UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLEMING, HAYES, and PARKER
Appellate Military Judges

UNITED STATES, Appellant
v.
Private First Class ERICK VARGAS
United States Army, Appellee

ARMY MISC 20220168

Headquarters, Fort Campbell
Jacqueline Tubbs and Sasha N. Rutizer, Military Judges
Lieutenant Colonel Ryan W. Leary, Staff Judge Advocate

For Appellant: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Dustin L. Morgan, JA; Major Karey B. Marren, JA (on brief and reply brief).

For Appellee: Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Bryan A. Osterhage, JA; Captain Sean Patrick Flynn, JA (on brief).

16 June 2022

MEMORANDUM OPINION AND ACTION ON APPEAL BY THE UNITED STATES FILED PURSUANT TO ARTICLE 62, UNIFORM CODE OF MILITARY JUSTICE

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

FLEMING, Senior Judge:

The government asserts the military judge abused her discretion when she dismissed this case with prejudice because the government failed to disclose to the defense, until at trial, a prior act and statement by appellee. We find the military judge abused her discretion by dismissing the case with prejudice when lesser sufficient remedial remedies were available to cure any harm to the defense caused by the government's disclosure failure.

BACKGROUND

In April 2021, the government charged appellee with two specifications of sexual assault and four specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2019) (UCMJ).[1] The convening authority referred the case in June 2021; the arraignment occurred in mid-July 2021; and additional Article 39(a), UCMJ sessions occurred in November 2021 and on March 7, 2022. On March 8, 2022, during the named victim's (Specialist (SPC) [redacted]) direct testimony, the military judge granted the defense motion to dismiss the charge and specifications with prejudice. The government now appeals the military judge's ruling pursuant to Article 62, UCMJ.

FACTS

On Friday, March 4, 2022, prior to the start of appellee's contested court-martial, the government re-interviewed SPC [redacted]. During this interview, SPC [redacted] stated appellee called her a "beauty queen" and kissed her on the forehead "3–4 times" prior to the sexual assault. This was new information, and the government failed to disclose it to the defense.

On Monday, March 7, 2022 an Article 39(a), UCMJ hearing was conducted regarding motions filed pursuant to Military Rules of Evidence 404(b) and 412. Specialist [redacted] testified during the hearing regarding the events surrounding the charged offenses but, again, the new information was never revealed. At the contested trial the following day during SPC [redacted] direct examination, the government counsel asked questions about the events leading up to the charged offenses. Specialist [redacted] testified that appellee "started grabbing my head and kissing my foreh[ead], telling me I was a beauty queen[.]"

Defense counsel immediately objected asserting it was "the first time we have ever heard this testimony." A debate ensued as to when the government first learned about this new information. Initially, the trial counsel asserted the government learned of the new information from SPC [redacted] after the Article 39(a), UCMJ, session on Monday, March 7, 2022, acknowledging the information was not immediately disclosed. The military judge excused the trial counsel from further participation in the trial and the government detailed new counsel. This new trial counsel acknowledged that the government knew about the new information on Friday, March 4, 2022, conceding the government failed to disclose to the defense the new statement by appellee to SPC [redacted] about being a "beauty queen" and his act of kissing

[1] The government dismissed one specification of sexual assault and one specification of abusive sexual assault with prejudice prior to the start of the contested trial on March 8, 2022.

her on the forehead. The military judge concluded the government's nondisclosure of the new information was not "willful misconduct."

The military judge and the parties then explored a range of options to cure the government's nondisclosure. Ultimately, defense counsel asserted "the only proper remedy is dismissal with prejudice. However, if the Court does not believe that that's appropriate, then we would request a mistrial and dismissal without prejudice." The government proffered the following alternative remedies: (1) allowing the defense to impeach SPC [redacted] "on this issue;" (2) granting a continuance for the defense to have "the time that they need to adequately prepare for their case;" and (3) "craft[ing] a limiting instruction to the panel and also an instruction to the government that they will not argue these acts."

After listening to the parties, the military judge made the following oral ruling:

> I do find that a delayed disclosure hampered the ability to prepare a defense. There are a number of things the defense could have done. They could have prepared a different direct examination or cross-examination of her. They could have crafted a new theory. They could have if they felt that that evidence was overwhelming, sought a pretrial agreement to some or all of the offenses, or pled without the benefit of a pretrial agreement to some or all the offenses if that was a consideration for them. The non-disclosure of that information foreclosed them from considering that strategy. Whether the non-disclosure would have allowed the defense to rebut evidence more effectively. Had they had that information earlier, they could have used that information in their opening statement, in their *voir dire*.
>
> This Court is required to craft the least drastic remedy to obtain a desired result. I have considered the number of remedies. I have already dismissed the original trial counsel. I have considered not allowing any additional direct examination of the victim, but, of course, would result in - - that has no -- that is an absurd result. There is no evidence presented. I have considered allowing a delay. I don't think a delay cures the issue. I've considered bringing the alleged victim back in here to allow the defense to fully cross-examine her on that issue, and then putting her back on in front of the panel members. That does not cure the issue. It doesn't cure what I previously

> stated with respect to a strategic option, with what they could have done with that information ahead of time. I've considered a curative instruction, but you cannot unring that bell, not when you consider the government's opening statement. I've considered precluding the government from being able to argue anything about linking a basis of the kiss on the forehead. But that doesn't cure the issue, which is non-disclosure, failure to allow them to prepare, and foreclosing the ability to create a strategic option. So the fact is, there is not another remedy. Defense, I am granting your motion to dismiss with prejudice. I am aware under R.C.M. 915 ---- Court's in recess for 5 minutes.

After a seven-minute recess the court was recalled and the military judge concluded her ruling stating "I considered a mistrial under ... R.C.M. 915 and do not find that that remedy is sufficient given the gravity of the government's discovery violation. So with that said, Defense, I am granting your motion to dismiss with prejudice. In a moment we'll call in the members and I will dismiss them."

The government then asked the military judge to reconsider her oral ruling and requested "a continuance, breaking for the day, to file a written response." The military judge provided the following two-word response "No. Denied."

The panel was recalled and advised the military judge "granted a motion that terminate[d] these proceedings." The trial was then immediately adjourned. The parties at trial never filed any written briefs and the military judge did not issue a written ruling.

LAW AND DISCUSSION

This Court reviews "a military judge's discovery rulings [] for an abuse of discretion." *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015) (citing *United States v. Jones*, 69 M.J. 294, 298 (C.A.A.F. 2011)). Likewise, we also review "a military judge's remedy for discovery violations" using the abuse of discretion standard. *Id.* (citing *United States v. Trimper*, 28 M.J. 460, 461-62 (C.M.A. 1989)). "The abuse of discretion standard calls for more than a mere difference of opinion," but instead occurs when the military judge's "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *Id.* (citations and internal quotation marks omitted). Absent clear error, we are bound by the military judge's fact-finding. *See id.* at 482. In *Stellato*, the Court of Appeals for the Armed Forces (CAAF) stated while dismissal with prejudice may be an appropriate remedy for a discovery violation, "dismissal is a drastic remedy and courts must look to see

whether alternative remedies are available." 74 M.J. at 488 (quoting *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004)).

Here, the military judge failed to impose the least drastic remedy that would have cured the error; as such, dismissal with prejudice was outside the range of alternative choices reasonably arising from the relevant facts and applicable law.[2] We need go no further in our analysis than to discuss her decision that a mistrial was not a reasonable remedy. Granting a mistrial is, by no means, a lower level remedial measure but, as it is one step removed from the most draconian act of dismissing a case with prejudice, it must be considered before granting a case dispositive ruling.

"The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." Rule for Courts-Martial [R.C.M.] 915(a). "The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons," including times "when inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members." R.C.M. 915(a), discussion. Mistrials are an unusual and disfavored remedy that are reserved as a "last resort." *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003). "Because of the extraordinary nature of a mistrial, military judges should explore the option of taking other remedial action." *Ashby*, 68 M.J. at 122 (citation omitted).

We now turn to the military judge's decision to deny granting a mistrial as a "last resort" remedy. The military judge provided a bare bone discussion regarding a mistrial after pronouncing "there is not another remedy," granting the motion to dismiss for prejudice, and then taking a seven-minute recess to craft a one sentence analysis that "the gravity of the government's discovery violation" warranted dismissal with prejudice. First, the military judge's analysis as to the "gravity" of the violation appears to contrast with her earlier finding of fact that the government's discovery violation was not "willful misconduct." The timing and brevity of the military judge's limited analysis creates a strong impression that any mistrial remedy was an after-thought and not a seriously considered and weighed option. Further, although not dispositive to our decision, we note the military judge

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[2] As the basis for the dismissal was a discovery violation, typically we would address both the ruling finding a discovery violation and the subsequent remedy. *See Stellato*, 74 M.J. at 481. However, the government concedes the statement at issue should have been disclosed, stating in their brief, "[u]pon learning of this information, trial counsel should have provided timely notice to the accused." Therefore, we focus primarily on the dismissal with prejudice, and discuss the discovery violation only as it relates to the appropriateness of the military judge's remedy.

was unwilling to allow the government an opportunity to present a written brief and a written ruling was not forthcoming to expand upon her reasoning for granting a dismissal without prejudice, a case dispositive ruling, as opposed to granting a less stringent remedial measure of a mistrial. Additionally, the military judge summarily rejected without comment a government request for reconsideration.

In determining whether a mistrial was a reasonable remedy, we now turn to the military judge's ruling as to the potential harms to the defense because of the government's nondisclosure. The military judge held the defense was harmed because they could have "crafted a new theory" of the case or prepared a different voir dire, opening statement, or direct or cross-examination of SPC [redacted]. The military judge also held the defense could have sought a pretrial agreement with the convening authority or, in the alternative, decided to plead guilty without the benefit of a pretrial agreement. All of these alleged harms, however, could have been sufficiently addressed with a mistrial which would have given the defense an opportunity to craft a new theory of the case, prepare a different voir dire, opening statement, or direct or cross-examination of SPC [redacted], or to explore pretrial negotiations with the convening authority, or to plead guilty.

We find a decision to grant a mistrial was an even more reasonable remedial measure in this case when: (1) the defense counsel agreed to a mistrial, as an alternative form of relief, if a dismissal without prejudice was not granted; and (2) the military judge made a finding of fact, which we now affirm as it is not clearly erroneous, that the government's discovery violation was not "willful misconduct." Under this backdrop, a decision by the military judge to grant a mistrial would have allowed for a "trial by another court-martial" and an opportunity for the defense to cure every harm articulated by the military judge.[3]

In *Stellato*, the CAAF highlighted that the "military judge concluded [his ruling] by noting that '[t]he almost complete abdication of discovery duties' 'call[ed] into serious question whether the Accused [could] ever receive a fair trial' where evidence was lost, unaccounted for, or left in the hands of an interested party." 74 M.J. at 489 (brackets in original). The CAAF determined the military judge did not err in finding prejudice, in part because the discovery violations prevented the defense from calling a "key witness" and the aforementioned lost and unaccounted for evidence. *Id.* at 490.

This case does not involve lost witnesses, lost evidence, or the "complete abdication of discovery duties" but, instead, consists of a singular failure by the

[3] *See* R.C.M. 915(c)(2). By this order, we do not suggest that a mistrial was the only appropriate lesser remedy; a more in-depth inquiry might have established that a continuance and/or a curative instruction, for example, would have satisfactorily addressed the failure to disclose.

government to notify the defense regarding a two-word statement and one act by appellee discovered by the government a few days prior to the contested trial. Although this opinion should in no way be misconstrued to condone the government's disclosure failure, we find the military judge abused her discretion by dismissing the case with prejudice when she failed to exhaust lesser reasonable remedies.

CONCLUSION

The government's appeal under Article 62, UCMJ is GRANTED. The military judge's March 8, 2022 oral ruling dismissing the case with prejudice is VACATED. The record of trial is returned to the military judge for proceedings not inconsistent with this opinion.

Judge HAYES and Judge PARKER concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court