UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant ERIC W. SNOEY

ACM 35907

16 November 2005

Sentence adjudged 4 February 2004 by GCM convened at Mountain Home Air Force Base, Idaho. Military Judge: Nancy J. Paul.

Approved sentence: Bad-conduct discharge, confinement for 12 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, and Captain John N. Page III.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Stacey J. Vetter.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

SMITH, Judge:

The appellant was tried at Mountain Home Air Force Base (AFB), Idaho, by a general court-martial consisting of officer members. In accordance with his pleas, the appellant was convicted of one specification of conspiracy to commit larceny, one specification of larceny, and three specifications of housebreaking with intent to commit larceny, in violation of Articles 81, 121, and 130, UCMJ, 10 U.S.C. §§ 881, 921, 930. The convening authority approved that portion of the adjudged sentence consisting of a

bad-conduct discharge, confinement for 12 months, and reduction to E-1. He did not approve the adjudged forfeitures.

The appellant asserts the military judge committed three errors in the presentencing portion of the trial by: (1) allowing a government sentencing witness to express an opinion about the appellant's trustworthiness, (2) erroneously restricting the content of the appellant's unsworn statement, and (3) instructing the court members not to consider matters in the appellant's unsworn statement about the disposition of other cases. Finding no error, we affirm the findings and sentence.

Background

The appellant was a security forces troop with over 12 years of service. He and five other security forces members stole various items of government property. While on patrol duty on three nights in January 2003, the appellant unlawfully entered five buildings on Mountain Home AFB for the purpose of stealing government property. The property he stole, including night vision goggles, a bulletproof vest, and a digital compass, was valued at more than $8,000.

At the time of the appellant's trial, disciplinary action had been taken against four of the six airmen involved in the thefts. The appellant's unsworn statement was delivered to the court members in two parts. The appellant opened by apologizing for what he had done and asked the members to consider his background and family circumstances in arriving at a sentence. The appellant's trial defense counsel then provided "more background into the story that I'm sure the government wouldn't want you to hear." That background included a list of the six security forces members (including the appellant) involved and an assessment that a Technical Sergeant, not yet prosecuted, was the "ringleader" of the group. The trial defense counsel then provided a detailed summary of the disciplinary actions taken against four of the members.

The trial defense counsel offered a copy of the appellant's unsworn statement as a defense exhibit. The statement included two attachments that mirrored the statements made orally by trial defense counsel as part of the appellant's unsworn statement: (1) the "background" list and assessment, and (2) the summary of disciplinary actions. The military judge called an Article 39(a), UCMJ, 10 U.S.C. § 839, session to express her reservations about the attachments. She ultimately decided not to allow them to be provided to the court members because "this goes very close to being evidence instead of an unsworn statement."

Discussion

On direct examination, the assistant trial counsel asked the security forces squadron operations superintendent, Senior Master Sergeant (SMSgt) Howard, if he had

an opinion about the appellant's trustworthiness. He said, "I have come to know [the appellant] as a liar and a thief." The trial defense counsel did not object to the question or the testimony, so we review for plain error. *United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998).

SMSgt Howard was not asked for, and did not provide, his opinion as to the appellant's rehabilitation potential. *See* Rule for Court-Martial 1001(b)(5). Appellate government counsel contends the evidence was proper rebuttal to three character statements submitted by the trial defense counsel that characterized the appellant as honest and trustworthy. Those defense exhibits had been admitted into evidence, but they had not yet been presented to the court members. The government's position is persuasive, in that the question could have been asked and answered in rebuttal. We hold these circumstances do not rise to the level of plain error. *See, e.g., United States v. Armon*, 51 M.J. 83 (C.A.A.F. 1999).

The appellant's contention that the military judge restricted the content of his unsworn statement is true only with respect to the written version of his statement. The oral version was presented without objection or modification. It is apparent that the appellant and his counsel read their portions from the subsequently proferred written version; thus, the background and summary of disciplinary actions were presented to the court members.

An accused may refer to dispositions in related cases. *United States v. Grill*, 48 M.J. 131, 133 (C.A.A.F. 1998). The appellant did so in this case through the oral version of his unsworn statement. Even if the military judge committed error in not admitting the attachments to the written version, there was no material prejudice to the substantial rights of the appellant given the fact the court members received the information in another form. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

Without objection from trial defense counsel, the military judge instructed the members that:

> During the unsworn statement, as well as during arguments, the accused, defense counsel, and trial counsel indicated what happened to other members for commission of similar offenses. The disposition in other cases is irrelevant for your consideration in adjudging an appropriate sentence for this accused. You do not know all the facts of those other cases, nor anything about the accused in those cases, and it is not your function to consider those matters in this trial.

The appellant contends this portion of the instruction materially prejudiced his allocution rights.

Failure to object to sentencing instructions at trial waives the issue on appeal absent plain error. *United States v. Hall*, 46 M.J. 145, 146 (C.A.A.F. 1997). The challenged instruction is substantially the same as that given in *United States v. Friedmann*, 53 M.J. 800, 801-02 (A.F. Ct. Crim. App. 2000). As in *Friedmann*, the military judge in this case placed the unsworn statement in the proper context for the members. *See Grill*, 48 M.J. at 133. In doing so, she followed this Court's sound precedent and committed no error.

Conclusion

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