UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant HERNAN A. RUIZ MARTINEZ
United States Air Force

ACM S31909

23 August 2012

Sentence adjudged 21 December 2010 by SPCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Michael E. Savage.

Approved sentence: Bad-conduct discharge, confinement for 60 days, forfeiture of $964.00 pay per month for 2 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Ja Rai A. Williams (argued); Colonel Tom E. Posch; Major Scott W. Medlyn; and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Lieutenant Colonel C. Taylor Smith (argued); Colonel Don M. Christensen; Lieutenant Colonel Linell A. Lentendre; Major Scott C. Jansen; and Gerald R. Bruce, Esquire.

Before

ROAN, WEISS, and CHERRY
Appellate Military Judges

OPINION OF THE COURT

CHERRY, Judge:

A special court-martial composed of officer and enlisted members convicted the appellant, in accordance with his pleas, of two specifications of assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928, and one specification of communicating a threat, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged and approved sentence

consisted of a bad-conduct discharge, confinement for 60 days, forfeiture of $964.00 pay per month for 2 months, and reduction to the grade of E-1.

On appeal, the appellant asserts that the military judged abused his discretion by allowing the Government to present extrinsic evidence of uncharged misconduct to the court members and by accepting an improvident guilty plea. The appellant also argues that the specification of the Article 134, UCMJ, charge fails to state an offense in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011).[1]

Background

In May of 2010, the appellant had an argument with CND, his wife at the time of the court-martial, in their Goldsboro, NC, home. The argument culminated in the appellant retrieving a loaded pistol from his nightstand and pointing it at her. He also placed the pistol in his own mouth and asked whether CND wanted him to commit suicide. The appellant was fully aware that there were bullets in the magazine of the pistol.

In September of 2010, the appellant invited CND to dinner in their home and expressed his desire for reconciliation. CND maintained that she wanted a divorce. After CND's dog jumped on the appellant repeatedly, he pushed the dog down, hit the dining room table, and threw a cable box at the animal. In response, CND expressed frustration at the appellant's continuing anger issues and attempted to leave the premises. To prevent her from doing so, the appellant assaulted her by unlawfully pushing and restraining her. He then communicated a threat to rape her, with the knowledge that she had been raped before. He apologized immediately afterwards. While CND did not believe that the appellant intended to rape her, she testified that she was in fear of physical harm.

[1] The appellant asserts the following issues for this court to consider:

> I. Whether the military judge abused his discretion by allowing the Government to present extrinsic evidence of uncharged misconduct to the court members for the purpose of rebutting sentencing evidence.
>
> II. Whether the Specification of Charge II fails to state an offense because it alleges a violation of Article 134, [UCMJ, 10 U.S.C. § 934,] but fails to allege any of [the three terminal clauses].
>
> III. Whether the military judge abused his discretion in accepting Appellant's plea to communicating a threat when Appellant's true intention, the understanding of the person to whom the statement was communicated and the surrounding circumstances reveal the statement not to be a threat.

Extrinsic Evidence of Uncharged Misconduct

During sentencing, trial defense counsel introduced the appellant's supervisor, Technical Sergeant (TSgt) Santos, as a character witness and questioned her with respect to the appellant's potential for retention in the Air Force, to which she stated that she "absolutely" still would want the appellant back to work for her despite her knowledge of the charges he pled guilty to. In addition to her testimony, previously admitted into evidence was TSgt Santos's character letter, in which she stated, among other things, that "The Air Force is looking for good NCOs . . . to mentor the junior enlisted Airmen. I believe Sergeant Ruiz is more than capable of this very important task." In an Article 39(a), UCMJ, 10 U.S.C. § 939(a), session following trial defense counsel's direct examination, trial counsel expressed his intent to pose "did you know; have you heard" questions to TSgt Santos concerning uncharged misconduct, specifically regarding a November 2008 incident in which the appellant allegedly choked CND and subsequently sought counseling for anger management. Trial defense counsel objected that TSgt Santos's testimony regarded retention and not rehabilitation and inquiry into the November 2008 incident would be irrelevant and highly prejudicial. Following examination of TSgt Santos as well as CND during the Article 39(a), UCMJ, session, the military judge decided to allow for cross-examination into the November 2008 incident, to which TSgt Santos testified being unaware of the exact factual circumstances except that he had gone to anger management.

During direct examination of trial defense counsel's subsequent witness, the appellant's squadron commander Lieutenant Colonel (Lt Col) Hughes, trial defense counsel asked Lt Col Hughes to opine on the appellant's ability for rehabilitation, to which he opined that the appellant rehabilitative "potential is great." During cross-examination, trial counsel questioned Lt Col Hughes regarding his knowledge of the November 2008 incident, to which Lt Col Hughes admitted having knowledge of. Following the defense's sentencing case, trial counsel recalled CND as a rebuttal witness to "lay the evidence for the 2008 incidents" and demonstrate the appellant's lack of rehabilitative potential, "mostly for sentencing argument purposes." Trial defense counsel objected on the same basis stated during the Article 39(a), UCMJ, session, which the military judge overruled. The military judge stated that Lt Col Hughes's testimony had opened the door for limited rebuttal testimony concerning the November 2008 choking incident. CND testified that the appellant had choked her in November of 2008 and attended mandatory counseling afterwards. During sentencing argument, trial counsel referenced the November 2008 incident and subsequent counseling to once again demonstrate that the appellant lacked potential for rehabilitation.

Uncharged Misconduct

The appellant now argues that the allowance of extrinsic evidence of uncharged misconduct resulted in prejudice to the appellant by creating the possibility of punishing the appellant for a prior, uncharged act.

We review admissibility of sentencing evidence for abuse of discretion. *United States v. Clemente*, 50 M.J. 36, 37 (C.A.A.F. 1999). An abuse of discretion occurs when a challenged action is arbitrary, clearly erroneous, or clearly unreasonable. *United States v. Travers*, 25 M.J. 61 (C.M.A. 1987). Generally, cross-examination concerning prior misconduct is allowable given a good-faith intention to test whether a witness has sufficient knowledge to testify as to the accused's reputation or character.[2] *United States v. Pruitt*, 46 M.J. 148, 151 (C.A.A.F. 1997); Mil. R. Evid. 405(a). However, "the cross-examiner is not allowed to prove the existence of the acts about which he asks." Stephen A. Saltzburg, et al., *Military Rules of Evidence Manual* 496 (3d ed. 1991). This can be contrasted with the admissibility of uncharged misconduct as evidence in aggravation, which allows for evidence "directly relating to or resulting from the offenses of which the accused has been found guilty." Rule for Courts-Martial (R.C.M.) 1001(b)(4). In *Pruitt*, our superior court ruled that the military judge erred by allowing the introduction of extrinsic evidence of uncharged misconduct in order to rebut the opinion of good character evidence. *Pruitt*, 46 M.J. at 151. Similarly, in the case sub judice, the uncharged misconduct was not introduced as evidence in aggravation but instead to rebut character evidence. We thus find that, while cross-examination of Lt Col Hughes regarding the November 2008 choking incident was allowable, the judge erred in allowing CND's subsequent testimony during rebuttal.

However, an error of law regarding the sentence does not provide a basis for relief unless the error materially prejudiced the substantial rights of the accused. *United States v. Bridges*, 66 M.J. 246, 248 (C.A.A.F. 2008) (citing Article 59(a), UCMJ, 10 U.S.C. § 859(a); *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005)). Material prejudice in sentencing occurs where an error substantially influences the adjudged sentence. *Griggs*, 61 M.J. at 410 (citing *United States v. Boyd*, 55 M.J. 217, 221 (C.A.A.F. 2001)). In this case, the appellant fails to demonstrate material prejudice. The appellant pled guilty to physically assaulting and pointing a loaded pistol at his then-wife, another Airman. His adjudged punishment included a bad-conduct discharge and less than 17 percent of the maximum confinement allowable. We find that the evidence of uncharged misconduct did not substantially affect the appellant's adjudged sentence. Accordingly, we find that there was error, that the error was harmless, and that the appellant is not entitled to relief.

[2] The trial judge may require the Government to establish in advance their good faith basis for believing that the conduct occurred. *Michelson v. United States*, 335 U.S. 469 (1948).

Legal Sufficiency of the Article 134, UCMJ, Charge

The appellant entered into a pre-trial agreement which limited his maximum sentence and dismissed an attempted rape charge in exchange for his guilty plea to two specifications of assault and one specification of wrongfully communicating a threat, in violation of Article 134, UCMJ. The Article 134, UCMJ, specification reads as follows:

> In that STAFF SERGEANT HERNAN A RUIZ MARTINEZ . . . did, at or near Goldsboro, North Carolina, on or about 15 September 2010, wrongfully communicate to [CND] a threat to rape [CND].

Prior to accepting the appellant's guilty plea, the military judge advised the appellant as to the elements of an Article 134, UCMJ, offense, the last of which was "that under the circumstances [the] conduct was to the prejudice of good order and discipline in the Armed Forces or was of a nature to bring discredit upon the Armed Forces." The judge proceeded to define conduct that is "prejudicial to good order and discipline" or "service discrediting," to which the appellant acknowledged full understanding. The appellant now asserts that, because the language of each specification does not expressly allege a terminal element of Article 134, UCMJ, offense, they are insufficient to properly state an offense in light of *Fosler*.

We review de novo whether a charge and specification states an offense. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). "A specification states an offense if it alleges, either expressly or by [necessary] implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *Id.* at 211 (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)); *see also* R.C.M. 307(c)(3). The appellant was charged with communicating a threat in violation of Article 134, UCMJ. The Government did not allege Clause 1, 2, or 3 of Article 134, UCMJ, in the specification. Our superior court recently held that failure to allege the terminal element of an Article 134, UCMJ, offense is error but, in the context of a guilty plea, the error is not prejudicial where the military judge correctly advises the appellant of all the elements and the providence inquiry shows that the appellant understood to what offense and under what legal theory he was pleading guilty. *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012), *cert. denied*, __ S. Ct. __ (U.S. 25 June 2012) (No. 11-1394). Having fully reviewed the entire record of trial, we are convinced the appellant suffered no prejudice to a substantial right: he knew under what clause he was pleading guilty and clearly understood how his conduct violated the terminal element of Article 134, UCMJ.

Providency of the Guilty Plea

We review a judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Nance*, 67 M.J. 362, 365 (C.A.A.F. 2009). "A military judge abuses his discretion if he fails to obtain from the accused an adequate factual basis to support the

plea – an area in which we afford significant deference." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)).

The elements of communicating a threat are: (1) that the accused communicated certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future; (2) that the communication was made known to that person or to a third person; (3) that the communication was wrongful; and (4) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 110.b (2008 ed.).

On appeal, the appellant asserts that the plea was defective because his repeated statement of "I am going to rape you" to CND did not in fact communicate a present intent to rape her. He contends that he did not intend to rape or hurt her, and she didn't interpret his words as a threat. Instead, he asserts that his words were merely meant to "get an emotional reaction out of her." "The intent which establishes the offense is that expressed in the language of the declaration, not the intent locked in the mind of the declarant." *United States v. Gilluly*, 32 C.M.R. 458, 461 (C.M.A. 1963) (citing *United States v. Humphrys*, 22 C.M.R. 96 (C.M.A. 1956)). "The offense is complete when one wrongfully communicates to another an 'avowed present determination or intent to injure presently or in the future.'" *Id.* at 460-61 (quoting *United States v. Holiday*, 16 C.M.R. 28 (C.M.A. 1954)) (internal quotation marks omitted). Courts apply a "reasonable person" standard in determining this intent: a threat exists "so long as the words uttered could cause a reasonable person to believe that he was wrongfully threatened." *United States v. Shropshire*, 43 C.M.R. 214, 215 (C.M.A. 1971) (quoting *Humphrys*, 22 C.M.R. at 96); *see also United States v. Phillips*, 42 M.J. 127, 130 (C.A.A.F. 1995) ("Our only concern is whether a reasonable factfinder could conclude beyond a reasonable doubt that a reasonable person in the recipient's place would perceive the contested statement by appellant to be a threat.").

In the case before us, we find that the appellant clearly communicated an intent to injure CND. Although neither CND nor the appellant felt that the appellant intended to rape her, the appellant admits that he believed CND would interpret his words to be a threat to harm or injure. More importantly, CND testified that she was worried for her safety. Under the "reasonable person" test necessitated by *Shropshire*, the appellant certainly satisfies its requirements: he communicated a threat to injure during a domestic argument in which he had physically and wrongfully restrained and pushed her. Not only did he expect CND to fear harm or injury, but she also did in fact fear harm or injury. Additionally, a review of the record shows that the appellant himself understood and admitted to more than adequate facts and circumstances to establish all of the elements of communicating a threat prior to the acceptance of his guilty plea. Therefore, we do not

find a substantial basis in law or fact for questioning the appellant's guilty plea to communicating a threat. We hold that the appellant's pleas were provident.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[3] Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly the approved findings and sentence are

AFFIRMED.

OFFICIAL

Angela E. Dixon

ANGELA E. DIXON, MSgt, USAF
Deputy Clerk of the Court

[3] The Court notes the court-martial order (CMO), dated 25 February 2011, incorrectly fails to indicate the individual pleas and findings on any of the specifications. Additionally, it fails to indicate the appellant's plea to Charge I before it was withdrawn. Finally, the forum was a panel of officer and enlisted members, not just officers. We order the promulgation of a corrected CMO.