UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant FRANKEY L. PETERMAN II
United States Air Force

ACM 38705

24 March 2016

Sentence adjudged 14 June 2014 by GCM convened at Mountain Home Air Force Base, Idaho. Military Judge: Natalie D. Richardson.

Approved Sentence: Dishonorable discharge, confinement for 2 years, and reduction to E-1.

Appellate Counsel for Appellant: Captain Lauren A. Shure.

Appellate Counsel for the United States: Major Jeremy D. Gehman and Gerald R. Bruce, Esquire.

Before

ALLRED, TELLER, and ZIMMERMAN
Appellate Military Judges

OPINION OF THE COURT

ZIMMERMAN, Judge:

At a general court-martial composed of officer members, Appellant was convicted, contrary to his pleas, of violating Article 120, UCMJ, 10 U.S.C. § 920. Appellant was found guilty of sexually assaulting Senior Airman (SrA) CM when he penetrated her vulva with his finger while she was asleep. The court sentenced Appellant to a dishonorable discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the dishonorable discharge, confinement, and reduction, but deferred confinement and forfeitures and then waived a period of mandatory forfeitures for the benefit of Appellant's dependents.

On appeal, Appellant makes four averments: (1) the finding of guilty is legally and factually insufficient, (2) the military judge erred in excusing a court member for implied bias after the member requested evidence related to the complaining witness's testimony, (3) the Government engaged in unlawful command influence when the court member in the previous averment was excused from the court panel, and (4) the military judge restricted Appellant's constitutional right to present his defense by instructing court members they could not use a witness's invocation of the right to remain silent against her. We disagree with these challenges and affirm the finding and sentence.

Background

Appellant, along with SrA CM and three friends, engaged in some pre-party socializing and then attended a Halloween party starting in the late hours of 25 October 2013. As transportation to the party in Boise, Idaho, they drove Appellant's sports utility vehicle (SUV) from their homes in the Mountain Home Air Force Base locale. When the party ended in the early hours of 26 October 2013, they reloaded into Appellant's SUV to go home, making a stop at a restaurant to eat. In the SUV, Appellant drove the vehicle, SrA CM sat in the front passenger seat, and the other three friends sat in the back seats. All four passengers fell asleep as Appellant drove them towards Mountain Home.

During this drive back, SrA CM awoke suddenly to see Appellant's right hand already placed in between her thighs underneath her shorts, and she felt his fingers inside her vagina. She was uncertain how long he had been digitally penetrating her before she awakened, but when she realized what Appellant was doing, she screamed profanities at him and immediately climbed into the back seat with her friends through the opening between the front passenger and driver's seats.

Prior to this night, Appellant and SrA CM were coworkers and had also been casual friends during a time when Appellant was married to SrA CM's good friend. However, she and Appellant did not normally socialize with each other, and the record contained no evidence SrA CM ever expressed consent to the touching. SrA CM testified she was confused, scared, and just wanted to get away from Appellant when she awoke. Once she was in the back seat, she tried to wake her friends to tell them he had touched her. All the while, Appellant said nothing in response to her accusation, and he continued to drive.

All three friends confirmed they were asleep when SrA CM climbed into the back seat, and no one saw Appellant touching SrA CM. SrA CM's best friend testified she awoke to SrA CM calling her name and yelling that Appellant "fingered" her in her sleep. This friend further testified she was scared after she heard this, and because Appellant did not say anything in response to the accusation, she did not know what would happen next. Appellant only asked where he should drive them. The other two friends testified SrA CM climbed into the back seat, stating Appellant had touched her. All passengers testified SrA CM looked scared or frantic, as well as crying and shaking. Although SrA CM and the

three friends spoke about the "fingering" or touching loudly enough for everyone in the car to hear, the witnesses testified Appellant did not respond to any statement or questions about the assault while in the SUV. It was only after they arrived at the friends' house that Appellant spoke to one of the friends about the accusation, claiming SrA CM was lying. SrA CM was inside the friend's house when they relayed Appellant's denial to her, angering and prompting her to report the sexual assault to the local police shortly afterwards.

Mountain Home investigators interviewed Appellant the same day. He provided a statement denying the allegation and maintaining that while he touched SrA CM twice during the drive home when she was sleeping, he only touched her on the shoulder to ensure she was all right. When the investigator offered DNA testing of Appellant's hand to ascertain whether Appellant or SrA CM were telling the truth, Appellant agreed to swabbing of his fingers for DNA testing.

The record contained medical and scientific evidence relevant to the assault. A sexual assault nurse examiner screened SrA CM for potential sexual assault and collected forensic evidence from her body. Also, a forensic biologist from the United States Army Criminal Investigation Laboratory tested the DNA swabs from SrA CM's genital area, as well as from fingers from both of Appellant's hands, finding matching DNA from SrA CM on the fingers of Appellant's right hand but not his left. However, the forensic biologist did not find Appellant's DNA on the swabs from SrA CM's genital area, but did find a partial DNA profile from an unknown male on SrA CM's vaginal swabs.

Additional facts necessary to resolve the assignment of errors are included below.

Legal and Factual Sufficiency[1]

Appellant maintains on appeal that the Government "failed to present sufficient evidence at trial to support the conviction in light of the additional evidence found during the forensic exam of the complaining witness." We disagree.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)). 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 [appellant's] guilt beyond a reasonable doubt." *Turner*, 25

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

M.J. at 325. Our appellate review "involves a fresh, impartial look at the evidence," contained in the "entire record without regard to the findings reached by the trial court" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

We find the evidence legally and factually sufficient to support Appellant's conviction. The elements of the sexual assault offense are: (1) that Appellant committed a sexual act upon SrA CM by penetrating her vulva with his finger, and (2) that he did so by causing bodily harm to SrA CM, to wit: a nonconsensual sexual act with an intent to gratify his sexual desire. *Manual for Courts-Martial, United States*, pt. IV, ¶ 45.a.(b)(1)(B) (2012 ed.).

Evaluating the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt, and the evidence is, therefore, legally sufficient. SrA CM's testimony about Appellant's nonconsensual digital penetration of her, along with eyewitness testimony of her immediate, emotional reaction to the unwanted sexual touching, as well as forensic findings of SrA CM's DNA on Appellant's right hand fingers, could all be reasonably considered credible and convincing.

The defense theory at trial was that Appellant did not digitally penetrate SrA CM. They argued that if Appellant had sexually assaulted SrA CM, Appellant's DNA should have been found on SrA CM's vaginal swabs, which it was not. Also, they asserted the biologist found a partial DNA profile from an unknown male on the vaginal swabs of SrA CM, but did not find the unknown DNA profile on Appellant's fingers. With regard to Appellant's argument that the results from the forensic examination of SrA CM made the evidence insufficient, we disagree. First, the biologist provided alternate theories for the lab's findings: Appellant did not touch SrA CM's genital area, there was not enough DNA left behind from Appellant's fingers to be detectable on SrA CM's vagina, or there was not enough DNA from the unknown male to be detectable on Appellant's fingers. Therefore, court members could reasonably have found that Appellant did not leave sufficient DNA from his fingers to be detected on the swabs of SrA CM's genital area, or the amount of partial DNA from the unknown male was so low that the biologist could not detect it on Appellant's finger swabs.

Second, the parties entered into a stipulation of expected testimony from the forensic biologist, who stated the results from Appellant's right hand finger swabs were consistent with him having contact with SrA CM's body and could have been from direct contact with her vagina, but the lab could not test specifically for vaginal fluid. However, in the biologist's opinion, it was "unlikely that these DNA results would have been obtained through mere touching or physical contact, but…[was] possible." Court members could reasonably have found this testimony supported SrA CM's complaint.

After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are personally convinced of Appellant's guilt. Appellant's conviction on the charge and specification is both legally and factually sufficient.

Implied Bias Challenge

On appeal, Appellant asserts the military judge erred in excusing a court member, Capt JG, on the basis of implied bias. We disagree and conclude the military judge did not err.

After initial voir dire, challenges, and excusals of potential court members, the court-martial panel consisted of six officer members, including Capt JG. During the Government's presentation of its case-in-chief, the military judge afforded all court members the opportunity to submit questions for SrA CM after counsel concluded direct and cross-examination of her. Capt JG submitted his question and added his commentary to counsel's examination of SrA CM and her responses, stating, "The questioning from M[ountain] H[ome] Police about who was driving, drinks in the car . . . Are these facts from the M[ountain] H[ome] Police department? It was just a lot of 'Did not say that?' statements. Article 32 hearings were clear, though." (Ellipses in original). Based on the preceding statements and other statements Capt JG made during the military judge's ensuing questioning of him, trial counsel challenged Capt JG's continued service as a court panel member, which the military judge granted.

We review "issues of implied bias . . . under a standard less deferential than abuse of discretion, but more deferential than de novo." *United States v. Woods*, 74 M.J. 238, 243 (C.A.A.F. 2015) (citing *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)). A court member should be excused for cause when it appears he "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." Rule for Courts-Martial (R.C.M.) 912(f)(1)(N). Recently, our superior court expounded on the application of R.C.M. 912 to implied bias challenges:

> R.C.M. 912(f)(1)(N) sets the basis for an implied bias challenge, which stems from the historic concerns about the real and perceived potential for command influence in courts-martial. Unlike the test for actual bias, this Court looks to an objective standard in determining whether implied bias exists. The core of that objective test is the consideration of the public's perception of fairness in having a particular member as part of the court-martial panel. In reaching a determination of whether there is implied bias, namely, a perception or appearance of fairness of the military justice system, the totality of the circumstances should be considered.

United States v. Peters, 74 M.J. 31, 34 (C.A.A.F. 2015) (citations and internal quotation marks omitted).

After reviewing the entire circumstances related to Capt JG's excusal by the military judge, we find the military judge did not err. A reasonable member of the public could find Capt JG's continued participation would call into question the fairness of the trial. Capt JG expressed that the questions he submitted were "more for [the] defense to ask," implying that he believed the defense had some burden of persuasion and he desired for them to further inquire into specific areas raised during their cross-examination of SrA CM. Upon hearing this explanation, the military judge immediately admonished Capt JG that his questions "are not to help either side." To which, Capt JG later explained that his comment on "questions for the defense" was not intended to be "in favor of either side" and that he simply wanted to see evidence that would support trial defense counsel's impeachment of SrA CM.

After considering these clarifications, along with other responses from Capt JG and his comments in the initial voir dire session, the military judge remained troubled about Capt JG's inability to follow her instruction and about the appearance of unfairness. For example, regarding whether he could follow the judge's instructions, Capt JG stated, "That was my fault on the first one, 'cause I know you briefed us to ask the witnesses, and for some reason—I don't know what I was thinking." Given Capt JG's express rationale and the implications of his statements, "the risk that the public [would] perceive that [Appellant] received something less than a court of fair, impartial members [was] too high." *United States v. Townsend*, 65 M.J. 460, 463 (C.A.A.F. 2008). Despite his repentant assurances that he could follow instructions from that point forward, we believe the public could find unfairness in the proceedings if the military judge permitted Capt JG to remain on the panel after he violated the military judge's instruction in the first place. His failure is especially troublesome for two reasons: because it was clear from his comments that he understood the instruction at issue, and because the instruction specifically warned the members to not attempt to help either side, an essential requirement for an impartial panel and a fair trial. Given the totality of the circumstances and in light of Capt JG's desire to have the defense present evidence, the military judge properly excused Capt JG for cause in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality. *See Downing*, 56 M.J. at 422.

Unlawful Command Influence

At trial, Appellant sought relief through a motion to dismiss the case with prejudice, claiming actual and apparent unlawful command influence. Appellant claimed that unlawful command influence infected every phase of this trial due to the actions of the

President of the United States, Secretary of Defense, and the Chief of Staff of the Air Force in regards to sexual assault cases. The military judge allowed the parties to conduct extensive voir dire of the potential court-members and excused some of the members after challenges, but ultimately denied the defense's unlawful command influence motion. The judge found beyond a reasonable doubt that there was no unlawful command influence in the accusatory or adjudicatory stages of Appellant's case. On appeal, Appellant claims trial counsel committed unlawful command influence, which was furthered by the military judge when she removed Capt JG from further participation in the trial. We disagree with Appellant's contentions.

Article 37(a), UCMJ, 10 U.S.C. § 837(a), states: "No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . or any member thereof, in reaching the findings or sentence in any case . . . ." The mere appearance of unlawful command influence may be "as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Ayers*, 54 M.J. 85, 94–95 (C.A.A.F. 2000) (quoting *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991)) (internal quotation marks omitted).

We review allegations of unlawful command influence de novo. *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013). "On appeal, the accused bears the initial burden of raising unlawful command influence. Appellant must show: (1) facts, which if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that the unlawful command influence was the cause of the unfairness." *Id*. (citing *United States v. Richter*, 51 M.J. 213, 224 (C.A.A.F. 1999)). The initial burden of showing potential unlawful command influence is low, but is more than mere allegation or speculation. *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002). Appellant must initially present "some evidence" of unlawful command influence. *Id*. (quoting *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)) (internal quotation marks omitted). Then, after an issue of unlawful command influence is raised by some evidence, the burden shifts to the Government to rebut an allegation of unlawful command influence by persuading the court beyond a reasonable doubt that: (1) the predicate facts do not exist; (2) the facts do not constitute unlawful command influence; or (3) the unlawful command influence will not affect the findings or sentence. *Biagase*, 50 M.J. at 151.

As an initial matter, we find the military judge's findings of fact on the defense's unlawful command influence motion are supported by the record and correct in law.[2] Upon our review of the entire record, we further find Appellant did not present some evidence of

[2] Trial defense counsel argued a theme of "believe the victim" had permeated the Air Force and influenced the court-martial and court members. The military judge found "no evidence of any actual taint of any court member . . . no appearance of unlawful command influence . . . [and] no influence of command [had] placed an intolerable strain on the public perception of the military justice system." Even if it had, the military judge found beyond a reasonable doubt there was no unlawful command influence, and an objective, disinterested observer fully informed of all facts and circumstances would not harbor a significant doubt as to the fairness of the court-martial.

actual unlawful command influence in trial counsel's challenge of Capt JG. Trial counsel's challenge of Capt JG was based on good cause, and it was not an attempt to coerce or improperly influence the actions of the court-martial or court members. Also, the military judge's excusal of Capt JG was proper, as discussed above, and not in furtherance of any unlawful command influence.

Even assuming Appellant produced some evidence of apparent unlawful command influence, we find beyond a reasonable doubt that the case was not infected by actual or apparent unlawful command influence. An objective, disinterested member of the public, fully informed of all facts and circumstances,[3] would not harbor a significant doubt as to the fairness of Appellant's trial. *See United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006).

Instruction on Witness's Right to Remain Silent

Last, Appellant urges this court to set aside the finding and sentence because the military judge improperly instructed the court members to not draw any adverse inference from a witness's exercise of her right to remain silent at a pretrial hearing. Appellant asserts the military judge's instruction to the members restricted his constitutional right to present an aspect of his defense, specifically, the witness's lack of credibility, and the instruction was confusing and contradictory. We do not agree.

Whether a military judge properly instructs the court members is a question of law we review de novo. *United States v. Torres*, 74 M.J. 154, 157 (C.A.A.F. 2015). This court reviews a military judge's decision to give an instruction under an abuse of discretion standard. *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996).

Here, the Government witness testified on direct examination as to her observations before and after the sexual assault, which included interactions with both Appellant and SrA CM. Through cross-examination, trial defense counsel elicited from the witness that she was testifying at trial under grant of testimonial immunity, and that she had testified at an Article 32, UCMJ, 10 U.S.C. § 832, pretrial hearing during which the investigating officer advised her of the right against self-incrimination for false official statement. The witness responded in the affirmative when asked if she "refused to testify anymore" at the prior hearing.

[3] After Capt JG was excused, the military judge instructed the remaining members that they ought not speculate on the reason for Capt JG's excusal, and it must not discourage them from asking questions of witnesses, "either those to come, or from witnesses from whom [they have] already heard." One member clarified with the judge that they could ask questions of the first witness (SrA CM) and other witnesses, if questions came to mind later in the trial. All the members confirmed their understanding of these instructions, and in fact went on to ask questions of the witnesses during the trial.

The military judge permitted this cross-examination, but prior to findings deliberation and over defense objection, the military judge gave the following instruction to the court members:

> Right to remain silent. Senior Airman [AS] testified that she was advised of her rights at the Article 32 hearing, including the right to remain silent, based on suspected false official statement. At that point she had an absolute right to remain silent at that hearing. You will not draw any inference adverse to her from the fact that she exercised that right and did not continue her testimony at the Article 32 hearing.

The military judge also instructed the members that they "have a duty to determine the believability of the witnesses," that the witness had testified under a grant of immunity which could be considered "along with all the other factors that may affect the witness's believability," and the members may consider the witness's prior inconsistent statements in deciding whether to believe her in-court testimony.

Military Rule of Evidence 301(f)(1) states "[t]he fact that a witness has asserted the privilege against self-incrimination in refusing to answer a question cannot be considered as raising any inference unfavorable to either the accused or the government." The rule contains no temporal limitations; therefore contrary to Appellant's urging, this court does not interpret the rule to only apply to in-court invocation of this privilege. Rather, Mil. R. Evid. 301(f) applies to both pretrial and in-trial invocation of a witness's right to remain silent.[4]

Once a right against self-incrimination has been invoked by a witness, no inferences can be drawn from a legitimate assertion of a witness's constitutional rights. Therefore, the military judge did not abuse her discretion in giving this instruction. Further, Appellant's constitutional right to confront this witness and present credibility issues was not hindered by the military judge's instructions, because the defense attacked the witness on ample evidence impacting the witness's believability. As such, the military judge's

[4] Language in Rule for Courts-Martial (R.C.M.) 405 further contradicts Appellant's assertion that Mil. R. Evid 301(f)(1) only applies at trial. R.C.M. 405 governs the conduct of Article 32, UCMJ, 10 U.S.C. § 832, pretrial investigations (now "preliminary hearings"), and provides Mil. R. Evid. 301 shall apply in pretrial investigations or preliminary hearings. R.C.M. 405(i) (2012); R.C.M. 405(h) (2015); *see also United States v. Johnson*, 39 C.M.R. 241 (C.M.A. 1969) (case pre-dating Mil. R. Evid 301 where Court of Military Appeals held accused not prejudiced when law officer did not permit him to impeach witness's credibility with witness's refusal to testify at Article 32, UCMJ, pretrial investigation). Moreover, Mil. R. Evid. 301(f)(1) is a subsection of Section III, *Exclusionary Rules* and Related Matters Concerning Self-Incrimination, Search and Seizure, and Eyewitness Identification. (Emphasis added). This section of rules dealing with admissibility of assertions of constitutional rights are exclusionary (i.e., rules of prohibition), and further weigh against Appellant's argument that comment on a witness's invocation of such assertions are outright permissible.

instruction did not restrict Appellant's right to present a defense because it did not hamper the defense's comment on permissible credibility evidence. The military judge properly tailored findings instructions covering all credibility issues raised by the evidence, including testifying under grant of immunity and prior inconsistent statements. *See Maxwell*, 45 M.J. at 424 (stating that instructions must sufficiently cover issues in the case and focus on facts presented by evidence). Additionally, the instruction to not draw any adverse inference from the witness's invocation of rights was limited in scope and did not restrict the members' consideration of evidence that the witness was suspected of making a false official statement. Lastly, we are satisfied that when viewed in light of the witness's in court confession that at "[t]he Article 32, [she] lied," any evidence that she invoked her right to remain silent at that pretrial hearing becomes much less consequential.

Conclusion

The approved finding and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved finding and sentence are **AFFIRMED**.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist