UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class NEHRAL ALBERT R. MALIWAT
United States Air Force

ACM 38579

19 October 2015

Sentence adjudged 28 August 2013 by GCM convened at Joint Base Charleston, South Carolina. Military Judge: Michael J. Coco.

Approved sentence: Dishonorable discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Mr. William E. Cassara (civilian counsel) (argued); Major Isaac C. Kennen; and Captain Travis L. Vaughan.

Appellate Counsel for the United States: Major Mary Ellen Payne (argued); Lieutenant Colonel Joy L. Primoli; and Mr. Gerald R. Bruce, Esquire.

Before

TELLER, HECKER, and SANTORO
Appellate Military Judges

OPINION OF THE COURT

SANTORO, Judge:

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his plea, of rape, in violation of Article 120, UCMJ, 10 U.S.C. §

920.[1] The adjudged and approved sentence was a dishonorable discharge, confinement for two years, forfeiture of all pay and allowances, and reduction to E-1.[2]

Appellant raises three assignments of error: (1) the evidence is not legally and factually sufficient to support the conviction, (2) the military judge abused his discretion by providing a propensity instruction under Mil. R. Evid. 413, and (3) Appellant was denied his right under the Sixth Amendment[3] to effective assistance of counsel. We disagree and affirm.

Background

Appellant met Airman First Class (A1C) JM in August 2012 and quickly became her best friend. In September 2012, he began sending her sexually suggestive text messages and later that month they went on a date which led to consensual sexual intercourse. Soon thereafter, however, the two decided not to continue with a sexual relationship. This was the status of their friendship on 14 October 2012, when A1C JM asked Appellant to come to her dorm room and rub her head because she was not feeling well. She testified that Appellant had done this on another occasion and it did not lead to a sexual encounter. In a text message to Appellant, she said, "You can come over now but just so you know I'm not putting clothes on haha." She sent another message clarifying the status of their friendship was unchanged saying, "No sex either." Appellant responded, "Lol ok."

When Appellant arrived, he rubbed A1C JM's head while they talked. After ten minutes of conversation, Appellant stood up, got on top of her, straddled her body with his legs, and kissed her. She initially returned the kiss but then pulled away and told Appellant, "No, I don't want this." Appellant responded by pinning her arms over her head and kissing her cheek, neck, and down her body. She repeatedly said "no" and "stop," but Appellant persisted.

A1C JM testified she was unable to move because Appellant was holding her wrists too tightly. Appellant moved her underwear aside and inserted his fingers into her vagina. She tried to close her legs but he grabbed her thigh and forced her legs open. She made one last attempt to move, but Appellant pushed her down and held her. Appellant then undressed himself, spit on her vagina, put his body weight on top of her so she could not move, and inserted his penis into her vagina. A1C JM continued to say "no" throughout the assault which lasted until Appellant ejaculated on her stomach.

[1] Appellant was acquitted of one specification of abusive sexual contact against a different individual.
[2] We note that the expurgated Court-Martial Order does not reflect, in full, the convening authority's action. We direct promulgation of a corrected expurgated order.
[3] U.S. CONST. amend VI.

Appellant got dressed and asked A1C JM if she was mad. Because she did not want to talk about it, A1C JM said "no" even though she was angry and hurt about what had happened. A few hours later, they had the following conversation over text message:

A1C JM: Sorry but I am mad about what happened earlier.

Appellant: I knew u would be. . . . I'm sorry babe

A1C JM: I said no.

Appellant: I know . . . I couldn't control myself. The more u said no the more I wanted u

A1C JM: :-(

Appellant: I'm sorry babe will u forgive me?

A1C JM: No. I can't. I'm sorry.

Appellant: I understand

A1C JM: No you don't. That's rape.

Appellant: Babe . . .

A1C JM: Don't babe me

Appellant: Can I go into ur room and we can talk?
I feel horrible

A1C JM: No

Appellant: Do u want me to stop talking to you

A1C JM: Yes

Appellant: Ok. I'm sorry
I [f*****d] up, I ended up doing u wrong and being just another dude but I know I'm not. Ur special to me and I see u in a different light than anyone else. I don't want to lose u as my great

> friend. I had a lapse of reality and acted selfishly and I feel horrible for what I did to you. I know ur mad, ur hurt, and that ur going through a lot of things. I'm so sorry and I'm willing to do anything to make things right even if it means leaving u be. I love u [J]. I'm sorry

The same day, A1C JM reported the assault to the Sexual Assault Response Coordinator. When she later met with agents from the Air Force Office of Special Investigations (AFOSI), they saw bruising on her arms and legs where Appellant had grabbed her during the assault.

Additional facts necessary to resolve the assignments of error are included below.

Legal and Factual Sufficiency

In his first assignment of error, Appellant argues that the evidence is not legally and factually sufficient to sustain his rape conviction because he had a reasonable belief that A1C JM consented to the sexual activity and because she lacks credibility. We disagree.

We review issues of legal and factual sufficiency de novo. *See United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324, 25 (C.M.A. 1987)). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. In doing so, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

In this case, the Government was required to prove that at the time and place alleged, Appellant (1) committed a sexual act by penetrating A1C JM's vagina with his penis and (2) that he committed the act by using unlawful force. "'[U]nlawful force' means an act of force done without legal justification or excuse." Article 120(g)(6), UCMJ. "'[F]orce' means . . . the use of such physical strength as is sufficient to overcome, restrain, or injure a person . . . ." Article 120(g)(5)(B), UCMJ.

We have reviewed the record of trial, paying particular attention to the evidence and reasonable inferences that can be drawn therefrom. We conclude that the sexual act was not consensual and that Appellant did not mistakenly believe that the victim consented. We find no reason to believe the victim may have consented to the sexual conduct, and this conclusion is solidified by Appellant's admissions in the text messages to her after the assault that he knew she said "no" and that he "could not control himself." Having reviewed the entire record and making allowances for not personally observing the witnesses, we ourselves are convinced of Appellant's guilt beyond a reasonable doubt. Likewise, when viewed in the light most favorable to the prosecution, the evidence is legally sufficient.

Mil. R. of Evid. 413

Appellant next contends the military judge abused his discretion when instructing on propensity evidence under Mil. R. Evid. 413 because he did not perform an analysis on the record and because the Government did not provide adequate notice of its intent to argue propensity.

In addition to being charged with raping A1C JM, Appellant was charged with committing abusive sexual conduct upon Private First Class (PFC) KM by touching her vagina and breasts on divers occasions.[4] During an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session after both sides had rested, the Government requested a propensity instruction under Mil. R. Evid. 413, which provides:

> (a) In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.
>
> (b) In a court-martial in which the Government intends to offer evidence under this rule, the Government shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 5 days before the scheduled date of trial, or at such later time as the military judge may allow for good cause.

The interactions between counsel and the military judge regarding an instruction pursuant to Mil. R. Evid. 413 were as follows:

[4] Appellant was acquitted of these allegations.

STC: The other thing is we also believe that the [Mil. R. Evid.] 413 propensity instruction is appropriate.

MJ: Did you give notice of 413?

STC: Sir . . .

MJ: That's a yes or no question.

STC: The answer to that is no, sir.

MJ: Then you're not getting the instruction.

STC: If I could just direct you to the plain language of [Mil. R. Evid.] 413, "The government shall disclose the evidence to the accused including statements of witnesses or summary of the substance of any testimony that is expected to be offered at least 5 days before the scheduled date of trial." That was certainly done. These [offenses] both were on the charge sheet, [Article] 32 happened, preparing for trial, defense had every opportunity. The purpose behind [Mil. R. Evid.] 413 is to ensure that if there is uncharged misconduct that the government makes the accused aware of that. In a case where you have both instances being charged the accused is already on notice of that, sir. That's the plain language of [Mil. R. Evid.] 413.

MJ: Okay. Beyond that, any other objections?

STC: No, sir.

SDC: May I be heard on that first, sir?

MJ: I'm not sure you need to but go ahead.

SDC: First, I understand ----

MJ: I'll tell you what. We're not going to go into overtime tonight and we're going to start at 0740 tomorrow morning and we will have all these answered. . . .

The next morning, when discussing the instructions, trial defense counsel asked whether the military judge was going to instruct on propensity. The military judge stated he was going to provide the instruction and explained:

> When I asked trial counsel whether or not they had given notice I went back and looked. [Mil. R. Evid.] 412 requires a written motion, [Mil. R. Evid.] 413 does not. Trial counsel was correct when he stated that the language of [Mil. R. Evid.] 413 states that as long as they've given you the evidence, including witness statements 5 days prior to trial then it's allowable, that they've put forth the evidence. Therefore, now that the evidence is in front of the members I will instruct on it.

Trial defense counsel responded, "Yes, Your Honor," and both parties indicated they did not have any other objections or requests for further instructions.

Effect of Failure to Provide Notice

Since, pursuant to Article 59(a), UCMJ, 10 U.S.C. § 859(a), we may only set aside a finding or sentence on the ground of an error of law if the error materially prejudices a substantial right of Appellant, we need not reach the issue of whether the Government was required to provide notice of its intent to request a propensity instruction if we can instead determine that Appellant was not prejudiced by any failure to give notice.

In this case, there is no question that the pertinent evidence was properly before the members since it was admitted for proof of Specification 2 of the Charge. Our superior court addressed a similar situation in *United States v. Burton*, 67 M.J. 150, 153–54 (C.A.A.F. 2009). In a split decision, our superior court held it was improper for trial counsel to argue the appellant had a propensity to commit one charged offense on the basis of evidence of another charged offense without first applying the procedural protections of Mil. R. Evid. 413. More importantly for this case, the entire court agreed on what the appropriate course of action would have been to cure any such error—instruction by the military judge on the appropriate use of propensity evidence under these circumstances. *See id.* at 154, 155 (Effron, C.J., concurring in part and in the result), 157 (Erdmann, J., concurring in part and dissenting in part). "The real risk," the majority held, "was that [the improper argument] would invite members to convict appellant based on a criminal predisposition, not that members would now perceive properly admitted direct evidence of charged conduct as propensity evidence." *Id.* at 154.

In this case, there was no prejudicial error because the military judge gave the appropriate propensity instruction that was missing in *Burton*. Unlike *Burton*, the trial

counsel in this case asked for the propensity instruction before argument. During oral argument, Appellant's counsel conceded that the propensity instruction provided was an accurate statement of the law.

At oral argument before us, Appellant's counsel asserted that the lack of notice was still prejudicial because it affected his presentation of the case. Appellant suggests that, had he known that the Government was going to argue propensity, he may have elected a different forum, conducted a different cross-examination, or decided to testify. Significantly, Appellant never raised these concerns nor requested such relief at trial. The military judge, had such claims of prejudice been raised below, could have allowed Appellant to reopen his case to recall witnesses or personally testify, and provided appropriate instructions to the members explaining the unusual flow of events. Appellant also did not ask for a mistrial on the basis of the Government's failure to provide notice before forum selection. In the absence of any such request, we are not persuaded that any failure to provide notice truly prejudiced Appellant in presenting his case. The fundamental issue, as the *Burton* court phrased it, was that members might convict Appellant based on a criminal predisposition rather than on competent evidence of each offense. That evidence of predisposition was known to Appellant long before trial, and, to the extent the evidence would have affected those tactical decisions, such potential effects were manifest before Appellant made his forum selection or rested his case.

Procedural Protections under Mil. R. Evid. 413

Even if any failure to provide notice was not prejudicial, we must still determine whether the evidence was admissible for the purpose of showing propensity in the first instance. We review a military judge's decision regarding Mil. R. Evid. 413 for an abuse of discretion. *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013). "Where the military judge is required to do a balancing test under [Mil. R. Evid.] 403 and does not sufficiently articulate his balancing on the record, his evidentiary ruling will receive less deference from this court." *United States v. Berry*, 61 M.J. 91, 96 (C.A.A.F. 2005). Where the military judge does not put his findings on the record, there is "nothing to which we can give deference, and so, we will evaluate the use of the evidence based on the record." *United States v. Barnes*, 74 M.J. 692, 699 (Army Ct. Crim. App. 8 May 2015).

There is a general presumption of admission for Mil. R. Evid. 413 evidence. *Berry*, 61 M.J. at 95 (citing *United States v. Wright*, 53 M.J. 476, 482–83 (C.A.A.F. 2000)); *see also United States v. James*, 63 M.J. 217, 220 (C.A.A.F. 2006) (noting an "exceptionally strong preference" in favor of admitting propensity evidence in cases involving specific sexual misconduct in Mil. R. Evid. 413). However, there is a "constitutional requirement that evidence offered under [Mil. R. Evid.] 413 be subjected

to a thorough balancing test under [Mil. R. Evid.] 403." *Berry*, 61 M.J. at 95 (quoting *United States v. Dewrell*, 55 M.J. 131, 138 (C.A.A.F. 2001)).

There is a two-part analysis to determine the admissibility of evidence under Mil. R. Evid. 413. First, the evidence must meet three threshold requirements, which are: (1) the accused is charged with an offense of sexual assault, (2) the proffered evidence is evidence of the accused's commission of another sexual assault,[5] and (3) the evidence is relevant under Mil. R. Evid. 401 and 402. *Solomon*, 72 M.J. at 179; *Wright*, 53 M.J. at 482. The second part of the analysis is a balancing test under Mil. R. Evid. 403, incorporating the *Wright* factors. The nine, non-exclusive *Wright* factors are:

> the strength of the proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence; the possible distraction of the fact-finder; the time needed to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties.

Berry, 61 M.J. at 95; *Wright*, 53 M.J. at 482.

Because the military judge did not put his analysis on the record, there is nothing to which this court can give deference on review. Nevertheless, when we perform our own Mil. R. Evid. 413 analysis, we find that the evidence meets the requirements for use under that rule.

First, regarding the threshold requirements, both offenses meet the definition of "offenses of sexual assault" found in Mil. R. Evid. 413(d); thus, prongs one and two are met.[6] Additionally, Congress and the courts have repeatedly said that the prior sexual misconduct of an accused is relevant to whether the accused committed the charged offenses. *See, e.g.*, *Wright*, 53 M.J. at 480–81. This includes the use of evidence of other charged sexual offenses to demonstrate propensity under Mil. R. Evid. 413. *See Wright*, 53 M.J. at 478, 483 (affirming the use of charged sexual assaults on different victims to prove propensity under Mil. R. Evid. 413); *United States v. Schroder*, 65 M.J. 49, 52 (C.A.A.F. 2007) (permitting the use of evidence of both charged and uncharged sexual misconduct as other acts evidence under Mil. R. Evid. 414 to prove charged offenses).

[5] The standard is that "the members could find by a preponderance of the evidence that the offenses occurred." *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013).

[6] Although Appellant was acquitted of the abusive sexual contact specification, the military judge properly instructed the members that to use that specification for propensity, it only needed to be proved by a preponderance. We are convinced that the evidence presented established facts sufficient that the members could find by a preponderance of the evidence that acts charged as abusive sexual contact occurred. *See Solomon*, 72 M.J. at 179.

Second, nearly every factor under a Mil. R. Evid. 403 balancing test weighs in favor of admitting the evidence. We briefly address each *Wright* factor.

Strength of the proof of the prior act. Both acts were vetted through the military justice process. These were not rumors, unfounded allegations, or hearsay statements reported by a law enforcement agent. The witnesses testified under oath about Appellant's actions and were subject to the crucible of cross-examination. As the Navy-Marine Court recently stated, "[W]e see nothing more prudent or fair about a rule that would prohibit evidence from being considered under Mil. R. Evid. 413 if it pertains to charged offenses, but allow it if the evidence is too old or too weak to be charged . . . ." *United States v. Bass*, 74 M.J. 806 (N.M. Ct. Crim. App. 2015). Therefore, this factor weighs in favor of admission. We are cognizant of our superior court's ruling in *Solomon* strongly critical of admitting evidence of misconduct that resulted in an acquittal. *Solomon*, 72 M.J. at 181–82. However, this case is distinct from *Solomon* for two reasons. First, as Appellant conceded, the evidence in question was already properly before the members to prove the underlying charged offense, so the harm enumerated in *Solomon* from admission of evidence of the prior act could not have been avoided. Second, the panel's decision to acquit Appellant of the charges related to PFC KM had not occurred at the time of the instruction.

Probative weight of the evidence. Generally, the probative value of evidence of similar crimes in sexual assault cases is strong. *See Wright*, 53 M.J. at 480–81 (discussing the support for Mil. R. Evid. 413 in the Congressional record). Additionally, in this case, both women testified about the Appellant's aggressive behavior in pursuing a physical relationship after knowing them for a relatively short time. They also described how Appellant restrained them in a similar manner by holding their wrists above their heads. Consequently, this factor favors admission.

Potential for less prejudicial evidence. There was no less prejudicial alternative.

Possible distraction of the factfinder. This was not a mini-trial within the trial because the evidence would have been presented to the members regardless of the Mil. R. Evid. 413 ruling. Additionally, neither charged act was substantially more troubling than the other. *Cf. Berry*, 61 M.J. at 97 (presenting Mil. R. Evid. 413 evidence of child molestation in an adult sexual assault case distracted the members). This factor also favors admission.

Time needed to prove the prior conduct. This factor weighs in favor of admission. As discussed above, this evidence would have been presented regardless of the Mil. R. Evid. 413 ruling because it involved a charged offense.

Temporal proximity of the prior event. The acts occurred only six weeks apart. Our superior court has found a time gap of 10 years did not prohibit use under Mil. R. Evid. 413. *See Dewrell*, 55 M.J. at 137–38 (permitting a gap of 7 to 10 years); *United States v. Bailey*, 55 M.J. 38, 41 (C.A.A.F. 2001) (permitting gaps of 3-and-a-half years and 10 years). Thus, this factor supports admission.

Frequency of the acts. Multiple acts within six weeks satisfy this factor.

Presence of intervening circumstances. Appellant remained on active duty and there was no indication that major life events occurred during these six weeks. Thus, this factor supports admission.

Relationship between the parties. Appellant had similar relationships with both women. He developed intense relationships in a short time and consistently pushed the sexual boundaries of those relationships. Accordingly, this factor favors admission.

Therefore, while the military judge did not put his analysis on the record, we conclude that the evidence satisfies the requirements of Mil. R. Evid. 413 and that the military judge did not abuse his discretion in providing the propensity instruction.

Ineffective Assistance of Counsel

Appellant's final assignment of error is that his trial defense counsel were ineffective by failing to ask A1C JM about certain text messages she exchanged with Appellant. During trial, trial defense counsel did cross-examine the victim about the text messages introduced by the Government, as well as statements she made in some other text messages. However, in Appellant's post-trial Petition for Clemency, trial defense counsel provided the convening authority excerpts from the messages used to confront the victim at trial. Of the thousands of text messages exchanged between Appellant and the victim, Appellant highlighted eight series of messages in his clemency petition which he claimed undermined the victim's credibility and established that she either consented to the assault or that he was under a mistake of fact as to her consent. Appellant now argues that counsel were ineffective by failing to use three of those eight series in cross-examination.[7]

We review claims of ineffective assistance of counsel de novo. *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012). The Sixth Amendment[8] guarantees an accused in a criminal trial the "right to the effective assistance of counsel." *United States v. Cronic*, 466 U.S. 648, 654 (1984). In *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the Supreme Court established a two-prong test to analyze claims of ineffective

[7] Trial defense counsel did confront the victim at trial with the remaining five series of text message conversations.
[8] U.S. CONST. amend. VI.

assistance of counsel. "[T]o prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010).

The deficiency prong requires Appellant to show his defense counsel's performance "fell below an objective standard of reasonableness," according to the prevailing standards of the profession. *Strickland*, 466 U.S. at 687–88. The prejudice prong requires Appellant to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. We need not decide if trial defense counsel was deficient if the prejudice prong of *Strickland* is not met. *See United States v. Saintaude*, 61 M.J. 175, 183 (C.A.A.F. 2005).

Before the members, trial defense counsel confronted the victim about text messages to Appellant where she described her breasts and vagina, discussions about sex as an incentive for physical training, her responses to Appellant's repeated requests for sexual acts, and sexually-explicit comments she made to Appellant. Trial defense counsel also confronted her about messages she deleted before reporting the assault to investigators. Trial defense counsel provided a complete summary of the text messages to A1C JM during cross-examination and argued during closing that the prosecution had failed to provide the panel with certain messages that "paint a different picture than [A1C JM] wants you to believe."

In spite of this, the members convicted Appellant. We fail to see how confronting the victim with a handful of additional text messages creates a reasonable probability that the result of the proceedings would have been different. The members were provided testimony about text messages the victim sent to Appellant, her prior sexual relationship with Appellant, and her hiding of "unfavorable" evidence. Even with this information the members still found the victim credible and concluded the prosecution had met its burden of proving Appellant's guilt beyond a reasonable doubt. We are convinced that nothing about the content or the context of the three additional series of text messages—particularly in light of Appellant's admission that the victim said "no" but that he was unable to control himself—creates a reasonable probably that the result of the proceeding would have been different had the victim been confronted with the additional messages. Thus, under the facts of this case, there is no reasonable probability that, absent the alleged error by trial defense counsel, the result would have been different. Appellant has failed to meet his burden to establish prejudice under the *Strickland* test.

Conclusion

The findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c),

UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court