UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOE A. MONTOYA, IV
United States Air Force

ACM 38116

14 August 2013

Sentence adjudged 29 February 2012 by GCM convened at Luke Air Force Base, Arizona. Military Judge: Joseph S. Kiefer (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for 42 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Scott W. Medlyn.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Rhea A. Lagano; and Gerald R. Bruce, Esquire.

Before

HARNEY, MITCHELL, and SOYBEL
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, the appellant was convicted by a military judge sitting as a general court-martial of one specification of rape by using force against another person, in violation of Article 120, UCMJ, 10 U.S.C. § 920. The military judge sentenced the appellant to a dishonorable discharge, confinement for 42 months, total forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.[1]

[1] Pursuant to the terms of a pretrial agreement, the convening authority agreed to cap confinement at 10 years and dismiss one charge and one specification of sodomy, in violation of Article 125, UCMJ, 10 U.S.C. § 925. That charge was withdrawn and dismissed after arraignment.

The appellant raises three issues for our review: (1) improper argument by the trial counsel; (2) ineffective assistance of counsel;[2] and (3) sentence severity. We disagree and, for the reasons discussed below, affirm the findings and sentence.

Background

On 28 October 2011, the appellant went to an on-base party, where he met the 18-year-old civilian victim, JT. After a night of drinking alcohol, the appellant asked if someone would walk him back to his dorm room. JT offered to walk him back. While in his room, the appellant and JT engaged in consensual kissing. The appellant began to take off JT's clothing. JT told the appellant she did not want to have sexual intercourse with him. The appellant continued to remove JT's clothing and put his penis in her vagina despite her telling him several times "no" and "stop." JT physically resisted by using her hands to push against the appellant's chest, but the appellant used his body weight to hold JT down. After a few minutes, the appellant stopped having sexual intercourse with JT. JT got dressed and left.

Improper Argument

During sentencing argument before the military judge, trial counsel made several statements the appellant claims were improper and amounted to prosecutorial misconduct. The appellant asserts that trial counsel argued facts not in evidence before the court. Those comments consisted of trial counsel arguing that the appellant's actions were both service-discrediting and impacted good order and discipline in the armed forces, as well as arguing that the victim inherently trusted the appellant due to his status as a military member. Because trial defense counsel failed to object to trial counsel's argument, we review the issue for plain error. *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007); *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001). To prevail under a plain error analysis, the appellant must show: "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right [of the appellant]." *Erickson*, 65 M.J. at 223 (quoting *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). We conclude that trial counsel did not engage in misconduct through any comments made during the sentencing argument, and find no plain error.

At the beginning of his argument, when proposing a punishment, trial counsel pointed out that "a civilian of the local community was raped . . . by the accused." Trial counsel then asked rhetorically, "Did his crime bring dishonor upon the United States Air Force? Absolutely." Trial counsel continued: "And there's no one in this room who can say the accused, who was just found guilty of rape, maintains the basic standard of a member of the Air Force and should be walking around freely. The accused raped a civilian who is supposed to trust an Air Force member to keep her safe."

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

Soon thereafter, in the context of arguing for confinement, trial counsel referred to the victim's trauma: "She's having a hard time going through the day . . . [H]er school has been affected. Her life has been turned upside down and she can't even live a normal student life anymore. All of this happened because she trusted a military member, because she wanted to help a military member who she thought would keep her safe."

In the context of arguing for a dishonorable discharge, trial counsel asserted, "What [the appellant] did had a direct impact . . . on [JT], and the United States Air Force. Civilians are supposed to trust military members to keep her safe and nothing [sic] ever happened to her." Trial counsel continued, "The accused has brought dishonor to the United States Air Force, including all the members like you and me." Trial counsel urged the military judge to tell "[JT], her father and mother and all those who wonder about our military system and what would happen if you rape someone, all military members should be able to say the United States Air Force is here to protect them." Trial counsel wrapped up the argument by again focusing the military judge on the gravity of the crime and the victim's civilian status: "[Y]ou can say to our civilian community that the United States Air Force is protecting them by sending the right message."

A trial counsel is charged with being a zealous advocate for the Government. *United States v. Barrazamartinez*, 58 M.J. 173, 176 (C.A.A.F. 2003) (citing *U.S. v. Nelson*, 1 M.J. 235, 238 (C.M.A. 1975)). As a zealous advocate, trial counsel may "argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). *See also Nelson*, 1 M.J. at 239. During sentencing argument "the trial counsel is at liberty to strike hard, but not foul, blows." *Baer*, 53 M.J. at 237. Trial counsel may not "seek unduly to inflame the passions or prejudices of the court members." *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983).

In this case, the appellant, an Air Force member, raped an 18-year-old girl from the local civilian community in a dormitory room on an Air Force base. When viewed in the context of the entire court-martial, we find trial counsel's comments to not only be fair but, also reasonable inferences fairly derived from the evidence. *Gilley*, 56 M.J. at 121. The victim testified about the ongoing trauma she suffered because of the rape. She testified how she continually had flashbacks to the rape, how the incident affected her relationship with her parents, and how it partially contributed to her leaving school. One may reasonably infer from the evidence, as did trial counsel, that the appellant's conduct dishonored the Air Force, fell below the standards expected of airmen, and violated the trust that the victim placed in the appellant when she agreed to walk him back to his room. Additionally, trial counsel's comments urging the military judge to send the "right message" to the civilian community fairly embodies the generally accepted sentencing philosophies, which include general and specific deterrence and social retribution. Rule

for Courts-Martial 1001(g). The lack of any objection by defense counsel is some measure of the minimal impact of the trial counsel's argument. *Gilley*, 56 M.J. at 123.

Finally, while the appellant rightfully notes that trial counsel may not "unduly . . . inflame the passions or prejudices of the court members," the sentencing authority in this case was a military judge, sitting alone. *Clifton*, 15 M.J. at 30. Even if trial counsel's comments were improper, military judges are presumed to know the law and to follow it absent clear evidence to the contrary. *Erickson*, 65 M.J. at 225 (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)). Here, there is no evidence to rebut that presumption, and no court member was unduly inflamed in this judge alone trial.

Ineffective Assistance of Counsel

The appellant next argues that his trial defense counsel was ineffective for two reasons: (1) for failing to advise him about his options for waiver and deferment of forfeitures; and (2) for failing to submit substantive clemency matters to the convening authority. We disagree and find that trial defense counsel was not ineffective during his post-trial representation of the appellant. We also conclude that a fact-finding hearing is not necessary for us to resolve this issue. *United States v. Ginn*, 47 M.J. 236, 244-45 (C.A.A.F. 1997).

This Court reviews claims of ineffective assistance of counsel de novo. *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009). When reviewing such claims, we follow the two-part test outlined by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under *Strickland*, the appellant has the burden of demonstrating: (1) a deficiency in counsel's performance that is "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and (2) that the deficient performance prejudiced the defense through errors "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

The right to effective representation extends to post-trial proceedings. *United States v. Cornett*, 47 M.J. 128, 133 (C.A.A.F. 1997). Defense counsel is responsible for post-trial tactical decisions but should act "after consultation with the client where feasible." *United States v. MacCulloch*, 40 M.J. 236, 239 (C.M.A. 1994). Defense counsel may not submit matters over the client's objection. *United States v. Hood*, 47 M.J. 95, 97 (C.A.A.F. 1997).

We need not decide if defense counsel was deficient during post-trial representation if the second prong of *Strickland* regarding prejudice is not met. *United States v. Saintaude*, 61 M.J. 175, 183 (C.A.A.F. 2005). Our superior court has held that errors in post-trial representation can be tested for prejudice, which will be found if "the appellant 'makes some colorable showing of possible prejudice.'" *United States v. Lee*, 52 M.J. 51,

53 (C.A.A.F. 1999) (quoting *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998)).

The appellant has failed to make a colorable showing of possible prejudice in this case. We instead find that the appellant's trial defense counsel provided proper post-trial effective representation. First, we find that trial defense counsel properly advised the appellant about his options for deferment or waiver of forfeitures. The record shows that on 24 February 2012, the appellant signed a form entitled "Post Trial Rights Advisement." Among other items, this form set forth the appellant's rights with respect to deferment or waiver of forfeiture of pay. Below the appellant's signature is that of his trial defense counsel, who attested that "[t]he preceding document was signed by [the appellant] after being fully counseled and advised by me of the previously noted rights." The record also shows that the appellant answered in the affirmative when asked by the military judge if his counsel had explained those rights to him.

In his affidavit, trial defense counsel stated that he reviewed the post-trial rights with the appellant prior to trial. He explained to the appellant in depth the process for deferment or waiver of forfeiture of pay, to include the appellant's family and financial situation. Trial defense counsel learned that the appellant was married to another active duty member of the Air Force who was receiving full pay, allowances, and benefits. Based upon this information, trial defense counsel explained to the appellant that the convening authority probably would not defer forfeitures for his spouse because she was already receiving Air Force pay, he was not providing her with any financial support, they had no children, and there was no history of financial hardship. The appellant understood and told his counsel he could "see no justification for asking for the deferment." According to trial defense counsel, the appellant "voluntarily, knowingly, and intelligently waived his right to request deferment." We find nothing in the record to convince us otherwise.

Second, we find that trial defense counsel effectively advised the appellant regarding clemency. In his affidavit, trial defense counsel states that he explained the clemency process to the appellant prior to the end of the court-martial, and again after the appellant was confined. The appellant did not ask his counsel to submit anything to or request anything specific from the convening authority. According to trial defense counsel, the appellant was inclined to waive clemency, but opted to allow counsel to submit a clemency request asking the convening authority to reduce his sentence by a couple of months.

Trial defense counsel decided not to resubmit the sentencing package introduced at trial to the convening authority as part of the clemency request. Based on his experience, trial defense counsel concluded that merely resubmitting the sentencing materials in clemency would not be helpful and could actually undermine the clemency effort. He instead reviewed each case individually and would include materials from the

sentencing package with the clemency request only if, in his opinion, they were "so substantial and significant that [they] warranted being resubmitted with clemency." As described in his affidavit, trial defense counsel took this approach in the appellant's case:

> [I]n my opinion, the only items that were relevant were four character letters. *It was a specific, reasoned, and strategic decision on my part not to re-submit any of these character letters, or any of the other matters in the sentencing package.* One character letter was from a TSgt who ran the bay orderly program that [the appellant] was working on [sic] while pending trial. The TSgt knew [the appellant] in that capacity only and only for 2 months. Two other character letters were from Airmen in [the appellant's] unit; an Amn that knew [the appellant] for 4 months and an A1C that knew my client for about 14 months. The final character letter was from a civilian employee that knew [the appellant] for about 4 months. *All of these character letters were very "thin" in nature . . . They added little, if anything, relevant to clemency,* and again, these items had already been in front of the sentencing authority.

(emphasis added).

Defense counsel states he made a "specific, reasoned, and strategic decision" about what he chose to submit on the appellant's behalf for clemency, he advised his client on a course of action for clemency, and that the appellant agreed with his advice. We find no reason to question his judgment on this matter.

Sentence Severity

The appellant next avers that his sentence is inappropriately severe when compared with other closely related cases with less severe sentences. We disagree.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-85 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering 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, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999).

Additionally, "[t]he Courts of Criminal Appeals are required to engage in sentence comparison only 'in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.'" *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). Sentence comparison is generally inappropriate unless this Court finds that any cited cases are "closely related" to the appellant's case and the sentences are "highly disparate." Closely related cases include those which pertain to "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Lacy*, 50 M.J. at 288. "[A]n appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.' If the appellant meets that burden . . . then the [g]overnment must show that there is a rational basis for the disparity." *Id.*

The appellant argues that his sentence is too severe when compared to four other Air Force cases where the accused were convicted of similar charges. He asserts that the accused in those cases received either (1) a lesser period of confinement for more egregious acts than he committed; or (2) the same or slightly longer period of confinement for crimes more serious and more numerous than his.[3]

We decline the appellant's invitation to engage in sentence comparison. We have reviewed the cases cited by the appellant and find them unpersuasive. The facts and the mix of charges and specifications in those cases vary significantly from the facts and charge in the appellant's case. The appellant has failed to show how these cases are in any way closely related to his case. They do not involve "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Lacy*, 50 M.J. at 288. The only common factor among the cases is that they involve crimes committed by other Air Force members under Article 120, UCMJ. Exercising our discretion, we find that sentence comparison in this case is unwarranted. *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001) (holding that the Courts of Criminal Appeals have the discretion to consider sentences in other courts-martial when reviewing a case for sentence appropriateness and relative uniformity).

We next consider whether the appellant's sentence was appropriate "judged by 'individualized consideration' of [the appellant] 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *Snelling*, 14 M.J. at 268 (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all other matters contained in the

[3] The appellant cites to the Court-Martial Orders for *United States v. Payton*, ACM 37824; *United States v. Hohenstein*, ACM 37965; *United States v. Lara*, ACM 37861; and *United States v. Chambers*, ACM 38044.

record of trial. The appellant forcibly raped an 18-year-old girl after ignoring her multiple pleas of "no" and "stop." The victim testified to the ongoing trauma she has suffered because of the rape. Thus, we find that the approved sentence was clearly within the discretion of the convening authority, was appropriate in this case, and was not inappropriately severe.

Conclusion

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. Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court