UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Chief Master Sergeant PAUL H. SCHRODER
United States Air Force

ACM 35855

31 March 2006

Sentence adjudged 7 July 2003 by GCM convened at Bolling Air Force Base, District of Columbia. Military Judge: Kevin P. Koehler.

Approved sentence: Dishonorable discharge, confinement for 10 years, forfeiture of all pay and allowances, and reduction to E-4.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Major Terry L. McElyea, Major Sandra K. Whittington, and Mary T. Hall, Esq.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Heather L. Mazzeno, and Captain Kimani R. Eason.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

PER CURIAM:

We considered the record of trial, the assignments of error, and the government's answer thereto. We examined the military judge's admission of propensity evidence under Mil. R. Evid. 414 and 403 and hold that there was no clear abuse of discretion in that ruling. *See United States v. Ruppel*, 49 M.J. 247, 251 (C.A.A.F. 1998); *United States v. James*, 60 M.J. 870, 871 (A.F. Ct. Crim. App. 2005). We note that the military judge's findings instruction on the use of propensity evidence was not drawn from Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 7-13-1 (15 Sep 2002). Rather, it was taken verbatim from *United States v. Dewrell*, 55 M.J. 131, 138 (C.A.A.F. 2001). Although it is advisable to give *Benchbook* instructions whenever possible, we hold that the military judge did not abuse his discretion in giving the instruction at issue in this case.

We examined all the evidence admitted at trial. We hold that this evidence is both legally and factually sufficient to sustain the appellant's conviction. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

During opening statement, the trial counsel erroneously included matters the military judge previously ruled inadmissible. We find no abuse of discretion in the military judge's denial of a defense request for a mistrial. The curative instruction the military judge supplied was sufficient to correct the error. *See United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000). *See also* Rule for Courts-Martial (R.C.M.) 915 and its Discussion. We examined trial counsel's arguments, both on findings and on sentencing, and hold that they contain no plain error. *See United States v. Baer*, 53 M.J. 235, 237-38 (C.A.A.F. 2000); *United States v. Powell*, 49 M.J. 460, 464 (C.A.A.F. 1998). *See also* R.C.M. 919(c) and 1001(g).

We examined the record as a whole. We find no basis for holding that the military judge improperly ruled on the admissibility of evidence during a conference held under R.C.M. 802(a), nor do we find he otherwise used such a conference as a substitute for on-the-record litigation. *See United States v. Thomas*, 32 M.J. 1024, 1026 (A.F.C.M.R. 1991); R.C.M. 802(a), Discussion. During his summary of the conference, the military judge made no reference to having decided anything that was outside the scope of R.C.M. 802. We hold that the trial defense counsel's failure to object to the military judge's summary of the conference waives the issue. *See Thomas*, 32 M.J. at 1026; R.C.M. 802(b).

Concerning the alleged ineffectiveness of trial defense counsel, we applied the criteria in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), and conclude that we can resolve this issue without additional factfinding. Examining the appellate filings and the record as a whole, we hold that the appellant was not denied effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Finally, the sentence adjudged and approved is not inappropriately severe. *See United States v. Healy*, 26 M.J. 394, 395-97 (C.M.A. 1988).

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 approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court