UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BURTON,[1] FLEMING, and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist DANNIE L. POWELL, JR.
United States Army, Appellant

ARMY 20200006

Headquarters, 7th Infantry Division
Joseph A. Keeler, Military Judge
Colonel Rebecca K. Connally, Staff Judge Advocate

For Appellant: Captain Thomas J. Travers, JA; William E. Cassara, Esquire (on brief and reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Craig J. Shapira, JA; Lieutenant Colonel Wayne H. Williams, JA; Captain Christopher K. Wills, JA (on brief).

8 March 2022

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

FLEMING, Judge:

Appellant claims the military judge erred in his instruction to the panel regarding prior inconsistent statements. For the reasons set forth below, we agree, and grant relief in our decretal paragraph.[2]

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[1] Senior Judge Burton took final action in this case prior to her retirement.

[2] 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.

BACKGROUND

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2016) [UCMJ].[3] The panel sentenced appellant to a dishonorable discharge, confinement for forty-eight months, reduction to the grade of E-1, total forfeitures, and a reprimand.

The victim, (hereinafter "[redacted]"), met appellant at a music festival. They exchanged cellphone numbers and maintained friendly communications via text message. [redacted] felt some romantic interest in appellant and agreed to meet him in-person later that month. [redacted] testified she told appellant that she was not interested in sexual intercourse and he appeared to respect her boundaries.

About a week after the music festival, appellant and [redacted] met again in-person. Appellant drove [redacted] to his friend's house for a party, where they spent the evening with approximately five other people. Multiple witnesses testified [redacted]s interactions with appellant were light hearted and romantic during the party. Most of the party-goers were drinking alcoholic beverages. Further, [redacted] testified she and appellant ingested methylenedioxymethamphetamine, more commonly known as "molly," during the party.

[redacted] testified that at some point during the party, she began experiencing blurred vision, weakness, and an inability to move her body. Appellant took [redacted] to a guest bedroom where she thought she could rest. [redacted] testified appellant began undressing himself. She told him she did not want anything to happen but appellant removed her pants and penetrated her vagina with his penis. [redacted] testified she did not consent to the sexual act and she screamed loudly, in an effort to obtain help from the other party-goers. Appellant, however, did not stop the sexual intercourse. [redacted] testified she went unconscious and later awoke in a different sexual position before blacking out again.

At trial, multiple prior inconsistent statements from [redacted] and other witnesses were admitted. For example, the day after the incident, [redacted] sought medical treatment. She did not report using drugs or alcohol to the emergency room staff, nor did she mention losing consciousness. RR, [redacted]s friend, testified [redacted] told RR that [redacted] and appellant were heavily making out and they attended the party to engage in sexual activity. [redacted] told RR when appellant fingered her vagina, she thought to herself that she did not really want to have sex, but she was not sure if she verbally relayed that information to appellant. During cross-examination, RR clarified that

[3] The panel acquitted appellant of one specification of wrongful use of a controlled substance in violation of Article 112a, UCMJ.

[redacted] did not know if she ever told appellant she wanted to stop the sexual conduct. Neither the government nor the defense objected to the introduction of these and multiple other prior inconsistent statements.[4]

After the parties rested, the government requested an instruction regarding prior inconsistent statements with respect to [redacted], appellant, and other witnesses. The defense objected, stating "I don't object to the court giving the general instruction. But it would be commenting on the credibility of the witness for the court to identify [each] ... witness." Ultimately, the panel was instructed, without further objection from either side, that:

> You have heard testimony that before this trial that [redacted], AO, BD, appellant, KR, and Specialist JM made statements that may have been inconsistent with their testimony here in court. If you believe that an inconsistent statement was made, you may consider the inconsistency in deciding whether to believe the witnesses in court testimony.
>
> You may not consider that earlier statement as evidence of the truth of the matter as contained in the prior statement. In other words, you may only use it as one way of evaluating the witness's testimony here in court. You cannot use it as proof of anything else.
>
> For example, if a witness testifies in court that the traffic light was green, and you heard evidence that the witness made a prior statement that the traffic light was red, you

[4] The parties at trial and the appellate counsel in their briefs consistently used the terminology "prior inconsistent statements" to describe the witnesses' testimony so, for consistency purposes, we will continue to use that terminology. We pause to note, however, in our experience, this terminology is usually a phrase of art utilized to describe testimony that was initially *objected* to at trial which the military judge ultimately ruled was admissible as: (1) impeachment evidence with the singular non-substantive purpose of exploring the witnesses' credibility; or (2) substantive evidence meeting the rigorous non-hearsay qualifications under Military Rule of Evidence [Mil. R. Evid.] 801(d)(1)(A) (emphasis added). *See* Mil. R. Evid. 801(d)(1)(A) (requiring, prior to admission, the following: the witness testify at trial, the witness' prior statement "be given under penalty of perjury at trial, hearing, or other proceeding or in deposition," the witness' prior statement be inconsistent with the witness' trial testimony, and the witness be subject to cross-examination about the prior statement).

> may consider that prior statement in evaluating the truth of the in court testimony. You may not, however, use the prior statement as proof that the light was red.

LAW AND DISCUSSION

The sole issue is whether the panel was properly instructed regarding prior inconsistent statements. They were not.

Whether a panel was properly instructed is a question of law reviewed de novo. *United States v. Hale*, 78 M.J. 268, 274 (C.A.A.F. 2019). "Under a plain error analysis, the accused 'has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused.'" *United States v. Payne*, 73 M.J. 19, 23–24 (C.A.A.F. 2014). Prior inconsistent statements are generally only admissible for impeachment purposes but "may be considered [as substantive evidence] for any relevant purpose" when "admitted without objection." *See* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 7-11-1, n.2 (10 Sep. 2014) [Benchbook]; *United States v. Trisler*, 25 M.J. 611 (A.C.M.R. 1987) (holding hearsay admitted without objection allows the factfinder to give full probative value to the testimony).

No one objected during the course of the entire trial to the admission of any prior inconsistent statements made by [redacted], appellant, or the other witnesses. All prior inconsistent statements were admitted without limitation and, therefore, were substantive evidence. Although it is arguable whether the initial defense objection preserved a non-waived error for appeal, we determine such a debate is not relevant because we find the military judge committed plain error by providing, in contrast to a correct legal instruction, a 360 degree completely erroneous instruction—that all the witnesses' prior inconsistent statements were limited in purpose to only determining witness credibility and "could not be use[d] as proof of anything else." We pause now to provide the sample instruction that appropriately addresses the nature of the admitted prior inconsistent statements:

> You have heard evidence that before this trial (state the name of the witness(es)) made (a) statement(s) that may be inconsistent with his/her/their testimony here in court. I have admitted into evidence (testimony concerning) the prior statements(s) of (state the name of the witness(es)). You may consider (that statement) (these statements in deciding whether to believe (that witness's) (these witnesses') in-court testimony.

> You may also consider (that statement) (these statements) along with all the other evidence in this case.
>
> (For example if a witness testified in court that the traffic light was green and you heard evidence that the witness made a prior statement that the traffic light was red, you may consider the prior statement as evidence that the light was, in fact, red, as well as to determine what weight to give the witness's in-court testimony.)

Benchbook, para. 7-11-1, n.2.

We recognize the government counsel was the genesis for the instructional error by requesting a limiting instruction as to the prior inconsistent statements. However, the military judge possessed a duty to provide appropriate legal instruction to aid the panel in deliberations. *See, e.g., United States v. Killion*, 75 M.J. 209 (C.A.A.F 2015). The military judge's explicit erroneous instruction to consider numerous amounts of admitted substantive evidence for impeachment purposes only misled the panel, and we presume the panel members followed the military judge's erroneous instruction. *See United States v. Matthews*, 53 M.J. 465, 471 (C.A.A.F. 2000).

We must now consider any resulting prejudice to appellant and whether an erroneous evidentiary instruction, a non-constitutional error, had a "substantial influence on the members' verdict in the context of the entire case." *United States v. Steen*, 81 M.J. 261, 263 (C.A.A.F. 2021) (citations omitted); *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007). "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." *United States v. Berry*, 61 M.J. 91, 97 (C.A.A.F. 2007) (citing Article 59(a), UCMJ). In determining the prejudice, we weigh "(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. Berry*, 61 M.J. at 98 (internal citations omitted).

The corroborating evidence in this case was not strong. It was, as these cases are commonly referred to, a she said/he said case. [redacted] testified the sexual incident was non-consensual and appellant testified it was consensual. The lay witnesses, who were mostly party-goers, were generally consistent in describing appellant and [redacted] as engaging in friendly and flirtatious interactions prior to the alleged incident. No one else was in the guest bedroom at the time of the incident and none of the other multiple party-goers testified to hearing [redacted] scream. Although the forensic results of a SAFE examine generally corroborated the occurrence of sexual intercourse, which appellant readily conceded, [redacted]s trial testimony as to her non-

consent, and incapacitation, was undoubtedly the lynchpin in securing appellant's conviction.

As to the materiality and quality of the evidence in question, numerous prior inconsistent statements from [redacted] were admitted during trial and the panel was advised that none of them were to be considered as substantive evidence. As to her incapacity, [redacted] admitted she did not tell medical personnel she was intoxicated, from either alcohol or "molly" usage at the time of the assault. [redacted] initially testified she had previously articulated her unwillingness to have sexual intercourse with appellant, prior to meeting him on the night of the incident, and she screamed for appellant to stop the sexual conduct, in an attempt to get help from the other party-goers. [redacted]s friends, however, testified for the government that [redacted] was interested in appellant and intended to engage in at least some sexual activity, and that [redacted] could not recall verbalizing any non-consent when appellant attempted to move from digital penetration to full sexual intercourse.

Based on the nature of this case, we find the erroneous instruction prejudiced appellant and had a substantial influence on the members' verdict in the context of the entire case.

CONCLUSION

The findings of guilt and sentence are SET ASIDE. A rehearing may be ordered by the same or a different convening authority.

Senior Judge BURTON and Judge PARKER concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court