UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MATTHEW E. TAKARA
United States Air Force

ACM S31832

13 July 2012

Sentence adjudged 28 April 2010 by SPCM convened at Elmendorf Air Force Base, Alaska. Military Judge: Don Christensen (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 140 days, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Nathan A. White (argued); Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; Major Naomi N. Porterfield; Major Daniel E. Schoeni; Major Robert D. Stuart; and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Captain Erika L. Sleger (argued); Lieutenant Colonel Linell A. Letendre; Major Deanna Daly; Major Scott C. Jansen; and Gerald R. Bruce, Esquire; Nicole Provo (intern).

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

OPINION OF THE COURT

HARNEY, Judge:

A special court-martial composed of a military judge sitting alone convicted the appellant contrary to his pleas of one specification of failure to obey a lawful order, in violation of Article 92, UCMJ, 10 U.S.C. § 892; and four specifications of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928. The military judge sentenced the appellant to a bad-conduct discharge, confinement for

140 days, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

The appellant has raised four issues before this Court: (1) his trial defense counsel was ineffective when he advised the appellant to decline nonjudicial punishment and demand trial by court-martial; (2) his trial defense counsel was ineffective when he included in the unsworn statement information that was contradicted by discovered evidence; (3) his trial defense counsel was ineffective when he failed to file a motion to dismiss for unreasonable multiplication of charges; and (4) the military judge abused his discretion by admitting improper rehabilitation evidence as rebuttal evidence during sentencing.

Background

On the night of 7-8 November 2009, the appellant contacted his then-wife, Senior Airman KT (now KB) asking for a ride home. The appellant and KB were in the process of divorcing. KB picked up the appellant from a local Anchorage, Alaska bar and drove him home. An argument ensued. Upon arriving at the appellant's apartment in Eagle River, Alaska, KB asked the appellant to leave her car; he refused. The appellant took the keys from the ignition and threw them in the backseat. As KB tried to exit the car, the appellant grabbed her jacket from behind, and she started screaming. The appellant put his hand over her mouth and pulled him into his lap. KB got away and ran from the car. The appellant gave chase and tackled her from behind. Her face hit the ground, causing some bleeding. The appellant carried KB back to his apartment, where he pushed her through the garage doorway. When KB tried to get away, the appellant dragged her back. During the altercation, the appellant shook KB and pushed her against the door. Several neighbors witnessed the altercation and called 911. The Anchorage Police arrived at the scene, interviewed KB, and arrested the appellant.

On 9 November 2009, the appellant's first sergeant issued him a No Contact Order. The No Contact Order directed the appellant to refrain from contacting KB either verbally, non-verbally, or through a third party. Despite the order, the appellant attempted to contact KB by inviting her to be a friend on his Yahoo Messenger profile and via his cell phone. KB reported these incidents through her chain of command.

On 16 December 2009, the appellant was offered nonjudicial punishment for violating the No Contact Order. After seeking the advice of his counsel, Captain (Capt) SR, the appellant declined nonjudicial punishment and requested trial by court-martial. On or about 19 January 2010, the appellant learned that Alaskan authorities had dismissed his off-base assault charge. Capt SR told the appellant that the military had sought and received jurisdiction over this offense and that it would be referred to court-martial along with the no contact order violation.

On 22 January 2010, Capt SR informed the appellant that he could no longer represent him. Capt SR asked the appellant to sign a memorandum that released Capt SR and requested Capt AR to be his defense counsel. The appellant signed the memorandum. Capt AR represented the appellant at his court-martial.

Prior to trial, Capt AR helped the appellant prepare an unsworn statement. The unsworn statement included the following language: "Also, I have never had any other disciplinary actions prior to this event . . . . I want nothing more than to continue with my Air Force career, and, at the very least to not lose the benefit of everything I've tried to do for the service." The appellant claims, and Capt AR does not dispute, that the appellant's version did not include the assertions that he had no negative paperwork or that he wanted to stay in the Air Force. The appellant claims these statements were added by Capt AR or Staff Sergeant (SSgt) F, the defense paralegal. The appellant further claims he never saw the finished unsworn statement until he read the unsworn statement at trial and that Capt AR never asked the appellant to verify whether he had prior negative paperwork. Capt AR disputes the appellant's claims of having no knowledge of the "no disciplinary actions prior to this" language, stating that the appellant had made prior false claims of a clean record – first, during a routine interview with Capt AR, second, on the client intake form, and third, on his referral EPR. Capt AR also states that the appellant had signed the statement before reading it in court.

On 26 April 2010, the eve of trial, the trial counsel discovered that the appellant had committed misconduct at a previous assignment. The trial counsel obtained two memoranda for record (MFR) from SSgt CB regarding the appellant's prior misconduct and SSgt CB's opinions of appellant. The Government provided these documents to Capt AR on the morning of trial, 27 April 2010. The MFRs were admitted during sentencing over defense objection to rebut the appellant's signed unsworn statement. Capt AR did not interview SSgt CB, nor did he discuss the MFRs or any of the claims SSgt CB made in them with the appellant.

The appellant submitted a post-trial affidavit asserting that Capt SR and Capt AR provided him ineffective assistance of counsel. The Government submitted affidavits from Capt SR and Capt AR addressing appellant's complaints. Additional facts necessary to the disposition of this case are set forth in the analysis below.

I. Ineffective Assistance of Counsel

The appellant was represented by two separate trial defense counsel, independently of each other: Capt SR and Capt AR. He claims Capt SR was ineffective by: (A) insufficiently advising the appellant by recommending he decline the offer to adjudicate his violation of the No Contact Order via Article 15, UCMJ, nonjudicial proceedings; and that Capt AR was ineffective by: (B) failing to exclude or advise against the inclusion of a rebuttable assertion in his unsworn statement; and (C) failing to file a

motion to dismiss Specifications 2-5 of Charge II because they constituted unreasonable multiplication of charges.

Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000)). This court reviews claims of ineffective assistance of counsel de novo. *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (citing *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006)). 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). *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987). 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 deficiency prong requires the appellant to show his defense counsel's performance fell below an objective standard of reasonableness, according to the prevailing standards of the profession. *Id*. at 688. The prejudice prong requires the 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. In doing so, the appellant "must surmount a very high hurdle." *Perez*, 64 M.J. at 243 (quotation marks and citations omitted); *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998) (quotation marks and citations omitted). This is because counsel is presumed competent in the performance of their representational duties. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001). Thus, judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000) (citing *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)).

To determine whether the presumption of competence has been overcome, our superior court has set forth a three-part test:

1. Are the appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?

2. If the allegations are true, did defense counsel's level of advocacy "fall [] measurably below the performance . . . [ordinarily expected] of fallible lawyers"?

3. If defense counsel was ineffective, "is . . . there . . . a reasonable probability that, absent the errors," there would have been a different result?

United States v. *Polk*, 32 M.J. 150, 153 (C.M.A. 1991) (citations omitted) (brackets and ellipses in original); *see also United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011).

"[T]he defense bears the burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance." *Tippit*, 65 M.J. at 76 (citing *Polk*, 32 M.J. at 153). When there is a factual dispute, appellate courts determine whether further fact-finding is required under *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997).[1] If, however, the facts alleged by the defense would not result in relief under *Strickland*, the Court may address the claim without the necessity of resolving the factual dispute. *See Ginn*, 47 M.J. at 248.

In conducting its analysis under *Strickland*, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697; *see also United States v. Saintaude*, 61 M.J. 175, 183 (C.A.A.F. 2005) ("[W]e need not determine

[1] In *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997), our superior court delineated the authority of the Court of Criminal Appeals to decide ineffective assistance of counsel issues without further proceedings:

> (1) if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on that basis;
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> (2) if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected on that basis;
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> (3) if the affidavit is factually adequate on its face to state a claim of legal error and the Government either does not contest the relevant facts or offers an affidavit that expressly agrees with those facts, the court can proceed to decide the legal issue on the basis of those uncontroverted facts;
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> (4) if the affidavit is factually adequate on its face but the appellate filings and the record as a whole "compellingly demonstrate" the improbability of those facts, the Court may discount those factual assertions and decide the legal issue;
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> (5) when an appellate claim of ineffective representation contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record (including the admissions made in the plea inquiry at trial and appellant's expression of satisfaction with counsel at trial) unless the appellant sets forth facts that would rationally explain why he would have made such statements at trial but not upon appeal; and
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> (6) the Court of Criminal Appeals is required to order a factfinding hearing only when the above-stated circumstances are not met. In such circumstances the court must remand the case to the trial level for a *DuBay* proceeding. During appellate review of the *DuBay* proceeding, the court may exercise its Article 66, UCMJ, factfinding power and decide the legal issue.

Id. at 248.

whether any of the alleged errors [in counsel's performance] establish[ ] constitutional deficiencies under the first prong of *Strickland*. . . . [if] any such errors would not have been prejudicial under the high hurdle established by the second prong of *Strickland*."); *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004); *United States v. McConnell*, 55 M.J. 479, 481 (C.A.A.F. 2001). The appropriate test for prejudice under *Strickland* is whether there is a reasonable probability that, but for counsel's error, there would have been a different result. *Strickland*, 466 U.S. at 694.

A. Forum Election

The appellant argues that his first defense counsel, Capt SR, was ineffective because he gave the appellant insufficient advice by recommending he decline the offer to adjudicate his violation of the No Contact Order via Article 15, UCMJ, nonjudicial proceedings. Specifically, the appellant complains that Capt SR did not fully advise him regarding the impact of a decision to decline the nonjudicial proceedings, particularly that such declination could result in a court-martial that could include additional charges stemming from the 8 November 2009 incident. He argues that "If [Capt SR] had properly . . . advised me of all the ramifications of declining nonjudicial punishment before I had done so, I would not have declined nonjudicial punishment." He further argues that he would have thereby avoided trial by court-martial and that "what was a minor nonjudicial punishment action became a federal conviction."

To resolve the appellant's claim, we must first determine whether an evidentiary hearing is necessary. Generally, evidentiary hearings are required if there is any dispute regarding material facts in competing declarations submitted on appeal which cannot be resolved by the record of trial and appellate filings. *Ginn*, 47 M.J. at 248. Applying these standards to the issue at hand, we find that any material conflict in the respective declarations regarding this issue may be resolved by reference to the record and appellate filings without the need for an evidentiary hearing.

Turning to the appellant's ineffectiveness claim, our analysis under *Strickland* "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [appellant] as a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice." *Strickland*, 466 U.S. at 697; *see also Saintaude*, 61 M.J. at 183; *Quick*, 59 M.J. at 386; *McConnell*, 55 M.J. at 481. Accordingly, the appellant's ineffectiveness claim fails if he has not shown a reasonable probability that, but for counsel's error, there would have been a different result. *Strickland*, 466 U.S. at 694. The appellant contends that, but for Capt SR's insufficient advice, he would have accepted nonjudicial proceedings and would have thereby avoided trial by court-martial and a result where "what was a minor nonjudicial punishment action became a federal conviction." We disagree.

The offer of nonjudicial punishment addressed a singular allegation that the appellant violated a no contact order on or about 30 November 2009 and made no mention of the 8 November 2009 incident in which he was arrested for assaulting KB. There is no evidence that the Government intended or indicated that the appellant would be shielded against any future court-martial in exchange for the appellant's acceptance of nonjudicial punishment for his violation of the No Contact Order. Indeed, Capt CS, the Chief of Justice at Elmendorf Air Force Base during the time of Capt SR's representation of the appellant, and the Government representative with whom Capt SR negotiated the appellant's case, stated in a post-trial affidavit that, "During my time as Chief of Justice I would diligently attempt to acquire jurisdiction of all criminal cases pending in local civilian courts . . . Once the civilian authorities relinquished jurisdiction in the [appellant's] case . . . it was quickly determined that the appropriate disposition was a court martial." Thus, even if the appellant had accepted the offer for nonjudicial proceedings vis-à-vis the no contact order violation, such acceptance would not have precluded court-martial on any other allegations stemming from the 8 November 2009 incident. In other words, the harm he now complains of having suffered – exposure to court-marital for the 8 November 2009 assaults – would have resulted either way, with or without Capt SR's advice that assault charges could still have been brought at a subsequent court-martial.

In our opinion, the record clearly shows that the appellant was advised concerning his right to accept the offer of nonjudicial punishment and elected not to do so. He now claims that this decision was misguided because he would have otherwise accepted the offer in order to avoid trial by court-martial for assault. Nothing in the record, however, shows that his acceptance of the offer would have precluded the Government from pursuing further charges in a trial by court-martial. The appellant has failed to overcome the high burden under *Strickland.*

B. Unsworn Statement

The appellant additionally claims that his second trial defense counsel, Capt AR, was ineffective by unilaterally including in the appellant's unsworn statement an assertion that the appellant had no history of disciplinary action prior to the charged misconduct, even though Capt AR received, prior to arraignment, inconsistent evidence in the form of a letter of reprimand previously issued to the appellant for making a false official statement.

In his affidavit, the appellant cites several deficiencies on the part of Capt AR: (1) that he did not investigate with the appellant the truth/accuracy of the "no prior disciplinary actions" assertion in the unsworn statement; (2) that he did not investigate the truth/veracity of the statements in SSgt CB's MFR; and (3) that he did not explore and analyze the full implication of SSgt CB's MFR to the appellant's case or otherwise discuss the MFR with the appellant. The appellant claims these deficiencies prejudiced

him because they allowed the Government to introduce rebuttal evidence that directly contradicted the assertions in the unsworn statement, thereby attacking the appellant's credibility; this additionally prejudiced the appellant by leading to a harsher punishment than might have resulted if the appellant had not been shown to be "an unrepentant liar." As a result, the appellant asks this Court to set aside the sentence and order a rehearing. We decline to do so.

Assuming, arguendo, that the appellant has satisfied *Strickland's* deficiency prong by showing that Capt AR should have further investigated the appellant's background, and should have deleted the "no prior misconduct" statement or, at the very least, advise the appellant against its inclusion, "any such errors would not have been prejudicial under the high hurdle established by the second prong of *Strickland*." *Saintaude*, 61 M.J. at 183. The appropriate test for prejudice under *Strickland* is whether there is a reasonable probability that, but for counsel's error, there would have been a different result. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. In our view, it is not reasonably probable that, absent the claimed errors, a different sentence would have resulted.

The appellant avers that Capt AR's performance placed the appellant's credibility in a vulnerable position of attack by the Government. However, even if we accept this as true, the record does not reveal that such attack significantly impacted the sentence. During its sentencing argument, the Government did not directly argue that other evidence contradicted the appellant's statements that he had "no prior disciplinary actions" or that he wanted to stay in the Air Force. The closest the Government got was when it stated, "He should get no credit for taking responsibility because it took him a long time to accept responsibility for what he did. There's a real question as to whether he really regrets what happened and whether he has learned his lesson." The military judge stated he considered trial counsel's "no credit" argument as a comment on the appellant's unsworn statement. Though this could be construed to mean the military judge may have factored in the appellant's credibility in assessing the sentence, a contextual reading of the military judge's entire commentary indicates the judge was primarily interested in protecting against an appeal concerning the appellant's right to plead not guilty or remain silent. *Cf. Wiggins v. Smith*, 539 U.S. 510, 534-37 (2003) (finding that the "mitigating evidence counsel failed to discover and present [was] powerful"). Moreover, the nature of the crimes was of domestic violence. The military judge imposed a period of confinement 2 months less than what the Government requested and considerably less than the available maximum.[2] In light of the above considerations and the totality of the record, it is not reasonably probable that, absent the claimed errors, a different sentence would have resulted.

[2] The maximum penalty available for the offenses of which the appellant was convicted included: a bad-conduct discharge, 1 year of confinement, total forfeitures, and a reduction to E-1. The Government asked for a bad-conduct discharge, 6 months of confinement, and a reduction to E-1. The military judge adjudged a bad-conduct discharge, confinement for 140 days, and a reduction to E-1.

Even if the appellant has established deficiencies in Capt AR's representation, he has failed to show that those deficiencies resulted in prejudice. Accordingly, we deny his request for a sentence rehearing on this ground.

C. Failure to File Motion for Unreasonable Multiplication of Charges

The appellant argues that Capt AR was additionally ineffective for failing to file a motion to dismiss Specifications 2-5 of Charge II because they constituted unreasonable multiplication of charges. Having reviewed the record, we find that the appellant's counsel acted well within the professional norms expected of able defense counsel with regard to the matters raised by the appellant. Accordingly, we need only briefly comment on the appellant's concerns.

When the basis of an ineffective assistance claim is failure to make a motion at trial, the appellant must show "a reasonable probability that such a motion would have been meritorious." *United States v. Jameson*, 65 M.J. 160, 163-64 (C.A.A.F. 2007) (quoting *McConnell*, 55 M.J. at 482); *see also Moulton*, 47 M.J. at 229 (The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time decisions are made, not on how they now appear in hindsight) (citing *Strickland*, 466 U.S. at 689); *United States v. Madewell*, 917 F.2d 301 (7th Cir. 1990) ("The likelihood of success of a motion, however, is directly relevant to the question of whether the failure to make it constitutes inadequate assistance of counsel. If a particular trial tactic is clearly destined to prove unsuccessful, then the sixth amendment standard of attorney competence does not require its use.") (citations omitted); *United States v. Crouthers*, 669 F.2d 635 (10th Cir. 1982) ("'[E]ffective assistance does not demand that every possible motion be filed, but only those having solid foundation'. . . . Nor does the Sixth Amendment require errorless defense.") (citations omitted).

The appellant contends that Specifications 2-5 stem from a continuous course of conduct spanning a brief period; when charged individually they unreasonably positioned the appellant to face four convictions instead of one. He further argues that his trial defense counsel should have filed a motion to dismiss. He notes that the military judge sua sponte considered Specifications 2-5 as one offense for sentencing; thus, he argues that it is highly probable that the military judge would have relied on Rule for Courts-Martial (R.C.M.) 307(c)(4) to dismiss three of the four specifications and merge the allegations into one specification of assault consummated by a battery.

To resolve the appellant's claim, we must first determine whether an evidentiary hearing is necessary. To reiterate, evidentiary hearings are generally required if there is any dispute regarding material facts in competing declarations submitted on appeal which cannot be resolved by the record of trial and appellate filings. *Ginn*, 47 M.J. at 248. When the appellant's affidavit states a claim of legal error, and the Government does not

contest the relevant factors, we may decide the legal issue on the basis of those uncontroverted facts. *Id*. According to the record and Capt AR's post-trial affidavit, his rationale for not making the motion to dismiss was two-fold. First, his considered assessment was that a motion to dismiss would not have been successful in this case: "[B]ased on my experience with this issue in a factually similar case and my review of case law . . . I did not believe that a motion to dismiss was warranted." Second, he did notify the military judge before and during trial that, in the event the appellant were found guilty of more than one of the affected specifications, the defense would argue that the specifications were multiplicious for sentencing purposes.

Evaluating counsel's performance from his "perspective at the time of the alleged error and in light of all the circumstances," we find Capt AR's decision not to file a motion to dismiss reasonable. *United States v. McCastle*, 43 M.J. 438, 440 (C.A.A.F. 1996) (citing *Kimmelman v. Morrison,* 477 U.S. 365, 381 (1986)). The record supports Capt AR's assertions, and he based his decision on a reasonable assessment of case law. "As a general matter, [t]his Court will not second-guess the strategic or tactical decisions made at trial by defense counsel." *Perez*, 64 M.J. at 243 (brackets in original) (internal quotation marks and citations omitted). Here, each specification was aimed at distinctly separate criminal acts; the number of specifications described rather than exaggerated the appellant's criminality; there is no evidence of prosecutorial overreaching or abuse in drafting the specifications; and the appellant's punitive exposure was not increased since the specifications were merged for sentencing. *See United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001). Unreasonable multiplication of charges is a limitation on the military's discretion to charge separate offenses, and is a discretionary review by a military judge of the prosecution's charging decision. *United States v. Erby*, 46 M.J. 649, 651-52 (A.F. Ct. Crim. App. 1997).

We disagree with the appellant's assertion that the military judge would have dismissed the specifications for being unreasonably multiplicious simply because he merged the specifications for sentencing. The appellant has failed to persuade this Court of the likelihood that such a motion would have been meritorious. *See Jameson*, 65 M.J. at 164. Accordingly, we hold that the appellant has failed to overcome the "strong presumption" of Capt AR's competence. *Strickland*, 466 U.S. at 689. Because these offenses were considered multiplicious for sentencing, we also find that the appellant was not prejudiced.

We have considered both the individual areas where ineffective assistance has been alleged, as well as the overall, cumulative impact of all asserted ineffectiveness claims. Based on the evidence that was presented, we certainly cannot say that the representation the appellant received was objectively unreasonable. The record clearly shows that it was the Government's overwhelming evidence and the violent nature of the appellant's crimes rather than his counsels' performance that led to the appellant's

conviction and resulting sentence. We are completely satisfied that the appellant received a fair trial, and that the results, including his sentence, were reliable and fair.

II. Admissibility of Rehabilitation Evidence in Rebuttal

In addition to his complaints regarding his counsel, the appellant avers that the military judge erred in admitting Prosecution Exhibit 13, SSgt CB's MFR, as rebuttal evidence. We disagree.

Prosecution Exhibit 13 was an MFR that contained SSgt CB's opinions regarding the appellant's: (1) rehabilitative potential; (2) desire to remain in the Air Force; and (3) character for truthfulness. The Government moved to admit Prosecution Exhibit 13 after the appellant delivered his unsworn statement. In his unsworn statement, the appellant stated, in relevant part, that:

> There is nothing more that I want than to be able to serve my country and the United States Air Force. . . . But I know there is an even better part of me that is not reflected on the charge sheet, and that is my track record of awards and accomplishments that help show that I am able to be rehabilitated.
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> . . . .
>
> But the lessons I learned from my parents about persevering through tough situations leaves me confident that I can overcome this conviction . . . .

In Prosecution Exhibit 13, SSgt CB stated, in relevant part, that:

> . . . I do not believe he can be rehabilitated for continued service in the United States Air Force. . . . [The appellant] had an attitude of wanting to get out of the Air Force since I have known him . . . . He also had a problem of lying to supervisors and supervision. While I was his supervisor I learned not to trust [him], and found him lying to me on many occasions. I believe if he [appellant] was allowed to continue service in the U.S. Air Force, it would negatively affect and (sic) future duty assignments.

The defense objected to the admission of Prosecution Exhibit 13 as cumulative.[3] The military judge overruled, stating:

[3] The defense also objected to Prosecution Exhibit 14, in which SSgt CB prepared and signed another memorandum for record (MFR), also dated 14 April 2010. In this MFR, SSgt CB stated that the appellant had received a Letter of Reprimand on 27 August 2008 for making a false official statement. The prosecution offered this statement to rebut the appellant's statement in his unsworn statement that he had never been subject to any prior disciplinary action.

> I find that the letter from [SSgt CB] referenced his opinion about rehabilitation potential of the accused, which you asked both of your witnesses about. Also, [the appellant] made statements in his unsworn about wanting to stay in the Air Force. According to [SSgt CB], he is giving a different opinion in the past that is directly rebuttal (sic) to the unsworn statement. I do find that to be a fact in the unsworn statement, an opinion, to make it clear for the appellate court, "I want to stay in the Air Force."

The appellant argues that the military judge abused his discretion in admitting Prosecution Exhibit 13 because it contained an inadmissible discharge recommendation under R.C.M. 1001(d)(5) and did not rebut anything stated by any of the defense sentencing witnesses. The appellant also argues that his unsworn statement that he wanted to stay in the Air Force was an opinion, and thus not rebuttable under R.C.M. 1001(c)(2)(C), which limits rebuttal of unsworn statements to statements of fact. Finally, the appellant argues that Prosecution Exhibit 13 contained inappropriate extrinsic evidence that characterized the appellant as a liar, which is improper rebuttal since it was not pertinent to either the testimony of the two defense witnesses or the appellant's statement that he wanted to stay in the Air Force.

The Government counters that SSgt CB's statement rebuts the appellant's unsworn statement, where he stated "I want nothing more than continue to serve with my career in the Air Force." The Government further asserts that SSgt CB was not giving a discharge recommendation but was rebutting testimony from defense sentencing witnesses that the appellant had high rehabilitation potential. Finally, the Government asserts that even if Prosecution Exhibit 13 was improperly admitted, the potential for unfair prejudice was nearly non-existent. This was a judge-alone trial, and "the military judge was able to sort through the evidence, weigh it, and give it appropriate weight." *United States v. Manns*,

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Prior to admitting SSgt CB's MFR, the military judge engaged in the following colloquy with trial counsel and defense counsel:

> MJ: Trial counsel, what specifically do you believe this rebuts?
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> ATC: Your honor, it rebuts the accused's statement that he had never received any disciplinary action before. It also shows the basis for the LOR. We could not track down the LOR, itself.
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> MJ: I understand that.
>
> Defense counsel, do you concur that the accused did make a statement similar to what trial counsel stated?
>
> DC: One moment, Your Honor. Yes, Your Honor.
>
> MJ: What is offered as Prosecution Exhibit 14 for Identification is admitted as Prosecution Exhibit 14.

54 M.J. 164, 167 (C.A.A.F. 2000). The appellant suffered no prejudice; his sentence was in line with his offenses, and the military judge was able to give the evidence the weight it deserved.

We review a military judge's decision to admit evidence over a defense objection for an abuse of discretion. *United States v. Eslinger*, 70 M.J. 193, 197 (C.A.A.F. 2011); *United States v. Billings*, 61 M.J. 163, 166 (C.A.A.F. 2005). An abuse of discretion occurs where the findings of fact are clearly erroneous or the conclusions of law are based on an erroneous view of the law. *United States v. Hollis*, 57 M.J. 74, 79 (C.A.A.F. 2002). The military judge has the discretion to permit rebuttal sentencing arguments. R.C.M. 1001(a)(1)(F), (d). Except for non-factual matters in the accused's unsworn statement, in sentencing, "[t]he prosecution may rebut matters presented by the defense." R.C.M. 1001(c)(2)(C), (d). As such, extrinsic evidence of prior instances of similar misconduct may become relevant and admissible to rebut statements of fact in accused's unsworn statement. *United States v. Cleveland*, 29 M.J. 361, 363 (C.M.A. 1990); *see also United States v. Driver*, 36 M.J. 1020 (N.M.C.M.R. 1993).

The permissible "scope of rebuttal is defined by evidence introduced by the other party" and evidence offered in rebuttal serves the legal purpose of R.C.M. 1001(d) where it "explain[s], repel[s], counteract[s] or disprove[s]" that other party's evidence. *United States v. Saferite*, 59 M.J. 270, 274 (C.A.A.F. 2004) (internal quotation marks and citations omitted). Thus, "where the defense has first introduced evidence that an accused has not committed prior acts of misconduct, the Government may introduce evidence that he did commit such acts by means of cross-examination or in rebuttal." *United States v. Gambini*, 13 M.J. 423, 427 (C.M.A. 1982); *United States v. Ledezma*, 4 M.J. 838 (A.F.C.M.R. 1978) (reasoning that when the accused introduces evidence of his reputation and the good quality of his prior service, the prosecution may rebut with specific instances of misconduct "[f]or, otherwise, an accused would occupy the unique position of being able to parade a series of partisan witnesses before the court testifying at length concerning specific acts of exemplary conduct by him without the slightest apprehension of contradiction or refutation by the opposition, fullhanded with proof of a contrary import although the prosecution might be") (internal quotation marks and citations omitted).

A. Discharge Recommendation

We first address whether or not SSgt CB offered an improper discharge recommendation in his MFR, Prosecution Exhibit 13. The appellant argues that SSgt CB's opinion that the appellant could not "be rehabilitated for continued service in the United States Air Force," is an inadmissible discharge recommendation under R.C.M. 1001(b)(5)(D). That rule addresses opinion evidence of rehabilitative potential, and prohibits "opinion[s] regarding the appropriateness of a punitive discharge or whether the

accused should be returned to the accused's unit." *Id*. We find that the military judge did not err in admitting SSgt CB's opinions about the appellant's rehabilitation potential.

"'[T]here can be a thin line between an opinion that an accused should be returned to duty and the expression of an opinion regarding the appropriateness of a punitive discharge.' . . . if the defense were allowed to admit such evidence . . . the Government is free to rebut such assertions." *Eslinger*, 70 M.J. at 197 (quoting *United States v. Griggs*, 61 M.J. 402, 409-10 (C.A.A.F. 2005)). Here, the defense presented SSgt MT, the appellant's supervisor at Elmendorf Air Force Base, to comment on the appellant's rehabilitative potential. SSgt MT testified that the appellant was "always steadfast that he wants to stay in the Air Force even if he loses everything. He is very positive about staying in and working to move on from here. I think with him receiving whatever punishment that he does get, if he is allowed to stay in, I don't see his work ethic changing." In response, the Government presented SSgt CB's opinion on the appellant's rehabilitative potential, in Prosecution Exhibit 13, that: "I do not believe he can be rehabilitated for continued service in the United States Air Force. . . . I believe if he was allowed to continue service in the U.S. Air Force, it would negatively affect and (sic) future duty assignments."

In essence, the appellant argues that the defense's case was devoid of any "retention evidence" as articulated in *Eslinger*. Thus, SSgt CB's opinions were outside the scope of proper rebuttal and otherwise unfair. We disagree and find that SSgt MT's comments can fairly and reasonably be construed to mean that he "would willingly serve with the [appellant] again," and qualify as mitigating "retention evidence" envisioned by *Eslinger*. *Id*. at 198. We further find that SSgt CB's comments did not amount to a discharge recommendation. He did not explicitly state that he expected or recommended a punitive discharge; rather, insofar as he refers to the "negative affect" it would have on future assignments, his comments can fairly be construed as a description of the "magnitude or quality of any such potential" – that is of being poor.

We find that the military judge did not abuse his discretion. His decision to admit the evidence has not been shown to be "'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *Miller*, 46 M.J. at 65 (quoting *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)).

B. Rebuttable Statement of Fact

We next address whether or not the appellant made a rebuttable statement of fact in his unsworn statement. We again find that the military judge was within his discretion to admit Prosecution Exhibit 13 as proper rebuttal evidence.

R.C.M. 1001(c)(2)(C) prohibits examining an accused about an unsworn statement, but "[t]he prosecution may, however, rebut any statements of facts therein."

Our superior court has issued two opinions that address the distinction between fact and opinion in an unsworn statement. In *United States v. Cleveland*, 29 M.J. 361 (C.A.A.F. 1990), our superior court analyzed, under R.C.M. 1001(c)(2)(C), the accused's unsworn statement that, "[a]lthough I have not been perfect, I feel that I have served well," to find it was "more in the nature of an opinion." *Id*. at 363-64. In *United States v. Manns*, 54 M.J. 164 (C.A.A.F. 2000), the accused made an unsworn statement that "I have tried throughout my life, even during childhood, to stay within the laws and regulations of this country." *Id*. at 165. The Court found that statement to be an assertion of fact, seemingly distinguishing it from the *Cleveland* statement by emphasizing the word "feel" used in *Cleveland*. In *Cleveland*, the Court reasoned that the use of the word "feel" was a statement of opinion: "[W]hen viewed in context, it was more in the nature of an opinion—indeed, an argument—as to the meaning of the documents that had been introduced as defense exhibits." *Id.* at 364. In *Manns*, the Court reasoned that the phrase "I have tried" was an assertion of fact that the appellant had tried to obey the law: "Thus, we hold that the prosecution was entitled to produce evidence that appellant had not tried, or at least had not tried very hard." *Id*. at 166.

Applying the rationale of *Manns* and *Cleveland* to this case, the appellant's statement that "There is nothing more that I want than to be able to serve my country and the United States Air Force" expresses his unequivocal desire to remain in the Air Force rather than his general feelings on the topic; as such, it is more akin to the statement in *Manns*. Our review of the record concludes that the military judge found the appellant's statement to be an assertion of fact when he stated "I do find that to be a fact in the unsworn statement . . ." before admitting Prosecution Exhibit 13 as proper rebuttal evidence. When sitting as the trier of fact, the military judge is presumed to know the law and apply it correctly. *United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011) (citing *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000)). Thus, we find that the military judge was within his discretion to admit Prosecution Exhibit 13 as proper rebuttal evidence.

C. Extrinsic Evidence in Rebuttal

Finally, we address whether or not Prosecution Exhibit 13 contained improper rebuttal evidence in the form of extrinsic evidence that characterized the appellant as a liar, which was not pertinent to either the testimony of the two defense witnesses or the appellant's unsworn statement. We find no error.

The two defense witnesses, SSgt MT and the appellant's father both testified as to the appellant's rehabilitation potential, and SSgt MT also testified that the appellant had not "had any paperwork or duty related incidents." Additionally, in his unsworn statement, the appellant stated: "Also, I have never had any other disciplinary actions prior to this event. . . . I want nothing more than to continue with my Air Force career . . . ." "A broad assertion by an accused . . . that he has never engaged in a certain

type of misconduct may open the door to impeachment by extrinsic evidence of the misconduct." *United States v. Matthews*, 53 M.J. 465, 469-70 (C.A.A.F. 2000) (internal quotation marks and citation omitted). Here, the military judge ruled that "the letter from [SSgt CB] referenced his opinion about rehabilitation potential of the accused, which [defense counsel] asked both [defense] witnesses about." In making this ruling, the military judge did not abuse his discretion; the record supports his findings of fact, and his ruling is consistent with legal precedent.

Conclusion

The approved findings and the sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. 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 the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court