IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.	Docket No. ARMY 20220620
Private (E-2) **MATTHEW Z. CONNER,** United States Army, Appellant	Tried at Fort Campbell, Kentucky, on 14 July and 5 December 2022, before a general court-martial convened by Commander, Fort Campbell, Colonel Travis Rogers and Colonel Sean S. Park, Military Judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignment of Error

WHETHER THE MILITARY JUDGE PLAINLY ERRED BY ALLOWING THE VICTIM TO PROVIDE A RECOMMENDATION OF A SPECIFIC SENTENCE IN HIS UNSWORN STATEMENT.

Statement of the Case

On 5 December 2022, a military judge sitting as a general court-martial convicted appellant, consistent with his pleas, of one specification each of abusive sexual contact and sexual assault, in violation of Article 120, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920.[1] (Statement of Trial Results [STR]; R.

[1] In exchange for appellant's pleas of guilty, the government dismissed without prejudice, to ripen into prejudice upon completion of appellate review, one specification of sexual assault without consent, one specification of abusive sexual

at 51). The military judge sentenced appellant to a reduction to E-1, total forfeitures, twenty-three months confinement for each specification, to be served concurrently, and a dishonorable discharge. (R. at 101). On 9 December 2022, the convening authority approved the findings and sentence. (Action). The military judge entered judgment on 17 December 2022. (Judgment).

Statement of Facts

On or about 6 February 2021, Mr. [redacted][2] went to appellant's barracks room to watch a movie after an evening of drinking. (R. at 27; Pros. Ex. 1, p. 3). Mr. [redacted] and appellant both fell asleep in appellant's bed. (R. at 27; Pros. Ex. 1, p. 3). When appellant woke up, he began to touch Mr. [redacted]'s penis, noticed it was erect, and "pursued [it] further." (R. at 27). Appellant pulled down Mr. [redacted]'s shorts and began performing oral sex on him while he was asleep. (R. at 32; Pros. Ex. 1, p. 4). Appellant "was attracted to [Mr. [redacted]]" and "thought that [they] were at the point where that was acceptable," (R. at 30), though appellant admitted that Mr. [redacted] was sleeping and did not give him consent. (R. at 27; Pros. Ex. 1, p. 5).

Appellant and the government entered into a plea agreement with terms, *inter alia*, to limit the confinement portion of the sentence to a minimum of

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contact, one specification of indecent language, and one specification of indecent conduct. (Charge Sheet; App. Ex. XIV; R. at 50).

[2] At the time of the charged offenses, Mr. [redacted] was Specialist (SPC) [redacted], a fellow soldier in appellant's company. (R. at 27, 28, 29). By the time of appellant's guilty plea, however, [redacted] had left the Army. (Pros. Ex. 1, p. 2).

eighteen months and a maximum of twenty-four months for each specification to which appellant pled guilty, to be served concurrently. (App. Ex. XIV, p. 3). The plea agreement authorized the military judge to otherwise adjudge all other lawful punishments.[3] (App. Ex. XIV, p. 3). The parties also agreed to enter into a stipulation of fact. (App. Ex. XIV, p. 2; Pros. Ex. 1).

During the sentencing phase, Mr. [redacted], through his Special Victims' Counsel (SVC), provided an unsworn statement to the court. (R. at 58). Absent from the proceedings, Mr. [redacted] chose to use his counsel as a proxy for delivery of his statement because appellant's actions "impacted [him] greatly, both in [his] life and [his] health." (R. at 58). In this statement, Mr. [redacted] stated, "I strongly believe [appellant] should receive the maximum jail sentence available." (R. at 58). Appellant did not object to this statement, nor did the military judge stop or interrupt it. (R. at 58).

The government offered appellant's enlisted record brief at sentencing and rested. (R. at 56–57; Pros. Ex. 2). The defense offered an unsworn statement of appellant, testimony regarding duty performance and rehabilitative potential from a former noncommissioned officer, two peers, and two family members, and a "good

[3] A dishonorable discharge for appellant's convictions was required as a matter of law. (R. at 36).

soldier" packet that consisted of twelve pages of photographs and a National Emergency Medical Technician (EMT) certificate. (R. at 59–91; Def. Ex. A).

During argument, the government requested the military judge impose twenty-four months confinement for both offenses, to run concurrently. (R. 92, 95). The defense requested the military judge impose a sentence of eighteen concurrent months. (R. at 99). The military judge sentenced appellant, in addition to reduction, forfeitures, and a dishonorable discharge, to twenty-three concurrent months for each offense. (R. at 101).

Additional facts are incorporated below.

Assignment of Error

WHETHER THE MILITARY JUDGE PLAINLY ERRED BY ALLOWING THE VICTIM TO PROVIDE A RECOMMENDATION OF A SPECIFIC SENTENCE IN HIS UNSWORN STATEMENT.

Standard of Review

This court has applied plain error review when there was no objection at trial to a purported error in a victim's unsworn statement under Rule for Courts-Martial [R.C.M.] 1001(c). *United States v. Love*, ARMY 20210396, 2023 CCA LEXIS 156, slip op. at 3 (Army Ct. Crim. App. 4 Apr. 2023) (summ. disp.); *see United States v. Tyler*, 81 M.J. 108, 113 (C.A.A.F. 2021). To prevail under a plain error standard, an appellant must prove (1) that there was error, (2) that the error was

plain or obvious, and (3) that the error materially prejudiced a substantial right of the appellant. *United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008).

Law

"A crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at the presentencing proceeding related to that offense." R.C.M. 1001(c)(1). The content of such statements "may only include victim impact and matters in mitigation. The statement may not include a recommendation of a specific sentence." R.C.M. 1001(c)(3). "Upon objection by either party or *sua sponte*, a military judge may stop or interrupt a victim's statement that includes matters outside the scope of R.C.M. 1001(c)(3)." R.C.M. 1001(c)(5)(B) discussion.

"If an error occurs in the admission of evidence at sentencing, the test for prejudice 'is whether the error substantially influenced the adjudged sentence.'" *United States v. Hamilton*, 78 M.J. 335, 343 (C.A.A.F. 2019) (quoting *United States v. Sanders*, 67 M.J. 344, 346 (C.A.A.F. 2009)). This court considers four factors when deciding whether an error substantially influenced the sentence: "(1) the strength of the government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." *United States v. Edwards*, 82 M.J. 247 (C.A.A.F. 2022) (quoting *United States v. Barker*, 77 M.J. 377 (C.A.A.F. 2018)).

Argument

The military judge did not plainly err by allowing the victim to testify, through his SVC, regarding appellant's sentence because the victim did not request or recommend a specific sentence. Rather, the SVC read Mr. [redacted]'s unsworn statement, which expressed Mr. [redacted]'s belief that appellant should receive the "maximum jail sentence available" given appellant's lasting impact on him:

> Your Honor, I'm sorry that I could not be here today. It is not because I have not been impacted by Private Conner's actions, but rather because they have impacted me greatly, both my life and my health.
>
> Private Conner's actions on 6 February 2021 [have] contributed to my current depression and anxiety, something that I struggle with daily. After 6 February 2021, my life took a huge downturn, solely because of the impact all of this had. I no longer felt like I could continue being a soldier, which resulted in me ETSing from the Army. I'm still working to turn my life around and heal from what Private Conner did to me. Although I could not be at this hearing today, I strongly believe Private Conner should receive the maximum jail sentence available. He deserves to be impacted by his actions for as long as possible, especially since his actions will haunt me long after any jail sentence is finished.

(R. at 58).

Mr. [redacted]'s unsworn victim impact statement was not a recommendation on specific sentence, but rather a comparison between appellant's sexual assault and how that assault has impacted Mr. [redacted]. Notably, neither counsel objected to the statement, nor did the military judge *sua sponte* stop or interrupt its delivery. (R.

at 58; *see* R.C.M. 1001(c)(5)(B) discussion). That no one in the courtroom gave the victim's statement regarding the "maximum jail sentence available" a second thought indicates that, even if it was error, the error was not plain or obvious. There is no clear evidence that the judge "embraced a view of the law that conflicts" with R.C.M. 1001, and there is no indication that the military judge relied upon that specific statement when determining appellant's sentence. *United States v. Rapert*, 75 M.J. 164 (C.A.A.F. 2016).

Even if this court finds the military judge plainly erred, the error did not substantially influence the sentence. Examining the strength of the government's case, there was "exceptionally strong aggravation evidence considering the" nature of the sexual assault of Mr. [redacted]. *Edwards*, 82 M.J. at 239. Appellant contends the government's case was weak because it called no witnesses and offered nothing more than appellant's enlisted record brief. (Appellant's Br. 5). As explained by the military judge, appellant's answers during his guilty plea inquiry and anything contained in the stipulation of fact could be used in determining an appropriate sentence. (R. at 19, 21).

The government's sentencing case was concise, effective, and strong. In predatory fashion, appellant groped Mr. [redacted]'s penis, pulled down his shorts, gave him a "hand job," and performed oral sex on him for approximately five minutes while appellant knew that Mr. [redacted] was asleep. (Pros. Ex. 1, pp. 4–5; R. at 27).

Appellant apparently thought such actions on a sleeping victim might be acceptable under some circumstances, as he told the court he "thought that [he and Mr. [redacted]] were at [that] point." (R. at 30).

With respect to the second factor, appellant merely offered testimony from previous co-workers and family regarding his work ethic and rehabilitative potential. When asked about his rehabilitative potential, SPC IY spoke about everyone deserving a "shot at a second chance." (R. at 75). Ms. JC responded generally with "I do believe people can move on and change." (R. at 70). These responses lacked specificity and were unpersuasive, generalized characterizations. With this testimony, personal photos, and an EMT certificate, appellant introduced minimal evidence of extenuation and mitigation.

The materiality of [redacted]'s brief, vague statement does not support a conclusion that appellant was prejudiced. In the context of the impact appellant's actions had on him, Mr. [redacted] stated his general belief, rather than a specific recommendation, that appellant's sentence should be commensurate with the impact it will have on Mr. [redacted]. (R. at 58).

Finally, the quality of the evidence weighs in favor of the government. Although Mr. [redacted] described the assault and its clear negative consequences on him, its emotional and sympathetic impact was blunted by delivering it through his SVC rather than in person. (R. at 58; Audio of proceedings at 11:39:11). This

statement expressed the victim's belief regarding appellant's sentence vis-à-vis his own mental anguish, not a recommendation of a specific sentence.

Even if this court agrees with appellant that a limited portion of Mr. [redacted]'s brief statement should not have been allowed, it did not substantially influence the sentence. *See Hamilton*, 78 M.J. at 343. "Military judges are presumed to know the law and follow it absent clear evidence to the contrary." *United States v. Erickson,* 65 M.J. 221, 225 (C.A.A.F. 2007) (citing United States v. Mason, 45 M.J. 483, 484 (C.A.A.F. 1997)). It is noteworthy that even though trial counsel requested the maximum sentence available under the plea agreement, the court declined to adjudge it. The sentence imposed by the military judge was not due to Mr. [redacted]'s comment on appellant's sentence, but the seriousness of the offenses. This was a just punishment for a sexual assault and adequate deterrence for appellant, who thought he and Mr. [redacted] "were at a point where [it] was acceptable" to perform oral sex on a sleeping friend. (R. at 30). Thus, the impact of any erroneously admitted portion of [redacted]'s unsworn statement had no impact on the sentence adjudged.

Conclusion

WHEREFORE, the government respectfully requests this honorable court affirm the findings and the sentence as approved by the convening authority.

[redacted]

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Certificate of Filing and Service

I certify that a copy of the foregoing was electronically submitted to this Honorable Court and to Defense Appellate Division [redacted] on 25 September 2023.

[redacted]
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