UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLEMING, MORRIS, and ARGUELLES[1]
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class DAVID S. PARLER
United States Army, Appellant

ARMY 20220135

Headquarters, Eight Army
Christopher E. Martin, Military Judge
Lieutenant Colonel Yolanda A. Schillinger, Acting Staff Judge Advocate

For Appellant: Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Rachel P. Gordienko, JA; Captain Kevin T. Todorow, JA (on brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline J. DeGaine, JA; Major Kalin P. Schlueter, JA; Major Austin L. Fenwick, JA (on brief).

12 October 2023

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent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 sexual assault and one specification of abusive sexual contact in violation of Article 120, UCMJ, 10 U.S.C. §920. The military judge sentenced appellant to a dishonorable discharge and confinement for nine months. The convening authority approved the findings and sentence and took no further action. This case is before the court for review pursuant to Article 66,

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

UCMJ. Appellant raises one assignment of error, ineffective assistance of counsel, which merits discussion and relief.[2]

BACKGROUND

Appellant was represented at trial by his civilian defense counsel, Mr. DC, and an Army Trial Defense Services Attorney, Captain (CPT) PB.

Appellant and the victim had been dating for a few months prior to the alleged offense when the victim went to appellant's barracks room around 1200 to resolve an argument. While appellant was making breakfast, the two began kissing. The victim then sat down on appellant's bed where they again consensually kissed. The parties dispute what happened next, which forms the basis for the charges at issue.

Per the victim, appellant then pulled down her shorts and engaged in oral sex over her objections. The victim testified when appellant stopped, she began to plan her escape from the room. First, the victim told appellant she was thirsty, and when he went to get her a drink, she hid in the closet hoping she could slip past him and get to the door before he came back. This alleged plan did not work because appellant saw her in the closet. The victim then told him she had to go to the bathroom. Her plan was to run to the front door from the bathroom while appellant was still in the bedroom. Unfortunately, appellant reached the door and bolted it before she could get out. Per the victim, appellant then led her back to the bedroom, where he forcefully took off her pants. Notwithstanding her alleged claims she was not joking, he was scaring her, and she did not want him to continue, appellant placed his penis against her labia. Appellant did not penetrate the victim but instead abruptly stopped the assault and let the victim leave. The victim also testified, "any other time I've turned down any type of sexual advances, he's listened."

In addition to the victim, the government called as a witness the Army Criminal Investigation Command agent ("agent") who interviewed appellant. Prior to the agent's testimony, the military judge memorialized a previous Rule for Courts-Martial (R.C.M.) 802 off-the-record session. During the session, after the government informed the military judge that they intended to introduce a video snippet of the interview showing appellant on the phone while the agent was out of the room, defense counsel indicated that they would be seeking to introduce the rest of the videotaped interview. Defense counsel also informed the judge that some

[2] We have also given full and fair consideration to 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.

portions of the interview might contain evidence of the victim's prior sexual conduct protected by Military Rule of Evidence [Mil. R. Evid.] 412.[3]

The military judge noted he had not viewed the video and was not going to litigate the issue in chambers. He acknowledged, however, the defense position that the victim may have potentially "opened the door" by testifying that in past encounters, appellant always stopped when she said no. The military judge decided the trial would proceed with the agent's testimony, and if "there is good cause to file a 412 motion, then I'd allow [defense] to do that." The military judge concluded by saying he agreed with the defense that all of the conduct occurring in appellant's barracks room the day of the alleged offense was *res gestae,* and admissible, as to the charged offenses.

On direct, the agent testified as to what he was told by appellant in the videotaped interview. Although appellant initially denied any intent to sexually assault the victim, he admitted at the end of the interview "in his heart of hearts" he "wasn't thinking, and the moment had just gone to him." Although the agent recorded the entire interview, as noted above, the government moved to admit only one small segment of the recording, when appellant took a phone call while the agent was out of the room.

During this call, appellant describes to a friend on speaker phone how when the agent asked a question about why he didn't stop when the victim told him "no" multiple times, he responded he wasn't thinking. Appellant also told his friend when the agent asked if he heard the victim saying stop the first time and ignored her, he said "yeah he wasn't thinking." When his friend then says, "I thought we talked about this," appellant replies "What do you mean, I gave the whole f --- ing story bro," at which point the friend says, "I told you you had to come up with something better."

Contrary to their representations at the R.C.M. 802 session, after the agent testified on direct, defense counsel did not seek to move the entire videotaped interview into evidence, nor did they ever request leave to file a motion under Mil. R. Evid. 412. Rather, on cross-examination defense counsel asked the agent about a discussion he had with appellant during the interview. The discussion was about a

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[3] Military Rule of Evidence 412 precludes the admission of any evidence pertaining to the alleged victim's other sexual behavior or sexual predisposition. The rule contains several exceptions, two of which are relevant here: (1) evidence of the victim's prior sexual behavior with the accused if offered by the accused to prove consent; and (2) evidence the exclusion of which would violate the accused's constitutional rights.

letter, which appellant brought with him to the interview, entitled "Why I didn't stop" (hereinafter referred to as the "letter"). The letter only contains details surrounding the charged offense and provides no detailed insight into the previous sexual activities between the parties.[4]

The agent testified appellant's letter described his initial encounter with the victim in the kitchen and bedroom as consensual kissing. The letter further described a point when the victim pulled her shorts down past her hips to reveal she was not wearing underwear. With respect to the oral copulation, appellant's letter stated "[s]he was resisting no, saying stop, but just looking at my arms between her thighs and my face as I was slowing moving down to her vagina." The letter then stated while the victim was moving around as he was giving her oral sex, they were "natural movements" and he "just followed along."

After the description of oral sex, appellant's letter detailed how the victim sat up on the bed and touched his genital area while saying "he don't want to play." After that, they started kissing again, and appellant wound up on top of her on the bed. When he tried to pull her pants down again, the victim told him he needed to calm down and to get her something to drink. When appellant returned with the drink, he "saw that she hid in the closet, she laughed and smiled, and I smiled and said, what are you doing," after which he guided her out of the closet by her shoulder, and "figured now that we were playing - - now we were playing around and [I] just followed along." The agent testified the letter further described how after appellant saw the victim run to the door from the bathroom, he "then got up and come[sic] to the door," where he asked if she was going to change before meeting up with some friends for lunch. He then led her back to the bed and kissed her. After appellant wound up on top of the victim while kissing her, she told him to stop while "my genitalia were touching hers," which is when it "then clicked that it was different from the other times, so I just looked at her and completely stopped, and then I got up." When the government lodged a Mil. R. Evid. 412 objection, defense counsel argued the "other times" referred to were from the same day, and not some prior sexual encounter, and the government withdrew its objection.

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[4] Although the government initially objected on hearsay grounds, trial counsel ultimately conceded defense's line of cross-examination was admissible under a "complete the record" theory. Military Rule of Evidence 304(h) provides that "[i]f only a part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce the remaining portions of the statement." *See United States v. Benton*, 54 M.J. 717, 723 (Army Ct. Crim. App. 2001) (Mil. R. Evid. 304(h) is "manifestly, a rule of admissibility" that "makes it clear that, once the government has introduced a part of a statement, the decision to offer the remainder is a tactical call by the defense.").

Finally, the agent admitted at this point in the interview that appellant told the agent "[s]he had been saying, no, playfully before and then now when it was over that last, 'no', was assertive." The agent testified the letter concluded by saying after appellant apologized and the victim left, "I began to think what happened? I was just going along with it." Appellant's letter concluded he couldn't really read the victim's expressions until the end, and "she continued to smile and laugh while the whole situation was going on."[5]

Neither side sought to introduce the videotaped interview or the letter into evidence. Rather, other than the very small clip at the end of the video where appellant is on the phone, the only evidence of the interview before the finder of fact was the agent's testimony on direct that appellant finally admitted he knew in his "heart of hearts" the victim did not consent, and his testimony on cross-examination about the contents of the letter.

In the interview, however, appellant also talked about his prior sexual experiences with the victim. Among other things, appellant described how in the past "it was kind of games," where the victim would say "no," he would stop and "she would just look at me," and then they would keep going again. Appellant also told the agent because of these past experiences, "I figured she was playing around," and she also did not mean "no" on this occasion. Appellant also described how teasing was part of the foreplay in their 4 or 5 prior sexual encounters. Finally, appellant said he held down the victim's wrist during oral sex because that was what they usually did, and in the past she had given him a "seductive no." None of this evidence (hereinafter referred to as appellant's "unadmitted statements") was before the military judge when he rendered his verdict.

Mr. DC never asked about these prior instances during cross examination of the alleged victim, or the special agent who conducted the interview. While the defense certainly should have known about these statements, Mr. DC made no attempt to elicit testimony about them on cross, even after discussing the potential of Mil. R. Evid. 412 evidence in an R.C.M. 802 session.[6] In fact, when certain questions raised objections by the Government under Mil R. Evid. 412, Mr. DC doubled down on this "strategy" by claiming he was only speaking to prior instances on the same day as the alleged assault.

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[5] Appellant did not testify at trial.

[6] Given the government's concession that the letter was admissible under Mil. R. Evid. 304(h), the same logic likely also would have applied to the unadmitted statements.

Appellant now raises an ineffective assistance of counsel claim based on his counsels' failure to file a motion under Mil. R. Evid. 412 seeking to admit evidence pertaining to the prior consensual sexual encounters between appellant and the victim. For the reasons set forth below, we agree with appellant that his counsel were ineffective and will set aside his convictions.

LAW AND DISCUSSION

We review claims of ineffective assistance of counsel de novo. *United States v. Captain*, 75 M.J. 99, 102 (C.A.A.F. 2016); *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (citing *United States v. Gutierrez*, 66 M.J. 329, 330-31 (C.A.A.F.) "To prevail on an ineffective assistance claim, the appellant bears the burden of proving that the performance of defense counsel was deficient and that the appellant was prejudiced by the error." *Captain*, 75 M.J. at 103 (citing *Strickland v. Washington*, 466 U.S. 668, 698 (1984)).

To establish his counsel's deficiency, appellant must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. In evaluating performance, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 689-90. This presumption can be rebutted by "showing specific errors [made by defense counsel] that were unreasonable under prevailing professional norms." *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001). As it pertains to the first *Strickland* deficiency prong, "[w]hen a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion..., an appellant must show that there is a reasonable probability that such a motion would have been meritorious." *United States v. Harpole*, 77 M.J. 231, 236 (C.A.A.F. 2018) (citations omitted).

Prejudice is established by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. Appellant must show "'a reasonable probability that, but for counsel's [deficient performance] the result of the proceedings would have been different.'" *Captain*, 75 M.J. at 103 (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694; *see also Harrington v. Richter*, 562 U.S. 86, 112 (2011) (holding that the likelihood of a different result must be substantial, not just conceivable) (citing *Strickland*, 466 U.S. at 693, 697). In assessing an ineffective assistance claim, we can analyze *Strickland's* performance and prejudice prongs independently, and if appellant fails either prong, his claim must fail. *Strickland*, 466 U.S. at 697.

We ordered Mr. DC and CPT PB to submit affidavits answering the following questions: (1) "Were you aware of appellant's statements during the Criminal Investigation Command interview conducted on 11 May 2021 pertaining to the prior consensual activity between appellant and the victim;" and (2) "Why did you not file a motion under Mil. R. Evid. 412 seeking to introduce evidence pertaining to prior consensual activity between appellant and the victim, either before trial or in the middle of trial?"

Defense could have introduced evidence of the alleged prior consensual activity in two forms: (1) appellant's direct testimony; or (2) the admission of appellant's unadmitted statements from the videotape of his CID interview. Because Mr. DC's affidavit focuses almost exclusively on the letter and makes no direct mention or reference to appellant's specific unadmitted statements in the video described above, it is not particularly responsive or helpful. To the extent Mr. DC makes any reference to the unadmitted statements, he states appellant would only be able to provide "generalized" testimony if called to testify at trial. Along the same lines, Mr. DC focuses a significant portion of his affidavit on the fact that appellant allegedly would not have made a good witness on the stand, and their witness preparation practice sessions went poorly. Mr. DC, however, ignores the fact that the successful admission of the unadmitted statements from the CID interview would have negated the requirement or risk of calling his client at trial.[7] Having determined appellant would not likely serve as a persuasive witness, we see an increased need, apparently unidentified by his counsel, to at least seek the admission of his videotaped statements.

Mr. DC also states or implies several times in his affidavit that because there were no other prior instances where the victim tried to flee, any Mil. R. Evid. 412 motion would have been futile. Towards the end of his affidavit, Mr. DC summarizes the purpose of a "M.R.E. 412 motion... would have been to elicit (1) there was a prior sexual relationship and (2) every time the victim said no, [a]ppellant stopped and those items of evidence were allegedly elicited by the government."

CPT PB's affidavit, which contained only three substantive paragraphs, is even less responsive and helpful. Initially, CPT PB states because Mr. DC's "[d]eclaration is accurate," he is "join[ing] it and "adopt[ing] it as my own." In short, this "ditto" affidavit falls well below the standard of what we expect when we

[7] Neither counsel state in their affidavits that appellant ever told them he was lying about the prior encounters, or even that they believed appellant was lying about them, such that seeking to introduce his unadmitted statements might constitute suborning perjury.

direct counsel to submit their own affidavit pertaining to potential ineffective assistance of counsel allegations.

CPT PB also describes how appellant was not able to provide specific details of any prior consensual sexual encounters and reiterates Mr. DC's concerns that appellant would be "exploited" on cross-examination if he testified. CPT PB reasons that highlighting "these prior experiences of when the alleged victim was playful or serious would cast doubt on [appellant's] mistake of fact during the alleged assault." Finally, CPT PB points out the *victim* never conceded any of their prior sexual encounters were "analogous of even remotely similar to the facts in this case."

Military Rule of Evidence 412(b)(2) provides, in pertinent part, "specific instances of a victim's sexual behavior with respect to the person accused of sexual misconduct" is admissible if offered by the accused to prove consent. Military Rule of Evidence 412(b)(3) makes admissible evidence of other sexual behavior if its exclusion would violate the accused's constitutional rights, such that it is relevant, material, and favorable to the defense. *United States v. St. Jean*, 83 M.J. 109, 113 (C.A.A.F. 2023) (citing *United States v. Erikson*, 76 M.J. 231, 235 (C.A.A.F. 2017)).

Applied here, appellant's unadmitted statements that his past sexual encounters with the victim were "kind of games" where she would tell him "no" and then question why he stopped, are clearly relevant, material, and favorable to the mistake of fact defense asserted at trial. This is especially true given appellant's letter describing how, after he found the victim smiling in the closet, he "figured now that we were playing - - now we were playing around and [I] just followed along." *See United States v. Roberts*, 69 M.J. 23, 27 (C.A.A.F. 2010) (holding that there is a "low threshold for relevant evidence" under Mil. R. Evid. 412); *United States v. Yepez*, ARMY 20210236, 2023 CCA LEXIS 12 at *6 (Army Ct. Crim. App. 11 Jan. 2023) (mem. op.) (finding military judge erred in relying on Mil. R. Evid. 412 to exclude evidence making it more likely for a fact finder to conclude appellant honestly and reasonably believed the victim consented).

Having determined that appellant's unadmitted statements were likely admissible under Mil. R. Evid. 412(b)(2) and (b)(3) and constitute "remaining portion" of appellant's admissions to the agent that were introduced against appellant, we turn to counsels' purported reasoning for not seeking their admission either before or during trial. See Mil. R. Evid. 304(h). First, to the extent counsel claimed appellant would not have made a good witness at trial, this purported justification ignores the fact that, because appellant made the unadmitted statements in his already recorded *interview*, their admissibility was in no way dependent on his testifying at trial, or even in a Mil. R. Evid. 412 hearing.

We also disagree with defense counsels' assertion that filing a motion under Mil. R. Evid. 412 would have been futile because appellant did not specifically describe a prior instance in which the victim attempted to flee. Although we held in *United States v. Andreozzi*, 60 M.J. 727, 739 (Army Ct. Crim. App. 2004) that relevance of prior sexual activity between appellant and the victim may be *increased* by the degree of its similarity to the charged conduct, neither this court nor the Court of Appeals for the Armed Forces has ever held that identical similarity is a prerequisite to the admission of evidence under Mil. R. Evid. 412. *See St. Jean*, 83 M.J. at 114 (rejecting appellant's characterization of *Andreozzi* "as *requiring* M.R.E. 412 evidence to be similar"); *United States v. Thomas*, No. ACM 39315, 2019 CCA LEXIS 78 at *20-21 (A.F. Ct. Crim. App. 28 Feb. 2019) ("Thus similarity and distinctiveness are not indispensable qualities of relevant Mil. R. Evid. 412(b)(1) evidence but simply enhance the relevance."). While appellant admittedly did not describe prior consensual sex as identical to the circumstances of this case, his unadmitted statements about how it was "kind of games" in the past, combined with his statements in the letter about how he found the victim smiling in the closet and thought, "now we were playing around," were highly probative to his mistake of fact defense.

Along the same lines, CPT PB's assertion "the alleged victim did not concede any specific circumstances prior to the alleged sexual assault that were analogous or even remotely similar to the facts in this case" evinces a fundamental misunderstanding of Mil. R. Evid. 412. Simply put, any requirement linking admissibility to the victim's concession or agreement with the factual basis for the motion would significantly undercut the reasoning and rationale behind Mil. R. Evid. 412 and its exceptions.

Likewise, CPT PB's claim that he "was worried that highlighting these prior experiences and [appellant's] knowledge of when the alleged victim was playful or serious would cast doubt on [appellant's] mistake of fact during the alleged assault," appears to be either a misstatement or a misunderstanding of the facts. Contrary to what counsel now seems to be asserting, in his unadmitted statements appellant *never* claimed that in prior sexual encounters he distinctively knew or could definitively tell when the victim was playful or being serious. Rather, appellant stated in their prior experiences the victim was playful, teasing, and questioned why he stopped when she said no. Indeed, the clear import of these statements seems to be that the incident in this case was the *first* time the victim was not playing when she said no, and when appellant realized "this is a totally different situation than what we usually do, I stopped." As such, it goes without saying appellant's unadmitted statements would have been both relevant and highly beneficial for appellant regarding his mistake of fact defense.

Finally, because it ignores virtually all of the unadmitted statements, we disagree with Mr. DC's assertion that in this case the only purpose of a "M.R.E. 412

motion would have been to elicit (1) there was a prior sexual relationship and (2) every time the victim said no, appellant stopped. To the contrary, not only were both of those items of evidence elicited by the government, but in the bigger picture this "summation" causes us to question whether Mr. DC has ever actually watched the entire video of the interview, or was even aware of the unadmitted statements when he submitted his affidavit.

In sum, we find that because the unadmitted statements were highly relevant to his mistake of fact defense, appellant has met his burden to show that there is a reasonable probability that a motion seeking to admit this evidence under Mil. R. Evid. 412 would have been meritorious. Moreover, we find that defense counsel failed to offer any viable justification for not seeking to admit this evidence at trial. As such, appellant's defense counsel were "not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

In order to prevail on his ineffective assistance claim, however, appellant must also demonstrate "'a reasonable probability that, but for counsel's [deficient performance] the result of the proceedings would have been different.'" *Captain*, 75 M.J. at 103 (quoting *Strickland*, 466 U.S. at 694). In this he said/she said sexual assault case with no other percipient witnesses, as it pertained to the events that unfolded on the day of the alleged assaults, the finder of fact heard from both the victim and appellant, albeit through the cross-examination of the agent about appellant's letter.

With respect to prior sexual encounters, however, the military judge heard only one side of the story, that is the victim's testimony that "any other time I've turned down any type of sexual advances, he's listened." As a result of defense counsel's errors, the finder of fact was not aware of appellant's alleged description of how prior sexual experiences were "kind of games" where the victim would say "no" and then question why he stopped. The finder of fact likewise did not hear appellant's explanation that, because of these past experiences, he thought the encounter in question was also consensual.

As noted above, appellant's unadmitted statements were clearly relevant, material, and favorable to the mistake of fact defense, especially given appellant's statements in the letter about how he thought they were "playing" after he found her in the closet. While we cannot say with absolute certainty the admission of this evidence would have resulted in not guilty verdicts, there is a reasonable and substantial probability the result of the proceedings would have been different had the finder of fact heard this critical evidence. As such, because appellant has also met his burden to demonstrate prejudice, we must set aside his convictions.

CONCLUSION

The findings of guilty and the sentence are SET ASIDE. A rehearing is authorized. All rights, privileges, and property, of which appellant has been deprived by virtue of the findings and sentence set aside by this decision are ordered restored. *See* UCMJ arts. 58b(c) and 75(a).

Senior Judge FLEMING and Judge MORRIS concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court