UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BROOKHART, PENLAND, and ARGUELLES[1]
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist LAROY D. FILMORE
United States Army, Appellant

ARMY 20210334

Headquarters, Fort Stewart
G. Bret Batdorff, Military Judge
Colonel Joseph M. Fairfield, Staff Judge Advocate

For Appellant: Peter Kageleiry, Jr., Esquire (on brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline DeGaine, JA; Major Mark T. Robinson, JA; A. Benjamin Spencer, JA (on brief).

14 February 2023

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

ARGUELLES, Judge:

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 (2019) (UCMJ).[2] The panel sentenced appellant to reduction to the grade of E-1, confinement for six years, and a dishonorable discharge. The convening authority took no action on the findings and sentence.

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[1] Judge ARGUELLES decided this case while on active duty.

[2] The panel returned not guilty verdicts for two specifications of abusive sexual contact and one specification of sexual assault, in violation of Article 120, UCMJ.

This case is now before us for review under Article 66, UCMJ. Appellant raises three assignments of error, one of which (sentencing error) merits relief as set forth in our decretal paragraph.[3]

BACKGROUND

Appellant and the victim were both stationed in Germany and were acquaintances. Shortly after the victim returned to her unit from a remote deployment, she, appellant, and a few other soldiers decided to get together on a Monday night for a few drinks. That evening, however, only one other soldier ("other soldier") joined appellant and the victim for a short period of time to drink and smoke. Although she admitted to being intoxicated, the victim testified that she did not have any difficulty speaking or standing. The other soldier described the victim as "pretty much drunk" and "kind of" swaying. Testimony at trial established that it was common knowledge in the unit that the victim was a lesbian, and the victim described how she and appellant talked during the course of the evening about what kinds of women they liked.

After the other soldier left, appellant and the victim went back up to appellant's barracks room, which was a two-bedroom suite with a common area in the front and bedrooms in the back. The victim testified that after she went to use the bathroom, appellant took her into the common area and forcibly anally raped her despite her telling him "no" and "stop." The victim also testified that while he was anally raping her, appellant was using derogatory terms regarding her sexuality and sexual preferences. There was no dispute that the victim defecated during the encounter, as there were feces and blood found in both appellant's room and the victim's room after the victim returned to her barracks. Although the victim also claimed that appellant forced her to orally copulate him while his penis had blood and feces on it, the panel returned a not guilty finding to the specification covering this conduct.

One of appellant's suitemates testified that while in his room with the door to the common area shut, he heard a chair dragging across the floor "back and forth" and a female moaning, but did not hear any spoken words. The other two suitemates testified that they were also in their room with the door shut and similarly did not hear anyone in the common room say "no" or "stop."

After the incident, appellant walked the victim back to her barracks room and left her phones with her next-door neighbor. The victim's suitemates testified that

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[3] We have also given full and fair consideration to appellant's other assigned errors, as well as the matter personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit.

after she returned to the barracks, they found her in the bathroom, sitting among a large amount of fecal matter and blood. The victim was very defiant and refused to let her suitemates touch her, but they ultimately got her cleaned up and put to bed. The next morning, after telling her suitemates that appellant raped her, the victim went to a hospital for a Sexual Assault Forensic Exam (SAFE). The exam did not reveal any injuries. A medical doctor testified at trial, however, that several weeks after the incident, there was evidence of an anal tear. The doctor explained how it was possible for the alleged sexual assault to have caused the tear even though the tear did not manifest itself until after the SAFE. Although the victim claimed that appellant punched her in the back during the assault, the SAFE did not document any injuries to the victim's back.

LAW AND DISCUSSION

1. Additional Facts

The only government witness called at sentencing was the victim, who made both sworn and unsworn statements. Her sworn testimony, a total of three pages of the record of trial, consisted almost entirely of her explanation of how the incident caused her to be diagnosed with a psychiatric disorder ("condition"), and how this condition drastically impacted her life and career. Specifically, she testified that:

> [As a result of my condition] I have to take, you know sometimes five pills a day to 17 pills a day . . . .
>
> I can no longer do my job because I'm diagnosed with [condition], and I have to [sic] such medications to mitigate some of those symptoms that I have.
>
> I work - - I'm a secretary now for my commander, and it - - just seeing my peers, and my unit go to the field, and knowing that I can't even hold a weapon because of my diagnosis, where I cannot get a drink with them, because on my profile it says, due to [condition], I cannot drink anymore.
>
> I'm getting out of the military due to [condition] due to the incident. Everything in my life has just been changed. I had 2 more years left on my contract.
>
> I've actually, due to my terrible sleeping - - not sleeping habits, but due to my [condition], I cannot go to sleep in the barracks anymore.

In her unsworn statement, an additional two and a half pages of the record of trial, the victim again referenced her diagnosis, telling the panel members that "[a]fter the event that took place, I was hospitalized and diagnosed with [condition]. My military career was forcibly taken away from me. My air traffic control career is being forcibly taken away from me." The victim's unsworn statement also included two comments about appellant's likelihood to reoffend:

> Judge, panel, I am asking you to take into consideration the terror [appellant] has brought into the community, and the crimes he will continue to wreak onto the innocent people that may cross his path.
>
> Your Honor, panel, what else will he take from the innocent and unknowing individuals?

Defense counsel did not object to any of the victim's testimony, and the military judge did not do anything to stop or prevent the victim from testifying about her medical condition or her views about appellant's recidivism.

After the victim concluded and the government rested its sentencing case, the defense called two supervisors to testify that appellant was a hard worker. Appellant's father similarly testified about appellant's good character. Appellant made an unsworn statement in which he regretted not testifying at trial so the panel could hear the "truth" and accused the witnesses who testified against him of lying under oath.

In his closing argument, trial counsel did not refer to the victim's condition and argued for a sentence of 15 years of confinement and the mandatory dishonorable discharge. The defense asked for only the mandatory dishonorable discharge and no confinement. Appellant elected sentencing by the panel, who as noted above sentenced him to reduction to the grade of E-1, confinement for six years and a dishonorable discharge. Appellant now alleges that the military judge committed plain error in allowing the victim to testify about her condition and offer her opinion that appellant was likely to reoffend. As set forth below, we agree.

2. Law

We review a military judge's ruling on the admissibility of sentencing evidence for abuse of discretion. *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009) (citing *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000)). If, however, appellant fails to object to the asserted error in the admission of sentencing evidence, as is the case here, we review for plain error. *United States v. Gomez*, 76 M.J. 76, 79 (C.A.A.F. 2017).

In *United States v. Tyler*, the Court of Appeals for the Armed Forces (CAAF) held that although a victim's unsworn victim statement is not subject to the Military Rules of Evidence, the military judge still has an obligation to ensure that it comports with the requirements of the applicable Rules for Courts-Martial (R.C.M.). 81 M.J. 108, 112-113 (C.A.A.F. 2021); *See also* R.C.M. 1001(c)(5)(B) Discussion ("Upon objection by either party or *sua sponte*, a military judge may stop or interrupt a victim's unsworn statement that includes matters [in aggravation] outside the scope of R.C.M. 1001(c)(3)"); *United States v. Hamilton*, 78 M.J. 335, 342 (C.A.A.F. 2019) (holding that the rule providing for the introduction of evidence in aggravation is "not a mechanism whereby the government may slip in evidence in aggravation that would otherwise be prohibited by the Rules of Evidence.").

In *Gomez*, one of the victims testified at sentencing that the trial process caused her to suffer from stress and a specific medical condition which affected the birth of her child. 76 M.J. at 79. In analyzing appellant's claim that this was improper testimony which impacted his sentence, the CAAF first acknowledged that in the broader sense, evidence pertaining to the medical impact on the victim is admissible as evidence in aggravation under the applicable Rules for Courts-Martial. *Id.* But, with respect to how this evidence was introduced, that is, through the testimony of the victim, the CAAF held that she was either:

> (1) providing the panel members with a diagnosis she had reached on her own without possessing the necessary medical expertise to do so; or, (2) providing the panel members with expert testimony about her medical condition without the proper foundation being laid for her qualifications to do so; or, (3) repeating as hearsay some statements that her doctor had made to her.

Id. "Under any of these three scenarios, [victim's] testimony was inadmissible." *Id.* (citations omitted). *See also United States v. Holland*, ARMY No. 20200311, 2021 CCA LEXIS 38 at *7-8 (29 Jan 2021) (mem. op.) (holding under *Gomez* that the military judge erred in allowing victims to testify about their diagnoses of severe depression, a medical provider's classification of the trauma, and the drug regimens resulting from the medical diagnoses).

Along the same lines, in *United States v. Frey*, the CAAF held that "whether or not a person convicted of a particular offense is more or less likely to offend again or become a serial recidivist is a question requiring expert testimony, empirical research, and scientific and psychological method, inquiry, and evidence." 73 M.J. 245, 250 (C.A.A.F. 2014); *See also Holland*, 2021 CCA LEXIS at *9-10 (military judge erred in allowing victims' testimony which created "an impermissible inference of recidivism").

Again, because there was no objection at trial, our review is for plain error, which requires us to find: (1) that there was error; (2) the error was clear and obvious; and (3) the error materially prejudiced a substantial right. *Gomez*, 76 M.J. at 79. In order to determine prejudice in this context, appellant bears the burden of showing that the military judge's failure to prevent the admission of improper sentencing evidence "'substantially influenced the adjudged sentence.'" *Id.* at 80, (quoting *United States v. Eslinger*, 70 M.J. 193, 200-01 (C.A.A.F. 2011)).

When determining whether an error substantially influenced a sentence, we consider: (1) the strength of the Government's sentencing case; (2) the strength of the defense sentencing case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. *Id.* (citations omitted); *see also United States v. Edwards,* 82 M.J. 239, 247 (C.A.A.F. 2022) (holding that prejudice due to the admission of improper sentencing matters is more likely if the information conveyed as a result of the error was not already obvious from the evidence at trial), (citing *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007)). The CAAF in *Edwards* also explained the difficulty of applying the four-factor test to sentencing errors:

> Before analyzing the individual factors, it is worth noting that this test—which the Court has applied to errors that occur during both the findings and sentencing phases of the court-martial—is considerably more difficult to apply to sentencing. Although there is a binary decision to be made with respect to the findings (guilty or not guilty), there is a broad spectrum of lawful punishments that a panel might adjudge. Complicating matters further, it is much more difficult to compare the "strengths" of the competing sentencing arguments than it is to weigh evidence of guilt. Proof of guilt can be overwhelming even without the erroneously admitted evidence, but there is no analogous analysis for determining the appropriate sentence.

Id.

3. Analysis

The government concedes, and we agree, that that the victim's testimony about her condition and appellant's likelihood to commit future crimes was inadmissible. As such, the first two prongs of the plain error test are satisfied. As to whether the military judge's error substantially influenced the sentence, as noted above we look to the respective strength of each party's sentencing case, as well as the materiality and quality of the evidence in question.

With respect to the first prong, after setting aside all of the inadmissible testimony from their only sentencing witness, the government's sentencing case is close to nonexistent. On the other hand, although appellant called three character witnesses, he certainly did not help his sentencing case by telling the same panel who found him guilty that the government's witnesses were lying. On balance, however, we find that notwithstanding his unhelpful unsworn statement, appellant still put on a slightly stronger sentencing case.

In any event, looking to the materiality and quality of the erroneously admitted sentencing evidence, these two factors overwhelmingly tip the scales towards relief. While we recognize that trial counsel did not refer to it in his argument, the impermissible evidence permeated, and was indeed the main focus, of the government's sentencing case. Likewise, the evidence pertaining to the victim's medical condition "was not already obvious from the evidence at trial." *Edwards*, 82 M.J. at 247.

In sum, after our consideration of the relevant factors, we have no trouble concluding that appellant has met his burden to show that the sentencing error "substantially influenced" his sentence. Moreover, given the dearth of admissible government sentencing evidence, we are unable to reassess the sentence and will instead exercise our discretion to remand the case for resentencing.

CONCLUSION

Upon consideration of the entire record, the findings of guilty are AFFIRMED. The sentence is SET ASIDE. A rehearing on the sentence may be ordered by the same or different convening authority.

Senior Judge BROOKHART and Judge PENLAND concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court