UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant KEITH M. TERRY
United States Air Force

ACM 35801

6 December 2005

Sentence adjudged 17 October 2003 by GCM convened at Offutt Air Force Base, Nebraska. Military Judge: Barbara Brand.

Approved sentence: Dishonorable discharge, confinement for 8 years, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

Appellate Counsel for Appellant: Colonel Carlos. L. McDade and Major Terry L. McElyea.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Michelle M. McCluer.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

FINCHER, Judge:

The appellant was tried by a general court-martial composed of officer and enlisted members at Offutt Air Force Base (AFB), Nebraska. Contrary to his pleas, the court found him guilty of violating a lawful order and rape, in violation of Articles 92 and 120, UCMJ, 10 U.S.C. §§ 892, 920. The members sentenced the appellant to a dishonorable discharge, confinement for 8 years, forfeiture of all pay and allowances,

reduction to E-1, and a reprimand. The convening authority approved the sentence as adjudged.

Among the appellant's assignments of error, he alleges: (1) The military judge improperly refused to grant implied bias challenges for cause against two officer members; and (2) The military judge erroneously gave a constructive force instruction over defense objection. We disagree and affirm.

Background

The appellant was a radiology technician working in the ultrasound department at the Offutt AFB hospital. In December 2002, he performed an ultrasound examination on Airman First Class (A1C) S to check for swelling in her right ovary. During the examination, the appellant talked with A1C S and told her he was taking classes at a local university. He asked if she would help him with one of his classes by letting him take ultrasound photos of the veins in her arms. She agreed to come into the hospital the next day, a Saturday, and help him with his study.

When she arrived at 1200 the radiology clinic was relatively deserted, although it was a reserve training weekend. The appellant led her to the ultrasound examination room by a more circuitous route than they had taken the day before. He began to examine her arms, but then told A1C S that he was having trouble seeing her veins. He asked if he could examine the veins in her legs to see if he could get a better picture. She agreed, and the appellant left the room while she removed her pants and donned a hospital gown. The appellant returned and continued the examination. When he reached her groin area, he told her the picture was fuzzy and asked if she would mind removing her panties. She agreed. The appellant left the room again and A1C S removed her panties.

When the appellant returned, he asked if he could take ultrasound pictures of her left ovary, because he needed pictures of female organs and already had pictures of her right ovary. A1C S agreed and placed her feet in the stirrups of the examining table. The appellant inserted an internal probe and continued the examination. When A1C S complained of some discomfort, the appellant apologized and adjusted his examination technique. Next, the appellant asked A1C S if she would mind turning over on her stomach. She complied.

The appellant positioned himself between her legs and continued to manipulate the internal ultrasound probe. He then asked her if she had ever had sex with a black man. She said that she had not. He next asked if she had ever had a one-night stand. She said, "no." He asked if she ever wanted to have a one-night stand, and she said she wanted to know a person before she "did anything" with him. Next he asked her what she would do if he had a condom. A1C S heard a "crinkling sound" turned her head and saw the skin

of the appellant's bare thighs. Then she felt the appellant's penis penetrate her vagina. At the same time, he pressed his hands on her back and grabbed her breast with his right hand. He told her not to scream. A1C S crawled away from him and got up. She put her clothes on and before she left the appellant told her not to tell anyone what had happened.

Implied Bias

At trial, the military judge denied the appellant's challenges for cause against two court members. One of the members, Captain A, had two former girlfriends who had been raped. One of these women became pregnant as a result of the rape. Captain A had once considered marrying her. When her child was born, she named him after Captain A. The other member, Major H, was married to a woman who had been sexually assaulted by her stepfather.

In evaluating the military judge's decision, we apply a less deferential standard than abuse of discretion but more deferential than de novo. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004). Our focus is to objectively examine the impact of her ruling on the "perception or appearance of fairness of the military justice system." *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997) (quoting *United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995)). *See also United States v. Youngblood*, 47 M.J. 338, 341 (C.A.A.F. 1997). Military judges follow the liberal-grant mandate in ruling on challenges for cause. *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993). Implied bias exists when "most people in the same position would be prejudiced." *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996).

We find no implied bias error here. In denying the challenge for cause against Captain A, the military judge noted that the situation had taken place over seven years ago, Captain A was now married to another woman, he had not contacted either of his former girlfriends for six years, he had stated that he could be fair and impartial and that every incident was different and should be viewed on its own merits. The military judge noted nothing in Captain A's answers or demeanor to indicate that he could not be fair and impartial.

In denying the challenge for cause against Major H, the military judge noted that the incident had happened over ten years ago, that he and his wife had not discussed it in the past five years, and that as recently as two years ago the mother, daughter, and stepfather had taken a trip to India together.

We note that neither of these court members had been victims of sexual assault themselves. Many years had passed since any of the incidents occurred and the facts appear substantially dissimilar to the appellant's case. Major H's wife had apparently even established some sort of reconciliation with her stepfather. Both court members affirmed their ability to remain fair and impartial. In light of these facts, we see no

specter of implied bias. See *United States v. Calamita*, 48 M.J. 917, 923 (A.F. Ct. Crim. App. 1998).

Therefore, despite the liberal-grant mandate, we find no error in the military judge's denial of the challenge for cause against either member. Under the circumstances, their answers on voir dire would not raise in an objective observer a "substantial doubt as to the legality, fairness, and impartiality" of the court-martial. See Rule for Courts-Martial (R.C.M.) 912(f)(1)(N); *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005).

Constructive Force

The appellant claims the military judge abused her discretion when she gave a constructive force instruction relating to the appellant's abuse of his position as an ultrasound technician. *See, e.g.*, *United States v. Brown*, 50 M.J. 262, 266 (C.A.A.F. 1999). The appellant seeks to distinguish this case from *United States v. Simpson*, 58 M.J. 368 (C.A.A.F. 2003), in which the court upheld a rape conviction involving a challenged constructive force instruction. *Simpson* involved a coercive relationship between a non-commissioned officer (NCO) and his subordinate trainees. The appellant argues that, unlike *Simpson*, his position as an NCO was never an issue, that he had no actual or legal authority over A1C S, and that the location and timing of the alleged rape were not significant. He also distinguishes *United States v. Clark*, 35 M.J. 432, 436 (C.M.A. 1992), in which the court said that an NCO "cannot create by his own actions an environment of isolation and fear and then seek excusal from the crime of rape by claiming the absence of force . . . especially where, as [in *Clark*], passive acquiescence is prompted by the unique situation of dominance and control presented by appellant's superior rank and position." The appellant in the case sub judice, argues no such elements of dominance and control exist in his case.

We find the appellant's arguments amount to distinctions without differences. While the appellant did not have an improper NCO/trainee relationship with A1C S, the totality of the circumstances reveals an environment that was just as coercive. The appellant created an atmosphere of trust when he performed a legitimate ultrasound on A1C S on Friday. He used this trust to procure her cooperation in his Saturday "study." He then systematically isolated her in a small examination room where he used his expertise as an ultrasound technician to dominate and control her. His illegitimate study incrementally progressed from arms to legs, from external to internal, from professional to sexual. When he finally manipulated her into the most vulnerable position, he penetrated her vagina with his penis, held her down, and told her not to scream. He then warned her not to tell anyone. In such a fact situation, we find the military judge's decision to give the constructive force instruction wholly appropriate. *See United States v. Leak*, 61 M.J. 234, 246 (C.A.A.F. 2005).

Conclusion

We have examined the appellant's remaining assignments of error and find they have no merit. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987). 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 findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court