UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM S32667

UNITED STATES
Appellee

v.

Colby D. SHERWOOD
Senior Airman (E-4), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 18 May 2021

Military Judge: Andrew R. Norton.

Sentence: Sentence adjudged on 18 August 2020 by SpCM convened at Luke Air Force Base, Arizona. Sentence entered by military judge on 25 September 2020: Bad-conduct discharge, confinement for 60 days, reduction to E-1, and a reprimand.

For Appellant: Captain Sara J. Hickmon, USAF.

For Appellee: Lieutenant Colonel Matthew J. Neil, USAF; Captain Cortland T. Bobczynski, USAF; Mary Ellen Payne, Esquire.

Before MINK, KEY, and ANNEXSTAD, *Appellate Military Judges*.

Judge ANNEXSTAD delivered the opinion of the court, in which Senior Judge MINK and Judge KEY joined.

ANNEXSTAD, Judge:

A special court-martial composed of a military judge convicted Appellant, in accordance with his pleas and pursuant to a plea agreement, of one specification of assault consummated by a battery in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928.[1,2] The court-martial sentenced Appellant to be reprimanded, confined for 60 days, reduced to the grade of E-1, and discharged from the service with a bad-conduct discharge. The convening authority approved the findings and sentence.[3]

On appeal, Appellant raises four issues before this court: (1) whether Appellant was properly subject to court-martial jurisdiction; (2) whether Appellant's receipt of a purportedly valid Department of Defense Form 214 (DD Form 214) had the legal effect of remitting the punitive discharge that was adjudged; (3) whether trial counsel's reference to the unsworn victim impact statement during his sentencing argument was improper and amounted to prosecutorial misconduct; and (4) whether Appellant's sentence was inappropriately severe.[4]

We resolve issue (3) adversely to Appellant in light of our superior court's recent decision in *United States v. Tyler*, ___ M.J. ___, No. 20-0252, 2021 CAAF LEXIS 396, at *12 (C.A.A.F. 26 Apr. 2021) (holding "either party may comment on properly admitted unsworn victim statements"). With respect to issues (1) and (2), we have carefully considered Appellant's contentions and find they do not require further discussion or warrant relief.[5] *See United States v. Matias*,

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[1] All references to the punitive articles of the UCMJ are to the *Manual for Courts-Martial*, *United States* (2016 ed.). All other references to the UCMJ and to the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial*, *United States* (2019 ed.).

[2] Appellant pleaded not guilty to the aggravated assault charge, but guilty to the lesser included offense of assault consummated by a battery. In exchange for Appellant's guilty plea, the Government withdrew and dismissed the aggravated assault specification, and withdrew and dismissed the charge of communicating a threat in violation of Article 115, UCMJ, 10 U.S.C. § 915. Because the communicating a threat offense occurred in 2020, Appellant chose to be sentenced under the rules that became effective on 1 January 2019.

[3] The plea agreement specified that the maximum period of confinement that could be adjudged for the offense was 97 days. There were no other limitations on the sentence.

[4] The fourth issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[5] In regards to issues (1) and (2), both parties submitted attachments to their briefs to this court. Without deciding whether the attachments could be considered consistent

25 M.J. 356, 361 (C.M.A. 1987). Therefore, we only address issue (4). We find no error materially prejudicial to a substantial right of Appellant; we affirm the findings and sentence.

I. BACKGROUND

On 29 June 2017, Appellant and his wife, RS, were at their residence on Luke Air Force Base (AFB), Arizona. The couple was eating dinner in the living room and began to argue. RS told Appellant that she was going to leave the residence to escape the argument and walked into the kitchen to grab the keys to the car. As she was approaching the keys, Appellant grabbed her with an arm around her chest and swung her to the ground. RS's head was the first part of her body to strike the hard kitchen floor, and the impact caused her to lose consciousness for a few seconds. After she regained consciousness, she left the residence. RS called her family and told them about the incident and then returned home. RS's father then called the local civilian police department to report the incident. Shortly thereafter, civilian and military police were dispatched to the couple's residence along with Luke AFB fire and paramedic personnel.

When the paramedics arrived, they assessed RS and noted that she had about a half-inch laceration and a contusion on the back of her head. RS was subsequently transported to a local hospital, where she received a computed tomography (CT) scan of her head. The CT scan revealed that RS had blood pooling in the left posterior portion of her brain, and she was diagnosed with traumatic brain injury, post-concussive syndrome, and a scalp contusion. RS was interviewed by police at the hospital and told them that she sustained the injuries to her head when Appellant threw her to the ground in her kitchen. Appellant was interviewed by law enforcement personnel the following day and told them that "he should not have done that" and that he "took it too far."

II. DISCUSSION

Appellant contends his sentence is inappropriately severe in light of his age, surrounding circumstances, and the stigma attached to his punitive discharge. We disagree and find Appellant's sentence appropriate.

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with our superior court's decision in *United States v. Jessie*, 79 M.J. 437, 442 (C.A.A.F. 2020), we find no relief is warranted on either issue because Appellant did not establish that he received a valid DD Form 214, received his final pay and accounting, or completed the clearing process as required by service regulations. *See United States v. Hart*, 66 M.J. 273, 275 (C.A.A.F. 2008).

This court "may affirm only . . . the sentence or such part or amount of the sentence, as [it] finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d) UCMJ, 10 U.S.C. § 866(d). We review sentence appropriateness de novo, employing "a sweeping Congressional mandate to ensure 'a fair and just punishment for every accused.'" *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (citations omitted).

In determining whether a sentence is appropriate, we consider 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. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (per curiam) (citations omitted). We have a great deal of discretion in determining whether a particular sentence is appropriate, but we are not authorized to engage in exercises of clemency. *United States v. Healy*, 26 M.J. 394, 395–96 (C.M.A. 1988).

After conducting a review of the entire record, we find that the adjudged and approved sentence is appropriate. In reaching this conclusion, we considered Appellant's unsworn statement, his enlisted performance reports, the defense exhibits submitted at trial, and all the matters submitted by Appellant during clemency. We also considered the facts of the offense to which Appellant was found guilty and all other properly admitted matters. In this case Appellant physically harmed his spouse, causing severe injury to her head and brain. In light of the significance of his criminal conduct, we find Appellant's sentence of a bad-conduct discharge, confinement for 60 days, reduction to the grade of E-1, and a reprimand as entered is appropriate for the crime he committed.

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and the sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court