UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLEMING, HAYES, and MORRIS
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist MARQUIS A. LOVE
United States Army, Appellant

ARMY 20210396

Headquarters, 1st Cavalry Division
Douglas K. Watkins and Joseph T. Marcee, Military Judges
Colonel Howard T. Matthews, Jr., Staff Judge Advocate

For Appellant: William E. Cassara, Esquire (on brief and reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Major Pamela L. Jones, JA; Captain Lisa Limb, JA (on brief)

4 April 2023

SUMMARY DISPOSITION ON RECONSIDERATION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

HAYES, Judge:

Appellant asserts three errors before this court, none of which merits discussion or relief. Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant asserts nine errors before this court, one of which merits discussion but ultimately no relief.[1]

Appellant asserts the military judge erred when he allowed the government to question the victim during his unsworn statement. While we agree this was error, we find the error was forfeited when appellant did not object and based on the

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[1] We have given full and fair consideration to the remaining issues personally raised by appellant before this court pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and determine they warrant neither discussion nor relief.

overall tenor of the examination, as compared to the victim's narrative statement, the error was harmless.

On 28 February 2023, we affirmed the findings and sentence.[2] On 24 March 2023 we granted appellant's request for reconsideration, which urged us to apply *United States v. Edwards*, 82 M.J. 239 (C.A.A.F. 2022). Appellee did not respond to the motion to reconsider. Upon reconsideration, we again affirm the findings and sentence.

BACKGROUND

A general court-martial composed of officer and enlisted members convicted appellant, contrary to his pleas, of one specification of attempted premeditated murder, one specification of aggravated assault, and one specification of battery in violation of Articles 80 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 928 [UCMJ]. The military judge dismissed the specification of aggravated assault, conditioned on the attempted murder specification surviving appellate review, because it involved the same conduct as the specification of attempted murder. The court-martial sentenced appellant to a bad-conduct discharge, confinement for twelve years, and reduction to the grade of E-1. The convening authority took no action on the findings and sentence.

Appellant shot the victim twice, once in the chest and once in the hip, and also struck the victim in the head with the same loaded handgun outside the door of appellant's apartment. The victim arrived at appellant's apartment at the invitation of appellant's wife, who indicated she would be in the shower and the door would be unlocked. Unbeknownst to the victim, appellant's wife was not present and had sent the invitation at appellant's direction. When appellant learned the victim was on his way, he turned on the shower and left his apartment with a loaded handgun, prepared to confront the victim. When the victim arrived and saw appellant with a handgun, he ran inside and locked the door, finding the shower running but nobody home. After a brief verbal exchange with appellant, the victim exited the apartment, where appellant struck him with his handgun and shot him twice.

During the presentencing phase of appellant's court martial, the victim provided an unsworn statement in a question-and-answer format with government counsel, followed by a brief statement. Both parts of the victim's unsworn statement spanned slightly less than six pages of transcript and addressed his background, the extent and impact of his injuries on his daily life and employability, as well as his future plans considering his injuries and his recovery. Appellant did not object to the line of questioning or the format of the victim's unsworn statement.

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[2] *United States v. Love*, ARMY 20210396, 2023 CCA LEXIS 116 (Army Ct. Crim. App. 28 Feb. 2023) (summ. disp.).

LAW AND DISCUSSION

Rule for Courts-Martial [R.C.M.] 1001(c)(5)(A) plainly states, "[t]he crime victim may make an unsworn statement and may not be cross-examined by trial counsel or defense counsel, or examined upon it by the court-martial." Rule for Courts-Martial 1001(c)(1) states "[t]he exercise of the right [to be reasonably heard] is independent of whether the crime victim...is called to testify by the government or defense under this rule." "Upon good cause shown, the military judge may permit the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement." R.C.M. 1001(c)(5)(B). Nowhere does the rule contemplate trial counsel conducting examination during the victim's exercise of the right to reasonably be heard.

This court addressed a nearly identical issue under a prior version of the rule in *United States v. Cornelison*, 78 M.J. 739 (Army Ct. Crim. App. 2019). Appellant contends, in light of *Cornelison,* it was error for the military judge to allow the government to conduct direct examination of the victim's unsworn statement under R.C.M. 1001(c). While we agree that it was error, the error was forfeited when appellant did not object. *See Cornelison*, 78 M.J. at 742 n.2.

When no objection is raised to the improper introduction of evidence at trial, we must first determine whether the issue is forfeited or waived. *United States v. Bench*, 82 M.J. 388 (C.A.A.F. 2022) (citing *United States v. Jones*, 78 M.J. 37, 44 (C.A.A.F. 2018)). Forfeited issues are subject to plain error review. *Johnson v. United States*, 520 U.S. 461, 466-67 (1997). A finding of plain error requires: 1) error, 2) the error be plain or obvious, and 3) the error affect substantial rights. *United States v. Olano*, 507 U.S. 725, 732 (1993). The court may correct such plain error when it materially prejudices an appellant's substantial right. *United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998).

Reviewing appellant's forfeited issue for plain error, we find error occurred and, in light of clear precedent from *Cornelison*, the error was plain. Appellant has failed, however, to show the error affected his substantial rights. The topics discussed during the brief examination, typical of any victim unsworn statement, coupled with the victim's compelling unassisted statement following the questions both leave us convinced that the error was harmless.

Appellant's reliance on *Edwards* in their motion to reconsider is misplaced.[3] In *Edwards*, the government's presentencing evidence was offered as part of the

[3] Appellant's motion to reconsider alleges this court may have "overlooked" *Edwards*. We note appellant raised and argued the applicability of *Edwards* in his Grostefon matters. These matters were duly considered by the court prior to issuing our initial opinion.

victim's unsworn statement. This violated R.C.M. 1001A[4] in two ways, neither of which are present here. First, the evidence in *Edwards* was not provided in an oral or written statement, it was in video format and included music and thirty images. *Edwards*, 82 M.J. at 246. Second, the video was produced by, and therefore contained statements from, the trial counsel. *Id.*

Here, although the direct examination of the victim by the trial counsel violated R.C.M. 1001(c)'s procedures, the matters that came before the factfinder for consideration were from the victim. While the matters were erroneously facilitated by the trial counsel, they remained matters from the victim. The fact the victim reiterated many of the same matters in his undirected statement further indicates the information conveyed through the direct examination would have been obvious to the factfinder regardless of the error.

Applying the four *Barker* factors addressed in *Edwards* to determine whether the error substantially influenced the appellant's sentence, we conclude it did not. *Id.* at 247 (citing *United States v. Barker*, 77 M.J. 377, 384 (C.A.A.F. 2018)). Despite the government's limited sentencing case, appellant was found guilty of physically assaulting and shooting another soldier who could not continue his service as a result. The defense offered little compelling evidence in extenuation or mitigation in comparison to the significant crime and inflicted injury. While both the materiality and quality of the matters in question were fairly compelling, an unsworn statement is not evidence. Additionally, the matters provided were typical of the type of victim impact statement that would have been, and in this case was, offered by the victim undirected. As such, even though assessing error in sentencing can be more difficult, *Id.*, we are confident appellant was not prejudiced by the brief question-and-answer session prior to the victim's unsworn statement.

CONCLUSION

On consideration of the entire record the findings of guilty and sentence are AFFIRMED.

Senior Judge FLEMING and Judge MORRIS concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court

[4] *Edwards* cites to a prior version of the Rules for Courts-Martial; the relevant language for appellant's case is found in R.C.M. 1001(c).