UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant LINDWOOD W. BURTON JR.
United States Air Force

ACM 36296

16 July 2007

Sentence adjudged 12 February 2005 by GCM convened at Yokota Air Base, Japan. Military Judge: Steven A. Hatfield.

Approved sentence: Dishonorable discharge, confinement for 7 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Captain Anthony D. Ortiz, and Mary T. Hall, Esq.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward, and Major Carrie E. Wolf.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

THOMPSON, Judge:

The appellant was tried at Yokota Air Base, Japan, by a general court-martial composed of officer and enlisted members. Contrary to his pleas, the appellant was found guilty of rape, indecent acts (as a lesser included offense of the charged indecent assault), and consensual sodomy (as a lesser included offense of the charged forcible sodomy) in violation of Articles 120, 134 and 125, UCMJ, 10 U.S.C. §§ 920, 934, 925. He was found not guilty of one specification of attempted rape. The court-martial sentenced the appellant to a dishonorable discharge, confinement for 8 years, and reduction to the grade of E-1. The convening authority disapproved the findings of guilty as to the offenses of indecent acts and consensual sodomy, and approved the sentence as adjudged, except for the term of confinement, which he reduced to 7 years.

On appeal, the appellant asserts six errors: (1) The military judge erred when he denied the defense motion to dismiss the rape charge because it was not properly investigated under Article 32, UCMJ, 10 U.S.C. § 832; (2) The evidence is legally and factually insufficient to support his conviction; (3) The trial counsel's findings argument was improper, in that he argued the appellant demonstrated a propensity to engage in sexual assault; (4) Assuming the trial counsel's findings argument was not improper, the military judge erred by failing to give an additional propensity instruction; (5) The military judge erred in permitting irrelevant matters in aggravation; and (6) The sentence is inappropriately severe. We have examined the record of trial, the assignments of error, and the government's response. We find that the military judge did err with respect to the first issue, but conclude the error did not materially prejudice the substantial rights of the appellant. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

Background

The charges against the appellant arose from his alleged improper sexual conduct with two women: first, with SS while he was on leave in Venice, Italy, in September, 2000, and second, with Senior Airman (SrA) H, in Tachikawa City, Japan, in February, 2004.

On 19 July 2004, a single charge and specification of rape of then-SrA H was preferred. A pretrial investigation of that charge, pursuant to Article 32, UCMJ, was held on 23 July 2004. The appellant was represented by counsel at the Article 32, UCMJ, investigation and had the opportunity to cross-examine SrA H, who was present and testified at the hearing. The defense did not allege any defects in the investigation and the charge was referred to a general court-martial on 16 August 2004.

During its preparation for trial, the government discovered evidence of possible additional misconduct by the appellant against SS. On 26 September 2004, the government provided notice to admit a written statement alleging the appellant committed the uncharged acts against SS in 2000, and on 27 September 2004 notified the defense that they intended to call SS, the alleged former victim, to testify at trial. On 28 September 2004, the appellant was arraigned in an Article 39(a) UCMJ, 10 U.S.C. § 839(a), session during which the defense submitted a motion to suppress the written statement and the testimony of the witness, based in part on lack of notice. The military judge declined to suppress the testimony based on lack of notice, but delayed the case until 15 November 2004 to allow the defense time to prepare.

On 8 November 2004, the charge alleging the rape of SrA H (the "original charge") was withdrawn and dismissed by the convening authority. On 10 November 2004, a charge of rape of SrA H was preferred; this charge is identical to the original charge except the appellant's unit was changed. Also on that date, three additional

charges and specifications were preferred, alleging attempted rape, forcible sodomy and indecent assault of SS. In an undated memorandum, Lieutenant Colonel (Lt Col) T was appointed to investigate the charges and specifications pursuant to Article 32, UCMJ. On 12 November 2004 the trial defense counsel submitted a memorandum to Lt Col T, requesting that SS and SrA H appear at the hearing. The trial defense counsel noted that the government intended to rely on the earlier Article 32, UCMJ, hearing as to the original charge, but demanded further investigation pursuant to Rule for Courts-Martial (R.C.M.) 405(b). The trial defense counsel proffered that since the time of the original Article 32 investigation, SrA H had committed veracity offenses, gone absent without leave (AWOL), and was found to have fraudulently enlisted in the Air Force.

On 14 November 2004, Lt Col T was issued a new appointment letter, authorizing him to investigate the three new charges and specifications, but not the original charge. On 18 November 2004, Lt Col T completed his investigation, noting in his report that he did not further investigate the original rape charge, but he did attach a copy of the earlier Article 32, UCMJ, hearing report to his new report, which was forwarded to the convening authority. The trial defense counsel made a written objection to the 18 November 2004 investigation, noting among other things, that the original charge had not been reinvestigated. All four charges were referred to general court-martial on 30 December 2004. The trial defense counsel submitted a timely motion to dismiss, maintaining that because the original charge was dismissed, a new Article 32, UCMJ, investigation was required, and that the government's use of the prior investigation was covered by Article 32(c), UCMJ, which provided the appellant the right to further investigation. The military judge denied the motion to dismiss, finding that the re-preferred charge was identical to the original charge except for the appellant's unit, that the original charge was properly investigated, and thus no new investigation was required. He also determined that use of the previous investigation did not fall under R.C.M. 405(c), and therefore the appellant was not entitled to demand further investigation.

Investigation of the Charge

We review the military judge's denial of the motion to dismiss for an abuse of discretion. *United States v. Davis*, 62 M.J. 645, 647 (A.F. Ct. Crim. App. 2006). We consider first the military judge's conclusion that no new Article 32 investigation was required for the dismissed and re-preferred charge. Our superior court has stated that when charges have been withdrawn and dismissed, reinstituting the charges "requires the command to start over." *United States v. Britton*, 26 M.J. 24, 26 (C.M.A. 1988). "The charges must be re-preferred, investigated and referred in accordance with the Rules for Courts-Martial, as though there were no previous charges or proceedings." *Id.* In the present case the government did not completely start over. Instead, the officer investigating the new charges simply forwarded the previous Article 32, UCMJ, report, to

the convening authority with no new recommendations. Thus the government did not fully comply with the requirements of Article 32. We also find the military judge erred when he determined that no further investigation was required by the provisions of Article 32(c), UCMJ, and R.C.M. 405(b). Those provisions state that where an investigation of an offense was conducted before an accused is charged, and that investigation provided the accused the rights to counsel, cross-examination, and presentation of evidence, no further investigation is required "unless it is demanded by the accused after he is informed of the charge." Article 32(c), UCMJ; R.C.M. 405(b).

We find that when the government relies on a previously completed Article 32, UCMJ, hearing to support re-referral of dismissed charges, with no new recommendations by an investigating officer, the investigation is covered by Article 32(c), UCMJ, and an accused has the opportunity to demand further investigation. The military judge abused his discretion by not allowing for reinvestigation under Article 32, UCMJ. The appellant contends that the appropriate remedy is to set aside the findings and sentence. We decline to do so. The requirements for pretrial investigations are binding "but failure to follow them does not constitute jurisdictional error." Article 32(e), UCMJ. An error in the Article 32, UCMJ, investigation process is not a "structural error subject to reversal without testing for prejudice." *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007) (quoting *Arizona v. Fulminante*, 449 U.S. 279, 307-10 (1991)). Article 59(a), UCMJ, states: "A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." On appeal we evaluate errors in Article 32, UCMJ, proceedings under Article 59(a), UCMJ. *Davis*, 64 M.J. at 449.

We test for material prejudice using the harmless beyond a reasonable doubt standard. *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005). The appropriate inquiry is "whether, beyond a reasonable doubt, the error did not contribute to the [appellant's] conviction or sentence." *Id.* (citing *United States v. Pollard*, 38 M.J. 41, 52 (C.M.A. 1993)).

As noted above, the appellant wanted to cross-examine the victim, SrA H, on unspecified veracity offenses, her AWOL, and evidence that she fraudulently enlisted in the Air Force by concealing drug use. This information was, however, provided to the convening authority before he referred the rape charge to a general court-martial. In addition to having the report from the original Article 32, UCMJ, investigation, the convening authority received pretrial advice concerning the rape charge in accordance with Article 34, UCMJ. In his pretrial advice to the convening authority, the staff judge advocate (SJA) commented on SrA H's credibility, noting that she had been given a letter of reprimand for two violations of AWOL, and that she made a false official statement in her response to the letter of reprimand. The SJA also informed the convening authority of the trial defense counsel's assertion that SrA H had used marijuana before joining the Air Force.

SrA H appeared at trial and testified. The trial defense counsel conducted a thorough cross-examination, among other things drawing admissions from SrA H that she lied about her pre-service drug use and made false statements to her superiors. We find there is no evidence that the trial defense counsel's pretrial preparation was hampered because of defects in the pretrial investigation. In light of the detailed cross-examination of SrA H conducted at trial, we find that the error in this case was not a factor in obtaining the appellant's conviction. We conclude that the military judge's refusal to dismiss the affected charge for reinvestigation was harmless beyond a reasonable doubt.

Factual and Legal Sufficiency

The appellant next argues that the evidence presented at trial was legally and factually insufficient to support his conviction for rape. We disagree. The test for legal sufficiency is whether, when the evidence is viewed in the light most favorable to the government, any rational factfinder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

The crux of the appellant's argument is that he is not guilty because SrA H lacked credibility, that she had a motive to fabricate, that her actions were inconsistent with someone who had been raped, and that the physical actions she described were improbable. We find the appellant's arguments unpersuasive. The evidence in this case, viewed in a light most favorable to the prosecution, provides a sufficient basis from which a rational trier of fact could have found all of the elements of rape beyond a reasonable doubt. Further, after considering all of the evidence in the record of trial and making allowances for not having personally observed the witnesses, we ourselves are convinced beyond a reasonable doubt that the appellant committed the offense. Therefore, his conviction is legally and factually sufficient. *See Turner*, 25 M.J. at 324-25.

Trial Counsel Argument

Next, the appellant asserts that, during his findings argument, the trial counsel improperly argued that the appellant demonstrated a propensity to engage in sexual assault. Specifically, the appellant contests the portion of the trial counsel's argument urging the members to compare the testimony from both of the alleged victims, and to use that testimony to examine the appellant's method of operation and his propensity to engage in sexual assault.

The standard of review for an improper argument depends on the content of the argument and whether the defense counsel objected to the argument. Failure to object to improper argument constitutes waiver. R.C.M. 919(c). In the absence of an objection, we review for plain error. *United States v. Rodriguez*, 60 M.J. 87, 88 (C.A.A.F. 2004). Plain error occurs when: (1) there is an error; (2) the error is plain or obvious; and (3) the error results in material prejudice to a substantial right of the appellant. *Id.* At 88-89 (citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998)).

In the case *sub judice*, the trial defense counsel did not object to the trial counsel's argument and thus we apply a plain error analysis to determine whether relief should be granted. While arguments that an accused has a propensity to commit an offense are generally prohibited, an exception has been made in the case of sexual assault. Under Mil. R. Evid. 413, other acts of sexual assault may be introduced for expansive purposes, including propensity. While Mil. R. Evid. 413 most often deals with prior sexual acts not charged in the ongoing proceedings, it is useful to analyze the present case in terms of Mil. R. Evid. 413. *See, e.g., United States v. Myers*, 51 M.J. 570 (N.M. Ct. Crim. App 1999). Where trial counsel's argument regarding propensity could have been made pursuant to Mil. R. Evid. 413 with uncharged prior sex acts, we find it is not plain error to make the same arguments when the prior sex acts are charged offenses.

We further find that the trial counsel's argument did not result in any material prejudice to the rights of the appellant. The trial counsel's argument spans 16 pages in the record of trial. During the course of the argument the trial counsel used the word "propensity" only twice, and while doing so he informed the members "I don't intend for you to take proof of one offense to find him guilty of another . . . ." We consider the argument of a trial counsel in context, and not in isolation. *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000). Viewed in context of the entire court-martial, we are convinced beyond a reasonable doubt that the trial counsel's comments did not prejudice a substantial right of the appellant.

Instructions from the Military Judge

The appellant avers that the military judge erred by failing to give an additional propensity instruction, based on the trial counsel's argument. In his instructions the military judge included a standard spillover instruction:

> Each offense must stand on its own and you must keep the evidence of each offense separate. Stated differently, if you find or believe that the accused is guilty of one offense, you may not use that finding or belief as a basis for inferring, assuming, or proving that he committed any other offense. The burden is on the prosecution to prove each and every element of each

> offense beyond a reasonable doubt. Proof on one offense carries with it no inference that the accused is guilty of any other offense.

The trial defense counsel did not object to the spillover instruction, and did not request a further propensity instruction.

The question of whether the members were properly instructed is a matter of law we review de novo. *United States v. Green*, 62 M.J. 501, 503 (A.F. Ct. Crim. App. 2005), (citing *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996)). A failure to object to an instruction prior to commencement of deliberations waives the objection absent plain error. R.C.M. 920(f); *United States v. Simpson*, 56 M.J. 462, 465 (C.A.A.F. 2002). In the present case we find the military judge's instruction was sufficient to inform the members how they should view the evidence. Even assuming, *arguendo*, that the military judge should also have given further instructions specifically mentioning propensity, his failure to do so did not result in material prejudice to a substantial right of the appellant.

Although charged with attempted rape, forcible sodomy, and indecent assault against SS, the members found him guilty only of consensual sodomy and indecent acts. This suggests that the members were not unduly swayed to convict the appellant by the military judge's failure to provide a specific propensity instruction. *See, e.g.*, *United States v. Schroder*, 65 M.J. 49 (C.A.A.F. 2007). Based on the totality of the evidence, the member's findings, and the spillover instruction given the members by the military judge, we are convinced beyond a reasonable doubt that the lack of a specific propensity instruction did not contribute to the appellant's conviction. *Kreutzer*, 61 M.J. at 298.

Sentencing Evidence

The appellant next argues that the military judge erred when he allowed SS to testify during sentencing. Over trial defense counsel's objection, SS testified during presentencing that she lost her self confidence, considered suicide, became easily hysterical, could not develop or maintain relationships, and could not go anywhere alone anymore. The appellant maintains that because the members found there was insufficient evidence to conclude the appellant forced SS to engage in sodomy or the indecent acts, her comments should have been restricted to any effects caused by her having consensual sex with the appellant.

The standard of review on appeal for the admission or exclusion of evidence on sentencing is whether the military judge clearly abused his discretion. *United States v. Clemente*, 50 M.J. 36, 37 (C.A.A.F. 1999). R.C.M. 1001(b)(4) permits a trial counsel to present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation

includes, but is not limited to, evidence of social, psychological, and medical impact or cost to any person who was the victim of an offense committed by the accused. Whether or not a circumstance is directly related to or results from the offenses calls for considered judgment by the military judge, and is not to be overturned lightly. *United States v. Wilson*, 47 M.J. 152,155 (C.A.A.F. 1997) (citing *United States v. Jones*, 44 M.J. 103, 104-05 (C.A.A.F. 1996)). We hold that the military judge in the present case did not abuse his discretion in permitting SS to testify as to proper matters in aggravation. R.C.M.1001(b)(4).

Sentence Appropriateness

This Court may affirm only such findings and sentence as we find correct in law and in fact, and determine, on the basis of the entire record, should be approved. Article 66(c), UCMJ, 10 U.S.C. § 866(c)**.** When considering sentence appropriateness, we should give "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

In conducting our review we must keep in mind that Article 66(c), UCMJ, has a sentence appropriateness provision that is "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) (citing *United States v. Bauerbach*, 55 M.J. 501, 506 (A.C.C.A.2001)). Article 66(c), UCMJ, "requires that [we] independently determine, in every case within [our] limited Article 66, UCMJ**,** jurisdiction, the sentence appropriateness of each case [we] affirm." *Baier*, 60 M.J. at 384-85.

We may also take into account disparities between sentences for similar offenses. Our duty to assess the appropriateness of a sentence is "highly discretionary," but does not authorize us to engage in an exercise of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

After carefully examining the submissions of counsel and taking into account all the facts and circumstances, we do not find the appellant's sentence inappropriately severe. *See Snelling*, 14 M.J. at 268-69. To the contrary, after reviewing the entire record, we find the sentence is appropriate for this offender and his offenses. *See Baier*, 60 M.J. at 383-84; *Healy*, 26 M.J. at 395.

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; *Reed*, 54 M.J. at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator