UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant KEITH E. POPE
United States Air Force

ACM 34921

30 August 2004

Sentence adjudged 27 September 2001 by GCM convened at Maxwell Air Force Base, Alabama. Military Judge: Sharon A. Shaffer.

Approved sentence: Bad-conduct discharge, confinement for 15 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Andrew S. Williams, Major Marc A. Jones, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Linette I. Romer.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

<u>This opinion is subject to editorial correction before final release.</u>

MOODY, Judge:

The appellant was convicted, contrary to his pleas, of four specifications of violating a lawful general regulation, one specification of maltreatment of a subordinate, and two specifications of assault consummated by a battery, in violation of Articles 92, 93, and 128, UCMJ, 10 U.S.C. §§ 892, 893, 928. The general court-martial, consisting of officer and enlisted members, sentenced the appellant to a bad-conduct discharge, confinement for 15 months, total forfeiture of all pay and allowances, and reduction to E-

1. The convening authority reduced the assault consummated by a battery specifications to simple assault but approved the sentence as adjudged.

The appellant has submitted eight assignments of error: (1) The evidence is factually and legally insufficient; (2) The Air Education and Training Command Instruction (AETCI) 36-2002 is unconstitutionally vague; (3) The military judge erred by not instructing the members concerning mistake of fact; (4) Trial counsel's findings argument impermissibly shifted the burden of persuasion to the appellant; (5) The appellant was prejudiced by the admission in sentencing of improper rebuttal testimony; (6) The military judge erred by admitting as rebuttal in sentencing a statement by the appellant; (7) The military judge erred by admitting in sentencing a memorandum that discussed the importance of core values to the Air Force Recruiting Service; and (8) The appellant received ineffective assistance of counsel. This last issue was submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Finding no error, we affirm.

Background

The appellant was assigned to the 331st Recruiting Squadron at Maxwell Air Force Base-Gunter Annex, Alabama. During the times alleged in the charges and specifications, he was serving as a recruiter in Athens, Georgia.

While working in that capacity, the appellant made numerous inappropriate remarks to females, some of whom were prospective recruits and another of whom was an active duty airman working in the office doing recruiter's assistance. Additionally, he engaged in conduct with them that was of a sexual nature, to include two instances of assault. For example, one victim, AR, testified that the appellant asked her inappropriately intimate questions, such as whether or not she had a boyfriend. In addition, she stated that the appellant displayed a picture on his computer screen. Although she did not see the picture, the appellant intimated to her that it was sexual in nature. She further stated that when she got up to leave, he looked her "up and down" and made noises like, "umgh-umgh, you look good." She stated that she felt "very uncomfortable" as a result of the appellant's conduct.

Another witness, JG, stated that the appellant would make suggestive comments to her, such as, "Those jeans look really sexy on you," and that he took her out more than once, to the movies, to lunch, and to play tennis. She stated that after a tennis game, the appellant invited her into his home, where he "cornered" her in his kitchen, "hugging on me and kind of kissing on my neck." She also stated that upon one visit to the recruiting office, the appellant made a sexual gesture to her, "[d]emonstrating oral sex on a female."

Other female witnesses told similar stories about sexual conduct and activity by the appellant. JB testified that the appellant visited her high school on a recruiting trip

and told her that "the rules in the Air Force were less strict than the Marines," and that her eyebrow ring was driving him "crazy" because it was "so sexy." She stated that, upon hearing this, her "skin was crawling." LW stated that, during one of her visits to the recruiting office, the appellant called her into a separate room, where he pulled her shirt and bra up and grabbed her breast. She testified, "He said that they were beautiful and he started to put his mouth on me, and I pulled away." LW immediately left the office and was very upset. She testified, "I was crying, you know confused, I didn't think nothing like this would happen." None of the victims appeared to have any knowledge of the others.

After findings, and during the sentencing portion of the trial, the appellant made an unsworn statement. Although a portion of the statement had obviously been prepared prior to trial, the appellant began his presentation with what appeared to be a spontaneous and rambling monologue. In it, he questioned the veracity of the witnesses against him, denying their versions of the events. In effect, the thrust of his statement was to challenge the credibility of the victims. The appellant also apologized to the victims for his actions.

After the conclusion of the defense case, the prosecution sought to rebut the appellant's statement. Among other things, the prosecution called four of the victims, three of whom were present in the courtroom during the appellant's unsworn statement, and asked each of them how they felt about the appellant's comments. When AR was asked how she felt about being called a liar by the appellant, she responded, "I'm offended. I didn't lie." She further stated, "I never saw [the picture on his computer] and I never said I did." JB responded to the prosecutor's question by saying, "It was upsetting. And I was shaking because for someone to call me a liar and I'm under oath is extremely displeasing to me and it's also an attack on my personality. Because I don't lie. I don't like to lie." LW stated that she did not understand the basis for the appellant's statement, "I have no reason, I have no point to lie. I'm not getting nothing out of it. So why would I lie?" Finally, JG stated that she was "[s]hocked and angry" after being called a liar by the appellant. She testified, "Him talking was the first time that I heard anything else about any of the other witnesses. You don't have six similar events on six women who do not know each other." When asked about the appellant's apology after being called a liar, JG replied, "To me it wasn't sincere and I don't see how he could be able to apologize." The defense did not object to the admission of this testimony.

Improper Questions on Rebuttal

Normally, this Court reviews a military judge's decision to admit evidence for an abuse of discretion. In light of the fact that there was no objection by the defense, however, we examine this issue for plain error. Plain error is error that is plain or

obvious and that materially prejudices the substantial rights of the appellant. *United States v. Powell*, 49 M.J. 460, 464 (C.A.A.F. 1998).

In the case sub judice, we have no difficult finding that the prosecutor's questions about the victims' feelings were obviously improper, as were the victims' replies about their emotions. Such matters neither explained, repelled, counteracted, nor disproved anything in the appellant's sentencing case. *See United States v. Saferite*, 59 M.J. 270, 273 (C.A.A.F. 2004); *United States v. Hallum*, 31 M.J. 254, 255 (C.M.A. 1990).

On the other hand, the victims went beyond merely commenting on their emotions and in fact asserted the truthfulness of their findings testimony. To that extent, they did provide information that constituted proper rebuttal evidence. We conclude that their testimony, taken as a whole and viewed in the context of the entire record, did not materially prejudice the appellant's substantial rights. In the final analysis, it was he himself who chose to impeach the verdict against him by questioning the veracity of witnesses whom the panel had already found to be credible beyond a reasonable doubt. The prejudice resulting from such a course of action was not likely to have been significantly exacerbated by this ill-chosen aspect of the prosecution's rebuttal case. Therefore, we hold that this issue does not constitute plain error.

Other Issues

We resolve the remaining assignments of error adversely to the appellant. Considering the evidence in the light most favorable to the prosecution, we hold that a rational factfinder could have found all essential elements of the offenses beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Furthermore, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

Defense counsel's failure to object to AETCI 36-2002, *Recruiting Procedures for the Air Force*, 18 Apr 2000, waived any error associated with its admission into evidence. Even if the error had not been waived, AETCI 36-2002 defines its prohibitions with sufficient clarity that a reasonable person can understand what conduct is proscribed. Therefore, it is not unconstitutionally vague. *See United States v. Saunders*, 59 M.J. 1 (C.A.A.F. 2003); *United States v. Hecker*, 42 M.J. 640 (A.F. Ct. Crim. App. 1995). Next, we hold that defense counsel's failure to object to the military judge's findings instructions waived any error. Rule for Courts-Martial (R.C.M) 920(f). Even if not waived, however, we find no error, plain or otherwise, in these instructions. The evidence adduced at trial did not raise the issue of mistake of fact. R.C.M. 916(j). *See United States v. Greaves*, 40 M.J. 432 (C.M.A. 1994).

Trial counsel commented in her findings argument that the good military character evidence presented by the defense was not persuasive of innocence. Examining the comments in light of the record as a whole, we conclude that this did not shift the burden of persuasion to the appellant. *See United States v. Stadler*, 44 M.J. 566, 569 (A.F. Ct. Crim. App. 1996), *aff'd*, 47 M.J. 206 (C.A.A.F. 1997). The military judge, in response to a defense objection, properly instructed the panel as to the presumption of innocence and burden of proof. Additionally, there was no error in the standard findings instructions he gave on the government's burden. In the absence of evidence to the contrary, the members are presumed to have complied with the instructions. *United States v. Mobley*, 34 M.J. 527, 531 (A.F.C.M.R. 1991), *aff'd,* 36 M.J. 34 (C.M.A. 1992).

The military judge admitted a transcript of an interview with the appellant in which he was questioned following a rights advisement about inappropriate sexual comments to JG and AR. This interview occurred prior to some of the offenses charged. We conclude that this transcript rebutted the appellant's unworn statement that at no time prior to the offenses had he been advised that his conduct with the victims was offensive in nature. Therefore, we hold that the military judge did not abuse her discretion in admitting the transcript. *See United States v. Hursey*, 55 M.J. 34 (C.A.A.F. 2001).

The military judge admitted, over defense objection, a memorandum from the commander of the Air Force Recruiting Service as aggravation evidence. The memorandum stated, in part, that each member of the command:

> must understand that <u>unprofessional relationships with applicants</u> . . . are harmful to all concerned as well as an embarrassment to AFRS, AETC, and the entire service. Such misconduct simply <u>will not be tolerated</u>. . . . If you choose to ignore these important rules for the sake of your own pleasure or esteem, you should not be surprised when, once you are caught, harsh adverse action follows.

This memorandum was provided to all Air Force Recruiting Service personnel. According to a witness, the appellant would have received his copy prior to the times alleged in the charges and specifications.

We hold that this memorandum was relevant to the appellant's state of mind and therefore admissible as aggravation. It did not improperly interject Air Force policy into the members' deliberations, nor did it state the commander's expectations as to punishment. *See United States v. Kropf*, 39 M.J. 107 (C.M.A. 1994); *United States v. Barrazamartinez,* 58 M.J. 173 (C.A.A.F. 2003).

Finally, we conclude that we can resolve the issue of ineffective assistance of counsel without ordering post-trial factfinding. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). The facts asserted by the appellant fail to demonstrate deficient

performance within the meaning of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Therefore, we hold that the appellant was not denied effective assistance of counsel.

The 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); *Reed*, 54 M.J. at 41. Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court