UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic AARON M. BUCKNER
United States Air Force

ACM 34537

2 May 2002

Sentence adjudged 28 February 2001 by GCM convened at Fairchild Air Force Base, Washington. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 10 months, and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Timothy W. Murphy, Major Jefferson B. Brown, and Captain Shelly W. Schools.

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

Before

YOUNG, BRESLIN, and HEAD
Appellate Military Judges

OPINION OF THE COURT

YOUNG, Chief Judge:

The appellant pled guilty to three specifications of stealing computer equipment, military property of the United States, in violation of Article 121, UCMJ, 10 U.S.C. § 921. In exchange for the appellant's guilty plea, the convening authority agreed to limit the period of confinement he would approve and to withdraw and dismiss one specification of making a false official statement, in violation of Article 107, UCMJ, 10 U.S.C. § 907. The military judge accepted the appellant's guilty pleas and sentenced him to a bad-conduct discharge, confinement for 15 months, and forfeiture of all pay and

allowances. Pursuant to the pretrial agreement, the convening authority reduced the period of confinement to 10 months, but otherwise approved the findings and sentence. The appellant asserts that the military judge erred by allowing the trial counsel to rebut an opinion on rehabilitation potential with extrinsic evidence. We affirm.

During the sentencing hearing, the prosecution proffered the testimony of Technical Sergeant (TSgt) Arend, the investigator who questioned the appellant about the commission of the offenses. The prosecution claimed TSgt Arend would testify that, when initially interviewed, the appellant told him that his father gave him the laptop computer. The appellant objected, asserting that TSgt Arend's testimony would concern the offense that was withdrawn and was, therefore, neither facts and circumstances surrounding the offenses, nor proper aggravation. Without making specific findings, the military judge declined to let the witness testify.

The defense called the appellant's father, a chief petty officer (CPO) in the United States Coast Guard, to testify on his son's behalf during the sentencing proceeding. CPO Buckner testified that the appellant had been a good kid growing up, had always been respectful of his parents, and had good rehabilitation potential. He also testified that, when he talked to the appellant, the appellant had admitted his wrongdoing and accepted responsibility without making any excuses. The following exchange occurred between the defense counsel and the appellant's father:

> DC: Are you aware that he was not—he was dishonest initially when he was talked to—
>
> CPO Buckner: Yeah, he originally told me that he didn't tell them everything that was going on. To me that would be a defensive mechanism, but I think, believe, later on he did, explained everything.

During cross-examination, the trial counsel asked CPO Buckner if he was aware that the appellant told investigators that he (CPO Buckner) had stolen the laptop and sold it to the appellant. CPO Buckner answered that he was not aware of that fact.

In rebuttal, the prosecution again offered, over defense objection, the testimony of TSgt Arend. The military judge made the following ruling:

> Chief Buckner testified that the accused had good rehabilitation potential. If in fact, the accused implicated a senior non-commissioned officer in the Coast Guard and accused him of theft of that particular laptop, in my mind, that is directly relevant to rehab potential and rebuts Chief Buckner's testimony that the accused had rehab potential. So, if that is what he is going to testify about, I will hear it.

TSgt Arend testified that, when interviewed, the appellant initially said his father worked for Federal Express, took the laptop off a Federal Express truck, and sold it to the appellant for $1,000.

On appeal, the defense argues that the military judge erred in permitting TSgt Arend to testify for the following reasons: (1) Testimony about specific instances of misconduct is not proper evidence of rehabilitative potential; (2) The specific instance of misconduct does not rebut the personal opinion of the appellant's father; and (3) The testimony did not "explain, repel, counteract or disprove" the appellant's sentencing evidence.

Prosecution sentencing evidence must pass two tests to be admissible: (1) It must tend to prove or disprove a fact permitted by the sentencing rules; and (2) It must be in the proper form required by the Military Rules of Evidence or the more relaxed sentencing rules. *United States v. Zakaria*, 38 M.J. 280, 282 (C.M.A. 1993) (citing *United States v. Martin*, 20 M.J. 227, 230 n.5 (C.M.A. 1985)).

"The prosecution may rebut matters presented by the defense. . . . If the Military Rules of Evidence were relaxed under subsection (c)(3) of this rule, they may be relaxed during rebuttal and surrebuttal to the same degree." Rule for Courts-Martial 1001(d).

We hold that the military judge did not abuse his discretion in admitting TSgt Arend's testimony. The defense had CPO Buckner testify to show that the appellant was basically a decent kid with good rehabilitation potential. But, the defense did not stop with CPO Buckner's opinion. They also asked CPO Buckner to recount specific acts of conduct, such as the appellant treated his parents with respect, he admitted his wrongdoing and accepted responsibility for his crimes, and the appellant's failure to tell the investigators everything when he was interviewed was merely a defensive mechanism.

If it is accurate to characterize CPO Buckner's testimony as merely an opinion of the appellant's rehabilitation potential, then it may not have been permissible for the military judge to permit the prosecution to rebut that opinion with specific instances of misconduct. *See United States v. Cameron*, 54 M.J. 618, 620 (A.F. Ct. Crim. App. 2000) (citing Mil. R. Evid. 405). But, CPO Buckner did not limit his testimony to an opinion of the appellant's rehabilitation potential. TSgt Arend's testimony explained and repelled CPO Buckner's suggestion that, when interviewed, the appellant merely failed to include all the details of his larceny. *See United States v. Wirth*, 18 M.J. 214, 218 (C.M.A. 1984) ("function of rebuttal evidence is to explain, repel, counteract or disprove the evidence introduced by the opposing party") (quoting *United States v. Shaw*, 26 C.M.R. 47, 51 (C.M.A. 1958)). In fact, this was classic impeachment by contradiction. *See United States v. Hall*, 54 M.J. 788, 792 (A.F. Ct. Crim. App. 2001), *pet. granted*, 55 M.J. 364 (2001). The prosecution's evidence established that, rather than just failing to provide

the investigators with the details of the offense, and rather than accepting responsibility for his misconduct, the appellant actively lied to them—he labeled his own innocent father a thief.

The military judge couched his ruling on the admissibility of the prosecution's extrinsic evidence in terms of rebutting the defense evidence that the appellant had good rehabilitation potential. Nevertheless, we are convinced he understood the close connection between rebuttal of the specific instance of conduct and rebuttal of the opinion evidence.

Finally, even if this rebuttal evidence was admitted in error, it did not materially prejudice the substantial rights of the appellant. Article 59(a), UCMJ, 10 U.S.C. § 859(a). The appellant stipulated that he lied to the investigator at first. The additional evidence about the nature of the falsehood was of minimal impact in this judge-alone trial.

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

AFFIRMED.

OFFICIAL

NANCY J. EUELL
Documents Examiner