what I did. What I did was something that when I'm not drinking is completely out of character for me. In fact, once I sobered up, I even thought to myself, "Oh, my God, what have I done?" I was in shock with myself and upset with myself, and I wanted to say something, but at the time I was extremely scared because I knew the consequences that were of it. And I did not know what to do, even though I knew it was right. I was so scared. . . . And I knew all along I wanted to say something to her, to the police, but I was so scared, I did not know what to do throughout the whole time. And I even knew--I knew the results and I knew what was going to happen, and I just didn't know what to do. Eventually, I did confess because I knew what the right thing was, and I knew that it wasn't right to keep on denying something that's not right.

After reviewing the assistant trial counsel's entire argument in context, we find the assistant trial counsel's comments concerning the appellant's delayed confession, comprising only a small portion of his entire argument, were made in "fair response" to the appellant's unsworn statement and, thus, were not improper. Even if the assistant trial counsel's comments rose to the level of constitutional error, however, we find beyond a reasonable doubt that it was harmless error.

Pretrial Confinement Credit

Finally, the appellant asserts that the military judge improperly calculated the number of days of credit he should be awarded for pretrial confinement. Specifically, the military judge determined that the appellant was entitled to 8 days of credit for time he spent in civilian pretrial confinement. The government concedes that the parties and the military judge miscalculated the number of days the appellant spent in pretrial confinement. We agree. Because the appellant went into civilian pretrial confinement on 2 May 2002 and was released on 10 May 2002, he is entitled to day-for-day credit for

each portion of a day he spent in pretrial confinement. *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). *See also United States v. Sherman*, 56 M.J. 900 (A.F. Ct. Crim. App. 2002). Accordingly, we order that the appellant receive one additional day of pretrial confinement credit, for a total credit of 9 days, against the confinement portion of his sentence.

Conclusion

The approved findings and sentence, as modified by this Court, 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 approved findings and sentence, as modified, are

AFFIRMED.

OFFICIAL

LAQUITTA J. SMITH
Documents Examiner