CORRECTED COPY

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant ROBERT K. WHITE
United States Air Force

ACM 34115

8 March 2002

Sentence adjudged 18 February 2000 by GCM convened at Ellsworth Air Force Base, South Dakota. Military Judge: W. Thomas Cumbie.

Approved sentence: Bad-conduct discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel James R. Wise, Lieutenant Colonel Timothy W. Murphy, Captain Patience E. Schermer, and Kenneth R. Norgaard.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, and Lieutenant Colonel Lance B. Sigmon.

Before

YOUNG, BRESLIN, and HEAD
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

The appellant was convicted, contrary to his pleas, of indecent assault, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The sentence adjudged and approved was a bad-conduct discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1. On appeal, he raises several allegations of error, specifically: 1) Trial defense counsel provided ineffective assistance of counsel; 2) The appellant was denied the right to impartial court members; 3) The appellant was denied the right to be

rehabilitated after being accused of lying; and 4) The sentence is inappropriately severe. We find no error and affirm.

Background

The appellant had almost 14 years' service and had been selected for promotion to Master Sergeant. He was divorced, but his two children often visited him in his on-base quarters. The appellant had a close relationship with the victim's family that had lasted over many years. The appellant was like an uncle to the victim, who was 16 years old at the time of the offense. She often worked as a baby-sitter for the appellant's children. After baby-sitting the appellant's children, the victim would sometimes sleep over at the appellant's quarters, to avoid a 40-minute drive home at night and to be closer to her other job at the base commissary the next day.

The appellant asked the victim to baby-sit his children on the night of 5 August 1999, and she agreed. She arrived at his quarters about 2200, and called her mother to check in. It turned out the appellant's plans changed, and he did not have his children that night, nor was he going out. The victim then left for a quick visit with a former boyfriend in a nearby park. She returned about 2245. The victim and the appellant sat up watching television and talking for one and a half to two hours. The appellant offered to share his bed, and the victim assented. She went to bed fully dressed. Early the next morning, she awoke to find the appellant assaulting her sexually. She tried to deter him by rolling over, then feigning waking up, but he persisted. She then left the room, and went to the base gymnasium where her former boyfriend worked. She was visibly distraught, and eventually revealed what had occurred. Her parents reported the matter to the Air Force Office of Special Investigations (AFOSI) the following day.

On 8 August 1999, the victim placed a "pretextual" telephone call to the appellant. With AFOSI agents listening in, she told the appellant she wanted to talk to him about what had happened the other night, without indicating the subject. At first, the appellant refused to discuss it on the telephone. When the victim persisted, he told her angrily, "nothing happened . . . do you hear me? nothing happened," or words to that effect.

AFOSI agents searched the appellant's home for items of evidence. The appellant turned over the boxer shorts he'd been wearing, which were later identified by the victim. The appellant also provided sheets, pillowcases, and other items; the victim indicated they were not the sheets from the appellant's bed.

Ineffective Assistance of Counsel

The appellant argues that his trial defense counsel provided ineffective assistance in preparing for trial. He complains that his counsels' performance was deficient in four areas: 1) failure to interview and call a material witness; 2) failure to call witnesses to testify about the appellant's character for veracity; 3) instructing the appellant not to

testify about certain acts of misconduct by the victim; and 4) failure to request further testing of the bedding and clothing involved in the offense, to disprove the victim's account. We carefully considered each allegation, and find them insufficient to overcome the presumption that counsel provided effective assistance.

We review claims of ineffective representation de novo. *United States v. Burt*, 56 M.J. 261 (2002); *United States v. Lee*, 52 M.J. 51, 52 (1999). The Supreme Court set out the standard of review for claims of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687. Our superior court adopted this standard of review for claims of ineffective assistance of counsel in courts-martial. *United States v. Scott*, 24 M.J. 186, 187 (C.M.A. 1987).

In *United States v. Polk*, 32 M.J. 150 (C.M.A. 1991), the (then) Court of Military Appeals adopted a three-pronged test to determine if the presumption of competence has been overcome:

> (1) Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
> (2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers"? and
> (3) If the defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result.

Polk, 32 M.J. at 153 (citations omitted). *See United States v. Sales*, 56 M.J. 255 (2002); *United States v. Grigoruk*, 52 M.J. 312, 315 (2000).

A. Failure to Call a Witness

The appellant contends his defense counsel were deficient in failing to locate Senior Airman (SrA) Travis Robinson and call him as a witness. Through affidavits submitted post-trial, the appellant indicates that SrA Robinson would have testified that the appellant arrived for work before 0600 the morning of the charged offense. The

appellant argues that this was significant evidence because it proved the appellant was at work at the time the victim alleged the assault occurred. The government responds by noting that it was the appellant, not the victim, who looked at the clock at the time of the offense and stated it was "before six." Thus, the government argues, the testimony was not that important.

Of course, counsel has a duty to make reasonable investigations, or to make a reasonable decision that makes particular investigations unnecessary. *Strickland*, 466 U.S. at 691; *United States v. Brownfield*, 52 M.J. 40, 42 (1999). We may assess the reasonableness of counsel's decisions regarding investigations based, in part, on what the accused told his counsel. "Counsel's actions are usually based, quite properly, . . . on information supplied by the defendant." *Strickland*, 466 US. at 691; *United States v. Curtis*, 44 M.J. 106, 121 (1996), *rev'd as to sentence on recon.*, 46 M.J. 129 (1997). When an accused has given counsel reason to believe that pursuing certain investigations would be fruitless, counsel's failure to pursue those investigations may not be later challenged as unreasonable. *Strickland*, 466 US. at 691.

We note that the appellant testified at trial that he left home at 0615 that morning, and arrived at work at about 0620. In a lengthy statement submitted to the convening authority post-trial, he again indicated that he arrived at work about 0625 that morning. In his affidavit submitted on appeal, he stated that he testified to the wrong times at trial because he had "forgotten about the Change of Command ceremony that occurred on August 6, 1999." The appellant blames his defense counsel for not interviewing SrA Robinson and discovering the correct information.

Based upon all the evidence, we conclude the appellant told his counsel that he arrived at work that morning at about 0620, as usual. It certainly seems reasonable for counsel to rely on the appellant's assertion that he got to work that morning at the normal time. Trial defense counsel were entitled to rely on this information in forming their investigative strategy. *Id.* There is no indication that the appellant told his counsel he was uncertain about the time, or anything else which would cause a reasonable counsel to inquire further. Clearly the appellant was aware of SrA Robinson, his co-worker. In fact, the appellant submitted a character statement from SrA Robinson in clemency. Therefore, we find counsel were not deficient in relying upon the appellant's own representations about the time he arrived at work in deciding whether to investigate further. Even taking as true the facts alleged in the affidavit, the appellant has not stated a basis for relief. *United States v. Ginn*, 47 M.J. 236, 248 (1997).

B. Failure to Call Witnesses re: Veracity

The appellant avers his counsel were ineffective in failing to call witnesses to testify about the appellant's character for veracity. He claims that, because the case was essentially a swearing-contest, his character for truthfulness was of paramount

importance. However, the appellant does not indicate specifically what witnesses should have been called. Instead he refers generally to character statements that the defense counsel decided not to offer in sentencing, attached to the record as appellate exhibits. The government responds that such testimony would have added little, noting that even the victim and her family testified that they thought of the appellant favorably before the incident in question.

We resolve this issue on grounds not presented by either party. First, trial defense counsel did call a witness to testify about the appellant's veracity. The appellant's girlfriend, Laura DeMersseman, was called as a witness by the defense counsel and testified that the appellant was "a very honest, truthful person." Thereafter, trial defense counsel argued pointedly that the military judge would instruct the members about the appellant's character for truthfulness and, by contrast, the victim's prior inconsistent statements.

Secondly, the character statements to which the appellant refers do not include any opinions concerning his character for truthfulness. They include observations about many other qualities, including duty performance, initiative, commitment to his children and temperance, but not one opinion that the appellant is a truthful person. We also note that trial defense counsel originally intended to offer these statements during the sentencing portion of the trial, but withdrew them when the government indicated it intended to call the appellant's ex-wife in rebuttal. We conclude the appellant has failed to present evidence to overcome the presumption that his counsel were not deficient in this regard.

C. Instructing Appellant re: Misconduct by the Victim

The appellant contends trial defense counsel "erred" by instructing the appellant not to testify about several prior acts of misconduct committed by the victim. Alternately, he asserts his counsel erred by failing to present the issue to a military judge to obtain a ruling as to the admissibility of the misconduct.

Before trial, defense counsel advised the appellant not to testify about his belief that the victim had been in trouble for shoplifting, assault and battery, and smoking marijuana. Apparently trial defense counsel recognized in advance that such information is not normally admissible, and properly advised the appellant not to attempt to get it into evidence. The reason for such advice is obvious—the appellant made a habit of volunteering information beyond that called for by a question. Surprisingly, on cross-examination the prosecutor asked the appellant about a prior statement referring to the victim getting into "mischief."

TC: Sergeant White, you just told me that [the victim] didn't need permission to go see [her boyfriend], either from you or her parents, so what kind of mischief are we talking about here, any of her mischief?

A: I can't give you a specific example, sir. I just told her that her mother had called and that—

Q: It's made up, isn't it, Sergeant White?

A: No, sir.

Q: Actually, Sergeant White, you care deeply about your kids, don't you?

A: I care very much about my children, yes, sir.

Q: And [the victim] has a history of this mischief you were talking about?

A: She has a history of being grounded, sir, yes, sir, and she has a history of getting in trouble, yes, sir.

The prosecutor then cross-examined the appellant about why he would allow the victim to baby-sit for his children if she had a history of behavioral problems. The appellant replied that she was nonetheless a good baby-sitter.

On re-direct examination, trial defense counsel asked the appellant to indicate the problems that the victim had outside the home. Trial counsel objected to the relevance of the evidence. The military judge ordered a hearing outside the presence of the members. Trial defense counsel asked the military judge to allow the answer, contending that it responded to trial counsel's question about what mischief the victim had been in, and that it rebutted the inference that he was lying about problems the victim experienced.

The military judge ruled that the proffered evidence was not admissible. He found that in the context of the questioning the mischief concerned whether the victim went places without authority or saw her boyfriend when she was not allowed, rather than the other alleged misconduct, and that the appellant was given the opportunity to testify about such prior behavior. He found that the proffered evidence about the victim's other misconduct was not relevant to her truthfulness, or to show bias, prejudice, or motive to misrepresent. The military judge conducted the balancing test required by Military Rule of Evidence (Mil. R. Evid.) 403, and concluded that the possible probative value was substantially outweighed by the danger of unfair prejudice, confusing the issues, and wasting the court's time.

We find no deficient performance by trial defense counsel. The alleged misconduct at issue here was not probative of a lack of truthfulness. Mil. R. Evid. 608(b). Therefore it was entirely appropriate for the defense counsel, as officers of the court, to advise the appellant not to mention it. TJAG Policy Letter No. 26, *Air Force Rules of Professional Responsibility*, (4 Feb 1998), Rule 3.4 ("Fairness to Opposing Party and Counsel. A lawyer shall not: . . . (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence . . ."). When trial counsel's cross-examination presented an arguable basis for admission, trial defense counsel tried to elicit the testimony. The military judge wisely ordered a session outside the hearing of the members to resolve the issue, and ruled against the defense. Thus, the appellant received the hearing and ruling on admissibility by the military judge that he maintains was appropriate.

D. Failure to Request further Scientific Testing

The appellant alleges trial defense counsel was deficient in failing to request that AFOSI test the bedding or the victim's clothes for fiber, hair, or DNA evidence. The appellant contends that this failure left the appellant with no corroborating physical evidence, and was critical because the trial was a "swearing-contest." We do not agree.

The appellant testified at trial that AFOSI agents came to his quarters two days after the incident in question to obtain physical evidence. He gave them the boxer shorts he had worn that night, and bedding that he claimed had been on his bed the night in question. The victim identified the boxer shorts, but stated that the bed linen was not the linen on the bed the night in question. Neither party offered the results of the forensic tests at trial. The appellant included copies of the test results in his clemency submission to the convening authority. According to the report, the laboratory did not conduct trace evidence examinations on the items of evidence because there were no seals on the evidence packages within the mailing container, and therefore there was an opportunity for contamination of the evidence. The serological analysis revealed the presence of amylase, an enzyme in saliva, on one of the pillowcases, however DNA analysis revealed that neither the victim nor the appellant could have been the source of the DNA on the pillowcase.

The appellant's complaints are without merit. Trial defense counsel was not deficient in failing to request testing of the clothing and bedding. The items were collected as evidence and sent for testing; only a defect in the packaging prevented the trace-evidence testing from being completed. Because of the resulting chance of cross-contamination, further requests for trace-evidence testing would have been futile. Finally, we note that trace-evidence testing would not be helpful under the circumstances of this case. Finding fibers from the couch on the victim's clothes would not prove she slept there; the presence or absence of fibers from the victim's clothes on the bedding, or vice versa, would not prove whether the bed linen was on the bed or the couch.

To the contrary, the test results could have hurt the defense. As noted above, the appellant gave the AFOSI agents bed linen he represented was on the bed the night in question. The victim told the agents it was not the bedding. The tests found DNA from saliva that could not have come from the appellant (an unmarried man) or the victim. This could have led reasonable court members to infer that the appellant gave the wrong bedding to the agents, suggesting consciousness of guilt. Under the circumstances, a reasonable defense counsel would have left this evidence alone.

Denial of Right to Impartial Members

The appellant maintains that he was denied his right to impartial court-martial members. In a post-trial affidavit, the appellant asserts that the senior member of the court-martial, Lieutenant Colonel (Lt Col) Lee was the "Operations Group Commander of the 42 Bomb Wing," and that the victim's father was a non-commissioned officer (NCO) in "the Safety Office of the Operations Group." The appellant asserts that it "can be presumed that a commanding officer knows the members of his command." Based upon this assumption, he further assumes that Lt Col Lee's "failure to disclose his relationship with the victim's father causes a substantial doubt as to his overall impartiality." He also contends that this failure to disclose the relationship deprived trial defense counsel of the right to exercise a challenge.

Rule for Courts-Martial (R.C.M.) 912(f)(1)(N) provides that a member shall be excused for cause whenever it appears that the member should not sit "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." Examples of grounds for challenge include when the member has a direct, personal interest in the result of the trial, or when the member is closely related to the accused, counsel, or a witness.

The Supreme Court has set forth a test for determining if a new trial is required when an error arises from a juror's failure to disclose information in voir dire.

> To obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.

McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984). Our superior court has applied this test to criminal cases arising under the UCMJ. *United States v. Mack*, 41 M.J. 51, 55 (C.M.A. 1994). *See also United States v. Taylor*, 44 M.J. 475, 477 (1996); *United States v. Modesto*, 43 M.J. 315, 320 (1995); *United States v. Lake*, 36 M.J. 317, 323 (C.M.A. 1993).

Reviewing the record of trial, we find that no one ever asked Lt Col Lee whether he knew the victim's father. The only questions that could have elicited such information, if any, were phrased very broadly, such as whether any court member was aware of any matter that might raise a substantial question concerning the member's participation in the case. The appellant seems to argue that Lt Col Lee should have volunteered the information. However, we find this assertion to be unsupported, for several reasons.

First, the appellant asserts Lt Col Lee was the commander of the Operations Group of the 42d Bomb Wing. However, this is contradicted by the record. The convening order shows that Lt Col Lee was assigned to the 28th Operations Support Squadron (28 OSS), and the members advised the military judge the convening order was correct. Furthermore, we are aware that colonels—not lieutenant colonels—normally command groups, and that there is no 42d Bomb Wing at Ellsworth Air Force Base. Secondly, the appellant asserts that the victim's father was assigned to the Safety Office of the Operations Group. Again, the information in the record of trial reveals that the victim's father was assigned to the Safety Office of the 28th Bomb Wing. We are aware that the Safety Office, like the office of the chaplain, the staff judge advocate, and protocol, are staff offices under the wing commander, and are organizationally separate from groups. Thus, the record of trial compellingly demonstrates the improbability of the appellant's assertion that the victim's father was within Lt Col Lee's command. *United States v. Ginn*, 47 M.J. 236, 248 (1997). By extension, there is no basis for the appellant's assumption that Lt Col Lee knew the victim's father. For these reasons, we find the appellant has failed to demonstrate that Lt Col Lee failed to answer honestly a material question on voir dire.

Although unnecessary, we turn to the second prong of the test. The appellant must demonstrate that a correct response would provide a valid basis for a challenge for cause. *Modesto*, 43 M.J. at 320. It is well-settled that "prior professional relationships . . . are not per se disqualifying." *United States v. Napoleon*, 46 M.J. 279, 283 (1997). *See also United States v. Dunbar*, 48 M.J. 288, 290 (1998); *United States v. Velez*, 48 M.J. 220, 225 (1998); *United States v. Hamilton*, 41 M.J. 22, 25 (C.M.A. 1994); *Lake*, 36 M.J. at 324. Even if Lt Col Lee knew the victim's father, it would not create a basis for a challenge for cause.

We also find no merit in the appellant's contention that the failure to disclose the relationship deprived trial defense counsel of the right to exercise a challenge. "[A] claim of unfairness dissipates if defense counsel could have reasonably discovered the grounds for his untimely challenges and examined these members on them through voir dire." *Lake*, 36 M.J. at 324; *United States v. Glaze*, 11 C.M.R. 168, 171 (C.M.A. 1953). The defense counsel was provided the report of investigation under Article 32, UCMJ, 10 U.S.C. § 832. Several of the statements clearly identified the victim as being the

dependent of a military member, and the member's name and organization. The appellant's failure to voir dire the members about whether they knew the victim's father waived any post-trial complaint that he was denied an opportunity to discover these matters. *McDonough Power Equipment*, 464 U.S. at 551 n.2; *Lake*, 36 M.J. at 324.

Denial of Right to Rehabilitation

As discussed above, trial counsel cross-examined the appellant about whether he actually told the victim that he "was in no mood for her mischief" on the night in question. The appellant testified that the victim had a history of being grounded and a history of getting in trouble. The appellant alleges the military judge erred in refusing to allow trial defense counsel to elicit testimony from the appellant about further instances of alleged misconduct by the victim, to rebut trial counsel's attack on his credibility. We find no error.

The appellant frames his argument in terms of his "right" to present rebuttal evidence. However, there is no such right. *See United States v. Banks*, 36 M.J. 150, 166 (C.M.A. 1992). The scope of rebuttal is defined by evidence introduced by the other party. *Michelson v. United States*, 335 U.S. 469 (1948). The Military Rules of Evidence govern the admissibility of evidence. To be admissible, evidence must be relevant. Mil. R. Evid. 401, 402; *United States v. Dimberio*, 56 M.J. 20, 24 (2001). Even if relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the members, or wasting time. Mil. R. Evid. 403.

The military judge did not abuse his discretion in excluding this evidence. The probative value of the evidence was not substantial. On its face, it tended to show he had some basis for warning the victim about getting into "mischief." It must be noted, however, that the appellant had already been allowed to testify that the victim had a history of "getting into trouble" and being "grounded"—matters which the victim's mother had also mentioned. Thus, the probative value must be measured in terms of its additional weight, which would be minimal. It tended to undercut his assertion that he nonetheless considered her a good person to care for his very young children, and that he made no inquiry the following morning where she had been the night before. The proferred evidence was not probative of the victim's truthfulness. However, it could have had an inappropriate effect on the court members, creating a danger of unfair prejudice. Moreover, if the appellant's allegations would have been admitted, it was likely that the prosecution would have wanted the victim to respond. This created a substantial risk of sidetracking the members on collateral matters, misleading them about the true issues before them, and wasting the court's time.

The sole case cited by the appellant, *United States v. Boone*, 17 M.J. 567 (A.F.C.M.R. 1983), does not support his argument. In that case, the Court ruled that the

military judge should have allowed cross-examination into specific acts of misconduct because they were directly probative of the witness's truthfulness. Obviously, this was not a matter of cross-examination—rather it was proferred in re-direct examination. More importantly, the additional evidence was not probative of the truthfulness of the victim.

Sentence Severity

The appellant argues that the sentence imposed and approved is inappropriately severe. He asks that this Court consider his record of military service and his family circumstances and the nature of the offense, and grant relief.

Article 66(c), UCMJ, 10 U.S.C. § 866(c), requires this Court to approve only that sentence, or such part or amount of the sentence, as it finds correct in law and fact and determines should be approved. The determination of sentence appropriateness "involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394,395 (C.M.A. 1988). In order to determine the appropriateness of the sentence, this Court must consider the particular appellant, the nature and seriousness of the offense, the appellant's record of service and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982); *United States v. Alis*, 47 M.J. 817, 828 (A.F. Ct. Crim. App. 1998).

We do not find the appellant's sentence to be inappropriately severe under all the circumstances of this case. The appellant's record of good service certainly weighs in his favor. On the other hand, the unique relationship between the appellant and the victim aggravates the crime. The appellant was in a position of special trust, and he violated that trust by sexually assaulting this young girl while she was a guest in his quarters on base. The offense was substantially more serious than the simple "groping" indicated by the appellant. Furthermore, the evidence indicated the victim experienced significant adverse effects following the crime.

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. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator