

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BURTON, FLEMING, and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist NICHOLAS R. ST. JEAN
United States Army, Appellant

ARMY 20190663

Headquarters, U.S. Army Fires Center of Excellence and Fort Sill
Robert L. Shuck, Military Judge (arraignment)
Douglas K. Watkins, Military Judge (motions)
Joseph Marcee, Military Judge (trial)
Lieutenant Colonel Jeffrey H. Robertson, Acting Staff Judge Advocate

For Appellant: Captain Thomas J. Travers, JA; Daniel Conway, Esquire (on brief and reply brief).

For Appellee: Lieutenant Colonel Wayne H. Williams, JA; Lieutenant Colonel Craig J. Schapira, JA; Captain Thomas J. Darmofal, JA; Major Marc J. Emond, JA (on brief).

13 January 2022

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

FLEMING, Judge:

Appellant raises multiple claims of error stemming from the alleged admission of human lie detector testimony and improper argument from the government. We find human lie detector testimony was not admitted and as to any improper argument, even assuming error, appellant did not suffer prejudice. Appellant also

claims the evidence is insufficient to sustain his false official statement conviction. For the reasons set forth below, we agree, and grant relief in our decretal paragraph.¹

BACKGROUND

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of false official statement and one specification of sexual assault, in violation of Articles 107 and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 920 [UCMJ]. The panel sentenced appellant to a dishonorable discharge, confinement for five years, total forfeiture of all pay and allowance, and reduction to the grade of E-1. The convening authority approved appellant's request to defer the adjudged reduction in grade, and approved the request to defer adjudged and automatic forfeitures.

The victim, ■■■, arrived to her new unit, Fort Sill, Oklahoma in early May 2018. Appellant met ■■■ shortly after her arrival when he was assigned as her unit sponsor. A few days after her arrival, ■■■ hung out with appellant and some fellow soldiers in a barracks' room. After ■■■ consumed alcohol in the barracks' room, appellant escorted ■■■ to her room, and she went to bed. At some point later that night, ■■■ woke up to appellant penetrating her vagina with his penis. ■■■ told her mother the next day that she had been raped, and wrote a note (described as a poem) about the assault in her phone. ■■■ attempted suicide three separate times after the assault. She was eventually separated from the Army through a Medical Evaluation Board (MEB).

At trial, the central defense theme was ■■■ lied about being raped, for a variety of reasons, including trying to obtain a MEB and disability check because of her false allegations. Appellant's counsel immediately pursued this defense theme by first raising ■■■ MEB during voir dire. Defense counsel asked the members if they knew a "Soldier who alleges they were a sexual assault victim can make a claim to receive a disability rating and compensation." Defense counsel next raised the topic during opening statements, telling the members ■■■ "now has a 70 percent disability rating associated with PTSD [post-traumatic stress disorder] from this alleged sexual assault." During the cross-examination of ■■■, defense counsel asked her if she received "a 70 percent disability rating paycheck every month," and whether the payment was "[d]irectly related to [her] allegations" against appellant. ■■■ answered yes to both questions. Defense counsel's three initial references to

¹ We have given full and fair consideration to appellant's other assigned errors, as well as those personally asserted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and determine they warrant neither discussion nor relief.

██████ MEB occurred before the government made any reference or mention of the topic.

Finally, during the redirect testimony of ██████, the trial counsel attempted to counter the defense theory that ██████ was lying about the rape in order to obtain a MEB by asking her “[j]ust in general what is your disability rating based on?” Defense counsel objected, and stated “[i]t’s going to be hearsay. She doesn’t make a determination of what it’s based on.” The military judge overruled the objection, and ██████ testified the basis of her disability rating was “[m]ajor depressive PTSD and leg injuries [which were unrelated to her rape allegation].” Trial counsel asked what “the major depression and PTSD” was based on, and ██████ answered, “[t]he assault [by appellant].”

During closing argument on the findings, the trial counsel argued:

Professional medical providers were involved in this case from the beginning, and it was finally determined by those professionals that she qualified for an MEB. It wasn’t Private ██████ who made that decision. It wasn’t her making all these suicide attempts just to get an MEB. She’s a brand-new soldier to the unit. She just wanted to go home. And, this MEB – you heard it on cross [examination from the defense] – is linked to the major depression that she was going through when she tried to kill herself three times – and that depression was because Specialist Nicholas St. Jean sexually assaulted her on 4 May 2018.

Defense counsel then presented closing argument asserting ██████ “capitalized on filing a disability claim” and “she now receives payment every month for the rest of her life because of this false story.” Defense counsel asserted “that is called fraud.” Defense counsel further argued, ██████ “played the system like a fiddle. CID and the government let the band play on.”

Trial counsel, during rebuttal argument, attempted to address the assertion of fraud stating defense counsel “essentially argu[ed] all the healthcare providers that saw her, in addition to the VA, [were] duped by her. That essentially, the Army doctors, and the behavioral health providers, are wrong.” Defense counsel did not object or request a curative instruction to any of the referenced trial counsel argument.

LAW AND DISCUSSION

1. ██████’s redirect testimony

During ██████ redirect testimony, defense counsel objected when the trial counsel asked her for the basis of her disability rating. The only objection from defense counsel, however, was “hearsay.” On appeal, appellant now asserts error because ██████ testimony amounted to the functional equivalent of human lie detector evidence.

Trial objections must be made with specificity. *See* Military Rule of Evidence (Mil. R. Evid.) 103(a)(1) (stating a party may only claim error in a ruling to admit evidence if the party timely objects and states the specific ground); *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014) (“A timely and specific objection is required so that the court is notified of a possible error, and so has an opportunity to correct the error and obviate the need for appeal.”); *United States v. Eggen*, 51 M.J. 159, 163 (C.A.A.F. 1999) (“[I]t seems clear that trial defense counsel did not object to the testimony of [an expert witness] on the basis that he had exceeded the area of his expertise. As such, that issue was waived for appeal.”); *United States v. Schlamer*, 52 M.J. 80, 85 (C.A.A.F. 1999) (holding defense counsel’s “objection to speculative testimony was not sufficient to preserve his objection to ‘human lie-detector’ testimony” and reviewing for plain error).

Although defense counsel objected to ██████ testimony, the error now asserted on appeal was not the basis for the trial objection. Given the failure to object with specificity, we review for plain error. *See United States v. Lopez*, 76 M.J. 151, 154 (C.A.A.F. 2017) (“[W]hen ‘an appellant has forfeited a right by failing to raise it at trial, we review for plain error.’”) (citing *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)). Under plain-error analysis, appellant “has the burden of establishing (1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights.” *Lopez*, 76 M.J. at 154 (quoting *Knapp*, 73 M.J. at 36).

Appellant fails the plain-error analysis, as there was no clear or obvious error. “Human lie detector testimony has been defined as ‘an opinion as to whether [a] person was truthful in making a specific statement regarding a fact at issue in the case.’” *United States v. Garcia*, ARMY 20180146, 2020 CCA LEXIS 247, *3 (Army Ct. Crim. App. 22 Jul. 2020) (mem. op.) (citing *United States v. Kasper*, 58 M.J. 314, 315 (C.A.A.F. 2003)). Such testimony is inadmissible, as it “is the ‘exclusive province of the court members to determine the credibility of witnesses.’” *Id.* (citing *United States v. Brooks*, 64 M.J. 325, 328 n.3 (C.A.A.F. 2007)). Here, ██████ testimony did not relate to witness credibility, and did not relate to another person’s truthfulness. ██████ testimony regarding the basis for her discharge represented her opinion, or understanding, of the cause for her discharge. ██████ did not offer an opinion regarding the veracity of anyone’s testimony or statement. Therefore, the government did not elicit the functional equivalent of human lie detector evidence, and there is no error.

Although we find [REDACTED] redirect response did not rise to the level of the functional equivalent of human lie detector testimony, we address the defense counsel's actions of raising the specter of [REDACTED] MEB three times prior to the government addressing the issue in her redirect. Even though appellant now attempts to assert error regarding [REDACTED] redirect response, we pause to note that [REDACTED] redirect response seems to merely reiterate what defense counsel had already established during cross examination: [REDACTED] received a MEB and it was linked to her sexual assault allegations against appellant. The defense can, through the testimony they introduce, open the door to the government presenting what may have otherwise been inadmissible evidence.²

In *United States v. Eggen*, appellant asserted testimony regarding “whether [the victim] was ‘faking’ his emotions and whether he was being truthful with [another witness] amounted to an impermissible expert opinion on credibility.” 51 M.J. at 161. The government highlighted the testimony was not raised on direct examination, but “was pursued on cross-examination.” *Id.* The Court of Appeals for the Armed Forces (CAAF) held, “[i]n effect, the actions by the defense counsel opened the door for this examination by the prosecutor. Any error was induced or ‘invited’ by the defense.” *Id.* (citations omitted). The court concluded, “[a]ppellant cannot create error and then take advantage of a situation of his own making. Invited error does not provide a basis for relief.” *Id.*

Likewise, defense counsel first raised the issue of [REDACTED] MEB, her disability rating, and the factual connection between her medical discharge and the ultimate issue, whether appellant raped her, before government counsel even broached the topic. As the issue complained of on appeal was repeatedly initially raised by defense counsel, it appears defense opened the door to [REDACTED] redirect testimony.

2. Trial Counsel's Closing Argument

Having first determined [REDACTED] did not provide the functional equivalent of human lie detector testimony, we now turn to the propriety of the trial counsel's argument. “A prosecutor proffers an improper argument amounting to prosecutorial misconduct when the argument ‘overstep[s] the bounds of that propriety and fairness

² For example, opinion evidence related to whether an accused is innocent or guilty is largely inadmissible, but one exception could be rebuttal evidence after the opposing party opens the door. See *United States v. Banks*, 36 M.J. 150, 161–62 (C.M.A. 1992) (stating “[g]enerally, use of any characteristic ‘profile’ as evidence of guilt or innocence in criminal trials is improper,” but “profile” evidence “may be admitted in rebuttal when a party ‘opens the door’ by introducing potentially misleading testimony”).

which should characterize the conduct of such an officer in the prosecution of a criminal offense.’” *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021) (quoting *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005) (brackets in original)). When defense counsel does not object to improper argument, we review for plain error. See *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019); *Fletcher*, 62 M.J. at 178 (“In the absence of an objection, we review for plain error.”) (citation omitted).

Under a plain error review, we must also find “a reasonable probability that, but for the error, the outcome of the proceeding would have been different.” *Voorhees*, 79 M.J. at 9 (quoting *Lopez*, 76 M.J. at 154). In *Voorhees*, the CAAF determined the “trial counsel’s findings and rebuttal arguments were riddled with egregious misconduct, much of which amounted to clear, obvious error.” However, the CAAF upheld the appellant’s conviction because of the lack of prejudice. In *Voorhees*, when assessing the prejudicial impact of improper argument, the CAAF considered “(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction.” 79 M.J. at 12 (citations omitted). “Despite the severity of trial counsel’s misconduct and the absence of curative measures,” based on the defense counsel’s failure to object to the argument and the strength of the government’s case, the CAAF did not find prejudice. *Id.* at 13–14.³

We first consider the initial part of trial counsel’s closing argument that unnamed professional medical providers determined [REDACTED] qualified for a MEB. No evidence, beyond [REDACTED] cross-examination and redirect testimony, was admitted as to the reason(s) behind these providers authorizing her MEB. Trial counsel’s initial argument failed to specify if the unknown providers authorized a MEB because of [REDACTED] PTSD, multiple suicide attempts, her unrelated-to-the-assault leg injuries, some combination of those conditions, or another reason entirely. Most importantly, we are left to ponder whether the providers authorized a MEB based on the mere existence of her PTSD or multiple suicide attempts and if an underlying determination as to the cause of those conditions, such as the veracity of her rape allegation, was even made or necessary.

³ Conversely, in *Fletcher*, the CAAF found “the trial counsel’s comments during her findings argument rose to the level of prosecutorial misconduct and that the misconduct was prejudicial.” 62 M.J. at 178. The trial counsel made multiple improper arguments, including the “interjection of her personal beliefs and opinions,” and the CAAF determined “trial counsel’s statements were so inflammatory and damaging that we cannot be confident that the members convicted [the appellant] on the basis of the evidence alone.” *Id.* at 185.

Continuing onward with argument, trial counsel next directly referenced [REDACTED] cross-examination testimony and, as the panel “heard it on cross,” the MEB was linked to the sexual assault. As previously stated, we view [REDACTED] cross-examination and redirect testimony as eliciting her opinion regarding the grounds of her MEB as opposed to presenting any functional equivalent of human lie detector testimony. We pause to note the defense wanted [REDACTED] MEB to be linked to her assault to argue it was proof of her motive to fabricate.

Only in response to the defense’s closing argument asserting [REDACTED] committed a fraud did trial counsel’s rebuttal argument veer towards the improper. Trial counsel characterized defense’s argument as an assertion that the providers were “duped” and all “wrong.” Insinuating the providers were not “duped” or “wrong” implied that the trial counsel knew why the providers separated [REDACTED], and their basis for the separation related to appellant’s actions. The government inference being that [REDACTED] was truthful, the providers believed her, so no one was “duped” or “wrong,” and the sexual assault occurred. First, as already stated, the underlying rationale of the providers was not before the court.⁴ This line of argument by trial counsel created a condition, suffered by some litigators, most commonly referred to as reciting “facts not in evidence” and it was improper on those grounds. *See Fletcher*, 62 M.J. at 183 (“It has long been held that a court-martial must reach a decision based only on the facts in evidence.”).

Although the trial counsel’s two sentence rebuttal argument might have crossed the line, as noted earlier, the argument was in response to topics first raised by defense counsel, namely, an assertion that [REDACTED] MEB was a fraud. As previously stated, it is unknown exactly what the medical providers thought, or believed, about [REDACTED] allegations against appellant. A myriad of potential reasons existed for providers to process [REDACTED] medical discharge, and it is speculative to imply they believed her claims. Ultimately, as the only evidence on the topic was [REDACTED] testimony, we determine trial counsel’s rebuttal argument was based on evidence not before the court, and improper on those grounds, but did not constitute plain error.

Although we find no plain error existed in trial counsel’s argument, we pause to address what, if any, prejudice arose. Based on the reasons discussed above, the severity of impropriety, if any, in the trial counsel’s argument was low.

⁴ This Court recognizes the opinions or determinations of medical personnel may not always be admissible at trial, and this opinion does not purport to address the admissibility of such evidence.

As an indicator of the low prejudicial value, the defense counsel did not object to the argument, and did not request a curative instruction.⁵ In *Voorhees*, the CAAF stated “defense counsel’s failure to object to any of the prosecutorial misconduct is ‘some measure of the minimal impact of [the] prosecutor’s improper argument.’” *Id.* (citation omitted) (brackets in original). [REDACTED] receipt of disability pay and a MEB was an insignificant factor within the government case. Despite our lengthy opinion on this issue, it was rarely addressed during the trial and, when raised, it was mostly proffered by the defense in an attempt to establish [REDACTED] motive to fabricate allegations against appellant. The strength of the government case lay with [REDACTED] testimony at trial and a poem she wrote shortly after the assault and any reference to [REDACTED] MEB was in direct response to the defense repeatedly raising the issue.

3. *Sufficiency of Appellant’s False Official Statement Conviction*

Appellant was charged and convicted of one specification of false official statement in violation of Article 107, UCMJ. The specification reads, in relevant part, that appellant did “with intent to deceive, make to Special Agent [PK], an official statement, to wit: “No” or words to that effect when asked if you had seen Private [REDACTED] between on or about 4 May 2018 and on or about 6 May 2018, which statement was totally false, and was then known by the said [appellant] to be so false.”

At trial, the government offered, and the military judge admitted, a portion of appellant’s statement to Criminal Investigation Command (CID) as prosecution exhibit (PE) 26. The exhibit contains questions from the investigator about whether appellant “spent time” with the victim, had sex with her, or forced himself on her. Appellant answered in the negative to all three questions.

Appellant now challenges the legal and factual sufficiency of his false official statement conviction. Appellant argues the evidence admitted at trial did not prove appellant made the statement contained in the specification. The government argues appellant’s statement “that he had not ‘spent time with’ [REDACTED] encompassed a

⁵ The military judge informed the parties of the instructions he intended to give, which did not include an instruction covering alleged human lie-detector testimony or argument. The military judge asked the defense counsel repeatedly if they objected to his instructions or were requesting additional instructions. Defense responded no on each occasion. In *United States v. Davis*, the CAAF reviewed a similar factual scenario, and stated the appellant did not merely fail to object, but “affirmatively declined to object to the military judge’s instructions and offered no additional instructions.” 79 M.J. 329, 331 (C.A.A.F. 2020).

statement that he had not ‘seen’ her.” As outlined below, we agree with appellant, and set aside the finding for this specification.

Law and Analysis

“The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (quoting *United States v. Gutierrez*, 73 M.J. 172, 175 (C.A.A.F. 2014)). “The test for a factual sufficiency review by the lower courts is ‘whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, *the members of the service court are themselves convinced of appellant’s guilt beyond a reasonable doubt.*’” *Id.* (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)) (emphasis in original).

Article 107, UCMJ, requires the government to prove appellant, with an intent to deceive, made a false official statement knowing it to be false. Article 107, UCMJ; *Manual for Courts-Martial* (2016 ed.) [*MCM*], 2016, pt. IV, ¶ 31.b. In this case, the government failed right out of the gate, as the first step requires proof appellant made a certain official statement. *MCM*, pt. IV, ¶ 31.b.(1). While the government proved appellant made a statement denying he “spent time” with ■■■, the government did not offer any evidence appellant made the statement contained in the charge. There was no evidence admitted at trial proving appellant stated “No,” or words to that effect, when asked if he had seen ■■■. As there was no evidence admitted at trial showing appellant made the charged statement, no rational trier of fact could have found all essential elements of the crime.

In *United States v. Gonzalez*, our superior court held the permissible actions our court can take after setting aside a specification includes dismissing the set aside specification and reassessing the sentence. 79 MJ. 466, 470 (C.A.A.F. 2020). Accordingly, we dismiss the false official statement specification (the Specification of Charge II) and reassess the sentence.

We have closely reviewed the record of trial and are satisfied that the sentence adjudged for appellant’s sexual assault conviction would have been at least a dishonorable discharge, confinement for fifty-eight months, total forfeiture of pay and allowances, and reduction to the grade of E-1. See *United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013); *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986).

CONCLUSION

On consideration of the entire record, the finding of guilty to The Specification of Charge I and Charge I is AFFIRMED. The finding of guilty to The

ST. JEAN — ARMY 20190663

Specification of Charge II and Charge II is SET ASIDE and DISMISSED. Only so much of the sentence as provides for a dishonorable discharge, confinement for fifty-eight months, total forfeiture of pay and allowances, and reduction to the grade of E-1 is AFFIRMED. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of his findings set aside by this decision, are ordered restored.

Senior Judge BURTON and Judge PARKER concur.

FOR THE COURT:



JOHN P. TAITT
Clerk of Court