

CORRECTED COPY

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
MULLIGAN, FEBBO, and WOLFE
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant BRIAN G. SHORT
United States Army, Appellant

ARMY 20150320

Headquarters, Fort Stewart
John T. Rothwell, Military Judge
Lieutenant Colonel Peter R. Hayden, Staff Judge Advocate

For Appellant: Lieutenant Colonel Charles D. Lozano, JA; Lieutenant Colonel Jonathan F. Potter, JA; Captain Heather L. Tregle, JA (on brief).

For Appellee: Lieutenant Colonel A.G. Courie III, JA; Major Melissa Dasgupta Smith, JA; Captain Vincent S. Scalfani, JA (on brief).

17 November 2016

SUMMARY DISPOSITION

Per Curiam:

While acquitted of more serious offenses, a panel with enlisted representation, sitting as a general court-martial, convicted appellant of three specifications of assault consummated by battery and one specification of simple assault in violation of Article 128, UCMJ. 10 U.S.C. § 928 (2006 & Supp. V 2012). The battery specifications alleged appellant pulled his wife's hair, dragged her by the hair, restrained her hands, and hit her on her legs with his open hand. The conviction of simple assault stemmed from appellant throwing a shampoo bottle at his wife's head.

The panel sentenced appellant, consistent with his explicit request, to be discharged from the Army with a bad-conduct discharge. The panel adjudged no other punishment (also consistent with appellant's sentencing argument). The convening authority approved the adjudged sentence.

On appeal, appellant's sole assigned error is that the trial counsel committed misconduct. Appellant's claims fall into two camps: First, appellant claims the trial

counsel committed misconduct when he repeatedly violated the military judge’s order restricting evidence under Military Rule of Evidence [hereinafter Mil. R. Evid.] 404(b). Appellant’s multiple objections at trial preserved these issues for appeal. Second, appellant complains the trial counsel’s closing argument asked the panel to put themselves in the shoes of the victim. Appellant made no objection to the trial counsel’s argument.¹

As an initial matter, we disagree with appellant’s phrasing of the issue, although we do not believe it materially changes the substantive analysis. The allegations of prosecutorial misconduct in this case all happened on the record. Thus, this case is not one where we are being asked to consider evidence from outside the record. *See, e.g., United States v. Marcus*, ARMY 20130795, 2016 CCA LEXIS 96 (Army Ct. Crim. App. 19 Feb. 2016) (where we treated appellant’s claim of prosecutorial misconduct as a petition for a new trial based on fraud on the court-martial). Here, at every instance, the military judge had an opportunity to address the alleged improprieties. For those instances where appellant objected, we review the military judge’s ruling to determine whether it was correct in law and whether his remedy was legally sufficient to address the issue. For those instances where appellant did not preserve the alleged error, we assess whether the military judge committed plain error. Put more simply, we see the issue not so much as whether the trial counsel committed prosecutorial misconduct, which focuses on the trial counsel’s conduct and motivations, but rather whether the military judge’s rulings (or omissions) on the conduct of the trial counsel constituted error (or plain error).²

¹ We do not discuss this part of the assigned error in depth. The trial counsel’s argument asked the members to “[i]magine how uncomfortable and how terrifying it was [for her] to sit on that [witness] stand.” That is, the trial counsel asked the members to place themselves in the shoes of the victim—not during the course of the offense—but rather as she testified. We do not find this to have amounted to plain error. Such argument, while possibly objectionable, does not invite the same harms as asking panel members to put themselves in the shoes of the victim while suffering the crime itself.

² Here, by way of example, the defense counsel thrice moved for a mistrial. The military judge denied each motion. We view the following two issues as being essentially the same: Did the military judge, in the absence of providing alternative relief, err in denying the motion for a mistrial? Did the trial counsel commit misconduct requiring us to set aside the findings? Put simply, if the military judge did not abuse his discretion in denying the motion, then likewise, appellant is not entitled to relief on appeal. Were it otherwise, appellant would have a broader opportunity to seek relief on appeal than at trial. For issues of law that were squarely before the military judge and who had the best viewpoint of the issues and their effect, this would be the antithesis of appellate practice. “[A] trial on the

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As a court of criminal appeals we grade the homework of the trial court,³ not the trial counsel.

The charges in this case all alleged instances of domestic violence. Prior to trial, the government provided notice of its intent to offer evidence under Mil. R. Evid. 404(b). Broadly, the government wanted to admit evidence regarding the relationship between appellant and his wife. Specifically, the trial counsel wanted to elicit evidence that appellant was verbally abusive, physically abusive during arguments, and controlling of his wife by limiting her access to money. The government claimed the charged offenses did not happen in isolation, and the government needed to be able to explain how they happened during a course of a marriage that lasted for years. Specifically, the government claimed the instances of other acts during the marriage were evidence that tended to show appellant's motive to commit the charged offenses. The trial counsel cited *United States v. Jenkins* to support the government's position where we said:

If the uncharged acts (assaults) were committed with the same intent (to dominate and control his spouse) relevant to the charged offenses (rape and forcible sodomy), then, if the appellant committed the charged acts (sexual intercourse and sodomy), it may be inferred that he did so with a similar intent.

48 M.J. 594, 599 (Army Ct. Crim. App. 1998) *see also United States v. Watkins*, 21 M.J. 224, 227, (C.M.A. 1986) (Evidence of motive is relevant “to show the doing of an act by a person as an outlet for [an] emotion.”).

The military judge granted in-part and denied in-part the government's motion. The military judge allowed the government to present evidence that neighbors had intervened in arguments between appellant and his wife and evidence that one neighbor had seen bruises on appellant's wife. The ruling, at least as interpreted during trial, prohibited appellant's wife from discussing the state of her marriage generally, explaining why she feared appellant, and explaining what led to the altercations that formed the basis of the charged offenses.

The net effect of the ruling was as the government tried to elicit testimony from the victim about what happened, any testimony that went beyond the specific

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merits, whether in a civil or criminal case, is the ‘main event,’ and not simply a ‘tryout on the road’ to appellate review.” *Freytag v. Commissioner*, 501 U.S. 868, 895 (1991) (Scalia, J. concurring) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)).

³ As approved by the convening authority. UCMJ art. 66(b).

charged acts was likely to elicit an objection from the defense. Accordingly, the government's presentation of the case was stilted and without context.

The military judge sustained a defense objection under Mil. R. Evid. 404(b) to almost every attempt by the victim to describe the state of her marriage to appellant. Specifically, the military judge sustained objections to the victim's testimony that her marriage was terrible because "I couldn't go anywhere. I couldn't do anything"; she did not "feel safe" in her home; appellant tracked her on her phone; and one time when she had sought refuge at the neighbor's house, appellant had broken into their house.

The military judge also sustained defense objections, as violations of his ruling under Mil. R. Evid. 404(b), when the government attempted to elicit evidence regarding the surrounding circumstances of charged misconduct.⁴ For example, when appellant's wife testified about a forcible sexual assault (of which appellant was acquitted) the military judge prohibited appellant's wife from testifying that as she started to walk away after the assault appellant threw a can of beer at her. Appellant's wife also testified about being dragged around the house by her hair (the charged offense) but the military judge prohibited her from testifying that after appellant had dragged her he "made me lay down [on a couch], and just held me by the throat and -- till I went to sleep."

On three occasions after the military judge sustained their objections, the defense moved for a mistrial.

Rule for Courts-Martial [hereinafter R.C.M.] 915(a) vests military judges with the discretion to declare a mistrial when "manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." However, the discussion to the rule advises caution, noting that mistrials are to be used "under urgent circumstances, and for plain and obvious reasons." R.C.M. 915 discussion; *see United States v. Garces*, 32 M.J. 345, 349 (C.M.A. 1991) (mistrial is a drastic remedy used to prevent miscarriage of justice). Because of the extraordinary nature of a mistrial, military judges should explore the option of taking other remedial action, such as giving curative instructions. *United States v. Fisiorek*, 43 M.J. 244, 247 (C.A.A.F. 1995); *United States v. Evans*, 27 M.J. 34, 39 (C.M.A. 1988). We will not reverse a military judge's determination on a mistrial absent clear evidence of an abuse of discretion. *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990); *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009).

⁴ *See United States v. Peel*, 29 M.J. 235, 239 (C.M.A. 1989). ("Over strenuous defense objection, the military judge allowed Ms. [C] to testify that, after pushing her to the floor, Peel had made her sit there for about forty minutes while he threw British coins at her face. This testimony was probably admissible as 'part of the same transaction as the' assault.") (internal citations omitted).

We find no “clear evidence of an abuse of discretion” in denying the defense’s motion for a mistrial. Arguably, the suspect testimony was admissible under Mil. R. Evid. 404(b). However, the military judge ruled it was not, in part because of his assessment that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The military judge, whose view of the evidence in the context of the trial is superior to ours, is entitled to deference in his determination. The military judge is likewise entitled to deference in assessing the effect of the violation of his ruling. Here, the military judge instructed the panel that they should ignore the prohibited testimony and found that “the panel members indicated readily that they understood” his instructions. Here, the danger of unfair prejudice from the evidence was slight, and the military judge’s instructions further lessened any prejudice.

The adjudged and approved findings and sentence are AFFIRMED.⁵



FOR THE COURT:

A handwritten signature in black ink, appearing to read "Malcolm H. Squires, Jr.", written in a cursive style.

MALCOLM H. SQUIRES, JR.
Clerk of Court

⁵ Corrected