UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant DONALD W. SWENSEN
United States Air Force

ACM 37555

19 May 2011

Sentence adjudged 01 September 2009 by GCM convened at Kadena Air Base, Japan. Military Judge: Grant L. Kratz (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 7 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Major Shannon A. Bennett, Major Darrin K. Johns, Major Anthony D. Ortiz, and Captain Andrew J. Unsicker.

Appellate Counsel for the United States: Colonel Don M. Christensen, Lieutenant Colonel Jeremy S. Weber, Captain Joseph Kubler, and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ROAN, Judge:

Pursuant to his pleas, the appellant was convicted at a general court-martial by military judge alone of one specification of engaging in sexual contact with a child under the age of 12, two specifications of indecent acts with a child under the age of 16, and one specification of wrongfully endeavoring to influence the actions of a witness, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934. The adjudged sentence consists of a dishonorable discharge, 11 years of confinement, forfeiture of all pay and

allowances and reduction to E-1. The convening authority approved the findings, 7 years of confinement, suspended the adjudged forfeitures and waived the mandatory forfeitures for six months, and approved the remainder of the sentence as adjudged.[1]

Appellant raises the following issues for our consideration: (1) The military judge erred during the sentencing phase by permitting trial counsel to present uncharged misconduct not directly related to the charged offenses; (2) The military judge abandoned his impartial role and became an advocate for the government thereby denying the appellant a fair trial; (3) The appellant suffered illegal punishment in violation of Article 13, UCMJ, 10 U.S.C. § 813; and (4) The appellant's sentence was inappropriately severe.[2] Having considered the issues and the entire record, we find no error that materially prejudices a substantial right of the appellant and affirm.

Background

At trial, the appellant admitted to engaging in divers incidents of indecent acts with his stepdaughter, BW. The first occurred three years prior when BW was approximately 14 or 15 years old. While she and the appellant were at a swimming pool, her bathing suit top came off. The appellant intentionally grabbed her breast while in the pool and did not immediately let go. The remaining indecent acts took place at the appellant's home during "tickle sessions" with the appellant, BW, and ES, the appellant's biological daughter. During these episodes, the appellant put his hand on BW's breast, allowing his hand to linger in order to arouse his sexual desires. The appellant further admitted to enticing ES into his bed and touching her genitalia when ES was 5 or 6 years of age.

During sentencing, the government called BW to testify about not only the events the appellant admitted to, but also four other sexual incidents that occurred prior to the charged offenses. Over defense objection, the military judge permitted BW to describe what had taken place. BW testified that when she was 7 or 8 years of age (approximately 9 or 10 years previously), the appellant coaxed her into the bathroom and she touched the appellant's penis after he urged her to do so. On another occasion a few months later, while BW and the appellant were taking a bath, the appellant pulled his bathing suit down and had BW sit on his erect penis. The third incident took place four to five years prior when BW was approximately 13 years old. The appellant took her into his room and told her, "men have urges and this is why I am molesting you." The fourth event took place when BW was 15. She testified that when she and the appellant were riding a jet ski, the

[1] The appellant and the convening authority entered into a pretrial agreement wherein the appellant agreed to plead guilty to certain charges and specifications in return for the convening authority's promise to dismiss other specifications and to not approve confinement in excess of seven years. The Court notes that the specifications that were withdrawn and dismissed pursuant to the pretrial agreement are not reflected in the court-martial order (CMO). Promulgation of a corrected CMO, properly reflecting the disposition of these specifications, is hereby ordered.

[2] Issues two, three, and four were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

appellant, who was in back, put his hand under her bathing suit and penetrated her vagina. BW further expounded on the tickling incidents, saying the appellant would sometimes put his hand down her pants without her consent.

Defense counsel objected to BW's testimony on the basis of uncharged misconduct and improper aggravation evidence. The military judge overruled the objection, finding the testimony reflected a pattern and a continuous course of conduct and was relevant in sentencing regarding the impact of the charged offenses on members of the appellant's family and the depth of the appellant's sexual problems. The military judge applied a balancing test under Mil. R. Evid. 403 and found the probative value of the evidence substantially outweighed the danger of unfair prejudice. He concluded his ruling by stating he would not sentence the accused for the uncharged offenses.

Sentencing Evidence

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). "When a military judge conducts a proper balancing test under Mil. R. Evid. 403, the ruling will not be overturned unless there is a 'clear abuse of discretion.'" *Id.* at 166 (quoting *United States v. Ruppel*, 49 M.J. 247, 250 (C.A.A.F. 1998)). To find an abuse of discretion, the challenged action must be arbitrary, clearly erroneous, or clearly unreasonable. *United States v. Travers*, 25 M.J. 61 (C.M.A. 1987).

Rule for Courts-Martial (R.C.M.) 1001(b)(4) provides "trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." The Court of Appeals for the Armed Forces has interpreted the "directly relating to or resulting from" language as including evidence of other uncharged crimes which are part of a "continuous course of conduct involving the same or similar crimes, the same victims, and a similar situs within the military community." *United States v. Nourse*, 55 M.J. 229, 231 (C.A.A.F. 2001) (quoting *United States v. Mullens*, 29 M.J. 398, 400 (C.M.A. 1990)).

In *Mullens*, 29 M.J. 398, our superior court resolved an issue comparable to the case sub judice. Mullens was convicted, inter alia, of sodomy with his son and indecent acts with his son and daughter. *Id.* at 398-99. Over defense objection, government counsel introduced evidence that included discussion of not only the charged offenses, but also revealed similar incidents involving the same victims occurring at earlier times (outside the charged time frame) and at a different military location. *Id.* at 399. The court determined that discussion of the uncharged misconduct was proper aggravation evidence under R.C.M. 1001(b)(4). The court held the prior misconduct:

> [E]videnced a continuous course of conduct involving the same or similar crimes, the same victim, and a similar situs with the military community

> . . . . These incidents demonstrate not only the depth of the appellant's sexual problems, but also the true impact of the charged offenses on the members of his family."

Mullens, 29 M.J. at 400.

Likewise, in *United States v. Munoz*, 32 M.J. 359 (C.M.A. 1991), the Court upheld the military judge's admission of sentencing testimony involving uncharged sexual abuse of one daughter during an accused's court-martial for commission of indecent acts against another daughter. The Court found several common factors such as the age of the child, the location of the offenses, the circumstances surrounding the offenses, and the fondling nature of the misconduct supported the admissibility of the evidence as probative of a plan to sexually abuse his children. *Id.* at 363. The Court specifically rejected the appellant's claim that the length of time (at least 12 years) between the misconduct with the first daughter and the sexual abuse with the second daughter made the prior abuse too remote in time to be permitted into evidence. The Court found "the object of appellant's purported plan was the sexual abuse of his young daughters. Accordingly, the victim's age at the time of the offenses was the critical concern, not the period of time between the misconduct and the charged offenses." *Id.* at 364 (citing *United States v. Mann*, 26 M.J. 1, 5 (C.M.A. 1988); *United States v. Hadley*, 918 F.2d 848, 851 (9th Cir. 1990)).

In *United States v. Tanner*, 63 M.J. 445 (C.A.A.F. 2006), our superior court looked to the rationale of Mil. R. Evid. 414[3] to affirm a sentence where evidence of uncharged prior acts of child molestation was admitted during the appellant's sentencing case. The appellant had been convicted of sexual abuse of his stepdaughter. While his case was on appeal, he was court-martialed a second time for various sexual assaults against his biological daughter. During sentencing at the second trial, the military judge admitted the court-martial order from the first trial that described in detail the various sexual acts that formed the basis of the accused's conviction. *Tanner*, 63 M.J. at 446. The court noted:

> [Mil. R. Evid.] 414 provides a vehicle for the admissibility of other acts of child molestation committed by the accused. The rule reflects a presumption that other acts of child molestation constitute relevant evidence of predisposition to commit the charged offense. As such, in a child molestation case, evidence of a prior act of child molestation "directly

[3] Mil. R. Evid. 414(a) provides: In a court-martial in which the accused is charged with an offense of child molestation, evidence of the accused's commission of one or more offenses of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.

> relat[es] to" the offense of which the accused has been found guilty and is therefore relevant during sentencing under R.C.M. 1001(b)(4).

Tanner, 63 M.J. at 449 (alteration in original).

In reviewing the record of trial in this case and applying the holdings discussed above, we have no difficulty finding the military judge acted within the bounds of his discretion in considering BW's testimony concerning the appellant's prior sexual misconduct. As was the case in *Mullens*, the appellant's uncharged misconduct involved the same victim and similar types of conduct for which the appellant was ultimately convicted. The events clearly reveal a continuing course of sexual transgressions involving his children and demonstrate not only the depth of the appellant's sexual problems, but also the true impact of the charged offenses on the members of his family. As such, they are proper sentencing aggravation evidence.

While we have some concern about the length of time that passed from the first incident, some 9 or 10 years prior, and the court-martial, the military judge appropriately applied a Mil. R. Evid. 403 balancing test and found the probative value of the evidence substantially outweighed any danger of unfair prejudice. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007) (any evidence that qualifies under R.C.M. 1001(b)(4) must also pass the balancing test of Mil. R. Evid. 403). Although the military judge did not fully articulate his Mil. R. Evid. 403 analysis on the record, he was not required to do so. *United States v. Acton*, 38 M.J. 330, 334 (C.M.A.1993). We are satisfied the events described by BW were directly linked and "closely related in time, type, and/or often outcome, to the convicted crime." *Hardison*, 64 M.J. at 281-282. We also note that this was a judge alone trial and the military judge specifically recognized he could not punish the appellant for the uncharged offenses. As the sentencing authority, a military judge is presumed to know the law and apply it correctly absent clear evidence to the contrary. *United States v. Erickson*, 65 M.J. 221, 225 (C.A.AF. 2007); *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997). We find no reason to disturb his decision on this matter.

Military Judge's Impartiality

The appellant makes a broad claim that the military judge abandoned his impartial role and became an advocate for the government by overruling defense counsel's objection concerning BW's testimony about uncharged misconduct and by permitting the appellant's wife to speculate as to ES's understanding of what the appellant had done to her.

The law provides a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle. *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001). When a military judge's impartiality is challenged on appeal, the test is whether, taken as a whole in the context of this trial, a court-martial's

legality, fairness, and impartiality were put into doubt by the military judge's actions; the test is objective, judged from the standpoint of a reasonable person observing the proceedings. *Id.* at 78 (quoting *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000)). "A military judge is presumed to know the law and apply it correctly, is presumed capable of filtering out inadmissible evidence, and is presumed not to have relied on such evidence on the question of guilt or innocence." *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000). As a result, "plain error before a military judge sitting alone is rare indeed." *United States v. Raya*, 45 M.J. 251, 253 (C.A.A.F. 1996).

Having reviewed the record, we are convinced the military judge acted appropriately and ruled within the bounds of his authority. We find the appellant has failed to meet his burden and the claim to be wholly without merit.

Unlawful Pretrial Punishment

For the first time, appellant claims on appeal he was punished in violation of Article 13, UCMJ, because he was not permitted to see his daughters, BW and ES, for 15 months prior to trial. Although the appellant specifically told the military judge he had not been punished prior to trial, he now asserts that he did not fully understand the scope of what the military judge was referring to and requests relief.

An appellate court reviews de novo the ultimate question of whether an appellant is entitled to sentence credit for violation of Article 13, UCMJ. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). Failure to seek sentence relief for violations of Article 13, UCMJ, at trial waives the issue on appeal absent plain error. *United States v. Inong*, 58 M.J. 460, 465 (C.A.A.F. 2003).

The appellant provides no proof to substantiate his claim outside of his post-trial affidavit. Despite the assistance of qualified counsel and the opportunity to inform the military judge of the circumstances, he remained silent. The appellant's failure to complain of his separation from his daughters prior to trial is strong evidence that he was not illegally punished, *United States v. Palmiter*, 20 M.J. 90, 97 (C.M.A. 1985), and we find there is no evidence of error, plain or otherwise, that he was subjected to pretrial punishment. The issue is therefore waived.

Sentence Severity

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 283-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of the offense, and the entire 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).

Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). The task of granting clemency, which "involves bestowing mercy—treating an accused with less rigor than he deserves," is assigned to the convening authority and other officials. *Healy*, 26 M.J. at 395-96.

The appellant argues that his sentence is too severe, emphasizing his 24 years of military service, his "many positive qualities and personal achievements, his rehabilitation potential, and his overall outstanding contributions to the United States military." We disagree. Intentional sexual molestation of minors merits a strong punishment. We hold that the approved sentence is not inappropriately severe, having given individualized consideration to this particular appellant, the nature of the offense, the appellant's record of service, and all matters in the record of trial.

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

STEVEN LUCAS
Clerk of the Court