UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman SETH R. WARD
United States Air Force

ACM S30837

29 March 2006

Sentence adjudged 2 February 2005 by SPCM convened at Mountain Home Air Force Base, Idaho. Military Judge: Jack L. Anderson.

Approved sentence: Bad-conduct discharge and confinement for 6 months.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Matthew S. Ward.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

PER CURIAM:

The appellant pled guilty to assault and battery of his estranged wife, in violation of Article 128, UCMJ, 10 U.S.C. § 928. Officer members sentenced him to a bad-conduct discharge, confinement for 6 months, and forfeiture of $1,251.00 pay per month for 6 months. The convening authority approved only so much of the sentence as provided for a bad-conduct discharge and confinement for 6 months. The appellant raises three issues before this Court.

The appellant first argues that the addendum to the staff judge advocate's recommendation was defective because it failed to address a legal error brought up in his post-trial clemency submissions. *See* Rule for Courts-Martial (R.C.M.) 1006(d). In his letter to the convening authority, trial defense counsel appeared to suggest that the court members failed to follow that part of the military judge's instructions concerning the purposes of sentencing. The trial defense counsel opined that the court members fashioned a sentence

that was intended to provide maximum monetary benefits to his wife and children, rather than for "punishment, rehabilitation, deterrence, etc." Even if the appellant's post-trial submissions raised a legal error, we conclude the legal issue has no merit, and thus the government has met its burden of establishing no prejudice. *See United States v. Welker*, 44 M.J. 85, 89 (C.A.A.F. 1996). Court members may properly take into account victim impact evidence in fashioning a sentence. *See* R.C.M. 1001(b)(4). Moreover, the record does not establish any impropriety on the part of the court members, and it would otherwise be improper to inquire of the court members about their deliberations. *See generally* Mil. R. Evid. 606(b).

The appellant next claims the trial counsel's sentencing argument was improper. Because the appellant failed to object at trial, the issue is waived, absent plain error. R.C.M. 1001(g); *United States v. Powell*, 49 M.J. 460, 462-65 (C.A.A.F. 1998). The focus of our inquiry is not on the words of trial counsel in isolation, but in the context of the entire trial. *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000). A trial counsel is permitted to make "a fair response" to claims made by the defense. *United States v. Gilley*, 56 M.J. 113, 120 (C.A.A.F. 2001); *see also* R.C.M. 919. We conclude the trial counsel's argument was not inflammatory. Rather, his comments responded to evidence presented by the appellant that he was a good father. To the extent a single comment may have been technically improper when viewed out of context, we find no prejudice to the appellant.

Finally, we turn to the appellant's last assignment of error, which alleges the court members erred in adjudging an overly harsh sentence based upon a belief the convening authority would take action in mitigation.[1] We disagree. The military judge instructed the court members on three occasions that they "should not rely on the convening authority" when deciding a sentence. In the absence of evidence suggesting the contrary, we will presume the court members followed the military judge's instructions. *See United States v. Jenkins*, 54 M.J. 12, 20 (C.A.A.F. 2000).

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); *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

[1] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).