UNITED STATES ARMY COURT OF CRIMINAL APPEALS

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

UNITED STATES, Appellee
v.
Private E2 JASON A. LEWIS
United States Army, Appellant

ARMY 20210434

Headquarters, Fort Drum
James A. Barkei, Military Judge
Colonel Robert Insani, Staff Judge Advocate

For Appellant: Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Bryan A. Osterhage, JA; Captain Carol K. Rim, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Joyce C. Liu, JA; Captain Carol K. Rim, JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline J. DeGaine, JA; Major Kalin P. Schlueter, JA; Major Jaclyn G. Hagner, JA (on brief).

24 February 2023

SUMMARY DISPOSITION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

ARGUELLES, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of assaulting his spouse, in violation of Article 128b, Uniform Code of Military Justice, 10 U.S.C. §§ 928(b) (2020) [UCMJ]. The military judge acquitted appellant of two specifications of assaulting his spouse in violation of Article 128b, UCMJ. The military judge sentenced appellant to a reduction to the grade of E-1 and a bad conduct discharge, and 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.

This case is before the court for review pursuant to Article 66, UCMJ. Appellant raises four assignments of error, none of which merit discussion or relief.[2] Based on our review of the record, however, we find that a prosecution exhibit admitted into evidence was improperly sealed. Although this error warrants discussion, because it in no way harmed the substantial rights of appellant, we will not disturb the findings or sentence.

BACKGROUND

During the trial the military judge admitted Prosecution Exhibit (PE) 13, which contained three short video clips documenting the alleged assaults. In the video clips, the victim appears to be wearing underwear and a t-shirt. After the trial counsel requested permission to publish PE 13, the victim's Special Victim's Counsel (SVC) questioned "if its publication is appropriate in – given those circumstances," in reference to the victim's state of dress. At a subsequent Article 39(a) session, the SVC again expressed concerns about the victim's attire in the videos, stating that "I don't know if it was sleeping-wear, pajamas, or what exactly, but I did not want to get too much into it – no more than necessary."

The military judge started by noting that he reviewed Rule for Courts-Martial (R.C.M.) 806 and acknowledged that "both the accused and the public, writ large, have an interest in the public recognition and observation of courts-martial to ensure the public's perception of fairness." After securing appellant's waiver to a right to a public trial "for the sole purpose of publication of evidence," the military judge ruled:

> Noting that the accused has knowingly waived his right and interests to a public trial, recognizing the special victim's – or, the alleged victim's interest in privacy, and noting that all parties do not require publication since this is a judge alone court-martial, I conducted my review of the three videos. And while I do not believe that those videos displayed exposed genitalia or other private areas of the alleged victim, *in an abundance of caution for the alleged victim's rights*, which she has chosen to exercise through her special victim's counsel, in combination with the parties – particularly, the accused – expressing no interest in displaying these videos for the general public's viewing, the court will withhold publication of the videos in this trial.

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[2] We have also considered the matters 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.

(emphasis added).

Although the military judge ultimately issued a Sealing Order, it did not include PE 13. Nevertheless, PE 13 was in fact sealed when we received the record of trial, and the Certified Record of Trial DD Form 490 likewise indicated that PE 13 was "(Sealed)." As such, it was necessary for Appellee to file a Motion to Examine Materials Under Seal to gain access to PE 13 for this appeal, which we granted. Moreover, on 6 February 2023, we issued an Order directing that "Prosecution Exhibit 13 should be readily available for public access and shall be unsealed."

LAW AND DISCUSSION

While we recognize that he did not explicitly list PE 13 in his Sealing Order, the military judge did ultimately authenticate the record of trial in which PE 13 was sealed. *See* Army Reg. 27-10, Legal Services: Military Justice, para. 5-56(f) (20 November 2020) [AR 27-10] (military judge responsible for authenticating the record of trial and attachments).

We review a military judge's ruling on public access and the sealing of exhibits under an abuse of discretion standard. *United States v. Scott*, 48 M.J. 663, 666 (Army Ct. Crim. App. 1998). The abuse of discretion standard is deferential, predicating reversal on more than a mere difference of opinion. *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015); *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) ("[T]he abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range.") (citation omitted).

In *United States v. Hershey*, the Court of Appeals for the Armed Forces (CAAF) held that in addition to an accused's Sixth Amendment right to a public court-martial, the press and the public have a First Amendment right to access courts-martial. 20 M.J. 433, 435-36 (C.A.A.F. 1985). Adopting the same "stringent test" set forth by the Supreme Court for closing criminal trials, the CAAF held that in order to close a court-martial to the public: (1) the military judge must find that there is an overriding interest that is likely to be prejudiced if the proceedings are not closed; (2) the closure must be narrowly tailored to protect that interest; (3) the military judge must consider reasonable alternatives to closure; and, (4) and the military judge must make adequate findings supporting the closure to aid in review. *Id.* at 436, citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1980). *See also Waller v. Georgia*, 467 U.S. 39, 45 (1984) (same).

Rejecting the government's claim that protecting the potential victim from embarrassment justified the closure, the CAAF in *Hershey* held that "[u]ndeniably there is a certain amount of mortification imposed on victim-witnesses in sex cases,

but that is a condition which cannot be eliminated from our judicial system." *Id.* (quoting *United States v. Brown*, 22 C.M.R. 41, 49 (1956)). *See also ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997) (same); *United States v. Story*, 35 M.J. 677, 678 (A.C.M.R. 1992) (holding that the explicit nature of a providence hearing involving charges of forcible sodomy should not have prevailed over the right of the public to attend the court-martial).

Rule for Courts-Martial 806(a)(4) sets forth the same four-factor test adopted in *Hershey*, stating that "[c]ourts-martial shall be open to the public unless (A) there is a substantial probability that an overriding interest will be prejudiced if the proceedings remain open; (B) closure is broader than necessary to protect the overriding interest; (C) reasonable alternatives to closure were considered and found inadequate; and (D) the military judge makes case-specific findings on the record justifying closure." Moreover, the Discussion following this rule acknowledges that while an accused may waive his right to a public trial, "[t]he fact that the prosecution and the defense jointly seek to have a session closed does not, however, automatically justify closure, for the public has a right in attending courts-martial."

In *Scott*, the military judge sealed a prosecution exhibit to protect "the apparent and significant privacy interests of persons referred to therein." 48 M.J. at 665. After reiterating the courtroom closure standards set forth in *Hershey* and *Press-Enterprise*, and noting that the Supreme Court recognized that the general public also has a qualified constitutional right of access to materials entered in evidence, the court in *Scott* held that the "qualified right of access to materials entered into evidence may apply with equal validity to exhibits that were presented in public at trial by court-martial." *Id.* at 666 (citations omitted). The same court also noted that it was not considering the broader question of whether the public has a qualified right of access to the entire record of trial, but was instead focusing "on the procedures a military judge must use before issuing a protective order concerning a prosecution exhibit admitted during a public hearing." *Id.* at 666, n.3. Applying the *Hershey/Press-Enterprise* standard to the sealing order before it, the court in *Scott* concluded that the military judge abused his discretion by failing to make specific findings supporting his conclusion that the privacy interests were overriding, failing to consider any reasonable alternatives, and failing to make sufficient findings to aid appellate review. *Id.* at 666-67.

Applied here, we recognize that the military judge may not have intentionally meant to seal PE 13, and we are appreciative of his efforts to protect the victim. But, at the end of the day the record pertaining to PE 13, to include the military judge's findings that the videos did not expose any private areas of the victim and that he was acting in an "abundance of caution" for her rights, falls well short of the *Hershey/Press Enterprise* standard required to seal an exhibit. This is especially true given the evidentiary significance of PE 13 as it pertained to the assault charge. *See Scott*, 48 M.J. at 666 (holding that matters relating to culpability should be

evident in the public record). On the other hand, although this error might have minimally impacted the public interest, there is no evidence that it in any way harmed the substantial rights of the appellant. As such, appellant is not entitled to any relief. *Id.* at 667 (holding that no relief warranted where sealing error did not harm appellant's substantial rights).

CONCLUSION

Upon consideration of the entire record, the findings of guilty and the sentence are AFFIRMED.[3]

Senior Judge BROOKHART and Judge PENLAND concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court

[3] As set forth above, we have already issued an Order unsealing PE 13.