UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant DANNY L. ANNIS
United States Air Force

ACM 38001

19 August 2013

Sentence adjudged 22 July 2011 by GCM convened at Fort George G. Meade, Maryland. Military Judge: Michael J. Coco.

Approved Sentence: Bad-conduct discharge.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni and Captain Christopher D. James.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Lauren N. DiDomenico; and Gerald R. Bruce, Esquire.

Before

HARNEY, SOYBEL, and MITCHELL
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MITCHELL, Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of one specification of aggravated sexual assault and one specification of abusive sexual contact, both in violation of Article 120, UCMJ, 10 U.S.C. § 920. The adjudged and approved sentence consisted of a bad-conduct discharge.

On appeal, the appellant raises one issue, asserting that the military judge erred by preventing him from introducing evidence of the victim's prior marital affair as evidence of a motive to fabricate.

Background

The appellant shared an apartment with Staff Sergeant (SSgt) VB in Maryland. In December 2009, while the appellant was deployed, Ms. AG moved into the apartment with SSgt VB and began electronic communications with the appellant. The electronic communication addressed that they would both be living in the same apartment and their shared interests. One topic was that they could be "cuddle buddies" when they watched movies together in the apartment. At that time, Ms. AG was separated from her husband, Senior Airman (SrA) BC. Ms. AG lived in the apartment for about six weeks but then moved out prior to the appellant's return from deployment in order to move back in with her husband, SrA BC.

The appellant and Ms. AG met in person in March 2010 and then had some personal social interactions over the ensuing months to include eating pizza while watching a movie at the appellant's apartment and a motorcycle ride to a tattoo parlor in order for Ms. AG to schedule an appointment. Ms. AG did not consider any of these interactions as dates.

By October 2010, Ms. AG had again separated from SrA BC. Ms. AG and the appellant met for drinks and dinner the night of 1 October 2010. During the course of the evening, the appellant and Ms. AG conversed about a variety of topics. At one point, they spoke about penis size to include that Ms. AG hated it when women were dishonest: "the best thing is always honesty, particularly in regard to that." She also told him "that, hypothetically, if [she] were in the situation with him [she] would have been honest with him."

Later, Ms. AG concluded that she was too intoxicated to drive and returned with the appellant to his apartment. They decided to watch a movie in the appellant's bedroom. Ms. AG removed her jeans, boots, and bra, wrapped herself in a blanket and laid down on the appellant's bed. While in the bed, Ms. AG sent an email to her boyfriend/fiancé, Specialist (SPC) CG. Ms. AG showed the appellant the new tattoo on her left hip. The appellant reminded Ms. AG of their conversation about penis size and guided her hand to his penis, and she "told him … it was a good size and just left it alone." Ms. AG then fell asleep in the bed while they were watching a movie. Ms. AG was awakened several times throughout the night by the appellant engaging in sexual activity with her; each time she said, "no," "stop it," and/or pushed him away and the appellant would stop.[1] The final time was when the appellant had his fingers in her vagina and his thumb in her anus. Although she attempted to push him away, the appellant "was very forceful this time and pushed back."

[1] The appellant was acquitted of the other specifications that alleged rape, aggravated sexual contact, aggravated sexual assault, and sodomy by the use of force or by overwhelming physical strength, in violation of Articles 120 and 125, UCMJ, 10 U.S.C. §§ 920, 925. All the charges and specifications were a result of the appellant's acts towards Ms. AG on the night of 1 October 2010.

The next morning, Ms. AG woke up feeling "fuzzy" and asked the appellant why she was not wearing any underwear. The appellant chuckled and remarked that he also was not wearing any underwear. Ms. AG dressed and departed. The appellant called her three times and sent her two text messages writing, "I feel so bad. Will you ever forgive me?"

Ms. AG reported the assault to law enforcement who took her to a registered nurse for a sexual assault forensic medical examination. The nurse identified vaginal and anal injuries consistent with penetration.

Suppression of Evidence of Ms. AG's Previous Adultery

The trial defense counsel filed a timely motion to admit evidence under Mil. R. Evid. 412. Trial defense counsel explained, "[W]e only want to make sure that in the course of general questioning we can refer to the two people in her life as they were and that is that she had, as needed, that she was married to [SrA BC] and that she was dating, had a special relationship with [SPC CG]." On appeal, the appellant challenges the trial judge's decision to suppress the evidence that at the time of the assault Ms. AG was married to SrA BC and engaging in an adulterous relationship with SPC CG.[2]

During the motion hearing, evidence was introduced that, months earlier when Ms. AG confirmed her previous adulteries to SrA BC, he lost his temper, removed all the pictures of the two of them off the walls of their abode, smashed the pictures, and set them on fire.

The trial judge ruled as inadmissible the evidence that Ms. AG was married to SrA BC at the time of the incident at the same time she was in a serious relationship with SPC CG. The trial judge clarified the ruling by stating that the trial defense counsel could cross examine Ms. AG on the fact that she was married and that she was disingenuous when asked if she was married, but prohibited the introduction of evidence of dating and having sexual intercourse with SPC CG while she was married to SrA BC. The trial judge further ruled as inadmissible evidence that Ms. AG was in a serious dating relationship with SPC CG and intended to marry him at the time of the incident.

The trial defense counsel engaged in a thorough and extensive cross-examination of Ms. AG. The cross-examination included impeachment with prior inconsistent statements, and the overall credibility of her claims. Through cross-examination, Ms. AG admitted that the only reason she did not "hang out" with the appellant more was because she was dating SPC CG and "he consumed most of [her] time." Ms. AG also admitted that she told SPC CG of the assault before she reported it to law enforcement, that he was very upset, and that she was concerned SPC CG "might do something irrational or be

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[2] The trial judge ruled for the appellant on other portions of the Mil. R. Evid. 412 Motion, to include that Ms. AG went on dates with the appellant while her fiancé, Specialist CG, was deployed.

very upset if he had run into [the appellant] walking the streets or something like that." Ms. AG conceded that she lied to SrA BC when she was married to him about "very important matters" and that she had similarly made "misrepresentations" to SPC CG about "very important matters."

When Ms. AG testified on direct examination she volunteered some of the information that was suppressed by the military judge in the earlier Mil. R. Evid. 412 hearing. The trial defense counsel asked for clarification on the use of the evidence. Over trial counsel's objection, the military judge ruled that the trial defense counsel could use the evidence for the purpose of motive to fabricate, but not for any propensity type of argument. After making this ruling, the following exchange occurred:

> MJ: Defense counsel, does that satisfy you? Is that what you intend to do with it anyways?
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> DC: Yes, sir.

During closing argument, trial defense counsel argued that Ms. AG had a motive to fabricate because consensual sexual activity between her and the appellant would endanger the relationship she had with SPC CG, who she had married by the time of trial. Trial defense counsel argued that Ms. AG was not "comfortable" with the events of the evening because of the danger consensual sexual activity would pose to her relationship with SPC CG. The trial defense counsel earlier introduced this theme during voir dire when the members agreed that since Ms. AG had a long-time boyfriend at the time of the incident, her desire to cover up consensual sexual intercourse might provide a motive to lie.

"We review the military judge's ruling on whether to exclude evidence pursuant to [Mil R. Evid.] 412 for an abuse of discretion. Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed de novo." *United States v. Ellerbrock*, 70 M.J. 314, 317 (C.A.A.F. 2011) (citing *United States v. Roberts*, 69 M.J. 23, 26 (C.A.A.F. 2010)).

In *Ellerbrock*, our superior court determined that based on the unique facts of that case, evidence of an alleged victim's previous consensual affair was constitutionally required to be admitted. *Id*. at 320. The Court explained that the victim did not want her marriage to end, she was afraid her husband would divorce her after the prior affair, and she knew that her husband's reaction to the first affair included kicking down her former paramour's door. *Id*. at 319. "Because evidence of [the wife's] prior affair was relevant, material, and the probative value of the evidence outweighed the dangers of unfair prejudice, the evidence of [her] prior affair was constitutionally required in this case." *Id*. at 320. The Court then applied the factors articulated in *Delaware v. Van Arsdall*, 475

U.S. 673, 684 (1986)[3] and determined that the error in excluding the evidence was not harmless beyond a reasonable doubt because the prosecution's case was not overwhelming, the victim's testimony was crucial, there was conflicting eyewitness testimony with significant contradictions, and that none of the questions on cross-examination of the victim concerned the previous affair. *Id*.

Although the appellant argues that his case mirrors that in *Ellerbrock*, the distinction between that decision and the present case is significant. In *Ellerbrock*, the Court reasoned that the victim was more likely to lie and state the sexual activity was not consensual because she wanted to preserve her marriage and she had heightened concerns that her husband was more likely to divorce her because of his reaction to her previous affair. In the present case, Ms. AG was aware that her actual husband, SrA BC, had a dramatic reaction to finding out she had engaged in adultery; however, by the time of the incident on 1 October 2010, it is clear that neither she nor her husband were interested in remaining married. She and SrA BC had separated in July 2010 and had signed a separation agreement.[4] She and SPC CG were in a serious relationship that would eventually lead to marriage. At that time of the incident, she referred to herself as SPC CG's wife, they established an email account together in their married name, and had serious discussions of marriage although they were not "officially" engaged.

The trial judge appropriately ruled that the admissible and relevant information was that Ms. AG was in a committed long-term relationship with SPC CG at the time of the offense as this provided a potential motive to obfuscate a consensual relationship with another man. It was not relevant how her soon-to-be ex-husband reacted when he found out about her previous adulterous affair with SPC CG given that this was an abandoned marriage. This Court finds that the trial judge did not abuse his discretion.

Post-Trial Processing Delays

Though not raised as an issue on appeal, we note the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Article 66(c), UCMJ, 10 U.S.C. § 866(c), empowers the service courts to grant sentence relief for excessive post-trial delay without the showing of actual prejudice required by Article 59(a), UCMJ, 10 U.S.C. § 859(a). *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). Having considered the totality of the circumstances and the entire record, we find the appellate delay in this case was harmless beyond a reasonable doubt. *Moreno*, 63

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[3] "These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

[4] The "separation agreement" was a document signed by both Senior Airman BC and Ms. AG although it was never notarized nor filed with any court system.

M.J. at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). Furthermore, given the totality of the circumstances and the entire record, we conclude that sentence relief is not justified. *United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *Tardif*, 57 M.J. at 224.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[5] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

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[5] The Court notes the Action does not include a date and both the Action and the Court-Martial Order (CMO) do not reflect the involuntary leave pursuant to Article 76a, UCMJ, 10 U.S.C. § 876a. We assume this was a clerical error and the appellant was ordered onto excess leave. *See* Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 9.35 (6 June 2013). Additionally, the CMO lists "engage in a sexual contact" in Specification 2 of Charge I. It should correctly state "engage in a sexual act." The CMO also lists "engage in sexual conduct" in Specification 3 of Charge I. It should correctly state "engage in sexual contact." We order a corrected Action and CMO. Rule for Courts-Martial 1114; AFI 51–201, ¶ 10.10.