UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic LARRY M. PALMER III
United States Air Force

ACM 38184

25 November 2013

Sentence adjudged 24 May 2012 by GCM convened at Wright-Patterson Air Force Base, Ohio. Military Judge: Michael J. Coco.

Approved Sentence: Dishonorable discharge and confinement for 4 years.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Rhea A. Lagano; Major Jamie L. Mendelson; and Gerald R. Bruce, Esquire.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Senior Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of one specification of rape by administration of a drug or intoxicant; one specification of wrongfully distributing some amount of Xyrem; and one specification of making a false official statement, in violation of Articles 120, 112a, and 107, UCMJ, 10 U.S.C. §§ 920, 912a, 907.[1] The members sentenced the appellant to a

[1] Consistent with his pleas, the appellant was found not guilty of an additional specification of rape and two specifications of forcible sodomy, in violation of Articles 120 and 125, UCMJ, 10 U.S.C. §§ 920, 925.

dishonorable discharge and confinement for 4 years. The convening authority approved the adjudged sentence.

Before this Court, the appellant raises five assignments of error: (1) Whether the evidence is factually sufficient to support the findings on the wrongful distribution specification; (2) Whether the military judge abused his discretion in disallowing certain questions under Mil. R. Evid. 513; (3) Whether the military judge abused his discretion in denying the challenge for cause against Colonel (Col) GP; (4) Whether the military judge abused his discretion in denying the challenge for cause against Col MS; and (5) Whether the sentence is inappropriately severe.[2] Finding no error that materially prejudices a substantial right of the appellant, we affirm.

Background

In April 2011, the victim, Senior Airman (SrA) AW, moved in across the street from the appellant. SrA AW lived with her husband (then boyfriend), Mr. RH, and their infant daughter. The appellant lived with his wife and son. The two couples were on friendly terms and they watched each other's children and pets. SrA AW testified that her relationship with the appellant was never flirtatious or sexual.

On the night of 30 July 2011, while Mr. RH was out of town on business, SrA AW went to the appellant's house to ask for some baby formula. The appellant was home alone. After a brief conversation, he suggested they should go out drinking. SrA AW declined because she had her daughter but offered, "I have vodka you can have." SrA AW then returned to her home and fell asleep with her daughter. She awoke sometime later to someone knocking on the door. She looked at her cell phone and noticed that that she had missed several text messages from the appellant. In the text messages, the appellant wrote, "Way to stand me up." SrA AW responded by explaining that she had fallen asleep because she has a "condition," making fun of the appellant's narcolepsy.

Eventually, SrA AW brought a half-empty bottle of vodka over to the appellant's house. She left her daughter at home asleep. The time was approximately 2100. At the appellant's house, they talked and drank the vodka. SrA AW testified that she drank three shots. She felt the effects of the alcohol, but did not feel drunk or impaired at that time. The appellant also drank shots and finished what was left in the bottle. At that point, the appellant told SrA AW that he had another type of alcohol. When SrA AW inquired what type of alcohol it was, the appellant said it was a "secret." He then poured fruit punch into two small glasses and ran upstairs. Upon returning back downstairs, the appellant handed SrA AW one of the glasses. She took a sip, and immediately said, "That tastes strange. It tastes salty." The appellant responded, "That sounds about right." They then sat on the couch and he moved closer to her. They talked and joked, and at

[2] Issues 3-5 are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

some point SrA AW patted him on his back and poked him in his stomach. SrA AW suggested that they invite a neighbor over to join them. The appellant responded that it was a bad idea. Feeling uncomfortable, SrA AW decided to leave and ran home to check on her daughter. The appellant went out in the street and started yelling that she had left her daughter alone. As there were neighbors outside who could hear what the appellant was saying, SrA AW lied and said that her mother was watching her.

SrA AW returned to the appellant's house where he handed her the drink again, and said, "Let's chug this." SrA AW chugged most of the drink. The next thing she remembered was sitting on the couch with her head in her hands and elbows on her knees. She felt "a fast intoxication," but a feeling different from being drunk.

A few minutes later, the appellant stood in front of SrA AW and exposed his penis and said, "See I told you it's big." She replied, "No bigger than [Mr. RH's]." She then went to the kitchen to get some water. The appellant followed and tried to pull her pants down. Her pants we loose with an elastic waistband. She also wore a shirt and bra but no underwear. She testified that this was her normal attire. SrA AW repeatedly told the appellant to "stop" but he continued until her pants were off. She then grabbed a toy and tried to barter it for her pants. The appellant responded by kissing her. At the same time, he tried to touch her genitals, but she pulled her shirt down over her groin and started walking towards the living room. At this point, she felt confused, had difficulty moving normally, and needed to use the wall, counter, and couch for balance.

Once SrA AW made it to the couch, the appellant resumed kissing her and attempted to perform oral sex. She pushed his head off of her and commented on Mr. RH and the appellant's wife. He responded by saying, "They won't find out." SrA AW made several attempts to push the appellant away and repeatedly told him "no" and to "stop." The appellant continued his sexual advances and eventually penetrated her vaginally. Realizing that her efforts to resist were futile, SrA AW decided to acquiesce in hopes of gaining some sense of control. She remembered not being able to feel anything and starting to fall asleep.

The appellant next attempted to pick her up, but she fell because she could not walk and did not want to go with him. The appellant tried picking her up two to three times and eventually carried her to the stairs. He then again vaginally penetrated her. This time from behind after she fell face first onto the stairs. SrA AW testified that she continued to tell the appellant "no" and to "stop" during this episode. At some point, she was able to grab the railing on the stairwell and lifted herself up. She tried to walk towards the front door, but fell down numerous times. As she kept falling, the appellant was laughing at her. She eventually crawled back to the couch where she fell asleep.

SrA AW's next memory was of the appellant smacking her in the face to wake up and dressing her because Mr. RH was at the door. It was about 0100 the following

morning. After a brief contentious conversation with the appellant, Mr. RH took her home, where she fell asleep on the couch.

SrA AW awoke at 0500 feeling that she had been drugged. She immediately woke Mr. RH up and told him to take her to the hospital. On arrival, she informed the medical personnel that she thought the appellant had given her Gamma-Hydroxybutyric acid (GHB) because he had jokingly made a reference to having GHB the night before. She was then examined by Ms. CJ, a Sexual Assault Nurse Examiner (SANE), to include a blood and urine test. During the examination, Ms. CJ noted contusions to SrA AW's vaginal area consistent with having experienced a vaginal assault.

Ms. DW, a forensic Deoxyribonucleic acid (DNA) examiner with the United States Army Criminal Investigation Laboratory, testified that the vaginal swabs taken during SrA AW's examination contained a DNA profile that matched the appellant's. Additionally, Commander (CDR) TB, a forensic toxicologist, testified that SrA AW's urine tested positive for the presence of GHB. CDR TB explained that GHB is a central nervous system depressant that causes a sedation effect and a sense of euphoria, and at high enough doses, can cause cognitive defects, confusion, and an inability to perform normal functions. The prescription name for GHB is Xyrem and it is dispensed in a clear liquid form and has a salty taste. He also stated that alcohol causes the effects of GHB to be more pronounced. Finally, he testified that GHB causes increased sensuality and is used as a "rape drug."

The appellant's medical records showed that he had been prescribed Xyrem since February 2011, which was most recently filled eight days before the alleged rape.

Factual Sufficiency

The appellant asserts that the evidence supporting his conviction for rape by administering a drug or intoxicant as alleged in Specification 1 of Charge I is factually insufficient. We disagree.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *United States* v. *Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

To establish the offense of rape under Article 120, UCMJ, the Government was required to prove the following elements, as instructed by the military judge: (1) that on or about 30 July 2011, at or near Wright-Patterson Air Force Base, Ohio, the appellant caused SrA AW to engage in a sexual act, to wit: sexual intercourse; and (2) that the appellant did so by administering to SrA AW a drug, intoxicant, or other similar substance, to wit: GHB without her knowledge or permission, thereby substantially impairing the ability of SrA AW to control her conduct. *Manual for Courts-Martial, United States*, A28-1, ¶ 45.a.(a)(5) (2012 ed.).

The appellant first argues there is reasonable doubt as to whether he administered the GHB without SrA AW's knowledge or permission. He claims she "was not duped" into ingesting the GHB because she knew he did not have any alcohol in his house and was otherwise on notice of the GHB when she realized the "mystery" drink did not taste like any alcoholic beverage she had ever drunk. She was also aware of the appellant's joke about having GHB, and she specifically named GHB when she reported being drugged to medical personnel the following morning. The appellant next alleges that there is reasonable doubt as to whether SrA AW was substantially impaired because the evidence showed that her behavior was knowing and voluntary. Finally, he argues that SrA AW had a motive to lie as she was afraid to jeopardize her relationship with Mr. RH. For the reasons set forth below, we find the appellant's position unpersuasive.

The evidence supported a finding that SrA AW did not know of or agree to consuming a GHB-laced drink. The appellant never informed SrA AW what the "secret" drink was. Although SrA AW knew he did not have any alcohol and suspected the next morning that it may have been GHB, these facts do not prove she knew the "secret" drink contained GHB. SrA AW specifically testified that the appellant never informed her he was putting GHB in her drink and she never gave him permission to do so. The appellant also argues that SrA AW's in-court testimony that she did not see him pouring anything into her drink is inconsistent with her alleged statement to Ms. CJ that she saw him pouring a "clear" liquid into her drink. Ms. CJ recorded in her notes: "[SrA AW] States later he [the appellant] provides some EtOH [alcohol] that was clear. He mixed it with fruit punch." The appellant misconstrues Ms. CJ's notes. Ms. CJ testified that she did not recall SrA AW ever stating that she saw the appellant put the alcohol in her drink, and if she had, she would have recorded such in her notes. Further, even if SrA AW did see the appellant pour a clear liquid in her drink, it does not logically follow that she knew it was GHB. SrA AW testified that she did not know what GHB tasted like nor did she know what GHB looked like. Accordingly, the Government provided sufficient evidence to prove the appellant administered the GHB without SrA AW's knowledge or permission.

The evidence also showed SrA AW was substantially impaired in her ability to appraise or control her conduct. Upon tasting the "secret" drink, she testified that it felt like, "a fast intoxication." Subsequently, her physical movements were significantly impaired as she fell numerous times and had to use a railing, wall, or couch for support.

She ultimately became incapacitated to the point where she passed out. This was confirmed by the appellant who informed Mr. RH when he arrived at the appellant's house that SrA AW had been passed out for several hours. Further, Mr. RH testified that he observed that SrA AW was in bad shape and was unresponsive to his questions. She was unable to stand on her own and stumbled and fell on the couch when they arrived home. Furthermore, SrA AW's cognitive deficiencies and inability to function normally are consistent with the effects of GHB the forensic toxicologist, CDR TB, explained during his testimony. CDR TB also testified that the effects of GHB are amplified when it is consumed with alcohol as occurred in this case. Although SrA AW remembered several aspects of the sexual encounters, she testified she was not in control of her body and her efforts to convince the appellant to stop were futile. She only acquiesced to gain some control of the situation. Accordingly, the evidence showed the GHB administered by the appellant impaired SrA AW's ability to appraise or control her behavior.

Finally, the appellant argues that the evidence is insufficient because SrA AW had a motive to lie because she was afraid of Mr. RH as he was a martial arts fighter who had anger management issues and she did not want to damage her relationship with him. The appellant's position is without merit. Despite the appellant's contention, the evidence showed that the sexual encounter occurred without SrA AW's consent and was due to the effects of the GHB that the appellant secretly administered.

Having paid particular attention to the matters raised by the appellant and making allowances for not having personally observed the witnesses, we find the evidence factually sufficient to support his conviction for rape. We are convinced beyond a reasonable doubt that the appellant is guilty of the rape charge and specification of which he was convicted.

Mental Health Records

The defense counsel filed a pre-trial motion to compel production of SrA AW's mental health records. The military judge granted the motion and the defense counsel was provided a copy of her mental health records, subject to a protective order.

During sentencing, SrA AW testified about the impact of the alleged rape, saying she had nightmares, she stopped interacting with her neighbors, and she became upset when she encountered the appellant at work. The defense counsel requested permission to cross-examine SrA AW using certain information from her mental health records. He argued the records proved she suffered from preexisting mental health problems which contradicted her claim that the alleged rape caused nightmares and problems with her social life. Specifically, defense counsel wanted to use SrA AW's responses to two mental health questionnaires, one administered about two weeks before the alleged rape and the other administered about five weeks after the incident. The trial defense counsel's argument was that her overall interpersonal relations score remained essentially

the same, which showed she was not affected by the rape. Trial counsel objected and the military judge sustained the objection, in part. He limited cross-examination on SrA AW's responses to 5 of the 45 questions listed on the questionnaires that he determined arguably rebutted her testimony. The defense counsel elected to only cross-examine her on 3 of the 5 authorized answers.

On appeal, the appellant argues that the military judge's ruling prevented his defense counsel from cross-examining SrA AW about questions from her mental health assessments that either did not change or minimally changed after the alleged rape. The military judge's ruling also prevented questioning concerning areas of SrA AW's life that improved between the time before and after the alleged rape. By limiting the scope of cross-examination of the Government's only sentencing witness, the appellant avers that the impact of SrA AW's testimony was stronger than it should have been.

This Court reviews a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010). "Trial judges have broad discretion to impose reasonable limitations on cross-examination, 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *United States v. McElhaney*, 54 M.J. 120, 129 (C.A.A.F. 2000) (citations omitted). However, a military judge's discretion is not unfettered. An accused's right under the Sixth Amendment[3] to cross examine witnesses is violated if the military judge precludes an accused from exploring an entire relevant area of cross-examination." *United States v. Israel*, 60 M.J. 485, 486 (C.A.A.F. 2005).

"A patient has a privilege to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to a psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition." Mil. R. Evid. 513(a). However, there is no privilege when such records are "constitutionally required." Mil. R. Evid. 513(d)(8). "To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence." Mil. R. Evid. 513(e)(4).

We have reviewed the ruling made by the military judge and find no abuse of discretion. The military judge correctly applied the provisions of Mil. R. Evid. 513 limiting the cross-examination of SrA AW to the areas she testified to on direct

[3] U.S. CONST. amend VI.

examination, specifically nightmares and her relationship with neighbors. Considering SrA AW never testified about the impact the alleged rape had on her overall mental health, the military judge did not abuse his discretion in preventing the defense counsel from exploring all aspects of her mental health on cross-examination. Instead, he struck an appropriate balance between the appellant's constitutional rights and the alleged victim's privileged communications to her mental health provider.

Challenges for Cause

In the third and fourth assignments of error, the appellant claims that the military judge abused his discretion in denying the appellant's challenges for cause of Col GP and Col MS.

During general voir dire, the trial defense counsel asked the members: "Would each of you agree that it is important to consider the prior action of the relationship of the parties, their conversations, nonverbal actions [sic] accused, prior contact and circumstances surrounding the touching or contact when determining whether the accused could have believed that he was okay to touch another person in a sexual manner?" Col GP responded in the affirmative. However, during individual voir dire, when asked a similar question, Col GP stated, "I put that into some of the training I've received from the Air Force that 'no' means 'no,' and that no matter what your pre-existing clues are or the impression you've gotten from the person, if they say 'no,' it's no longer in doubt, and you can't make the presumption that the previous activity would lead you on any further." When defense counsel subsequently asked, "Do you agree that there are situations that may be involved with mixed signals, if you will, that make it more difficult," Col GP agreed "[m]ixed signals could make it more difficult." Col GP also stated that in those situations it would be important to look at all of the facts and circumstances. The defense counsel challenged Col GP for cause arguing that he expressed an inelastic predisposition regarding sexual assault. The military judge denied the challenge for cause, stating the following rationale:

> I have considered actual bias, and implied bias and the liberal grant mandate. I find no actual and no implied bias. . . . I believe that he will consider all the evidence and make a fact-specific judgment based on the evidence as it plays out. He has not closed himself off – or he has not made a decision at this point in the proceeding.

Concerning the challenge for cause of Col MS, during general voir dire, the trial defense counsel asked, "If a woman stated that she did not remember consenting to certain sexual acts, but the man stated that all sexual contact was voluntary, could you believe that the acts were consensual?" Col MS gave a negative response. The trial defense counsel also asked, "Do any of you believe that if a woman is inebriated in any way, regardless of the cause, she cannot consent?" Col MS responded in the affirmative.

During individual voir dire, Col MS explained, "[I]f you had all your faculties about you, I can't see how you could not remember saying yes or no to that unless you were passed out or something along those lines. That's the only way I could see you not remembering." Col MS also explained, "[I]f you're inebriated, you can't consent or not consent. I mean the mere fact that you're inebriated means that you're pretty much out of it at that point, so you can't say yes or no." In response to questions by the trial counsel, Col MS stated that his answer was dependent on the definition of the word "inebriation" and that he would put aside his own definition and follow the military judge's definition.

The trial defense counsel challenged Col MS for cause arguing that he displayed an inelastic predisposition in that "he didn't really care about the other details. . . . If [a victim] can't remember, then it must be non-consensual." The military judge denied the challenge, stating:

> We have tied this concept of inebriation and memory lapses to consent, somehow, and asked them in a vacuum, without hearing any facts on it to determine whether or not they would find one way or the other. Given the demeanor of this particular member – well, a lot of them, but this particular one, I noted that he seemed to be confused by a lot of the questions, and frankly, I was too. I believe he has shown no type of bias of any kind and that he has not rejected any law and made any decisions at this particular point in time. I've considered actual bias, implied bias and the liberal grant mandate.

The appellant elected not to exercise his peremptory challenge against any member of the panel.

We find the appellant's claim meritless because he has waived the issue. Rule for Courts-Martial (R.C.M.) 912(f)(4) controls this very situation: "When a challenge for cause has been denied . . . failure by a challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review." *See also United States v. Medina*, 68 M.J. 587, 592 (N.M. Ct. Crim. App. 2009) (citing R.C.M. 912(f)(4)).

Even without waiver, we find the military judge did not err in denying the appellant's challenge for cause. Applying actual bias, implied bias, and the liberal grant mandate, there is nothing about Col GP's or Col MS's answers in voir dire to indicate the appellant received anything less than a panel composed of fair and impartial members. *United States v. Wiesen*, 56 M.J. 172, 176 (C.A.A.F. 2001).

Sentencing Severity

The appellant asserts that his sentence consisting of a dishonorable discharge and confinement for four years is inappropriately severe. We disagree.

This Court reviews sentence appropriateness de novo. *United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ. We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate, but are not authorized to engage in exercises of clemency. *Nerad*, 69 M.J. at 146; *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

In its presentencing case, in addition to calling SrA AW, the Government submitted three nonjudicial punishment actions under Article 15, UCMJ, 10 U.S.C. § 815, and six letters of reprimand for numerous acts of misconduct committed by the appellant, to include: dereliction of duty on two occasions, failure to go to his appointed place of duty on numerous occasions, false official statement, and reckless driving. Having considered the nature and seriousness of the offenses, this particular appellant, his record of service, and all matters contained in the record of trial, we do not find the sentence is inappropriately severe.

Conclusion

The approved findings and sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court