UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WALKER, EWING[1], and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Staff Sergeant JONATHAN MARIN
United States Army, Appellant

ARMY 20210375

Headquarters, Fort Carson
John M. Bergen, Military Judge
Steven C. Henricks, Military Judge *(DuBay)*
Colonel Pia Rogers, Staff Judge Advocate

For Appellant: Captain Tumentugs D. Armstrong, JA; William E. Cassara, Esquire (on brief and 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).

30 October 2023

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

PARKER, Judge:

Appellant raises four assignments of error, two of which warrant discussion but no relief. We find the government violated appellant's rights under Rule for Courts-Martial (R.C.M.) 914 and R.C.M. 701(a)(6), but that appellant has failed to demonstrate he suffered prejudice as a result of the violations.

BACKGROUND

Appellant and the victim, Private First Class (PFC) [redacted] met while deployed together to Erbil Air Base, Iraq in 2019. Appellant was a senior mechanic with a

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

Ranger Tab and a Noncommissioned Officer (NCO) to the victim. The victim needed mentorship to train for an upcoming spur ride. Appellant assisted her with her training and provided her professional development advice on her career progression. On or about 11 July 2019, the victim and appellant were at a café on the base socializing with other soldiers. Prior to heading to the café, appellant had stored the victim's weapon in the male housing tent on her behalf. When the victim got up to leave the café, appellant accompanied her so he could retrieve her weapon.

While the two were walking to the male tent, appellant grabbed the victim's wrist and tried to kiss her, and she tried to pull away from him. The victim testified that appellant would not let go of her wrist and began pulling her toward an empty bus that was parked nearby. She testified that she was scared, that appellant's actions were abrupt, and that he opened the driver side door of the bus and cornered her in the door. The victim testified she didn't know if she should scream or run, but that she had nowhere to go while he cornered her in the bus door. She testified she climbed up into the bus, faced the front of the bus and appellant walked toward her down the aisle of the bus as she walked backwards, not knowing what to do. Appellant then pushed her down onto the seats, and when the victim tried to sit up, he pushed her down again. She testified that when he pushed her back down, she gave up and shut down, that her shorts came off, and that appellant penetrated her vagina with his penis. Appellant ejaculated on the victim and she used her shorts to clean herself. She then got off the bus, telling appellant she wanted her weapon, and began crying. Appellant retrieved her weapon, and the victim immediately left and went to talk to her Sexual Harassment/Assault Response and Prevention (SHARP) representative. Distraught, the victim also called her mother and told her, "mommy, a sergeant just pulled me on a bus and raped me."

The victim also reported what happened to her platoon leader, First Lieutenant (1LT) [redacted]. As part of the investigation, 1LT [redacted] was interviewed by the trial counsel for appellant's court-martial, Captain (CPT) [redacted] and the unit paralegal, Sergeant (SGT) [redacted]. The interview was recorded on the unit's handheld recording device. The recorded interview of 1LT [redacted] was not disclosed to, or turned over to, defense counsel.

Appellant was tried before an officer panel at a general court-martial located at Fort Carson, Colorado. Contrary to his pleas, appellant was convicted of one specification of rape and one specification of sexual assault (charged in the alternative),[2] in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. §§ 920 [UCMJ]. Appellant was sentenced by a military judge to a dishonorable discharge and confinement for twelve years.

[2] The finding for Specification 2 of the Charge, as incorporated into the Judgment of the Court, is amended to reflect a response of "Dismissed."

On appeal, appellant alleged the government violated his rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and R.C.M. 701(a)(2)(a), in that they did not disclose 1LT [redacted] recorded interview to defense counsel. Appellant contended that the interview was material and reasonably tended to adversely affect the credibility of the victim, making such disclosure required. Appellant also alleged the government violated his rights under *Jencks v. United States*, 353 U.S. 657 (1957), and R.C.M. 914 and 701(a)(6), in that they did not disclose 1LT LM's recorded interview with the trial counsel, denying appellant his right to proper confrontation of the victim. On 22 May 2022, this court ordered a hearing pursuant *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 311 (1967), to establish facts relevant to whether these violations occurred. On 15 September 2022, the military judge issued his *DuBay* hearing findings of fact and conclusions of law. The military judge found the government did not violate its obligations under *Brady v. Maryland* or R.C.M. 701(a)(2)(A), but did find the government violated R.C.M. 701(a)(6) and R.C.M. 914.

LAW AND DISCUSSION

A. Dubay Hearing

We review a military judge's findings of fact at *DuBay* hearings under a clearly erroneous standard and the conclusions of law de novo. *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997).

In the *DuBay* order, we instructed the military judge to determine, *inter alia*, "[w]hat, if any, negative information did 1LT [redacted] provide during the interview about the victim." After hearing testimony and reviewing the documentary evidence, the military judge identified four general areas of possible negative information that 1LT [redacted] may have discussed during the interview, to include statements related to PFC [redacted]'s poor duty performance, sexual promiscuity, poor character, and a specific reference to PFC [redacted] as "shady."

After hearing witness testimony concerning the substance of 1LT [redacted]'s interview, as a preliminary matter, the military judge found that "1LT [redacted] possesse[d] the best memory of what occurred during her interview about the victim and accept[ed] her testimony as factual." In evaluating the testimony of the three witnesses present for the interview, the military judge reasoned that CPT [redacted] and SGT [redacted] only recalled the interview in general terms, whereas 1LT [redacted] remembered the specifics of the interview and testified persuasively. Moreover, the military judge found 1LT [redacted]'s testimony consistent, and not contradictory in any material or significant way, with the notes SGT [redacted] prepared contemporaneously with the recorded interview.

Relying upon 1LT [redacted]'s testimony, the military judge found that 1LT [redacted] spoke about PFC [redacted]'s poor duty performance during her recorded interview but did so to highlight that she believed the sexual assault was what caused the decline in PFC [redacted]'s duty performance. The military judge also found, consistent with 1LT [redacted]'s testimony, that 1LT [redacted] did not make any statements during the recorded interview about PFC [redacted]'s sexual promiscuity or poor character and did not refer to PFC [redacted] as "shady."

We find that military judge's findings of fact are reasonable and supported by the record. Because the military judge's findings of fact were not clearly erroneous, we rely on these facts in addressing appellant's assignments of error.

B. Brady v. Maryland

The Due Process Clause of the Fifth Amendment requires the prosecution to disclose evidence that is material and favorable to the defense. *Brady*, 373 U.S. at87. This requirement exists whether there is a general request or no request at all. *United States v. Agurs*, 427 U.S. 97, 107, (1976). "Evidence is favorable if it is exculpatory, substantive evidence or evidence capable of impeaching the government's case." *United States v. Behenna*, 71 M.J. 228, 238 (C.A.A.F. 2012) (internal citations omitted). Evidence is material when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *Id.* (internal quotation marks and citations omitted). Under due process discovery and disclosure requirements, the Supreme Court has "rejected any . . . distinction between impeachment evidence and exculpatory evidence." *United States v. Eshalomi*, 23 M.J. 12, 23 (C.M.A. 1986) (*quoting United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)). Once a *Brady* violation is established, courts need not test for harmlessness. *Behenna*, 71 M.J.at 238 (*citing Kyles v. Whitley*, 514 U.S. 419, 435-36, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)).

As highlighted by the military judge's findings of fact, the government recorded, and failed to disclose, their pretrial interview with 1LT [redacted], the victim's supervisor. The undisclosed interview was alleged to include evidence that was arguably favorable to the defense, specifically, the victim's poor duty performance, sexual promiscuity, poor character opinion, and that the victim was 'shady.' At trial, the defense argued that appellant and PFC [redacted] had a consensual sexual encounter and PFC [redacted] fabricated the rape allegation because she sought to redeploy from Iraq early. During the interview, 1LT [redacted] discussed PFC [redacted]'s poor duty performance while serving in Iraq, but only to highlight that she believed the sexual assault caused PFC [redacted]'s poor duty performance. Arguably, evidence of PFC [redacted]'s poor duty performance could be favorable to the defense as circumstantial evidence that PFC [redacted] exhibited a desire to redeploy early from Iraq.

However, even assuming this evidence was favorable to defense, the recording of 1LT [redacted]'s interview was not material. Stated differently, had the evidence of the interview been disclosed, the defense has failed to show a reasonable probability that the result of the proceeding would have been different. First, although 1LT [redacted] discussed PFC [redacted]'s poor duty performance, it was only within the context of 1LT [redacted]'s opinion that the rape was the catalyst for any deterioration of duty performance. Notably, prior to the rape, 1LT [redacted] had a high opinion of the victim's duty performance and at no time did she hold a poor opinion of the victim's character.

Second, the government provided two statements from 1LT [redacted] — a sworn statement executed several days after the rape and a character statement supporting the victim that was drafted in April 2020. In both documents, 1LT [redacted] praised the victim's duty performance prior to the rape. Specifically, in the character statement, signed approximately nine months after the rape, 1LT [redacted] provided illustrative examples of the victim's deteriorating duty performance following the rape and opined that the changes in her demeanor and performance were "a direct result of trauma." The military judge properly found both of these prior statements were consistent with the content of her recorded interview. As to whether 1LT [redacted]'s interview included evidence of sexual promiscuity, 1LT [redacted] testified she provided no such information. She testified that although she was asked by CPT [redacted] about this topic, she declined to answer stating a person can be sexually assaulted despite other consensual sexual activity. Lastly, 1LT [redacted] testified that she never held a poor opinion of the victim's character and never described her as 'shady.' She summarized that to the extent anything negative was construed from her interview, it was her intent to highlight the negative effect the rape had on the victim.

Tellingly, after the government provided evidence of the victim's poor duty performance in discovery, the defense elected not to cross-examine 1LT [redacted] on this topic. That strategic decision was understandable as the evidence of deterioration of duty performance directly following the rape was arguably more beneficial to the government than the defense as it would have provided potential evidence of the impact of the rape on the victim.

The recorded interview, which was substantively equivalent to information in 1LT [redacted]'s two prior statements the government had disclosed to the defense, was not material because there was not a reasonable likelihood of a different result concerning the findings or sentence had the government disclosed the interview.

C. R.C.M. Discovery Violations

Article 46, UCMJ, as implemented by R.C.M. 701-703, affords a military accused the right to obtain favorable evidence and provides "greater statutory discovery rights to an accused than does his constitutional right to due process."

United States v. Coleman, 72 M.J. 184, 187 (C.A.A.F. 2013). Disclosures are governed by R.C.M. 701, "which sets forth specific requirements with respect to 'evidence favorable to the defense' . . ." *United States v. Williams*, 50 M.J. 436, 440 (C.A.A.F. 1999). The Court of Appeals for the Armed Forces (CAAF) has recognized "two categories of disclosure error." *Coleman*, 72 M.J. at 187. This court applies the harmless error standard in "cases in which the defense either did not make a discovery request or made only a general request for discovery." *Id.*; *United States v. Hart*, 29 M.J. 407, 410 (C.M.A. 1990); *see Behenna*, 71 M.J. 228 at 238. An error is not harmless if it materially prejudiced an appellant's substantial rights. *United States v. Stone*, 40 M.J. 420, 422 (C.M.A 1994); UCMJ art. 59(a). The heightened, constitutional harmless beyond a reasonable doubt standard applies in "cases in which the defense made a specific request for the undisclosed information." *Coleman*, 72 M.J. at 187; *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004); *Hart*, 29 M.J. at 410. Such a failure to disclose a specific request "'is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial.'" *United States v. Claxton*, 76 M.J. 356, 359 (C.A.A.F. 2017) (citing *Roberts*, 59 M.J. at 327 (C.A.A.F. 2004)(quoting *Coleman*, 72 M.J. at 187)).

D. R.C.M. 701(a)(2)(A)

R.C.M. 701(a)(2)(A) provides that, upon defense request, "[t]he Government shall permit the defense to inspect any books, papers, documents, data, photographs, tangible objects, buildings, or places, or copies of portions of these items, if the item is within the possession, custody, or control of military authorities, and . . . *relevant* to defense preparation. . . ." (emphasis added). The Miliary Justice Act of 2016 amended R.C.M. 701(a)(2)(A) to broaden the scope of discovery, requiring disclosure of items that are "relevant" rather than "material" to defense preparation of a case. *See* MCM 2019, A15-9.

Prior to this expansion of R.C.M. 701(a)(2)(A), this court recognized the prior version of the rule "incorporate[d] a constitutional 'materiality' requirement similar to *Brady*." *United States v. Shorts, 76 M.J. 523, 531* (Army Ct. Crim. App. 2017). Because the new version of the rule only requires the disclosure of "relevant" evidence, a *Brady*-type analysis may no longer be applicable. For reasons set forth herein, we need not address this issue in our opinion.

Military Rule of Evidence 401 defines what is relevant in an expansive fashion, stating, "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Conversely, evidence is only irrelevant when it has no tendency to prove any fact of consequence.

The updated R.C.M. 701(a)(2)(A) still requires a request from the defense. In this case, the R.C.M. 701(a)(2)(A) defense request was a general request that included one specific request for an updated Criminal Investigation Division case activity summary and sought evidence "*material* to defense preparation of the defense." (Emphasis added). In other words, the discovery request mirrored the prior version of the rule and sought a narrower set of discovery instead of the more expansive set of discovery that would be *relevant* to defense preparation of the defense as permitted under the rule.

Given the unique facts of this case, the military judge properly found the government did not violate R.C.M. 701(a)(2)(A). Because the rule requires a request from the defense, and the request in this case sought evidence that was "material" rather than "relevant" to the defense case, the military judge's application of *Shorts* was appropriate. As noted above, the recorded interview was not material. Consequently, it was not within the scope of the evidence the defense requested and the failure of the government to disclose the recorded interview in response to this request was not in violation of R.C.M. 701(a)(2)(A).

Because we find no discovery violation, we need not decide whether a violation of a general request under the new version of R.C.M. 701(a)(2)(A) would be tested under a *Brady*-type analysis as described in *Shorts* or would be subject to a harmless error analysis. That said, even if the defense request would have sought "relevant" evidence resulting in a violation of the rule, the outcome would have been the same under either framework. There was neither a reasonable likelihood of a different result concerning the findings or sentence had the government disclosed the interview nor did the government's failure to disclose the evidence materially prejudice appellant's substantial rights.

E. Conceded Discovery Violations

The military judge found, and appellee does not challenge, that the government's failure to disclose 1LT [redacted]s interview violated R.C.M. 701(a)(6), and R.C.M. 914. We agree. The question is whether these violations prejudiced appellant.

1. R.C.M. 701(a)(6)

Neither appellant nor appellee directly addressed the appropriate analysis for the conceded R.C.M. 701(a)(6) violation or whether appellant is entitled relief based upon this discovery violation. We find appellant was not prejudiced by this violation.

As opposed to R.C.M. 701(a)(2)(A), which requires the defense to affirmatively make a request for evidence, R.C.M 701(a)(6) mandates that the

government provide to the defense all information "known to trial counsel" which "reasonably tends to negate or reduce the degree of guilt or reduce punishment" however it "does not create an obligation to get information of which the trial counsel is unaware." *Shorts*, 76 M.J. at 530-31. Moreover, there is no explicit requirement for "materiality." *Id.* at 531.

Notwithstanding the lack of "materiality" requirement in the rule, in *Williams*, the CAAF held that R.C.M. 701(a)(6) implements the Supreme Court's decision in *Brady*. *Williams*, 50 M.J. at 440. Consequently, the CAAF reasoned that if a R.C.M. 701(a)(6) violation occurs, "the test for prejudicial error is whether there is a reasonable probability of a different result had the suppressed evidence been disclosed to the defense." *Id.* (internal citation and quotations omitted).

Because the cited test for prejudicial error is akin to a *Brady* materiality analysis, based upon the rationale set forth in our preceding materiality analysis, appellant was not prejudiced by the government's R.C.M. 701(a)(6) violation.

2. Jencks Act and R.C.M. 914

The Jencks Act requires, upon motion by the defendant, a trial court to order the government to disclose prior "statement[s]" of its witnesses that are "relate[d] to the subject matter" of their testimony after each witness testifies on direct examination. 18 U.S.C. § 3500(b). R.C.M. 914 "tracks the language of the Jencks Act, but it also includes disclosure of prior statements by defense witnesses other than the accused." *United States v. Muwwakkil*, 74 M.J. 187, 190 (C.A.A.F. 2015). "Given the similarities in language and purpose between R.C.M. 914 and the Jencks Act," the CAAF concluded "that our Jencks Act case law and that of the Supreme Court informs our analysis of R.C.M. 914 issues." *Id.* at 191.

At the trial level, R.C.M. 914(e) provides the military judge with two remedies for the government's failure to deliver the qualifying statement: (1) "order that the testimony of the witness be disregarded by the trier of fact" or (2) "declare a mistrial if required in the interest of justice." When a R.C.M 914(e) violation is found on appeal, an appellate court's prejudice analysis "depends on whether the defect amounts to a constitutional error or a nonconstitutional error." *United States v. Clark*, 79 M.J. 449, 454 (C.A.A.F. 2020) (internal citations omitted).

In *Clark*, the CAAF recognized that a R.C.M. 914 violation generally will not rise to the level of a constitutional error. *Id.* In this case, because 1LT [redacted] testified and was subject to cross-examination, appellant was not denied his constitutional right to confront the witness against him. *See United States v. Sigrah*, 82 M.J. 463, 467 (C.A.A.F. 2022) (holding the constitutional right to confront a witness is not implicated when a witness testifies and is subject to cross examination). For nonconstitutional errors, "the test for prejudice is whether the error had a substantial

influence on the findings." *United States v. Kohlbek*, 78 M.J. 326, 335 (C.A.A.F. 2019) (citation omitted) (internal quotation marks omitted). "In conducting the prejudice analysis, this Court weighs: (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Id.* (internal quotation marks and citations omitted).

Because the defense did not contest that appellant engaged in sexual intercourse with SPC [redacted] and the government presented DNA evidence establishing appellant's semen was present on SPC [redacted]'s shorts, appellant's conviction hinged on whether the panel found the encounter to be consensual. Similar to *Kohlbek,* the government's case was strong. *Kohlbek*, 78 M.J. at 334. Specialist [redacted] provided detailed testimony describing how appellant restrained her by the wrist, forced her into the bus, and engaged in sexual intercourse while she repeatedly told him "no" and that she "didn't want to." Within minutes of the attack, SPC [redacted] sought out SGT [redacted] to obtain information on reporting the assault. Sergeant [redacted] testified SPC [redacted] was in distress, crying, and "in a panic," and told SGT [redacted] that she told someone to stop, but they wouldn't or didn't. Approximately 30 minutes following the assault, SPC [redacted] called her mom "hysterically crying" and was initially unable to communicate. After several minutes, her mother calmed her down and SPC [redacted] explained, "Mommy, a sergeant just pulled me on a bus and raped me." Specialist [redacted]'s actions, demeanor, and nearly contemporaneous reports of the incident provided evidence of the rape.

Moreover, even if the military judge excluded 1LT [redacted]'s testimony, an appropriate remedy under R.C.M. 914, the direct evidence the government presented to establish the elements of the rape would be unchanged and remain strong. First, 1LT [redacted]'s testimony did not touch on the facts or circumstances of the rape. Rather, 1LT [redacted]'s direct testimony was limited to rebuttal evidence focused on PFC [redacted]'s desire to remain in Iraq following the assault. This testimony, along with PFC [redacted]'s own testimony that she wanted to complete the deployment, was designed to undercut the defense theory that PFC [redacted] fabricated the rape so that she could redeploy early. Without 1LT [redacted]'s testimony, the panel would have still received evidence directly from PFC [redacted] undermining this defense theory. More importantly, if 1LT [redacted]'s testimony was stricken, the remaining evidence would still establish the elements of the offense.

Appellant's defense was not strong and rested on the premise that PFC [redacted] could not be believed. The defense presented witnesses that testified about PFC [redacted]'s reputation for untruthfulness and highlighted PFC [redacted]'s contradictory statements. As the government noted during closing argument, several of the reputation witnesses did not have extensive interactions with PFC [redacted] and the alleged contradictory statements were explainable.

First Lieutenant [redacted]'s testimony rebutting the alleged motive to fabricate was not material as it did not negate or otherwise disprove the remaining evidence supporting appellant's conviction. Similarly, the quality of the evidence was low as the testimony did not speak to any element of the offense.

In conducting the *Kohlbek* prejudice analysis, this court may also consider whether the defense had access to the same information as contained in the undisclosed evidence to further support a finding of no prejudice. *Sigrah*, 82 M.J. at 467–68 (*citing Rosenberg v. United States*, 360 U.S. 367, 371 (1959); *Clark*, 79 M.J. at 455).

As the military judge reasonably found, the only undisclosed negative evidence 1LT [redacted] provided during the recorded interview was that PFC [redacted]'s duty performance deteriorated following the rape. As previously noted, the defense had access to substantially the same evidence because the government provided the defense a character statement that 1LT [redacted] drafted for PFC [redacted] that was consistent with the undisclosed evidence. Although armed with this information, the defense elected not to cross-examine 1LT [redacted] on PFC's [redacted]'s poor duty performance following the assault and it is unlikely the defense would have taken a different approach had the government produced the undisclosed recorded interview.

Appellant was not prejudiced as a result of the R.C.M. 914 violation as the government's failure to disclose 1LT [redacted]'s recorded interview did not have a substantial influence on the findings.

CONCLUSION

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

Senior Judge WALKER and Judge EWING concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court